

Digitalization of the Civil Process in the Transboundary Aspect: Formulation of the Problem

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ABSTRACT

This article discusses the need to discuss the digitalization of the civil process at the interstate level. A significant part of cross-border disputes today are already digital disputes. The international civil process in whose scope the resolution of cross-border disputes falls is still weakly responding to a changing agenda, and in the scientific aspect, the need for the emergence of the E-justice section in the international civil process has not been studied enough. At the same time, at the national level, we are witnessing a wide penetration of digital disputes on the legislative agenda and, as a result, a certain transformation of national procedural rules. In this case, the emerging legal “vacuum” is ready to fill in alternative (non-state) electronic platforms for dispute resolution (online arbitration, dispute resolution on electronic platforms like “e-bay”, “pay pal”, etc.). The author tried to identify the starting points of the beginning of digitalization in cross-border disputes in the international civil process.

Keywords: *digitalization of justice, resolution of cross-border digital disputes, international civil litigation, recognition, Enforcement of Foreign Judgments*

1. RELEVANCE OF THE PROBLEM

The laws of development of the modern world economy have long recognized the existence of borders between states. The growth of cross-border e-commerce, in turn, leads to the growth of cross-border digital disputes (digital content), which are quite difficult to resolve exclusively within the framework of national procedural rules. The only branch of law that has the necessary tools for the effective resolution of cross-border digital disputes could be the international civil process, which, unfortunately, is still aloof from the popular at the national level such phenomenon as “digitalization of justice”. So, if you make a purchase of a defective product in a foreign online store “e-bay” and make payments using the “pay pal” payment system, existing state and interstate legal protection tools (judicial protection of rights) offer the buyer to return money to start going to court and obtaining a decision, and in the future, the search for opportunities for the execution of decisions abroad.

Thus, at the state and interstate level, we have a certain “vacuum” or the complete inability of existing legal institutions to quickly resolve such cases. As a result, the buyer is forced to look for more convenient tools to restore their rights, and the relevant sites are ready to offer an alternative to a lengthy and costly litigation. The current situation can be briefly described as “The global digital economy with local outdated justice”

In general, the digitalization of society and the state (its institutions) today has become, if not an everyday occurrence, then a well-established element of effective

and modern governance in the broad sense of the word. Most developed and developing countries attach great importance to digitalization. Digitalization required some adaptation of the classical legal institutions (conclusion of an agreement, evidence, court hearing, etc.) with digital means of communication (e-mail, video conferencing, etc.).

In substantive law, the classical institution of the conclusion of a contract required the translation of the will into electronic form, with the ensuing issues of identification and authentication of the sender. The principle of freedom of contract, which allows the parties to resolve many issues on their own, played an important role in the case of substantive law. Here (in substantive law), the parties are open to the possibility of widespread use of soft law instruments, which, together with the cross-border nature of modern world trade, to some extent, has contributed to digital harmonization in cross-border affairs. Vivid examples of this are the model laws of the UN, UNCITRAL and UNIDROIT: UNCITRAL Model Law on Electronic Transferable Records (2017), UN Convention on the Use of Electronic Communications in International Contracts (2005), UNCITRAL Model Law on Electronic Signatures (2001), UNCITRAL Model Law on Electronic Commerce (1996), UNIDROIT Principles of International Commercial Contracts (1994), etc.

In the civil process, taking into account the fact that procedural relations require the participation of an authoritative subject - the court, and the regulatory method itself is for the most part imperative, in the digitalization process the emphasis initially shifted strongly towards the active role of states. The judiciary, being one of the elements of a system of separation of powers, means the

need to address issues, including digitalization, taking into account the doctrine of sovereignty. States cannot allow parties or international organizations to arbitrarily change the rules of the proceedings and are very cautious in regulating cross-border cases.

The classic approach in cross-border issues has been the conclusion of agreements on legal assistance or on the recognition and enforcement of foreign decisions. The largest number of multilateral agreements in this area were prepared at the Hague Conference: Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019), Convention on Court Selection Agreements (2005), Convention on International Access to Justice (1980), Convention on Obtaining Evidence Abroad (1970), Convention on issues of civil procedure (1954), etc.

An interesting fact is that, in comparison with substantive law, international procedural agreements generally do not provide for cross-border digitalization of procedures and communication between courts and parties/between courts of different states. Digitalization today is destined for the development only at the national level of the states parties to these international agreements. Some “mansion” in this process is only out-of-court mediation, in which, in existing international agreements, cross-border digital communication is somehow provided/recognized. Moreover, the preamble of the UN Convention on International Settlement Agreements reached as a result of mediation (2018) explicitly indicates the need to create standards for the cross-border enforcement of international settlement agreements achieved as a result of mediation. One of the reasons for the difference in approaches is the understanding of mediation in these international documents as an exclusively alternative to judicial (state) proceedings.

2. GENERAL STANDARDS VS. COMPETITION

As has been shown above, the solution to the issues of digital interaction and communication of courts of various law and order, states, as before, strive to reserve, preferring to solve them *lex fori*. The classic international civil process has not yet received a new permanent section of E-Justice, in contrast to the national doctrines of the civil process, which, without the scope of e-justice, are hard to imagine today.

