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Research Article

Application of digital technologies in litigation and dispute resolution

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Abstract. By now (we mean 2020) "digitalization" has completely replaced the more general "modernization" and "innovation" from both the political vocabulary and the sci-entific agenda. It is difficult to say how long this trend will continue and what kind of socio-technological phenomenon will replace it. It can be "cyberization", within which a person will begin to bring himself into line with the canons of the sci-fi cyberpunk's and combine biological with technological (and digital at the same time) in his body, or vice versa, some kind of reactionary "naturalization". Anyway, now the widespread adoption of digital technology is an indisputable and obvious fact. And this process applies to all spheres of society's life, without bypassing legal proceedings and out-of-court settlement of disputes (or in other words — alternative dispute resolution), which can be significantly improved using digital technologies. This article analyses the practice and legislative regulation of the use of digital technologies in various forms of legal proceedings and such types of out-of-court dispute resolution as arbitration and mediation. Comparative legal method allowed to compare Russian and foreign legislations as well as approaches to determining the permissible limits of the use of digital technologies, including their "intellectual" variety. Individual proposals have been formulated to improve Russian legislation.

Key words: litigation, dispute resolution, arbitration, mediation, digital technology, digitalization, artificial intelligence

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Научная статья

Применение цифровых технологий в судопроизводстве и внесудебном урегулировании споров

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Аннотация. К настоящему времени «цифровизация» окончательно вытеснила более общие «модернизацию» и «инновации» как из политического лексикона, так и из научной повестки. Трудно сказать, сколько этот тренд будет сохраняться и какое социально-технологическое явление придет ему на смену. Это может быть «кибернизация», в рамках которой человек начнет приводить себя в соответствие с канонами научно-фантастического cyberpunk'а и совмещать в своем теле биологическое с технологическим (и заодно цифровым), или наоборот какая-нибудь реакционная «натурализация». Так или иначе, сейчас повсеместное внедрение цифровых технологий представляет собой бесспорный и очевидный факт. И данный процесс касается всех сфер жизнедеятельности общества, не обходя стороной судопроизводство и внесудебное урегулирование споров, которые могут быть существенно усовершенствованы при помощи применения цифровых технологий. В данной статье проводится анализ практики и законодательной регламентации применения цифровых технологий в различных формах судопроизводства и таких видах внесудебного урегулирования споров, как арбитраж и медиация. При помощи сравнительно-правового метода рассматриваются российское и зарубежное законодательство, а также подходы к определению допустимых пределов применения цифровых технологий, в том числе их «интеллектуальной» разновидности, формулируются отдельные предложения по совершенствованию российского законодательства.

Ключевые слова: судопроизводство, внесудебное урегулирование споров, арбитраж, медиация, цифровые технологии, цифровизация, искусственный интеллект

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Introduction

Digitalization as a process can go in some different directions. On the one hand, a human being may use computer technologies as tools designed to facilitate the solution of certain problems, as a calculator at one time simplified mathematical calculations. Such digitalization does not exclude the human operator's participation from decision-making.

On the other hand, digitalization can also assume the creation of intelligent systems (both virtual, i.e. representing some kind of software operating in a digital environment, and completely material, "materialized" — for example, robotic, operating IRL — in real life). Such systems may be capable of not only helping a human being, but also replacing them, combining the natural (in other words, "biological") human intelligence with an artificial one. It should be noted that intelligence itself is understood as the ability to achieve complex goals, and artificial intelligence (hereinafter referred to as AI), in turn, is a "non-biological intelligence" (Tegmark, 2017:39). More specifically, AI is a system of methods and means of computer solution of intellectual problems (such as visual perception, speech recognition, decision making, translation into various languages, etc.), which usually needs a human being (and their biological intelligence)[1].

Human intelligence is something very difficult for understanding; it is hardly measurable on some universal scale (although the practice of determining the level of intelligence development using IQ tests and other means is well known). This is due to the fact that it is heterogeneous and consists of at least emotional, verbal, spatial, logical, artistic, social and other elements or kinds of intelligence. At the same time, such differentiation of AI structural parts is not usually applicable, and assessment of its characteristics are made, as a rule, from two points of view — scientific and practical.

From a scientific point of view, AI is compared with human intelligence, so AI perfection will depend (in direct ratio) on its ability to imitate the natural thinking of a human being. AI development, according to this approach, consists in imitating human intelligence and artificial reproduction of its mechanisms. At the same time, from a practical point of view, the criterion of AI perfection is its ability to solve specific problems as well or even better than a human being. In this case, the "humanity" of

[1] Osipov, G.S., Velichkovsky, B.M. Artificial Intelligence. Great Russian Encyclopedia. Available at: https://bigenc.ru/mathematics/text/2022537 [Accessed 30th March 2020]; English Oxford Living Dictionaries. Available at: https://en.oxforddictionaries.com/definition/artificial_intelligence [Accessed 30th March 2021].

thinking is not evaluated, and only its effectiveness should be taken into account (Mitchell, 2019).

