Editorial

Currently, general digitalization has not spared the sphere of arbitration. What are the advantages and disadvantages of introducing digital technologies, how has COVID-19 influenced the work of leading arbitration institutions, does digitalization imply the delocalization of ICA, and does a "digital arbitrator" have a future? Alexey A. Kostin and Alexander V. Grebelsky answered these and other questions from Maxim I. Inozemtsev, Editor-in-Chief of the Digital Law Journal.

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INTERVIEW

DIGITAL ARBITRATION — A USEFUL TOOL IN THE HANDS OF HOMO SAPIENS

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Dear colleagues, as is well known, there is currently a multitude of ways to define "digital law," as well as several possibilities pertaining to the notion of "arbitration". The situation is even more complicated when we try to unite these to notions. Do you think that new technologies have influenced arbitration? In your opinion, is it fair to say that digitalization increases the efficiency of arbitration? Or, conversely, there are some negative consequences of implementation?

A. K.: I would like to draw your attention to the fact that in modern domestic arbitration law the term "arbitration" is understood, first, as the process of resolving disputes by an arbitral tribunal (a panel of arbitrators) and, second, as the making of a decision by the latter. Of course, arbitration as a procedure could not avoid the impact of new technologies, especially in the field of communications and information storage. Meaningful use of "digitalization" contributes to the efficiency of both the arbitration proceedings themselves and their administration by permanent arbitration institutions.

A. G.: I agree with Aleksey Kostin. New technologies certainly enable the use of video conferencing during the COVID-19 pandemic, but also the transition to electronic document management. This should include, for example, the use of e-bundles — case materials formed into special electronic volumes, with which both arbitrators and parties can work simultaneously. Moreover, specialized arbitration institutions have appeared that consider disputes within the framework of commercial transactions carried out on the Internet. This is the so-called online arbitration, which has gained particular popularity in China. Some centres (according to their assurances) are already considering hundreds of thousands of such Internet disputes a year.

Alexander, you have noted some peculiarities of work in the COVID-19 era? Were there any other changes in the work of leading arbitration institutions made during this period?

A. G.: At the very beginning of the pandemic, the provisions of the arbitration rules, which ensured wide discretion of the arbitral tribunal as a result of using video conferencing tools during

hearings, played a positive role in consideration of cases by the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (RSPP). In our experience, in most cases, both parties either asked for remote hearings themselves or gladly agreed to the relevant proposals of the arbitrators. But even where one of the parties could object to such a format, the arbitrators, taking into account the provisions of the rules, could make an appropriate decision on their own. As a result, in 2020, more than half of the 350 cases were processed using video conferencing systems, the largest number of such cases occurring in the third and fourth quarters of 2020. The staff of the apparatus, when possible, worked remotely. However, this did not in any way affect the timing or the quality of dispute administration, which is also shown by the increased number of cases considered last year.

A. K.: The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (CCI RF) did not stop working during the pandemic. In addition to the use of the entire range of means to prevent the spread of infection, the use of distant means of communication has expanded during organizational meetings and oral hearings, as well as meetings of collegial bodies such as the Presidium and the Committee for the Appointment of Arbitrators of the ICAC, primarily through video conferencing.

Has the ICA appointment procedure changed as a result of the introduction of digital technology?

A. K.: This aspect of the administration of arbitration has not undergone any significant "mutations" in the international dimension. With regard to the ICAC, as already noted, the meetings of the nominating committees were held in absentia, if necessary, and the President of the ICAC, in urgent cases, began to use more often the delegated powers of the appointing body that he had.

A. G.: The procedure for appointing arbitrators was carried out in strict accordance with the rules and has not undergone any changes. It is gratifying to note that foreign arbitrators also participated in several international disputes considered by the center in 2020, which, again, during the border closure period, became possible owing to the use of video conferencing systems.

As we know, ensuring confidentiality is one of the main advantages of dispute resolution in arbitration. Does the use of electronic technologies create problems of data leakage and digital security when storing documents, providing evidence, and communicating with parties to arbitration?

A. K.: One cannot but agree that the use of digital technologies often raises reasonable doubts about the preservation of the principle of confidentiality, which is considered one of the attractive features of commercial arbitration. Of course, the parties are free to limit or refuse it if necessary, but unauthorized intrusion into private proceedings is not allowed, which implies the need to develop and use appropriate means of protection against hackers.

A. G.: Long before the pandemic, the center was faced with the question of how to ensure confidentiality in the case of remote hearings. Unlike many foreign centers, in which hearings are carried out using available public systems like Zoom, the Arbitration Center under the Russian Union of Industrialists and Entrepreneurs opted for the Russian- developed Mind system, which is unusual in that it is hosted on servers located directly in the premises of the arbitration center, which is an

additional guarantee of confidentiality. Nowadays, when cyberattacks reach an unimaginable scale, it is, of course, impossible to insure against them for 100 %. But it should be understood that in an ordinary "face-to-face" dispute there is a risk of information leakage, since in addition to the aforementioned risks, there is always the process of interaction of the parties and their legal representatives with the case materials aside from the arbitration institution and arbitrators. Unfortunately, Russian law firms still pay insufficient attention to cybersecurity issues.

