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**ENSURING ACCESS TO JUSTICE IN THE CONTEXT OF
PROFESSIONALIZATION OF RUSSIAN COMMERCIAL PROCEDURE**

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GENERAL DESCRIPTION OF THE WORK

Relevance of the Research Topic.

Access to justice is one of the fundamental principles of judicial protection, defining both the purpose and the general meaning of judicial activity. The ideas of access to justice are equally relevant for all types of legal proceedings.

At the same time the Russian commercial process as well as the domestic procedural law as a whole is currently undergoing a deep reform. When considering the ongoing transformations in the aggregate it becomes obvious that at present justice in economic disputes is in search of a conceptually new path of development. On the one hand, for the commercial process for a long time the idea of the so-called professional litigation was more or less relevant. This idea implied the orientation of justice in economic disputes to the business sector and participants with deep professional (including legal) knowledge. As a result of such orientation in the Commercial Procedure Code of the Russian Federation (hereinafter – CPC of the RF) appeared provisions on early discovery of evidence, recognition by a party of circumstances not directly litigated, the obligation to submit a revocation by the respondent, etc. These provisions were widely claimed in commercial case law.

The emergence of new rules, regulations and institutions allowed scientists to draw a cautious conclusion about the more “rigid” (compared with the civil process) approaches of the commercial procedural law, as well as a tendency towards professionalization¹. This trend gives the commercial process significant specificity, which requires scientific reflection.

On the other hand, the basis of the Russian commercial process is the idea of access to justice, the provision of which is named in Art. 2 CPC of the RF as a task

¹ In relation to the commercial process the term “professionalization” was introduced into the scientific circulation of L. A. Prokudina. See, for example: L. A. Prokudina. Development of legal proceedings in commercial courts (professionalization issues) (beginning) // Bulletin of the Academy of the General Prosecutor's Office of the Russian Federation. 2008. No. 6. P. 30-34; L. A. Prokudina. Development of legal proceedings in arbitration courts (professionalization issues) (continued) // Bulletin of the Academy of the General Prosecutor's Office of the Russian Federation. 2008. No. 8. P. 30-34.

of legal proceedings in commercial courts. Access to justice is a guide both for the ongoing reforms and for the development of case law. However, the outward simplicity of the term in question hides a number of fundamental questions: what exactly is covered by this concept? From whom and what (parties, the court, the state as a whole or some external factors) does the actual access to justice depend on? If ensuring access to justice is indeed the task of legal proceedings in commercial courts (note that a similar task was included in Article 3 of the Code of Administrative Procedure of the Russian Federation²), then what should the court do in this regard when considering a specific case?

Also note that access to justice in economic disputes is a factor in the investment attractiveness and economic development of the state. The willingness of a foreign investor to cooperate with Russian partners directly depends on whether there are effective legal (including judicial) remedies in the Russian jurisdiction that allow promptly resolving legal conflicts that arise.

Like the term “access to justice” the concept of professionalization raises many questions at the present stage: about the content of this concept, its signs and manifestations, general purpose, etc. These issues have not yet received a comprehensive understanding of the domestic doctrine. Moreover, access to justice and professionalization in their cooperation have so far not been substantively examined by Russian science.

The ideas of professionalization were primarily formulated and intended for justice in economic disputes. However, it is worth paying attention to the fact that these ideas are no longer limited to the boundaries of the commercial process. In recent years civil procedure legislation, legislation on administrative proceedings have also seen the emergence of institutions that, in their most general form, can be described as inherent in professional litigation. In the future can be expected an extrapolation of the ideas under consideration to enforcement proceedings, in which a discussion about the professional capabilities of the debtor, the collector

² Code of Administrative Procedure of the Russian Federation 08.03.2015 № 21-Federal Law // RG. 2015. №49

(their representatives) and the enforcement authorities can also gain momentum. Moreover, the ideas of professionalization are found not only in legislative acts, but also in the case law of the Supreme Court of the Russian Federation, which periodically notes that the parties to legal proceedings in economic disputes are professional participants in the process, and therefore are obliged to know the procedural legislation, to navigate in case law. In the case law of commercial courts of various instances numerous legal positions have also been accumulated regarding various manifestations of professionalization.