The first way of digitalization (i.e. the use of digital technologies to help people) has been quite actively introduced for a long time, so now it is difficult to find areas of public relationships where computer technologies and technical means are not used yet at least in the form of stationary and mobile personal computers, other types of devices, as well as in the form of various software. Intellectual tools that facilitate human decision-making or even perform certain operations on their own are less common, although here we can also notice significant achievements in many areas. For example, "smart systems" are used to predict financial risks, in medical diagnostics, information security, and so on.

Digital progress does not deprive of attention the law, which, despite its natural conservatism (Baranov, 2019:64) and constant desire to regulate social relationships after the fact[2], is gradually changing due to the introduction of digital technologies. Speaking on the relevant changes in administering justice and out-of-court dispute resolution, it is possible to mention the so-called "e-justice" (electronic justice) as an example. On the basis of automated software it gives an opportunity and instruments to submit and register lawsuits, claims and other documents in electronic form (without the obligatory personal appearance in court with long hours of waiting), present and examine electronic evidences, systematize and catalog court cases, and perform other operations with minimal human involvement. The aforementioned forms of e-justice, which are quite common in some countries are digital in nature, but they, as a rule, do not use the full potential of modern digital technologies. It concerns AI in particular, the technology, which gives us reasons to imagine (hypothetically) much more radical innovations including replacement (at least partial) of judges and representatives of the parties by "electronic lawyers".

Software is also actively used to help users in solving certain legal issues — from drafting documents (statements of claim, contracts, etc.) to determining the legal position in the case. Such software can be intended for both non-specialists (for whom it becomes literally life-saving and allows not only to save money on legal services, but also to better understand the intricacies of legislation and its application (Thompson, 2015)), and for lawyers. For example, in 2017 Russia developed the analytical system "Sutyazhnik" (litigant) and announced it "an automated service for the selection of judicial practice corresponding to the content and subject matter of the uploaded documents"[3]. This service is now considered as self-learning and using big data, so it can be attributed to the number of digital technologies based on the capabilities of AI.

[2] As, for example, it was in the case of cryptocurrencies — instead of universalizing the legal regulation of the payment instruments market, legislators of various countries tried to create a new regulatory framework for cryptocurrencies. But while laborious work was carried out in this field, the excitement subsided, but the significance of "old' cryptocurrencies like Bitcoin and Ethereum did not decline. They turned into something ordinary, so now they do not deserve such close attention (and it is too late to ban them anyway).

[3] About the system // Analytical system "Sutyazhnik". Available at: https://sutyazhnik.ru/ [Accessed 30th March 2021].

But in reality, it is just a system capable of conditionally "smart" search and selection of materials by tags. A well-formulated query in the search line of the reference legal system gives a result close to the outputs of "Sutyazhnik", although it does not provide analytics in the form of a statistically determined probability of success in court while "Sutyazhnik" does. Also, we should mention Russian reference legal systems, such as "ConsultantPlus" and "Garant" (the latter has designed "Sutyazhnik"), which everyone can use in their professional and daily activities and thanks to which search for regulatory legal acts and reference information is very simple and only requires Internet connection (and a paid subscription to additional services, but that is a separate issue).

Digital technologies in judicial proceedings

Currently only non-intelligent digital technologies or technologies with quite simple AI are most often used in judicial (legal) proceedings. Search and data services are able to independently perform the tasks of selecting sources and other materials, but such tasks are connected with the routine (almost mechanical) type of work, while the creative part of intellectual activities still relies on human competence (as well as formulation of the correct query, without which the result of any "intellectual" search is unsatisfactory).

The "digital" reform in Russian legal proceedings took place in 2016, when the Federal Law No. 220 from June 23, 2016 was adopted[4]. This law made significant changes to procedural legislation. For example, since its adoption the submittance of lawsuits, claims, complaints and other documents to the court in civil proceedings may be implemented on paper or in electronic form, including the electronic document signed with an electronic signature (clause 1.1 of article 3 of the Russian Civil Procedure Code). So, the applicant (claimant or any other person) can choose the way of going to court that is more suitable for him/her and each of the options provided by the law can be considered as equivalent. And appeals against court decisions, which can be executed in the form of an electronic document, if not containing information constituting a secret protected by law, must be in any case duplicated on paper (clause 1 of article 13 the Russian Civil Procedure Code).

Electronic documents signed with an electronic signature are recognized by civil procedural legislation as written evidence along with "traditional" paper and other documents. Electronic documents are considered authentic and their paper duplicates are not required, however, the court may require the submission of original documents, which were previously submitted in electronic form (clause 1, 2 of article 71 of the Russian Civil Procedure Code)[5].

[4] Federal Law No. 220 of June 23, 2016 "On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Application of Electronic Documents in the Activities of Judicial Authorities". The Russian Federation Collection of Legislation, 27.06.2016, No. 26 (Part I), Art. 3889.

[5] Order of the Russian Supreme Court Judicial Department No. 251 of December 27, 2016, "Bulletin of acts on the judicial system", February 24, 2017, No. 2.

