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Forensic Expertise Payment in Civil and Commercial Courts: Constitutional Court Perspectives and Legislative Updates

Oleg A. Yastrebov^{ID}, Svetlana A. Smirnova^{ID}✉, Maxim V. Mozgov^{ID}

RUDN University, Moscow, Russian Federation

✉smirnova_sva@pfur.ru

Abstract. The research includes an analysis of the Ruling of the Constitutional Court No. 43-P dated 20.07.2023, aimed at protecting the right of experts to receive payment for forensic research commissioned by the court, regardless of a party's financial solvency in civil proceedings. The actions of judges in civil cases that prevent violations of expert's rights, as outlined by the Constitutional Court of the Russian Federation, are explained in layman's terms and presented clearly. The article also analyzes legislative changes that follow this ruling emphasizing general issues and differences between the approaches of Constitutional Court and the legislator. Notably, it addresses the removal of prohibition against refusing to conduct forensic research due to non-payment. Furthermore, it examines how the right to refuse forensic research could be affected in practice. The practical implications of the Constitutional Court's ruling for the development of court practices regarding expert appointments are highlighted. Additionally, the article presents core conclusions regarding relevant changes related to forensic expertise and discusses practical issues surrounding payment from the court to experts.

Key words: expert activity, constitutional court, appointment of expert examination, payment for expert examination, civil procedure

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Оплата судебной экспертизы в гражданском и арбитражном процессе: от позиции Конституционного Суда РФ к изменениям в процессуальное законодательство

О.А. Ястребов^{ID}, С.А. Смирнова^{ID}✉, М.В. Мозгов^{ID}

Российский университет дружбы народов, г. Москва, Российская Федерация

✉ smirnova_sva@pfur.ru

Аннотация. Проводится анализ Постановления Конституционного Суда РФ от 20.07.2023 № 43-П, направленного на защиту права эксперта получать оплату за проделанную работу по производству назначенной судом экспертизы независимо от платежеспособности сторон в гражданско-правовом споре. Доступно и последовательно изложены действия судьи в гражданском процессе, которые, по мнению Конституционного Суда РФ, позволят избежать нарушения прав эксперта. Публикация содержит анализ изменений в законодательстве, которые последовали за указанным Постановлением Конституционного Суда. Обозначены общие моменты и расхождения в подходах законодателя и Конституционного Суда, в частности исключение из законодательства нормы, запрещавшей эксперту отказываться от проведения экспертизы по мотиву неоплаты. Проведен анализ того, как может быть реализовано право на отказ от проведения экспертизы на практике. Подчеркнуто практическое значение постановления Конституционного Суда для дальнейшего развития судебной практики при назначении экспертизы. Раскрыто значение соответствующих изменений для экспертного сообщества, сделаны основные выводы по вступившим в силу изменениям в законодательство в части судебной экспертизы, а также приведены практические аспекты получения платежа от суда со стороны эксперта.

Ключевые слова: экспертная деятельность, Конституционный Суд, назначение экспертизы, оплата экспертизы, гражданский процесс

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Introduction

Financing and remuneration of experts are essential for the sustainable development of expert activity in Russia. Expert organizations play a crucial role in the administration of justice, and any failures in their operations are unacceptable.

The funds available to expert organizations are vital for paying salaries, purchasing modern equipment, developing new methods, and advancing scientific knowledge used in forensic expertise (Averyanova, 2009). This is pertinent for both state and non-state expert institutions.

Until recently, the most pressing issue regarding payment for expert examination arose in civil proceedings. The Constitutional Court of the Russian Federation and the legislator have made several efforts to address this problem. This research presents an analysis of these initiatives.

Position of the Constitutional Court of the Russian Federation on Expert Remuneration

In contrast to the commercial proceedings (Part 2 of Article 108 of the Commercial Procedure Code of the Russian Federation¹), until recently, judges in civil proceedings did not have the authority to reject a request for an expert examination, if the funds had not been transferred to the court's deposit.

This created a situation where experts in commercial proceedings were guaranteed payment for their work, while in civil proceedings, payment depended solely on the financial solvency of the party responsible for covering the expert examination costs. As a result, enforcement proceedings often concluded without a positive outcome, leaving experts in civil proceedings unpaid.

These circumstances promoted an appeal to the Constitutional Court of the Russian Federation to verify the constitutionality of paragraph 2 of Part 2 of Article 85, as well as Articles 96 and 97, and Part 6 of Article 98 of the CPC RF².

On July 20, 2023 the Constitutional Court issued its Decision No. 43-P, noting that the differences in procedural treatment stem from the specifics of cases involved. In commercial proceedings, the parties are primarily professional participants in business and other economic activities who protect their commercial interests and typically possess the financial capacity to make a deposit to the court's account for subsequent payment of expert examinations. In contrast, civil proceedings focus more on protecting individuals to civil, family, labour, housing and other legal relations, whose participants may not always have the necessary resources to protect their rights (Yastrebov & Kucherkov, 2012).

