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Legal alert from the dispute resolution practice

Resolution of the Plenum of the Supreme Court of the Russian Federation “On preparing a case for trial in an arbitration court”

On 4 June 2024, the Plenum of the Supreme Court of the Russian Federation (hereinafter – the "**SC RF**") adopted Resolution "On preparing a case for trial in an arbitration court" No. 12 (hereinafter – the "**Resolution**").

The resolution explaining the stage of preparing a case in an arbitration court largely repeats the previous resolution of the Plenum of the Supreme Arbitration Court of the RF dated 20 December 2006 No. 65 "On preparing a case for trial" (hereinafter – the "**Resolution of the SAC RF**").

However, the new Resolution contains a number of provisions that may be of practical value in judicial work.

01 The court has the right to request evidence from a party to the dispute

In paragraph 18 of the Resolution, the SC RF indicated the right of the court to demand evidence **from a person participating in the case**. In case of failure to fulfill this obligation without a good reason or failure to notify the court of the impossibility of presenting evidence, including within the period established by the court, such a person may be fined in accordance with part 9 of Article 66 Arbitration Procedural Code of the Russian Federation.

This clarification regarding the range of persons on whom the court has the right to impose the obligation to present evidence is likely intended to eliminate contradictory judicial practice regarding the court's right to request evidence from a party to the dispute.

Despite the fact that even in the Resolution of the Plenum of the SC RF of 23 April 2019 No. 10 "On the application of part four of the Civil Code of the Russian Federation" (clause 61), the SC RF allowed for the request of evidence from the defendant, in particular, in disputes regarding the recovery of compensation for the violation of intellectual rights. Until now, in judicial practice, the position of the courts is often encountered, according to which the court cannot oblige a party to a dispute to provide evidence, both to substantiate its position and to substantiate the legal position of the other party.

(see, for example, the resolution of the Arbitration Court of the Volga District dated 11/03/2024 in case No. A57-28847/2022, the resolution of the Arbitration Court of the Moscow District dated 01/04/2024 in case No. A40-188720/2023, the resolution of the Arbitration Court of the Ural District dated 27/04/2024 in case No. A76-35621/2021).

In this case, the courts, as a rule, referred to the legal position set out in the Resolution of the Presidium of the SAC RF dated 06/03/2012 No. 12505/11 according to which failure to provide evidence should be qualified solely as a refusal to refute the fact whose existence is argued with reference to specific documents as indicated by the procedural opponent.

In the new Resolution, the SC RF separately noted that the obligation to present evidence can also be assigned to the party to the dispute. In practice, this will allow the plaintiff or defendant to turn to the court for help in obtaining, for example, internal documentation of a procedural opponent, to which the opposite party, by definition, does not have access but which may play an important evidentiary role.

The resolution also notes that the imposition of a fine is unacceptable in relation to persons participating in the case whom the court has invited to provide evidence **in support of their own claims or objections**.

02 The court has the right to independently collect evidence, including using electronic databases to collect information

The SC RF notes that when preparing a case for trial, a judge has the right to independently obtain, including in electronic form, information necessary for the consideration of the case from open sources, in particular from state automated systems, from information systems to which access is provided on the official websites of authorities state authorities, local governments, organizations on the Internet information and telecommunications networks (clause 12 of the Resolution).

Despite the fact that arbitration courts have long been using electronic databases in practice, the Resolution of the SAC RF did not contain any explanations regarding the ability of the court to independently collect information.

Separately, it should be noted that as an appropriate source of information, the SC RF single out not only state registers, but also **the websites of organizations** which in the context of a significant increase in disputes with foreign organizations acquires particular value.

03 When preparing a case, the court is obliged to analyze the practice of higher courts

The SC RF reminds the courts that in order to uniformly apply the norms of substantive and procedural law, the judge needs to analyze the practice of applying legal norms regulating controversial legal relations **determined** by the decisions of the Plenum of the SC RF and the decisions of the Plenum of the SAC RF on issues of judicial practice that have remained in force, decisions of the Presidium of the SC RF and resolutions of the Presidium of the SAC RF that have remained in force, as well as those contained in reviews of judicial practice approved by the Presidium of the SC RF (clause 3 of the Resolution).