In general terms, the described procedure for electronic document flow also takes place in arbitration and administrative proceedings (clause 7 of article 4 of the Russian Arbitration Procedure Code and clause 2 of article 45 of the Russian Administrative Judicial Procedure Code, etc.). Electronic document flow is gradually increasing and becomes common in judicial practice. On January 17, 2019, the total number of "electronic" claims filed in courts of general jurisdiction through the system "Justice"[6], exceeded one million, whereas in 2018 there were twice as many such claims than in 2017 (695.5 thousand versus 283 thousand, respectively)[7]. But against the background of general indicators, the prevalence of electronic document flow in legal proceedings is still insignificant; to assess its scale, it is worth mentioning that in 2018, within the framework of civil proceedings alone courts received more than 17 million cases (a million electronic claims were filed not only in civil disputes, but to the courts of general jurisdiction as well) [8]. However, it seems that it is only a matter of time before electronic document flow will displace most of the traditional forms of office work from civil, arbitration and administrative proceedings.

The situation is a bit different in criminal proceedings. In 2016, the criminal procedural legislation was also supplemented by a provision on the procedure for the use of electronic documents. According to that provision a petition, application and/or complaint can be submitted to the court in the form of an electronic document with an electronic signature of the person filing such document (part 1 of article 474.1 of the Russian Criminal Procedure Code). Similarly, the court decision (if it does not contain information constituting any secret protected by federal law, affecting the security of the state, the rights and legitimate interests of minors, and has not been issued in a case of a crime against sexual inviolability and sexual freedom of a person) may be made in the form of an electronic document with judge's strengthened qualified electronic signature, but, as in other legal proceedings, the decision must be duplicated on paper (part 2 of article 471.1 of the Russian Criminal Procedure Code). And this is, in fact, a restraint in the electronic document flow in the Russian criminal proceedings.

Electronic evidence is well known and has already become common practice in in criminal proceedings, but the subjects of law enforcement activities (investigators and others) materialize it in every possible way tying to the data storage devices, or describing in a formalized "paper" document (for example, a protocol or "decryption"), which may be attached to the criminal case and remain just a folder of documents (Baranov, 2019:65). And although it is quite obvious that in any evidence it is not the specific form of its expression that is more significant, but the informativeness of

[6] State Automated System of the Russian Federation "Justice", available at: https://sudrf.ru/ [Accessed 30th March 2021].

[7] A million lawsuits electronically filed in federal courts of general jurisdiction through system "Justice". Information Centre of the Russian Supreme Court Judicial Department, available at: http://iac.cdep.ru/index.php?id=9&item=210 [Accessed 27th March 2021].

[8] Report on the work of the general jurisdiction courts on hearing civil, administrative cases in the first instance for 2018. The Russian Supreme Court Judicial Department, available at: http://www.cdep.ru/userimages/sudebnaya_statistika/2019/F3-svod_vse_sudy-2018.xls [Accessed 27th March 2021].

the evidence, the informative component of electronic evidence fades into the background, while their nature, permissible limits of application, advantages and disadvantages are still the subject of doctrinal research (Pastukhov, 2015:149—153; Voronin, 2019:74—84). Therefore, for example, a judge while studying a specific case analyzes an audio or video recording indirectly through its textual description, which being a narration, but not a literal transcript, violates accuracy and reliability principles.

The same applies to appeals and claims to law enforcement agencies; they (appeals and claims) are one of the grounds for initiating a criminal case (the legislation allows filing an electronic appeal; any, not just a crime statement) but are not considered a document until printed on paper. Only after that they go into operation. As a result of such manipulations there is no guarantee to their official acceptance and registration as a report of a crime (Voskobitova, 2019:91—104).

One of the trends in the development of criminal proceedings in foreign countries is full transition to electronic document management. Operating criminal cases entirely in electronic form is often considered the highest point of digitalization of criminal proceedings, and many countries either strive for this (such as the United States and Canada, as well as some European countries), or have already introduced such practice by abandoning traditional "paper" proceedings. Fifteen years ago, Belgium started to operate criminal cases in the form of an electronic file, which could be supplemented during the investigation by all autorized participants of proceedings including the police, court and lawyer. In the Saudi Arabia, the introduction of electronic criminal cases made it possible to reduce the investigation time by 80 % (Zuyev, 2018:6—7).

At the same time, it should be noted that the idea of the transfer of the Russian criminal justice system into electronic form is justly criticized (Alexandrov, 2018:24—34), because this system in itself seems to be quite problematic primarily due to the existing institution of preliminary investigation (Vlasova, 2018). It is hardly capable of functioning effectively in the modern world without a radical reform (one of the directions of which may be complete abolition of the institution of preliminary investigation with transition to an adversarial model of justice (Alexandrov, 2018:135—136). However, a complete transfer of document flow into electronic format even in the conditions of the current regulation of criminal proceedings (with only minimal changes in legislation necessary to legitimize such a transfer) can significantly reduce the burden on the preliminary investigation bodies, the court and other participants of the proceedings.