Access to justice and professionalization, therefore, are ideas that will determine the evolution of Russian procedural law. The above suggests that the study of the interaction of professionalization and access to justice in the commercial process (including the evolution of legislative decisions and case law approaches) may be of interest for the development of procedural law in general. Understanding the correlation of professionalization and access to justice in the commercial process, taking into account the accumulated case law of commercial courts is relevant not only in the scope of legal proceedings in economic disputes, but also in general civil process.

The Degree of Scientific Development of the Topic.

The issues of access to justice have been studied by domestic scientists more than once. The first major work in which an attempt was made to generalize the ideas of access to justice was the thesis by I.A. Prikhodko for the Doctor of Law, defended on the topic “Access to Justice in the Commercial and Civil Procedure: Main Problems” (2005). In this study a new analysis of the development of procedural legislation was presented, in which the main institutions of the civil and commercial process were examined through the prism of access to justice.

Of great importance is the monographic study of V.M. Zhuykov “Judicial Reform: Problems of Access to Justice” (2006), which also rethought many fundamental issues, in particular, the specifics of ensuring the access to justice in the context of intensive reforms of judiciary and proceedings.

It should be noted and the thesis of V.M. Sidorenko “The Principle of

Access to Justice and the Problems of its Implementation in the Civil and Commercial Process” (2001), O.V. Zhukova “Access to Justice at the Stage of Cassation Proceedings” (2005), N.N. Efremova “Procedural Means of Ensuring Access to Justice in the Field of Business and other Economic Activities (in the Context of International Legal Standards)” (2005), R.M. Masalajiu “Problems of Ensuring Access to Justice at the Stage of Supervisory Review in Civil and Commercial Processes” (2010), E.V. Vlasov “Access to Justice in Administrative Legal Proceedings” (2017), A.S. Korpen “The Right to Access to Justice and Mechanisms for its Protection in Modern International Law” (2019).

Achieving a modern understanding of access to justice in the commercial process would not have been possible without the contribution of V.F. Yakovlev, who addressed this issue many times both in the course of his practical work and in scientific research.

The professionalization of the commercial process has found meaning in the scientific works of L.A. Prokudina, M.Z. Schwartz as well as several other scientists.

At the same time the issues of the mutual influence of access to justice and the professionalization of the commercial process so far remain outside the scope of modern research, including dissertations.

The object of the study is public relations arising in connection with the realization of the right to judicial protection guaranteed at the international and constitutional levels in the Russian commercial process.

The subject of the study is the norms of the commercial procedural legislation and the case law of their application, affecting access to justice in economic disputes; theoretical, legislative and practical aspects of professionalization as a factor in access to justice.

The purpose and objectives of the study. The aim of the study is the formation of a theoretical model of the optimal ratio of access to justice and professionalization of the commercial process. The purpose of this model is to solve specific problems of the development of commercial procedural legislation

and the case law of its application.

The purpose of the study determines the following tasks:

- synthesis of historical experience in understanding the problems of access to justice;
- identification of the main approaches to the definition of the concepts of “access to justice”, “professionalization of the commercial process”;
- definition of the international legal content of the concept of “access to justice”;
- identification of the prerequisites and conceptual content of the professionalization of the commercial process, including through interdisciplinary analysis;
- formation of specific ideas about the relationship between the access to justice and the professionalization of the commercial process;
- identification of the essential features and specifics of this ratio in the commercial procedural law and the case law of its application;
- identification of possible ways to further develop doctrinal beliefs about access to justice, taking into account trends in professionalization.