Therefore, according to the Constitutional Court, the absence of an expert's obligation in commercial proceedings to conduct the research when a party refuses to pay cannot serve as a basis for recognizing paragraph 2 of Part 2 of Article 85 of the CPC RF – which imposes such an obligation – as inconsistent with the Constitution of the Russian Federation.

¹ Commercial Procedure Code of the Russian Federation. Available at: <https://uporov.ru/2012/08/04/commercial-procedure-code-of-the-russian-federation-arbitrazhnyj-processualny/> [Accessed 22nd September 2024].

² Civil Procedure Code of the Russian Federation. Available at: <https://base.garant.ru/12128809/> [Accessed 22nd September 2024].

Moreover, it is not acceptable for a forensic expert to go unpaid simply because an enforcement proceeding concludes without a recovery (Smirnova, 2014). The Constitutional Court specifically addressed the situation concerning non-governmental experts, emphasizing that losses incurred by organizations engaged in forensic expertise negatively impact their ability to fulfil their obligations to the employees conducting expert examination (Dyakonova, 2019).

This problem was also noted in 2011 by E. R. Rossinskaya and E. I. Galyashina (Rossinskaya & Galyashina, 2011:88). They pointed out that in state expert institutions, the costs of conducting expert examinations are reimbursed from the state budget, which includes expenses for equipment, necessary materials, and salaries of state forensic experts. In contrast, private experts or non-state expert institutions may lack sufficient financial or material resources necessary to conduct forensic examinations (Rossinskaya & Galyashina, 2011).

Guided by the need to protect the rights of experts, the Constitutional Court concluded that a decision to appoint an expert examination in civil proceedings should generally be made only after a preliminary deposit has been made. However, unlike in commercial proceedings, the absence of a deposit is not a reason to refuse the appointment of an expert. First, it is necessary to determine whether the expert's conclusions are crucial for the case and whether there has been any abuse of rights by the applicant actions – specifically, if the applicant has the financial means to make a deposit but chooses not to (Rossinskaya, 2017). In any of these cases, the expert examination should not be assigned.

Only if the expert examination is genuinely needed and the applicant is not abusing their rights – meaning they truly cannot deposit funds into the court account – should the court appoint the expert examination at its initiative, with payment from the budget (part 2 of Article 96 of the CPC RF). Alternatively, the court may exempt the citizen from covering the costs of the expert examination taking into account their financial situation (part 3 of Article 96 of the CPC RF).

In essence, the Constitutional Court has developed an algorithm of actions to protect the interests of experts in civil proceedings. The necessary rules were already established in legislation; however, what was lacking was a guarantee of payment for an expert's work when the court appointed an examination without a deposit and without budgetary payment. Consequently, appropriate changes to legislation were required.

Legislative changes impacting expert examination procedures

The need to amend the legislation in terms of protecting an expert's right to receive payment for their work has been a pressing issue for some time. Various solutions have been proposed in academic literature (Bagryanskaya, 2020; Smirnova, 2013, 2014; Zhizhina, 2023).

For example, in her dissertation O.A. Surovaya suggested granting heads of forensic expert organizations the authority to *“return to the court that appointed the forensic examination decisions on the appointment of a forensic examination without execution if the parties do not contribute funds to pay for the forensic examination to the account of*

a forensic expert organization within thirty calendar days”³. This proposal was aimed at key procedural codes, excluding the Criminal Procedure Code.

Such an approach could have been applicable prior to the Constitutional Court’s decision mentioned above. However, considering the Constitutional Court’s emphasis on the inadmissibility of delays in administering justice, the legislator opted for a more direct route – essentially excluding the possibility of appointing an expert examination before receiving funds in the court’s deposit or obtaining court approval to appoint an expert examination at budgetary expense.

The corresponding amendments were introduced by Federal Law No. 191-FZ⁴ on July 22, 2024, to both the CPC RF and the Federal Law on State Forensic Expert Activity in the Russian Federation. These amendments came into effect on August 2, 2024.

The changes can be characterized as minimalistic. Stripping away technical details, the essence of the amendments is as follows:

1. The court will issue a ruling on appointing an expert examination only after funds have been deposited into the court’s deposit, except in cases where the court initiates the appointment (Part 2 of Article 96 of the CPC RF) or exempts a citizen from covering the costs of the expert examination taking into account his financial situation (Part 3 of Article 96 of the CPC RF).

2. The provisions in the CPC RF and legislation on forensic expert activity that prohibited experts from refusing to conduct expert examinations without payment have been removed.

The first point aligns fully with the Constitutional Court’s approach. Now, experts are guaranteed payment either from the deposit or from budgetary funds.