In all types of legal proceedings another one type of digital technology is used, namely, videoconferencing (known to Russian justice since 1999, when this technology was first used in a criminal case in the Chelyabinsk Regional Court[9]). For example,

[9] 10th anniversary of video conferencing technology in the Russian justice // Chelyabinsk regional court. Available at: http://www.chel-oblsud.ru/index.php?html=news&nid=566 [Accessed 25th March 2021].

the civil proceedings construction concerning the sides and third parties, as well as the testimony of witnesses suggests that evidence can be obtained through videoconferencing, and information contained in such explanations and testimonies will be considered by the court as ordinary evidence (clause 1 of article 55 of the Russian Civil Procedure Code). However, the law provides for an ambiguous requirement for the use of videoconferencing, according to which the persons participating in the case, their representatives, witnesses, experts, specialists and translators must use the videoconferencing systems of the courts at their place of residence, stay or destination (clause 2 of article 155.1 of the Russian Civil Procedure Code). This legislative approach may be explained by the need to verify the attendance and identify participants of the proceedings, which is the part of court's responsibility to ensure their participation in the court session along with explanation of the rights, obligations and liability for violations to witnesses, experts, translators and others (clause 3 of article 155.1 of the Russian Civil Procedure Code). The described procedure is of a certain convenience for the court session participants (freeing them from the necessity to appear in a court, located in another region, etc.), but does not simplify the proceedings itself and leads to an additional burden on the courts at the place of residence of particular proceedings' participant. At the same time, participation in the court session may be carried out from participant's home or any other location, providing all the necessary identification and verification procedures through the "Justice" system or "State services", unified portal of public services (Gosuslugi), which would be much easier, more convenient and, of course, cheaper to organize.

All described examples of digital technologies use in legal proceedings in general are reduced to applying certain technical means of data processing in administering justice. That may be called electronic justice, but only in a narrow sense (Valeev & Nuriev, 2019:474). In a broad sense, e-justice, as it seems, should use digital technologies in an integrated manner and rely more on their intellectual capabilities. The use of intelligent (even partially autonomous) digital systems could contribute to solving a number of important and closely related problems, which are more obvious (and numerous) in the criminal proceedings. Among such problems, which we will briefly consider below, are the issues of broad judicial discretion in the appointment of the type and measure of punishment for a specific crime, the qualitative characteristics of the judiciary and a sharp accusatory bias in sentencing.

The Russian punishment system contains a wide range of sanctions, which, together with the rules for sentencing that have been elaborated in detail in the General Part of the Russian Criminal Code, contributes to sufficiently individualize criminal liability in each specific case. Despite this, judicial practice demonstrates numerous faults in criminal law application due to excessive judicial discretion. The exclusion from the Russian Criminal Code of the lower limits of punishment measures in many articles of the Special Part was intended to humanize the criminal punishments applying practice, but in reality, this initiative led to the situation when the appointment

of punishment does not depend on the nature and degree of social danger of the crime and personality of its perpetrator, as it is required by the general principles of sentencing (Article 60 of the Russian Criminal Code). It depends on the judge's ability to apply these principles and at the same time on other circumstances related to judge's personality (his/her level of legal qualifications, fear of the sentence revision because it is too "lenient", possible disciplinary consequences of such a revision, etc.) (Korobeyev, 2019:71—73). We may use part 4 of article 111 of the Russian Criminal Code as an example. In accordance with the current version of the above legal provision, imprisonment can be assigned as the main punishment for intentional infliction of grievous bodily harm, resulting in the death of the victim by negligence. The prison sentence can vary from the period from two months (the lowest limit of imprisonment term, established in part 2 of article 56 of the Russian Criminal Code) and up to fifteen years. Thus, the judge, subjectively assessing the social danger of the crime, the identity of the perpetrator and other circumstances in the case, by his/her decision determines punishment in a very broad framework[10], which raises the issue of huge scope of judicial discretion.

Special software is able to assist solution of this problem and can help the judge in making a decision on a specific criminal case or even replace him (but it is premature to come up with such revolutionary proposals now). It can include a matrix for assigning punishments and algorithms for their individualization (the requirements of the General Part of the Russian Criminal Code for the appointment of punishment with taking into account all mitigating and aggravating circumstances, each of which corresponds to a certain number of "points" for the convenience of their "machine" calculation and so on) and suggest to a judge the most appropriate from the formal-legal point of view type of punishment in every particular case. Such software involves only a few of judge's powers; the most important issues of assessing evidence, determining guilt, and so on will anyway remain within personal competence of the judge, so his role in legal proceedings is not diminished. It limits only judicial discretion in determining the type and measure of punishment (Alikperov, 2019:47—49), that seems to be quite appropriate and even expedient in order to avoid excessive subjectivity of the judge. Subjectivity may be of different nature; it can arise from politicization or arbitrariness (Golik, 2019:24), and even from trivial incompetence.