Methodology of Scientific Research. In the thesis were used general scientific methods: analysis, synthesis, modeling, historical method, functional method; special legal methods: formal legal and comparative legal. In addition, in the study an interdisciplinary methodology is used: procedural and legal issues are analyzed from the perspective of psychology, sociology, law and economics approach.

The theoretical basis of the study was the work of domestic scientists, including pre-revolutionary: A.L. Borovikovskiy, E.V. Vaskovskiy, V.M. Gordon, A.H. Gol'msten, E.A. Nefediev, I.E. Engelman; Soviet scientists: M.A. Vikut, M.A. Gurvich, A.A. Dobrovolskiy, A.F. Kleinman, V.M. Semenov, N.A. Chechina, M.S. Shakaryan, V.N. Scheglov and others.

The thesis is based on the research of modern jurists: T.E. Abova, V.O. Abolonin, D.B. Abushenko, T.K. Andreeva, A.T. Bonner, G.A. Hajiyev, H.I.

Hajiyev, M.L. Galperin, N.A. Gromoshina, O.V. Gutnikov, G.A. Zhilin, V.M. Zhuykov, A.V. Ilyin, I.N. Kashkarova, M.I. Kleandrov, A.I. Kovler, E.V. Kudryavtseva, R.M. Masalajiu, S.V. Moiseev, T.G. Morshchakova, I.A. Prikhodko, L.A. Prokudina, I.V. Reshetnikova, T.V. Sakhnova, D.A. Tumanov, L.V. Tumanova, M.A. Filatova, I.S. Shitkina, V.F. Yakovlev, V.V. Yarkov and others.

Of great importance for understanding access to justice (including in the context of the professionalization of legal proceedings) are the works of foreign scholars, including M. Cappelletti, L. Cadiet, B. Cardozo, B. Garth, I. Griss, KCh. Koller, F. Klein, U. Mattei, R. Posner, A. Uzelac, Lord Woolf.

The Normative and Empirical Basis of the Study is made up of the provisions of the Constitution of the Russian Federation, the Convention for the Protection of Human Rights and Fundamental Freedoms, case-law of the European Court of Human Rights, the norms of the Commercial Procedure Code of the Russian Federation, clarifications of higher judicial bodies and materials of judicial and commercial case law.

In addition the study took into account the provisions of the Civil Procedure Code of the Russian Federation, the Code of Administrative Procedure of the Russian Federation.

The Scientific Novelty of the study is determined by the fact that in the framework of the thesis the theoretical evolution of the concept of access to justice is presented for the first time, including in its relation to other theoretical doctrines; the basic theoretical approaches to understanding the access to justice were comprehended; a systematic and interdisciplinary analysis of trends in the professionalization of the commercial process and the correlation of this phenomenon with access to justice in economic disputes; proposals are formulated for the further development of commercial procedural legislation, as well as forecasts for the evolution of legal science in general, taking into account both professionalization trends and the need to ensure access to justice.

Defense Provisions.

1. Access to justice must be understood in two ways. Firstly, access to justice is an element of the right to judicial protection, which provides the opportunity to achieve the objectives of a fair trial.

Secondly, access to justice is understood as a general theoretical concept that encompasses organizational, institutional, procedural and other guarantees that ensure the effective exercise of the right to judicial protection.

2. In terms of ideology access to justice is the result of an understanding of the right to a fair trial through the prism of a more general right to an effective remedy, as provided for in Article 13 of the European Convention on Human Rights. At the same time ensuring access to justice is accompanied by the need to ensure access to other remedies.

3. Professionalization of legal proceedings is a trend in the development of procedural law, which involves optimizing the use of professional resources of the court, the parties and their representatives. In Russia at the present stage the most obvious manifestations of professionalization are the expansion of the procedural obligations of the parties, the raising of qualification requirements for their representatives and the specialization of courts.

