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Pre-trial procedures in disputes on the protection of intellectual rights

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Abstract: Pre-trial conflict resolution procedures do not cease to be in demand, and the development of their legal regulation does not lose its relevance. Disputes on protecting intellectual rights are no exception, and most countries have established special pre-trial procedures. However, specific difficulties emerge when applying the legal norms related to pre-trial conflict resolution procedures in disputes on the protection of intellectual rights, which can be clearly demonstrated while studying the Russian experience using the mentioned pre-trial procedures. The paper aims to analyze and define the peculiarities of pre-trial procedures in disputes on protecting intellectual rights in Russia. Using systemic approach, as well as comparative legal and formal legal analysis allowed author to define the peculiarities of pre-trial procedures in disputes on the protection of intellectual rights in the Russian Federation: special requirement on the mandatory pre-trial claim procedure is a departure from the general approach, according to which such procedure is required for disputes arising from transactions or unjust enrichment, and is probably due to the complexity of these disputes; in the administrative pre-trial procedure of dispute examination in the Chamber of Patent Disputes the parties have a wide enough set of procedural rights and opportunities, and the procedure is quite close to the judicial procedure, and in some respects even exceeds it.

Keywords: Pre-trial settlement. Russia. Claim procedure. Intellectual rights protection. Chamber of Patent Disputes.

1 Introduction

Against the background of ever-increasing judicial burden, pre-trial conflict resolution procedures do not cease to be in demand, and the development of their legal regulation does not lose its relevance.[1]

[1] VALEEV, D., KRSLJANIN, N. Kazan arbitration day: The rule-of-law development and regional governance. Russian Law Journal, Vol.5, Is.2, 129, 2017; MALESHIN, D., SILVESTRI, E., SITDIKOV, R., VALEEV, D.

This thesis is relevant not only for Russia, but, perhaps, for most countries of the world.[2] Disputes on the protection of intellectual rights are not an exception in this respect.[3]

The special legislative requirement on the mandatory pre-trial claim procedure for the settlement of disputes on the protection of intellectual rights related to the recovery of damages and/or compensation for the violation of exclusive rights is a departure from the general approach. Such a procedure is required for disputes arising from transactions or unjust enrichment, and is probably due to the complexity of these disputes.

The special claim procedure for settling a dispute on early termination of the legal protection of a trademark due to its non-use allows guaranteeing the protection of the rights and interests of both the right holder (as it gives them sufficient time to think over the proposal and respond to it) and the plaintiff. It happens due to the subsequent calculation of the three-year period of non-use will be carried out until the date of sending a claim and not filing a lawsuit, which eliminates the risk of evasion / circumvention by the right holder by starting to use the goods.

In administrative pre-trial proceedings before the Chamber of Patent Disputes, the parties have access to a wide range of procedural rights and opportunities, and the procedure is quite similar to, and in some respects even superior to, the judicial procedure.

Reforming Russian Civil Procedure. Russian Law Journal, 4(1), 142-147, 2016; VLADIMIROVICH, M.A., SERGEEVICH, E.K. Alternative dispute resolution in digital government. Revista Brasileira de Alternative Dispute Resolution – RBADR, ano 04, n. 07, p. 119, jan./jun. 2022; HAZIEVA, G.B., SITDIKOVA, R.I., SAFIN, Z.F., BLYZNETS, I.A. The script work in the complex object of copyrights // Revista san Gregorio, 3, 53, 2018; POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021; KOLZDORF, M.A. Infringement of exclusive rights on the Internet: controversial issues of protection. Arbitration Disputes, 3, 115, 2018.

2 YAROSHENKO, O., MOSKALENKO, O., SEREDA, O., INSHYN, M., & BURNIAGINA, Y. The Role of Trade Unions as a Subject of Social Partnership in Resolving Labour Disputes. Revista Brasileira de Alternative Dispute Resolution - RBADR, vol. 4, n. 7, 147, 2022; HALOUSH, H.A. The Liberty of Participation in Online Alternative Dispute Resolution Schemes. International Journal of Legal Information, 36(1), 102-117, 2008; CARVER, T. B., Vondra, A.A. Alternative dispute resolution: Why it doesn't work and why it does. Harvard Business Review, 72, 120, 1994; FIADJOE, A. Alternative dispute resolution: a developing world perspective. Routledge, 2013; VAUGHN, L.B. Integrating alternative dispute resolution (ADR) into the curriculum at the University of Washington School of Law: A report and reflections. Fla. L. Rev., 50, 679, 1998; SCHMIDT, G., RIBEIRO, N., & FERREIRA, D. B. The Brazilian Center for Arbitration and Mediation (CBMA) as an appellate sports arbitration institution. Revista Brasileira de Alternative Dispute Resolution - RBADR, vol. 3, n. 6, p. 93-108, 2021.