Developing the outlined ideas, we can go a little further and propose creating a self-learning system for promoting court justice. Such system may be built on the basis of big data technologies to have access not only to algorithms for choosing the type and measure of punishment, but also to the court decisions archives and Internet

[10] Circumstances, of course, may be different, but it is difficult to imagine that public danger, for example, "deliberate infliction of grievous bodily harm, resulting in the death of the victim by negligence, committed by a group of persons by prior conspiracy with the use of weapons against two or more persons for reasons of political, ideological, racial, national or religious hatred or enmity" may even theoretically correspond to the severity of punishment in the form of two months in prison.

resources in general (so it should be integrated with "Justice" system and certain Internet resources). It could also take into account public opinion, expressed, for example, in reputable media or other information services, and formulate recommendations to the judge, taking into account the public danger of each specific crime, defining this ambiguous characteristic in the frames of a completely democratic digital procedure.

It is also appropriate to assume that such system could find its application in other types of legal proceedings, because the very concept of a self-learning system with a flexible data accounting algorithm would make it possible to adapt it to the needs of any kind of proceedings.

Digital technologies in arbitration

Considering the use of digital technologies in legal proceedings at the present stage of development of public relations, it seems appropriate to look at the situation in the alternative dispute resolution with the focus on arbitration. In the Russian Federation, this type of alternative settlement of disputes is not yet fully exploited, while in foreign and international practice it is not only widely used but is also one of the leading platforms for testing and implementing digital technologies.

According to the study conducted in 2018 by Queen Mary University of London and White & Case law firm, 97 % of respondents named international arbitration as the preferred method of dispute resolution, either alone (48 %) or in combination with other non-judicial methods (49 %). Moreover, the majority of respondents (61 %) believe that major factors for developing international arbitration is increasing efficiency of its procedure through the use of digital technologies (White & Case & Queen Mary University, 2018:2—3).

The growth of digitization of cross-border commercial transactions is accompanied by practice of conducting online proceedings, including the use of Artificial Intelligence (AI). Many countries are actively optimizing dispute resolution procedures and implementation of latest achievements in electronic document management is becoming a priority (Khraputsky & Silchenko, 2019:32).

Several years ago, when the first scientific publications on the use of digital technologies in arbitration appeared, many experts manifested a certain degree of skepticism; they claimed that such technologies are incompatible with the fundamental requirements of arbitration such as confidentiality and privacy. However, over time, a positive attitude towards digital technologies in arbitration has generally grown, although there are still opponents to their use.

The use of digital technologies in arbitration (as well as these technologies themselves in general) can be roughly divided into two categories (Qin, 2019). The first category includes technologies that are not involved in making decisions or predicting the outcome of arbitration. Examples of such technologies include digital (online) signatures, e-mailing, stipulation of smart contracts, filing of procedural papers and

storage of relevant materials in electronic form, videoconferencing, etc. (clause 2 of Art. 3 of the 2017 ICC Arbitration Rules; Clause 1 of Art. 4 of the LCIA Rules). The second category includes technologies for predicting and determining arbitration outcomes. This category includes, for example, the Arbitrator Intelligence service designed to increase transparency, accountability and diversity in arbitrator's eligibility by using information on their prior decisions through Arbitrator Intelligence reports (Rogers, 2018). It should be noted that this service is being used more and more intensively and in the foreseeable future will be adopted to form arbitral tribunals around the world.

The use of digital technologies provides several advantages over the traditional form of arbitration such as convenience for the participants, improved standards, reduced costs and time. In some countries, the use of electronic evidence (e-discovery) is gradually becoming widespread[11].

There are also specialized "cyber institutions" that conduct arbitration entirely online (so-called online arbitration). These are, for example, e-court in the Netherlands and ODR Europe in Greece, CyberJustice in Canada, CIETAC in China, and so on. Special online platforms are also employed by ordinary arbitration institutions, for example, the London International Arbitration Court (Articles 1.2, 1.3 and 2.3 of the LCIA Arbitration Rules), the Vienna International Arbitration Center[12], the Hong Kong International Arbitration Center[13], the Arbitration Institute of the Stockholm Chamber of Commerce, Russian Arbitration Association[14], Russian Arbitration Center, etc.

It should be noted that although online arbitration has quite obvious advantages and is widely used, some of its main principles are not sufficiently regulated. This primarily concerns the form and execution of the arbitration agreement. Article II (2) of the 1958 United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) establishes the written form of the arbitration agreement. At the same time, many national laws regulating arbitration (for example, in Germany, France, Austria, Switzerland, Russia and so on) supplement the requirement established by the New York Convention by allowing an electronic form of the agreement.

The judicial practice also indicates a rather loose interpretation of this requirement. For example, in "*Compagnie de Navigation et Transports SA vs MSC Mediterranean Shipping Company SA*" case, the Swiss Supreme Court ruled that "the

[11] Subparagraph «a» of paragraph 3 of Art. 3 of the IBA Rules on Taking of Evidence in International Arbitration; Art. 4.7 of the Rules for the efficient conduct of the proceedings in international arbitration (Prague Rules).

[12] The 2018 VIAC Arbitration Rules, among other innovations, provide for the administration of arbitration cases in electronic form (Articles 7, 12 and 36).

[13] According to paragraph «e» of Art. 3.1 of the HKIAC Arbitration Rules, parties can agree to submit documents through a secure online platform — an innovation under the 2018 HKIAC Arbitration Rules.