Would it be correct to say that the reason for such a wary attitude of states to cross-border digitalization of justice is the reluctance to further narrow the *lex fori* doctrine, which has already “suffered” from the transfer of recognition and enforcement of foreign court decisions and/or international jurisdiction to the interstate level (two- and multilateral agreements), to give a definite answer without a detailed analysis is quite difficult? It cannot be ruled out that in this case it is more profitable for the rule of law, using forum shopping, to be in a situation of competition with each other.

Competition, being the most important postulate of the development of any rule of law, leading to the creation of best practice (for example, in the field of electronic justice), at the same time, cannot and should not be the main determinant due to the following. The existing technologies today make it possible to talk only about the digitalization of justice at the communicative level (the interaction of the court and the participants in the proceedings), which means their applied character. The urgent task is to increase efficiency or make the existing civil process more convenient. Only the development of artificial intelligence to a level capable of not only “doing like a person”, but also “thinking like a person” is capable of fundamentally shaking the foundations of a model of the civil process that has existed for centuries, which, according to scientists, is hardly worth the wait.

It is the applied nature of the digital technologies used today that can negate the benefits of best practice in the field of digital justice for most states (with rare exceptions). The parties would rather use the benefits of forum shopping and choose states with a low level of corruption in the courts, a high degree of trust in the judicial system and the quality of case handling, than a legal system in which the best and most modern possibilities for filing an electronic claim, participating in a court session through video conferencing, and it is also possible to receive notices and judicial acts through electronic communication channels.

The above emphasizes the importance of the scientific justification for the need for cross-border cooperation in terms of digital justice, in comparison with pure competition. The gain from common/harmonized digital standards and the cross-border effects of digital technologies in justice for litigants should be more important (interests of private actors) than reports on the next achievements of individual states in the field of digitalization of justice (public interests).

3. FINDING A STARTING POINT FOR A SCIENTIFIC DISCUSSION

It seems that the main problem for the inclusion in the sphere of the international civil process of mechanisms for resolving cross-border digital disputes may be the lack of opportunities at the interstate level for using modern digital technologies. Most of the current two- and multilateral relations of various legal orders and existing conventions were concluded in the 20th century, in a period in which cross-border disputes did not have a digital dimension, and national legal orders did not allow digitalization of justice in principle.

Such a starting point could be the principle of accessibility/effectiveness of judicial protection, recognized as at the international level (cl. 3 of Art. 2 of the International Covenant on Civil and Political Rights, Art. 6 of the European Convention for the Protection of Rights and Fundamental Freedoms, Art. 47 of EU Charter of Fundamental Rights), and in most national rule of law.

First of all, it is required to find out whether today this principle in its national understanding has a digital dimension. In other words, does it include the right to access to justice, the right of citizens and organizations to receive information electronically on the progress of a case, ensure remote participation in a court hearing, or receive a court decision in electronic form. It may be about whether the breakdown/shutdown of the digital service, for example, filing a lawsuit in electronic form, would be considered a violation of the right to judicial protection.

The next important aspect is the search for the answer to the question of whether the transboundary effect of this principle is recognized in most law and order. Since this issue falls within the scope of the international civil process, it must be considered from the perspective of international agreements and national norms containing the norms of the international civil process. For example, between two states in which the principle of reciprocity is not recognized, an agreement is concluded on legal assistance and recognition of foreign court decisions in family matters and the question arises whether this principle can be used (e.g., through an expansive interpretation of international conventions on rights and freedoms) to achieve recognition of a foreign court decision in a dispute on the protection of consumer rights. Does the court, which is requested to enforce a foreign decision, have the right to go beyond the framework of a bilateral international treaty and whether going beyond it

4. BRIEF CONCLUSION

The questions outlined above represent one of the possible options for finding an answer to the question of the acceptability of digitalization of the international civil process with the help of just one of the principles of the civil process. The fact of the need to begin such work, it seems, should not be in doubt. The fact is that the existing and actively developing alternative methods for resolving digital trans-border disputes in the medium and long term can not only create competition for the classical judicial (state) methods of resolution, but also law in general. The reason is that disputes at such sites are resolved and, most importantly, decisions taken are executed in the absence of any legal regulation (state or interstate). Moreover, the resolution procedure itself does not fit into the framework of existing procedural institutions (mediation, arbitration, etc.), and state bodies do not know how to respond to such phenomena.

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can be justified/balanced by the need to ensure the right to access to justice. Will it be considered correct that in recognition of a foreign court decision in this case it is made due to the cross-border effect and universality of the right to judicial protection, or is it just a judicial error?

In addition, the search for the answer to this question should also be sought in the national norms of the international civil process. Between states there may not be a two- or multilateral agreement on legal assistance in civil matters. In this case, the national regulation remains the only option. In this case, is the national court entitled to broadly interpret the right of an alien to access to justice using the statutory national principles of equality of arms or the national regime?

With a positive answer to both of these questions, the next step will be to justify the possibility of recognizing the cross-border effect of the right to judicial protection in its digital aspect. In this case, you need to check whether the following assumption is valid. Is there an agreement between the states on recognition and enforcement of foreign court decisions (in which there is not a word about electronic documents, etc.) sufficient to expand the scope of its application with the right to judicial protection to the similar/identical existing in both states elements of digital justice.

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