The ideas of professionalization are most characteristic of the commercial process, in which they first received legislative reflection and practical implementation. However the trends of recent years indicate that the trends of professionalization are extrapolated to other types of process.

4. Access to justice implies the existence of real, rather than formal, illusory judicial remedies. The real nature of judicial protection is provided by:

- the need for a rational legislative settlement of issues of obtaining judicial protection and the lack of disproportionate, excessive restrictions on procedural rights;

- the need to comply with persons interested in obtaining judicial protection of the requirements of procedural legislation.

5. Ensuring access to justice and professionalizing of the commercial process have one and the same goal: the realization of the right to judicial protection with

an optimal set of legal means without undue social and economic costs. In this regard, the professionalization and accessibility of justice should be considered in close collaboration; however, professionalization is a factor in ensuring the access to justice.

6. A factor in ensuring access to justice in the context of the professionalization of the commercial process is the meaningful cooperation between the court and the parties on issues of the case under consideration. Such cooperation is realized through the mechanism of shared responsibility of the court and the parties for the result of the consideration of the case and suggests that the achievement of the goals of the legal proceedings depends both on the court and on the procedural activities of the parties.

The shared responsibility of the court and the parties for the outcome of the consideration of the case serves to further develop the principle of adversarial civil procedure, suggesting that on a number of issues the procedural activity of the parties is required, and on a number – the activity of the court.

7. In the context of the professionalization of the commercial process it is advisable to expand the scope of subsequent judicial control over a wide range of categories of disputes, including bankruptcy, administrative cases, tax disputes. Such an extension does not contradict the ideas of access to justice and does not violate the principle of administering justice only by the court.

The Theoretical Significance of the Study lies in the interpretation and concretization of the concepts of “access to justice” and “professionalization of the commercial process”. These concepts can be used not only in the science of commercial procedural law, but also in related fields of scientific knowledge – civil procedure, administrative proceedings, enforcement proceedings.

As part of the thesis the evolution of theoretical approaches to access to justice is revealed, the conclusions about which can be used in further doctrinal interpretation of the right to judicial protection (in comparative, international legal, constitutional and procedural aspects).

The conclusions made in the thesis on ensuring access to justice in the

context of the professionalization of the commercial process may be in demand with the further development of the theory of principles of justice.

The Practical Significance of the Study.

Based on the results of the analysis of the correlation of professionalization and access to justice, a number of proposals have been formulated to improve legislation and case law approaches.

Thus, recommendations are formulated to ensure greater efficiency of the mechanism of procedural duties in a professionalizing environment.

Based on the need to ensure access to justice and taking into account the conclusions made in the thesis, further ways of development of a number of institutes of commercial procedural law are proposed.

Testing the Results of the Study. The main findings of the thesis are reflected in the author's scientific articles published in leading peer-reviewed journals, as well as in the author's reports at scientific conferences and events, including the April International Scientific Conference on the Development of Economics and Society at the Higher School of Economics (2018, 2019), St. Petersburg International Legal Forum (2019), International Congresses of Comparative Law of the Institute of Legislation and Comparative Law under the Government of the Russian Federation (2017, 2018, 2019).

The positions and approaches outlined in the dissertation were used by the author during practical work in the Commercial Court of the Moscow Region, expert and analytical activities at the Institute of Legislation and Comparative Law under the Government of the Russian Federation, as well as during classes in the disciplines "Commercial Process", "Procedural Documents" and open seminars of the research laboratory of international justice at the faculty of law of the National Research University Higher School of Economics.

The Main Content of the Thesis.

The thesis consists of three chapters, each of which consists of paragraphs.

Chapter 1 "Theoretical Evolution of the Ideas of Access to Justice" aims to summarize, systematize and specify the main doctrinal approaches to access to

justice.