3 LIDE, E. C. ADR and cyberspace: the role of alternative dispute resolution in online commerce, intellectual property and defamation. Ohio St. J. on Disp. Resol., 12, 193, 1996; MITCHELL, R. T. Resolving Domain Name-Trademark Disputes: A New System of Alternative Dispute Resolution Is Needed in Cyberspace. Ohio St. J. on Disp. Resol., 14, 157, 1998; BLACKMAN, S. H., & MCNEILL, R. M. Alternative Dispute Resolution in Commercial Intellectual Property Disputes. Am. UL Rev, 47, 1709, 1997; SMITH, M.A. Arbitration of Patent Infringement and Validity Issues Worldwide, HARVJ.OF LAW &TECH, 19, 299, 2006.

For example, one of the advantages of dispute examination in the Chamber of Patent Disputes is that the members of the collegium are persons with specialized knowledge of the subject of the dispute. This practically eliminates the need to appoint an expert examination or engage specialists; allows critical evaluation of evidence containing information related to special knowledge; allows the parties to compete not only in matters of law and facts, but also in the relevant area of specialized knowledge.

At the same time, there is a problem that the Chamber of Patent Disputes is subordinate to the body/person whose acts/decisions it reviews. The fact that formally the final decision is made by the Head of the Russian Federal Service for Intellectual Property (and not by the Board of the Chamber of Patent Disputes), in our opinion, does not really remove this problem. The real role of the head here is reduced not to "making" the decision, but to its "approval" (as it was called in the former rules), since the head of Russian Federal Service for Intellectual Property does not personally participate in the examination of the dispute and, accordingly, cannot or should not "make" decisions on the dispute. This problem may create risks of violation of the guarantees of independence and impartiality in the examination of disputes in the Chamber of Patent Disputes.

The aim of the paper is to analyze and define the peculiarities pre-trial procedures in disputes on the protection of intellectual rights in Russia. Using systemic approach, as well as comparative legal and formal legal analysis allowed author to define the peculiarities of pre-trial procedures in disputes on the protection of intellectual rights in the Russian Federation.

2 Peculiarities of the pre-trial procedure for IP rights' disputes

Disputes on the protection of intellectual rights are characterized by a special legal regulation of their pre-trial settlement, which is expressed in:

- procedural peculiarities of sending a claim both for all cases on the protection of intellectual rights and for their separate objects;
- the existence of specialized administrative bodies and/or procedures for consideration of certain cases.[4]

Non-observance (including improper observance) of the pre-trial procedure of consideration of a dispute on the protection of intellectual rights may lead both to non-acceptance of the claim by the court and to more serious negative

[4] HAZIEVA, G.B., SITDIKOVA, R.I., SAFIN, Z.F., BLYZNETS, I.A. The script work in the complex object of copyrights // Revista san Gregorio, 3, 53, 2018; POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021.

consequences. Those might be the loss of tactical advantage in the dispute, omission of the limitation period or the limitation period of application to the court, as well as to unnecessary expenses.

General statements on observance of the pre-trial procedure of economic dispute settlement (not only on protection of intellectual rights) are contained in Part 5 of Article 4 of the Arbitration Procedural Code of the Russian Federation. Civil-law disputes on recovery of money on claims arising from contracts, other transactions, as a result of unjust enrichment, may be submitted to the arbitration court after the parties have taken measures for pre-trial settlement after the expiration of thirty calendar days from the date of sending a claim (demand), unless other term and (or) procedure is not established by law or contract.

Other disputes arising from civil legal relations shall be referred to the arbitration court for resolution after observance of the pre-trial dispute settlement procedure only if such procedure is established by federal law or contract.

Economic disputes arising out of administrative and other public legal relations may be submitted to the arbitration court for resolution after observance of the pre-trial dispute settlement procedure if such procedure is established by the federal law.