How can the parties formalize their agreement on the use of information technology in the course of dispute resolution? Is it necessary to obtain the consent of the arbitrator?

A. K.: It seems that the main thing in this story is the agreement by all parties involved in the arbitration proceedings (primarily arbitrators and parties, as well as, where necessary, arbitration institutions) on information technologies that are equally accessible to all and will be used. Such an agreement between the parties alone is unlikely to create the desired effect. This agreement does not require any special formalization.

A. G.: Of course, if such an agreement is reached by the parties during the proceedings, its content should be discussed with the arbitral tribunal, but it is unlikely that the arbitrators will find it necessary to object to the rational agreement of the parties. If such an agreement is reached before the procedure starts and its conditions do not contradict the mandatory rules contained in the regulations and the applicable law, there should be no special problems with the fulfillment of its conditions. A large number of arbitration agreements, which ensure exclusively virtual oral hearings are being concluded around the world. During the period of the pandemic, the parties have appreciated the cost-effectiveness of this option.

What are the main problems with obtaining electronic evidence in international commercial arbitration from your point of view? Are there any difficulties in obtaining such evidence?

A. G.: In my opinion, electronic evidence is a much more reliable source of information than paper evidence. It is known that any electronic document has metadata that allows you to establish additional information about its origin, change, and movement. In addition, in the case of electronic document management, such as e-mail messaging, documents leave a digital footprint, since any message other than the user's computer passes through the outbound and inbound mail servers. Technologies have been developed throughout the world for working with such evidence, as well as detailed protocols, such as the one that is regularly prepared in the United States within the framework of the so-called Sedona conference. However, there is still the problem of a shortage of specialists in this area in Russia. Suffice it to say that every serious American law firm has a special department called E-discovery. I have not yet heard of the existence of such departments in any Russian law firms.

A. K.: The main thing here is verification: that is, how the authenticity of the information that was sent in the form of electronic documents will be confirmed. As a rule, in the absence of a mechanism for the use of an electronic signature, it is very likely that in some cases it will be necessary to request originals of documents or their duly certified copies.

Can evidence obtained from websites prohibited by the Federal Service for Supervision of Communications, Information Technology, and Mass Media or from the Darknet be qualified as evidence obtained illegally? In particular, what do you think of the evidence from WikiLeaks, an international non-profit organization that publishes classified information taken from anonymous sources, or when this information is leaked?

A. K.: According to the Law of the Russian Federation "On International Commercial Arbitration" (Article 19(2)), the arbitral tribunal is empowered to determine the admissibility, relevance, materiality, and weight of any evidence. It is difficult for me to imagine that information from prohibited sites would be relevant in cases of commercial arbitration; in any case, these issues should be resolved under the national law of the seat of arbitration.

A. G.: It is impossible not to agree with this point of view. Moreover, there is a significant advantage of arbitration, since the arbitrator, unlike a state judge, is not bound by strict national rules of evidence. At the same time, the arbitrators try to take into account the provisions of the law applicable to these issues. From a legal point of view, these situations are very difficult, since in modern international commercial arbitration the tribunal is mainly bound by the obligation to make enforceable decisions. Therefore, very often we are talking about the national legislation of the states, whose nationality the parties to the dispute possess. Indeed, such a situation will be rather exotic in commercial arbitration, but in investment arbitration, such cases have already been met. For example, in the famous ConocoPhillips v. Venezuela case, the respondent State requested the tribunal to reconsider part of the decision on jurisdiction and the merits of the dispute, since new evidence had been published by WikiLeaks before the completion of the proceedings regarding the determination of the amount of compensation awarded. The majority of the Tribunal's members concluded that the revision of the decision was undesirable, taking into account the principle of *res judicata*. At the same time, it is known that in this case there was a dissenting opinion from one of the arbitrators, who considered the evidence from WikiLeaks credible. An essential factor in such cases is an indication of who specifically received this or that evidence — the party itself or a third party.

Do you share the view that the use of online technologies complicates the possibility of interrogating witnesses and preventing them from exercising the right to be heard, since an online hearing is not able to convey the full range of emotions of the participants in the process, and does not exclude following the instructions of third parties?