In Section 1.1 “Historical Development of the Ideas of Access to Justice in Foreign Countries and Russia” the author analyzes in retrospective the development of ideas of access to justice. It is noted that these ideas were always present in scientific thought, but they were specified and terminologically formalized only in the twentieth century in the framework of the so-called “Florentine Project” and in the scientific works of Professor M. Cappelletti. The scientist formulated a methodology for studying access to justice, which can be defined as “legal interdisciplinarity” – legal issues have always remained as its core (and, accordingly, the methodology of legal science has been used), however, additionally analyzed phenomena were considered from the point of view of related sciences, including sociology, political science, economics, which allowed to obtain the most

The terminological design of the ideas of access to justice took place in Soviet Russia. In particular, Professor V.M. Semenov as a specific principle of justice singled out the principle of access to justice. However, in Soviet times the separation of access to justice into an independent conceptual category did not take place, and the full development of the ideas in question began only after the collapse of the USSR.

Section 1.2 “Scientific Approaches to Determining Access to Justice in Modern Russian Law” summarizes the existing theoretical understanding of the access to justice in Russia. So, it is stated that in Russia there are three main approaches to the studied concept: organizational (with an emphasis on judicial aspects), procedural (focuses on legal issues) and complex (generalizes organizational and procedural approaches). It is proved that these readings on access to justice do not contradict each other. This or that approach becomes relevant in connection with the specifics circumstances at a particular historical moment.

In the same paragraph case-law of the Constitutional Court of the Russian Federation is examined in detail, considering access to justice inextricably linked

to the right to judicial protection and fundamentally proceeding from the impossibility of limiting it.

Systematization of case-law of the Constitutional Court of the Russian Federation and a generalization of prevailing doctrinal approaches made it possible to propose an author's definition of access to justice, based on the fact that access to justice is primarily an element of the right to judicial protection.

Paragraph 1.3 “Access to Justice in the System of European Standards of Fair Trial” summarizes case-law of the European Court of Human Rights, which over the years has formed a systemic view of the right to access to justice. Certain parallels are established in the approaches of the ECtHR and the Constitutional Court of the Russian Federation: access to justice by both courts is considered as part of a broader right to a fair trial (judicial protection), it cannot be arbitrarily limited, and should be real, and not formally illusory. These similarities of approaches allow us to conclude that there is no conflict of interpretation on issues of access to justice between international and national constitutional jurisdiction. In addition, the general approach of both courts is that access to justice requires both a meaningful regulation in the legislation and the application of certain efforts of persons seeking judicial protection to comply with the requirements of the law.

Chapter 2 “Trends in the Professionalization of the Commercial Process and their Correlation with Access to Justice” examines the impact on the development and substantiation of theoretical and legislative views on access to justice of professionalization of the commercial process as a trend characteristic of litigation in economic disputes.

Section 2.1 “The Concept and Prerequisites for the Professionalization Of the Commercial Process” discusses the basic approaches to understanding this concept. So, in Russian commercial procedural law, professionalization involves optimizing the use of professional resources of the court and the parties, which leads to the following manifestations of this trend:

- expansion of the procedural obligations of the parties;
- increasing the legislatively established qualification requirements for

representatives of the parties;

- specialization of the court.

At the same time in the framework of this paragraph, attention is drawn to an interdisciplinary interpretation of the term “professionalization”, which allows us to conclude that the main and essential aspect of this concept is the meaningful cooperation of various entities, with regard to procedural law – cooperation between the court and parties.

In paragraph 2.2 “Cooperation Between the Court and Parties in the Course of the Trial: the Importance for Access to Justice” the concept of shared responsibility of the court and parties for the outcome of the proceedings, a logical continuation of the theory of interaction in the commercial process, is built on the basis of the theses reflected in paragraph 2.1. It is concluded that this type of responsibility is both a manifestation of the professionalization of the commercial process, and a condition for access to justice. At the same time the construction of a theoretical concept is accompanied by practical examples showing that shared responsibility of the court and parties for the result of the consideration of the case, although it does not yet find wide reflection in the doctrine, nevertheless, has already begun to receive actual reflection in case law.