Compliance with the pre-trial dispute resolution procedure is not required in cases of establishing facts of legal significance, cases of awarding compensation for violation of the right to trial within a reasonable time or the right to execution of a judicial act within a reasonable time, cases of insolvency (bankruptcy), cases of corporate disputes, cases on the protection of the rights and legitimate interests of a group of persons, cases of writ proceedings, cases related to the performance by arbitration courts of the functions of assistance and control in relation to arbitration courts, cases of recognition and enforcement of decisions of foreign courts and foreign arbitration awards, and also, if otherwise not provided by law, when the prosecutor, state bodies, local government bodies and other bodies apply to the arbitration court in defense of public interests, rights and legitimate interests of organizations and citizens in the field of business and other economic activities.[5]

A special statement on the claim procedure for settling disputes on the protection of intellectual rights is contained in Paragraph 5.1. of Article 1252 of the Civil Code of the Russian Federation, and it applies to all objects of intellectual

[5] VLADIMIROVICH, M.A., SERGEEVICH, E.K. Alternative dispute resolution in digital government. Revista Brasileira de Alternative Dispute Resolution – RBADR, ano 04, n. 07, p. 119, jan./jun. 2022; HAZIEVA, G.B., SITDIKOVA, R.I., SAFIN, Z.F., BLYZNETS, I.A. The script work in the complex object of copyrights // Revista san Gregorio, 3, 53, 2018; POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021; KOLZDORF, M.A. Infringement of exclusive rights on the Internet: controversial issues of protection. Arbitration Disputes, 3, 115, 2018.

rights. Thus, if the right holder and the infringer of the exclusive right are legal entities and (or) individual entrepreneurs, and the dispute is to be considered in the arbitration court, before filing a claim for damages or payment of compensation, it is obligatory for the right holder to file a claim.

The claim for compensation of losses or payment of compensation may be brought in case of full or partial refusal to satisfy the claim, or failure to receive a response to it within thirty days from the date of sending the claim, unless another term is provided by the contract.

A claim shall not be required to be filed by the right holder prior to filing a claim not related to the recovery of losses or compensation, namely:

- on recognition of the right;
- on suppression of actions violating the right or creating a threat of its violation;
- compensation for damages;
- seizure of a material storage media;
- publication of the court decision on the infringement.

In addition to the above, for disputes on early termination of legal protection of a trademark, Russian legislation establishes the rules for sending and content of a claim, as well as prescribes possible options for pre-trial settlement. Thus, according to Part 1 of Article 1486 of the Civil Code of the Russian Federation, legal protection of a trademark may be terminated prematurely in respect of all goods or part of the goods for individualization of which the trademark is registered, due to non-use of the trademark continuously for three years.

The interested person who believes that the right holder does not use the trademark in respect of all goods or part of goods for individualization of which the trademark is registered, shall send to such right holder a proposal to apply to the Federal Executive Body in the Field of Intellectual Property with an application for waiver of the right to the trademark. Other way is to conclude with the interested person an agreement on alienation of the exclusive right to the trademark in respect of all goods or part of goods for individualization of which the trademark is registered (hereinafter referred to as the proposal of the interested party).[6] The proposal of the interested party shall be sent to the right holder, as well as to the address specified in the State Register of Trademarks or in the relevant register provided for by the international treaty of the Russian Federation.

[6] POTAPENKO, E.G. Procedural and legal consequences of failure to comply with the mandatory claim procedure when applying to the arbitration court, Arbitration and civil procedure, 5, 27, 2021.

The proposal of the interested party may be sent to the right holder not earlier than after the expiration of three years from the date of state registration of the trademark.

If within two months from the date of sending of the interested party's proposal the right holder does not submit an application for waiver of the right to the trademark and does not conclude with the interested party an agreement on alienation of the exclusive right to the trademark, the interested party within thirty days after the expiration of the said two months shall have the right to apply to the court with a statement of claim for early termination of the legal protection of the trademark due to its non-use.

A new proposal of the interested party may be sent to the right holder of the trademark not earlier than upon expiration of a three-month term from the date of sending the previous proposal of the interested party.

The decision on early termination of legal protection of a trademark due to its non-use shall be adopted by the court in case of non-use by the right holder of the trademark in respect of the relevant goods for individualization of which the trademark is registered, within three years immediately preceding the day of sending to the right holder of the interested party's proposal.

Legal protection of the trademark shall be terminated from the date of entry into legal force of the court decision.