A. K.: I, like many experts in the field of MCA, share this view. A detailed argumentation on this issue is presented in the publication by English lawyer Khawar Qureshi QC "A leap towards digital court hearings must deal with all their limitations" in The Times on May 27, 2021. In reputable arbitration institutions, work is underway to improve regulatory requirements and create the technical conditions necessary to, if not completely eliminate, then at least significantly reduce the risks that are indicated in your question. In the practice of the ICAC, the issue of proper identification of persons acting as witnesses is also relevant.

A. G.: Before the outbreak of the pandemic, I myself was opposed to the use of virtual technologies for interrogating witnesses, since it is known that a significant part of the information is transmitted during interrogation non-verbally. However, after having gained experience in cross-examination

with videoconferencing systems as a representative, I can say that this procedure has its advantages — it allows you to concentrate much more on the witness and his reaction. If I may put it that way, the opposing party is forced to sit "on the other side of the ramp". In addition, you need to understand that the degree of drama in international commercial arbitration is sometimes artificially heated: after all, this is not a criminal process — we are talking about commercial and business relations between the parties, and the nuances of the behavior of witnesses play a secondary role here.

Do you think online dispute resolution can democratize the justice system, in particular the ICA system, making it more accessible and less financially burdensome? Or, on the contrary, the use of advanced technologies in the resolution of disputes, with its primary goal of providing greater comfort to its participants, will significantly increase the costs of considering the case?

A. K.: I am not sure if there is a direct link between online dispute resolution and democratization. From the point of view of the size of state duties in domestic legal proceedings, they are extremely democratic and therefore extremely busy. "Electronic justice" in the arbitrazh courts of Russia is to a certain extent present. New digital technologies here are designed to speed up existing procedures and overcome the obstacles caused by the pandemic. International commercial arbitration involves a substantially higher level of costs, which can sometimes become a barrier to the initiation of arbitration. At the same time, I cannot help noting that the arbitration fees in the ICAC at the RF CCI are several times lower than in similar arbitration centers in Vienna, London, Paris and Stockholm. It would be irrational and unfair to assume that the development and implementation of new technologies in the ICA field will increase the financial burden of arbitration users.

A. G.: It is difficult to answer this question unambiguously. Some participants in the proceedings, which were held according to the rules of our center, noted a positive effect in the form of savings in travel expenses for their lawyers. However, in foreign arbitration, a large item of expenses has been made up of the costs of technical specialists providing virtual support. To some extent, these costs are comparable to the costs of organizing face-to-face proceedings.

In the previous issue of our journal, UN Secretary-General António Guterres mentioned the problem of the digital divide. In your opinion, is there a digital divide in the ICA sphere — for instance, in the form of unequal access to technology among the parties to the dispute and arbitrators?

A. K.: It is difficult to disagree with the UN Secretary-General on this issue. In essence, we are talking about the actual inequality of access to advanced technologies. This circumstance may lead to a violation of the imperative principle of equal treatment of the parties prevailing in the ICA. Consequently, in specific arbitral proceedings, arbitrators must ensure that procedures and technologies are acceptable to all parties to avoid annulment or non-enforcement of awards.

A. G.: It should be understood that the digital divide does exist. For example, in terms of the development of information and communication technologies, Russia is only in 46th place in the UN world index. However, I am glad that the quality of the Internet connection in Russia is much better and at the same time cheaper than in many, even European, countries. Arbitrators indeed play a decisive role in upholding the principle of equality in the field of arbitration, who must tirelessly monitor a party's ability to exercise the right to be heard.

Does digitalization imply, in your opinion, ICA delocalization?

A. K.: It is obvious that digitalization works for the existing and developing concept of ICA delocalization. In this regard, one cannot fail to notice that the category of "place of arbitration" now appears not in the form of its physical location, but in a contractual or statutory structure that links a particular proceeding with the legal system of a particular country. I think that the need for such a connection will not be lost in the foreseeable future.

A. G.: It seems that the parties to commercial contracts in the future will pay much more attention to the deliberate choice of law applicable to the arbitration procedure, as well as to the choice of the competent authority, without linking these concepts exclusively with the place of arbitration. Accordingly, over time, the implied choice of applicable law, in my opinion, can be much more often found in the law applicable to the main contract due to the existence of a relevant clause. However, in my opinion, there can be no question of complete delocalization.

Does a "digital arbitrator" have a future, or is it only humans who are capable of resolving disputes?

A. G.: As we know, a large number of disputes among users of sites such as eBay and Alibaba are already being resolved using special computer algorithms. This makes the process cheaper and faster. However, the "digital arbitrators" are not yet capable of considering truly complex legal relations, which are commercial disputes with a foreign element. Nevertheless, I am almost sure that the corresponding technologies will help them in the future to understand the "higher mathematics" of jurisprudence — Private International Law. I dare only hope that this wonderful era will not begin with us.

A. K.: If we treat "digital arbitration" as a useful tool in the hands of *homo sapiens*, then a bright future awaits him.

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