[14] Although this association was the first in Russia to adopt the Rules for Online Arbitration, at the moment it does not administer disputes until the permission of the Government of the Russian Federation is obtained.

exchange of letters or telegrams" can be carried out by any means of communication and that this does not contradict Art. II (2) of the New York Convention[15].

When conducting online arbitration, the decision is also made in electronic form. In accordance with paragraph "a" of Part 1 of Art. IV of the New York Convention, in order to be recognized and enforced, an arbitral award must be duly certified. If the national legislation of the state where the arbitral award has to be recognized and enforced does not allow the electronic form of such an award to be equivalent to a written one, then the enforcement of the award may be difficult (in fact, completely impossible). To avoid such complications, arbitrators must send the parties a certified hard copy of the award, which in any national jurisdiction will be accepted as the original of the relevant document.

One of the most pressing issues in the field of arbitration is the use of AI. It entails tackling the following matters: possibility of replacing a human arbiter with an AI, regulation of the use of AI in arbitration by regulatory legal acts, enforceability of AI decisions, and potential use of AI in arbitration.

Formally, no national law governing arbitration explicitly prohibits the appointment of an AI (i.e. related software) as an arbitrator (Kasa, 2019:172). The normative definitions of the "arbitration tribunal" also refer only to the freedom of the parties to appoint arbitrators. For example, Section 3 of the Swiss Civil Procedure Code and Chapter 12 of the Law on Private International Law Act do not define an "arbitrator" or "arbitration tribunal" and do not require an arbitrator to be "human". Neither Austrian legislation does contain such a requirement. At the same time, paragraph 1 of Art. 16 of the VIAC Rules of Arbitration defines an "arbitrator" as any natural person (a human) who has full legal capacity and is able to act as an arbitrator, unless the parties have agreed on any specific additional qualification requirements. A similar definition is also enshrined in French law: "Only a natural person who has the full ability to exercise his rights can act as an arbitrator" (Article 1450 of the Code of Civil Procedure). In Russia, the Federal Law No. 382 "On Arbitration (Arbitration Proceedings) in the Russian Federation" from December 29, 2015 clearly defines that an arbitrator is an individual elected by the parties or elected (appointed) in accordance with the procedure agreed by the parties or established by the federal law for dispute resolution by an arbitration tribunal.

Nonetheless, according to the principle of freedom of the parties, one of the basic principles of arbitration, the parties have the right to choose their arbitrators themselves, so they must be able to determine its "nature", i.e. choose between a human arbiter and a machine arbiter (Kasa, 2018:79). But as follows from the above review of legislation, this is currently not allowed in all countries.

[15] Judgment of the Swiss Supreme Court (BGE 121 III 38, 44, E. 2 c.). Available at: http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F% 2F121-III-38% 3Afr & lang = fr & type = show_document [Accessed 27th March 2021].

It seems that the arbiter — machine has certain advantages. First of all, AI software is a priori impartial. A large number of studies have investigated the psychological aspects of decision-making and the influence of unconscious cognitive bias inherent in humans in this process. One example of such bias is the "anchor-effect" (Scherer, 2019: 510), which characterizes the ability to make a decision on a certain issue based on available data before the relevant issue is properly analyzed.

AI software is also free from a number of other purely «human» factors that can influence human decision-making. Such factors are, for example, the lack of the latest knowledge (including the field of law; the arbitrator machine, in turn, is able to update its databases automatically), fatigue and even hunger. According to a study conducted among Israeli judges in 2010, the hungrier the judge, the more severe are the sentences (the number of favorable decisions gradually decreased from about 65 % to almost zero in the morning until the time of a lunch break, and returned to the original 65 % after satisfying hunger) (Danziger & Levay & Avnaim-Pesso, 2011:6889—6892).

On the other hand, the decision made by AI software may not be enforced due to public policy violations by machine arbiters lacking both empathy and ability to explain their decision; the latter is an essential requirement in many jurisdictions. Thus, the General Data Protection Regulation of the European Union prohibits automated decisions if their algorithms cannot be subsequently explained to their users, who have an unconditional "right to an explanation".

But while science is exploring the possibility of replacing arbitrators with AI software, practitioners often use such software in the dispute resolution process in at least three ways. First, AI software can be used to process and analyze large amounts of data. Second, this software can be applied as a tool for the search and thematic selection of judicial practice, legislation and thematic scientific works. Third, AI software can predict the arbitrage outcomes.

The last method of practical application of AI software is, in our opinion, of the greatest interest and is extremely promising. In 2016, a study was carried out to recognize which individual decisions of the European Court of Human Rights (under Articles 3, 6 and 8 of the European Convention on Human Rights) were subjected to computer analysis. The primary task of the specially designed program was to find the relationship between the words contained in the ECtHR decisions, and compare their sequences and clusters with the results of specific cases. Further, to test the program's ability to predict the outcome of cases, its algorithms were applied to other cases that were not previously included in the program and, therefore, not known to it. The accuracy of the resulting forecasts was 79 % (Aletras & Tsarapatsanis & Preotiuc-Pietro & Lampos: 2016).