Paragraph 30 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 22.06.2021 No. 18 "On some issues of pre-trial settlement of disputes considered in civil and arbitration proceedings" the above statement of Article 1486 of the Civil Code of the Russian Federation is further specified by the following.

The proposal of the interested party to the right holder of the trademark, who does not use it continuously for three years, to apply to the Russian Federal Service for Intellectual Property with a request to abandon the right to the trademark, or to conclude with the interested party an agreement on alienation of the exclusive right to the trademark in respect of all goods or part of goods for individualization of which the trademark is registered, shall be sent, taking into account the provisions of Article 165.1 of the Civil Code of the Russian Federation, to the address of registration of the citizen at the place of residence or stay, and to the citizen, who is a registered trademark owner. In addition, the proposal of the interested party shall also be sent to all addresses specified in the State Register of Trademarks or in the relevant register provided for by the international treaty of the Russian Federation.

Sending the offer to these addresses indicates compliance with the pre-trial dispute resolution procedure provided for by Article 1486 of the Civil Code of the Russian Federation, even in case of their actual unreliability (Article 51, Paragraph 2, Article 1232, Paragraph 1 of the Civil Code of the Russian Federation).

Non-observance of this procedure is the sending of a proposal by an interested party to only one of the addresses specified in Article 1486.1 of the Civil Code of the Russian Federation; to an address not specified in the Unified State Register of Legal Entities or in the State Register of Trademarks; by e-mail rather than to the postal address of the right holder; before the expiration of three years from the date of state registration of the trademark.

If the actual receipt of the interested party's proposal is confirmed (Paragraph 1 of Article 165.1 of the Civil Code of the Russian Federation), the violation of the procedure for sending it may not indicate non-observance of the mandatory pre-trial dispute settlement procedure.

In the event that the interested party has sent the proposal with violation of the procedure or terms provided for by Paragraph 1 of Article 1486 of the Civil Code of the Russian Federation, it is possible to send a new proposal before the expiration of the above three-month term from the date of sending the previous proposal.

According to Paragraphs 2 and 3 of Article 1248 of the Civil Code of the Russian Federation, in some cases, the protection of intellectual rights in relations related to the filing and consideration of applications for patents for inventions, utility models, industrial designs, selection achievements, trademarks, service marks, geographical indications and appellations of origin of goods, with state registration of these results of intellectual activity and means of individualization, with the issuance of relevant title documents, with challenging the provision of these results and means of legal protection or with its termination, is carried out administratively, respectively, by the Russian Federal Service for Intellectual Property and other authorized state bodies. The decisions of these bodies come into force from the date of adoption. They can be challenged in court in accordance with the procedure established by law.

In this case, the costs of the party to the dispute associated with compliance with this procedure shall be reimbursed to the party to the dispute in whose favor the federal executive body made the decision, by the other party to the dispute. These expenses consist of patent and other fees, as well as costs, including amounts of money payable to experts, specialists and translators, reasonable fees for the services of patent attorneys, lawyers and other persons providing legal assistance (representatives), and other expenses incurred in connection with the consideration of the dispute. If, based on the results of the consideration of the dispute, a decision is made to partially satisfy the claims, expenses are subject to reimbursement to the party to the dispute in proportion to the volume of satisfied claims. In the event that, upon consideration of the dispute, a decision is made to partially satisfy the claims, the costs shall be reimbursed to the party to the dispute in proportion to the volume of satisfied claims.

The Order of the Ministry of Science and Higher Education of the Russian Federation and the Ministry of Economic Development of the Russian Federation of April 30, 2020, No. 644/261 approved the Rules for consideration and resolution of disputes in the administrative order by the Federal Executive Body in the Field of Intellectual Property.

In this order, disputes on the protection of intellectual rights in relations connected to the filing and consideration of applications for patents for inventions, utility models, industrial designs, trademarks, service marks, geographical indications and appellations of origin of goods, the state registration of these results of intellectual activity and means of individualization, the issuance of the relevant documents of title, disputing the granting of legal protection to these results and means of individualization, or disputing the granting of legal protection to these results and means of individualization. However, not all the above-mentioned disputes shall be considered, but only those directly specified in Paragraph 3 of the above Rules, namely: disputes on the protection of intellectual rights in relations related to the filing and examination of applications for patents for inventions, utility models, industrial designs, trademarks, service marks, geographical indications and appellations of origin of goods, state registration of these results of intellectual activity and means of individualization, and the issuance of the relevant documents of title.