It is important to note that, in contrast to the Resolution of the SAC RF in which the courts were ordered to take into account judicial practice when preparing a case:

> *in each case, when preparing a case for trial, analyze the **judicial practice** of applying the legislation governing controversial legal relations*
>
> (clause 7 of the Resolution of the SAC RF)

The new Resolution deals only with legal positions contained in the Resolutions of the Plenum and in the Resolutions of the Presidium of the SC RF and the SAC RF, as well as those contained in reviews of judicial practice approved by the Presidium of the SC RF.

With this clarification, the SC RF continues its work aimed at eliminating situations where courts take different positions on standard disputes contrary to the position of the SC RF on fundamental issues.

Previously, similar clarifications were formulated in the Resolutions of the Plenum of the SC RF dated 30 June 2020 No. 12 and dated 30 June 2020 No. 13 explaining the procedure for considering cases in the courts of appeal and cassation in which the SC RF also obliged higher courts to check judicial acts for compliance with the positions SC RF and the SAC RF.

04 Recording legally significant circumstances during an interview

The SC RF notes that when preparing a case for trial, in order to clarify the circumstances relating to the substance of the stated claims and objections, the judge has the right to conduct an interview with the participation of the parties during which the judge finds out what circumstances of the case are disputed by the parties, what evidence the parties consider reliable, and which ones are unreliable (clauses 13, 14 of the Resolution).

Clarification of these circumstances at the stage of preparing the case for trial, in particular the circumstances on which the parties have no disagreements and they consider them reliable, could become an effective tool in judicial work and would contribute to procedural economy.

The fact that the parties have recognized the circumstances is entered by the arbitration court into the record of the court session and certified by the signatures of the parties. Such recognition, stated in writing, is attached to the case materials (part 3 of Article 70 of the Arbitration Procedure Code of the Russian Federation).

However, in the Resolution of the SC RF, it notes that it is mandatory for the court to keep a record of the session in which an interview is being conducted **only if one of the parties to the dispute fails to appear** (clause 13 of the Resolution).

Thus, it is necessary to take into account that during the interview with the participation of the parties, the court has the right not to keep a record, including using audio recording devices, and if during the interview the procedural opponent made statements that confirm the circumstances on which the plaintiff's claims or the objections of the defendant are based, such a plaintiff or defendant must apply to the court with a request to record the case and reflect in the record the corresponding statement of the procedural opponent.

05 The court is required to hold preliminary hearings in most cases

In the original version of the Resolution, in order to more effectively implement the right to judicial protection, it was proposed to exclude the obligation of the court to hold a preliminary hearing in cases with shortened consideration periods.

For example, in cases of demolition of an unauthorized building, challenging the decisions and actions (inaction) of an official of the bailiff service, challenging the decisions of local governments to demolish an unauthorized building, imposing administrative liability, challenging the decisions of administrative bodies to impose administrative liability, on forcing a legal entity to convene a general meeting of participants, as well as cases related to the performance by commercial courts of the functions of assistance and control in relation to arbitration courts.

In the version of the Resolution adopted by the Plenum, this clarification was excluded (clause 6 of the Resolution), which, in our opinion, seems correct from the point of view of maintaining the balance of rights of the parties to the dispute, and also taking into account that cases with shortened processing times are sometimes complex, especially cases involving the demolition of unauthorized buildings which require careful preparation and copious evidence in the case from all parties.

Thus, **the Supreme Court of the Russian Federation retained the obligation to conduct a preliminary court hearing in most cases** with the exception of those that are directly listed in the law (for example, when considering cases in a simplified or writ proceeding, etc.).

06 Objections to moving the case to its consideration on the merits

The new Resolution did not change the previous approach of the highest authority that the court does not have the right to proceed to consider the case on the merits if the persons participating in the case raised objections regarding such a transition (paragraph 24 of the Resolution).

At the same time, the SC RF in the new Resolution, as well as in the Resolution of the SAC RF, does not require that such objections be motivated.

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