In 2017, another study was conducted on the decisions of the US Supreme Court. For this study, a computer program and experts (leading scientists, some of whom had experience working in the administrative office of the US Supreme Court) were

provided with case data from 1994 to 2002 and then asked to predict the outcome of sixty-eight "control" trials. The accuracy of the forecast of experts who analyzed these cases in their «profile» area was 59 %, while the forecast of the program was correct in 70 % of cases. The performance indicator for forecasting by AI software in this study turned out to be slightly lower than in the study of the ECtHR decisions, but this is explained by the fact that in this case the analysis affected all branches of law within the US Supreme Court jurisdiction (Moorhead, 2017).

However, in arbitration, the use of such software with AI is complex and one of the obvious obstacles here is confidentiality; access to arbitration decisions is much more difficult to obtain than to the decisions of the ECHR or the US Supreme Court and other similar courts.

In our opinion, AI software should not completely replace a human arbiter, but this does not mean that it cannot be applicable in arbitration. Arbitrators can use appropriate programs to organize and analyze case materials, seek relevant precedents, and even select possible arguments to resolve a dispute, i.e. intelligent digital technologies can assist arbitrators in making decisions, but should not completely replace them. For example, at the end of 2019, the Electronic Business Arbitration and Mediation Center (eBRAM) was launched in Hong Kong; it employs AI software for machine translation, word processing and other subordinate tasks.

We can also mention another noteworthy approach in foreign practice. For example, in France, the legislator has consistently promoted the use of AI software to resolve disputes on the Internet, especially for simple and repetitive cases[16]. Such approach allows not only to simplify the resolution of relevant disputes, but also to further regulate the use of digital technologies in order to avoid abuse.

Digital technologies in mediation

Resort to digital technologies is common for mediation; it is one of the most promising methods of out-of-court settlement of disputes among citizens and businessmen which can become an obligatory element of the pre-trial procedure for resolving disputes. In the Federal Law No. 193 On an alternative procedure for resolving disputes with the participation of a mediator (mediation procedure) of July 27, 2010, mediation is defined as a method of resolving conflicts with the assistance of a mediator on the basis of the voluntary consent of the parties in order to achieve a mutually acceptable solution. Consequently, one of the basic principles of mediation as a dispute resolution procedure may include mandatory participation of

[16] LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice. Available at: https://www.legifrance.gouv.fr/eli/loi/2019/3/23/JUST1806695L/jo/texte; Décret n° 2019-1089 du 25 octobre 2019 relatif à la certification des services en ligne de conciliation, de médiation et d'arbitrage. Available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039281664&dateTexte=20200322 etc. [Accessed 27th March 2021].

the parties to the dispute and the mediator, as well as its focus on reaching a compromise.

The use of digital technologies and, above all, their "non-intellectual" variety can significantly simplify the mediation procedure. The parties of the dispute may be at a great physical distance from each other (both within the same country or in different countries), or for some reason (for example, employment or illness) they may be unable to participate in the traditional face-to-face (offline) negotiation. The use of digital technologies such as, in particular, audio and video conferencing, e-mail and various chats allows the parties and the mediator to participate in the mediation process without the need in a personal meeting (Himikus, 2016:102—104).

However, mediation procedure demands verifying the identity of the disputing parties, ensuring protection of their personal data and solving other related problems. In addition, current Russian legislation does not provide for the possibility of concluding a mediation agreement in digital form — even with the use of an electronic signature (Article 12 of the Federal Law № 193 from July 27, 2010), which significantly limits potential of online mediation.

As a negotiator, the mediator helps participants of the mediation process to get out of a stressful or conflict situation, seeks to establish and eliminate the reasons of the dispute and find optimal for all parties solution, thus neutralizing the emotional component of an issue. To reach the goal the mediator has an arsenal of actions such as exchanging information with the parties, identifying the basic problem (reasons for the dispute), determining the interests of the parties, searching for points of contact between them and the most appropriate way out of the current situation.

The mediation procedure also includes the exchange of counter offers and arguments between the parties, determination of circumstances relevant to the settlement of dispute and, finally, drafting of mediation agreement. It seems that such actions can be carried out with the help of digital technologies (primarily communicative ones), however, replacing the human mediator with AI software is hardly possible.

The mediator should be impartial and strive to provide an emotionally comfortable environment for the parties of dispute. A computer program is extremely impartial and devoid of its own emotions, but at the current level of digital technologies development, it is also unable to fully take into account the emotions of the parties and help them find a compromise solution. It is the psychological factors of the interaction of the parties that are important in mediation, and only a human mediator can cope with them.

Mediation can be carried out without a direct meeting of the mediator and the parties in an online format, and this type of mediation is mostly common in the United States and European countries (it is known as ODR — "online dispute resolution"). Online mediation is used to resolve a wide range of disputes arising in business, family relationships, in the field of online commerce and so on.