Meanwhile, some disputes on contesting the legal protection of intellectual rights objects are considered directly by the Intellectual Property Court, namely (Paragraph 4, Article 34 of the Arbitration Procedure Code of the Russian Federation):

- on the establishment of the patented;
- on early termination of legal protection of a trademark due to its non-use.

The examination of the dispute shall be carried out at the meetings of the board. Information on the members of the collegium publishes on the official website.

Persons who related to each other or to any of the parties to the dispute, persons who participated in the examination of the corresponding application at the stage of adoption of the challenged decision of the Russian Federal Service for Intellectual Property, as well as persons who have direct or indirect interest in the outcome of the case, or about whom other circumstances are known that raise doubts as to their objectivity and impartiality, may not be members of the collegium and shall be subject to challenge.

The parties to the dispute have the right to submit a request to participate in a panel meeting in the remote access mode via videoconferencing.

The review of the dispute is carried out at the meetings of the collegium, which is formed from among the specialists, the list of which is determined by the Russian Federal Service for Intellectual Property and published on the official website.

Consideration of a dispute may be suspended at the request of a party to the dispute or by decision of the collegium in case of administrative or judicial consideration of another case, the decision on which may be of importance for the results of consideration of the dispute, until the decision on this case enters into legal force, as well as in case of availability of interim measures in respect of the intellectual property object which is the subject of the dispute, until the removal of the relevant measures. Objections, applications and other documents and materials may be filed electronically through the official website.

Having studied the materials of the dispute, having heard all persons participating in the meeting, the collegium shall retire to a deliberative room to form a conclusion on the results of consideration of the dispute, which shall be announced at the meeting. The conclusion of the panel may provide for the satisfaction of the objection or application in full or in part, or denial of the satisfaction of the objection or application. Subsequently, the Collegium of the Chamber for Patent Disputes shall establish a written conclusion, on the basis of which the Head of the Russian Federal Service for Intellectual Property or a person authorized by him shall also take one of the following decisions based on the results of the examination of the dispute:

- to grant the opposition or application in full or in part;
- refusal to satisfy the objection or statement.

3 Conclusion

The special legislative requirement on the mandatory pre-trial claim procedure for the settlement of disputes on the protection of intellectual property rights related to the recovery of damages and/or compensation for the infringement of the exclusive right is a departure from the general approach, according to which such procedure is required for disputes arising from transactions or unjust enrichment, and is probably due to the complexity of these disputes.

The special claim procedure for settling a dispute on early termination of legal protection of a trademark due to its non-use allows guarantee the protection of the rights and interests of both the right holder (as it gives them sufficient time to think about the proposal and respond to it) and the plaintiff, as the subsequent calculation of the three-year period of non-use will be carried out until the date of sending a claim, not filing a lawsuit, which eliminates the risk of evasion on the

part of the right holder by starting to use the trademark, which eliminates the risk of evasion of the right holder by starting to use the trademark.

In the administrative pre-trial procedure of dispute examination in the Chamber of Patent Disputes the parties have a wide enough set of procedural rights and opportunities, and the procedure is quite close to the judicial procedure, and in some respects even exceeds it.

As an example, one of the advantages of having disputes heard by the Chamber of Patent Disputes is that the members of the collegium include persons with specialized knowledge of the subject of the dispute. This accordingly:

- practically eliminates the need to appoint an expert examination or engage specialists;
- allows critical evaluation of evidence containing information related to special knowledge;
- allows the parties to compete not only in matters of law and facts, but also in the relevant sphere of specialized knowledge.

At the same time, there is a problem that the Chamber of Patent Disputes is subordinate to the body/person whose acts/decisions it reviews. However, the fact that formally the final decision is made by the Head of the Russian Federal Service for Intellectual Property (and not by the Board of the Chamber of Patent Disputes), in our opinion, does not really solve this problem. The real role of the head here is reduced not to "making" the decision, but to its "approval" (as it was called in the former rules), since the head of the Russian Federal Service for Intellectual Property does not personally participate in the examination of the dispute and, accordingly, cannot or should not "make" decisions on the dispute. This problem may create risks of violation of the guarantees of independence and impartiality during the consideration of disputes in the Chamber of Patent Disputes.

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