Section 2.3 “Access to Justice, Professionalization of the Commercial Process and Individual Principles of Justice: Theoretical and Practical Issues of Correlation” is intended to extrapolate the conclusions drawn in the previous parts of the work to the classical theory of the civil process, in particular to the theory of principles of justice. This paragraph shows that understanding the correlation of access to justice and the professionalization of the commercial process has the potential for further theoretical development of the principles of justice. So, it is shown how shared responsibility of the court and parties for the outcome of the consideration of the case can contribute to the development of the principle of adversarial; the specificity of the correlation of access to justice and the principle of administering justice only by the court in modern conditions is shown; mutual influence of professionalization and the principle of a reasonable time frame for

legal proceedings are illustrated.

Section 2.4 “The Unity of the Purpose of Professionalization and the Access to Justice” summarizes the theoretical findings on the relationship between professionalization and access to justice. Attention is focused on the inextricable connection of these categories, in particular, it is shown that professionalization is not only a trend in the development of the commercial process, but also a means of ensuring access to justice. In turn, access to justice is an objective limitation of professionalization, an obstacle to excessive and irrational normative regulation.

Chapter 3 “The Importance of Professionalization and Access to Justice for the Development of Commercial Procedural Law” is called upon to assess the possible ways of further developing ideas about the relationship between access to justice and professionalization of the commercial process.

Thus, paragraph 3.1 “Directions for the Development of Commercial Procedural Legislation through the Prism of Professionalization and Access to Justice” analyzes possible legislative development paths. In particular, the focus is on the large-scale reform of procedural legislation in 2018-2019. It is shown how the correlation of professionalization and access to justice can help rethink the main directions of reform, including the development of the institution of jurisdiction (competence), professional judicial representation, the institution of refusal to accept a statement of claim, simplified and order proceedings. In addition, attention is paid to the possible abolition of the mandatory nature of the motivation of the court decision, a comparison is made of the prospects for this abolition with the ideas of access to justice, professionalization of the arbitration process and European standards for a fair trial.

Section 3.2 “Directions for the Development of Theoretical Concepts About the Professionalization of the Commercial Process and Access To Justice” is devoted to ways of doctrinal development of issues that are the subject of a thesis research. In particular, the perspective of law and economics approach is noted for the purpose of further understanding the relationship between professionalization and access to justice. This scientific trend among other things is designed to

rationalize legal regulation, remove unnecessary regulators that create only practical barriers to the implementation of various legal institutions, as well as identify areas of public relations where there are not enough regulators. This purpose of economic analysis of law may be relevant for understanding the access to justice.

In conclusion, the findings of the thesis research are summarized.

List of Publications Featuring Major Scientific Findings of the Thesis:

1. Fokin E. Evolution of ideas of Access to justice in the legal studies and the practice of European Court of human rights // International justice [Mezhdunarodnoe pravosudie]. 2018. No. 4. Pp. 97-112;
2. Fokin E. Access to justice, quality of law and the development of Russian Commercial procedure // Journal of Russian law [Zhurnal rossiyskogo prava]. 2018. No. 12 Pp. 120-130;
3. Fokin E. «Professionalization» of Russian commercial procedure // Zakon. [Law]. 2019. No. 7. Pp. 159-166;
4. Fokin E. Reasonable delay of proceedings and Access to justice in English civil procedure: theoretical foundation and practical experience // Journal of foreign legislation and comparative law [Zhurnal zarubezhnogo zakonodatelstva i sravnitel'nogo pravovedeniya]. 2018. No. 1 Pp. 89-95;
5. Fokin E. Comparative civil procedure: subject, aims and perspectives // Journal of foreign legislation and comparative law [Zhurnal zarubezhnogo zakonodatelstva i sravnitel'nogo pravovedeniya]. 2018. No. 3 Pp. 152-161.