For example, on the international electronic trading platform eBay arising conflicts are often related to late delivery, damage to goods, their non-compliance with the declared specifications, etc. Such disputes require prompt (and, of course, effective) settlement, and if the buyer and seller did not manage to resolve the dispute on their own, the eBay platform provides an opportunity to use the Square-Trade resource, where the parties agree to participate in the dispute mediation procedure and further discussion with the direct participation of a professional mediator on the electronic platform (Gribkov, 2019).

A similar procedure is provided for the online payment service PayPal, which, without being an independent trading platform, offers tools to protect the rights of buyers and mediation services in dispute settlement.

The problem of dispute resolution in the field of electronic commerce is also urgent in the Russian Federation. On May 30, 2019, the Russian Ministry of Justice announced drafting the rules aimed at regulating the mechanism for protecting consumer rights (including in electronic commerce) through online mediation[17]. This draft law may create a regulatory framework for online mediation. It is worth noting that even traditional forms of mediation in Russia are not as common as, for example, in the United States and European countries, and the very concept of online mediation is not reflected in Russian legislation. Thus, the relevance of such steps is quite obvious.

Despite the absence of legislative regulation, there are some online services in Russia that offer mediation; one of them is the 7yaMediatsiya service[18] created by "Siberian Centre of Mediation"[19]. Designed to resolve family conflicts through mediation, this online platform uses webcams and automated logging and other digital technologies applicable to mediation. However, this service is used quite rarely; according to the official website, which was last updated in 2018, only one hundred and twenty persons applied, and the total number of consultations provided through the site reached five hundred forty-six.

It is possible to say that the institution of online mediation in Russia is at the earliest stage of its development. We cannot discuss the prospects of using digital technologies including AI since this procedure is not sufficiently known (and understandable) to its potential consumers; it needs improving and further elaborating both at the legislative level and at the level of technical support. It seems necessary to create a national platform which would allow the parties interested in mediation, firstly, to get acquainted with the procedure, and secondly, to find a suitable mediation specialist who could assist them online or, if necessary, in a traditional offline format.

[17] The Ministry of Justice began to develop a draft law on dispute settlement in Internet commerce. International information group «Interfax». Available at: https://www.interfax.ru/russia/662652 [Accessed 20th March 2021].

[18] 7yaMediatsiya. Available at: https://family.emediator.ru/ [Accessed 27th March 2021].

[19] Siberian Centre of Mediation. Available at: https://www.emediator.ru/ [Accessed 21th March 2021].

Similar platforms exist in many countries. For example, one of them is positioned as an international one and provides the opportunity to select a mediator for dispute resolution online in any country in the world[20]. Statistics shows that one hundred fifty-six mediators specializing in disputes related to sexual harassment are registered and offer their online mediation services in the United States where this platform was developed, and there are only three specialists (mediators) for all categories of disputes in Russia; one is located in Moscow while the others are located in Ankara (Turkey) and Dubai (United Arab Emirates). The last two also fall into the list of mediators working with clients from other countries.

Conclusion

Summing up we can assert that it is not currently possible to delegate justice and out-of-court forms of dispute resolution to artificial intelligence, no matter how perfect it is. The AI development opens up tremendous opportunities for humanity, but it also implies risks associated with hypothetical incompatibility of "digital calculation" with human feelings and emotions, alien to machines. Therefore, intelligent systems and programs should only assist humans in administering justice and implementing various forms of dispute settlement, but not replace them in the above activities. In any case the autonomy of such systems and programs should be strictly limited and subjected to formalized rules that have yet to be developed (perhaps even guided by the sci-fi ideas of Isaac Asimov).

This applies only to the "intellectual" variety of digital technologies, while other types are widely used and will be used in the future, including in legal practice. It should be noted that the benefits of digitalization have become more than obvious in 2020. The COVID-19 pandemic literally forced both public and private structures to implement online services and related tools in their activities. Some arbitration institutions, including the International Chamber of Commerce Arbitration Court, have already adopted relevant regulations for online hearings[21]. Also, because of sanitary restrictions due to the pandemic, the High Court in London for the first time broadcasted an online session of trial on YouTube in *National Bank of Kazakhstan & Another vs The Bank of New York Mellon & Ors* case[22].

Coronovirus restrictions have generated many other examples as well. Some more time will pass and a sufficient amount of analytical material will be accumulated; only after that it will be appropriate to raise the issue of digital practices in legal

[20] Online Mediators. Available at: https://www.onlinemediators.com/index.cfm [Accessed 23th March 2021].
[21] ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic. Available at: https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf [Accessed 21th March 2021].
[22] The High court of Justice Queen's Bench division commercial court. Case No: FL 2018 000007. Available at: https://www.judiciary.uk/wp-content/uploads/2020/04/FL-2018-000007-Kazakhstan.pdf [Accessed 21th March 2021].

proceedings and out-of-court dispute resolution in general but not only for the period of global quarantine and emergencies. In our opinion, the pandemic has only accelerated the already rapidly moving process of introducing such techniques into judicial and out-of-court dispute resolution practice because that process is able to reduce the costs of relevant procedures for their participants and governments, as well as to make these procedures more effective and convenient.

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