The second point somewhat contradicts the position of the Constitutional Court. Instead of providing guarantees of payment, as the Constitutional Court envisioned, the legislator allows experts the option to refuse to conduct an examination. This may stem from the fact that such an approach does not require additional budget expenditures, unlike the Constitutional Court’s proposal. Time will tell whether this discrepancy will pose challenges in the formation of judicial practice.

Another important aspect of the amendments aimed at protecting experts’ interests is the introduction of a rule – similar to that in commercial proceedings⁵ – stating that funds due to experts from the court deposit should be paid at the end of the court hearing in which the expert’s opinion was examined. This payment should occur not after a decision on the merits of the dispute or after completing appeal or cassation proceedings,

³ Surovaya Olesya Alexandrovna. Organizational and legal aspects of the activity of the head of a forensic expert organization: Abstract of the Candidate of Legal Sciences dissertation. Place of defense: Russian Federal Center for Forensic Expertise under the Ministry of Justice of the Russian Federation. Moscow, 2020.

⁴ Federal Law No. 191-FZ of July 22, 2024 On Amendments to the Civil Procedure Code of the Russian Federation and Invalidation of Part Four of Article 16 of the Federal Law ‘On State Forensic Expert Activity in the Russian Federation’.

⁵ Such an approach in the commercial proceedings is set out in paragraph 26 of the Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation No. 23 dated April 04, 2014 On Certain Issues of the Practice of Applying the Legislation on Expertise by Commercial Courts.

but immediately after the court hearing, even if the final decision on the case has yet to be made.

We hope that the courts will adhere carefully to this rule and ensure timely payment for expert's work.

Exploring the right of refusal: Legal framework

As stated in Part 4 of Article 79 of the new version of the CPC RF, the court must now commission an expert examination only if a deposit is available or if payment is entrusted to the budget. If this procedure is not followed, the expert has the right to refuse to conduct the examination.

This conclusion arises from the removal of the ban on refusing to conduct an expert examination due to non-payment from the legislation. While these provisions have been eliminated, the mechanism for exercising that refusal has not been clearly defined.

What should an expert do if the court has issued a decision to appoint an expert examination but no funds have been deposited? In such cases, it is advisable to promptly inform the court in writing about the refusal to conduct an expert examination, citing the absence of a deposit as stipulated in Part 4 of Article 79 of the CPC RF. Failing to do so may lead to unjustified delays in the administration of justice. It is also important to note that the legislator has not abolished fines for non-compliance with the expert's obligations under Article 85 of the CPC RF. Preventing the imposition of a fine is far easier than contesting it later.

When exercising the right to refuse, questions may also arise regarding the potential inconsistency of such refusal with the position of the Constitutional Court of the Russian Federation. According to Article 79 of the Federal Constitutional Law No. 1-FKZ dated July 21, 1994 On the Constitutional Court of the Russian Federation, decisions made by the Constitutional Court apply directly and do not require confirmation from other bodies and officials. Consequently, any participant in the proceedings or even the judge may argue that such a refusal is impermissible, despite subsequent changes in the procedural legislation lifting the ban on refusal.

To justify the permissibility of refusal under the current circumstances, we should refer directly to the text of the resolution of the Constitutional Court of the Russian Federation No. 43-P dated July 20, 2023. In paragraph 3 of Part 4 of this resolution, it states: *“Granting an expert the right to refuse to conduct research on behalf of the court due to a party's failure to pay the amounts due to the court's account, particularly in the absence of specially provided procedural tools for resolving such situations, creates certain risks of unfair behaviour by the party interested in delaying adjudication or obstructing the trial. Furthermore, imposing obligation on the party requesting the appointment of a forensic examination to deposit funds in advance under the threat of the expert's refusal to conduct examination can not only delay legal proceedings but also impose an additional financial burden on those participants who are entitled to benefits under civil procedure and tax legislation.”*

Thus, the Constitutional Court is concerned about two main issues: unjustified delays in proceedings and additional financial burdens on low-income participants (Smirnova 2012, 2014). The question arises: Do the amendments to the CPC RF contain procedural tools to address these issues?

The answer to this question seems to be affirmative. According to paragraph 1 of Part 4 of Article 79 in the new version of the CPC RF, the court issues a ruling on appointing an expert examination after the relevant person has deposited funds to the account, except in cases specified in Parts 2 and 3 of Article 96 of the CPC RF. These exceptions apply when the expert examination is funded by the budget, including situations where the applicant's financial circumstances are considered.

Regarding potential delays in proceedings, the court itself oversees this issue by setting a time limit within which the applicant must deposit funds (paragraph 2 of Part 4 of Article 79 of the CPC RF). At the end of this period, applications motion for expert examinations should either be rejected or commissioned at budgetary expense.

In this legal framework, there is no room for appointing an expert examination without payment. If such a situation arises, it constitutes a violation on the part of the court, not on the expert.

In such cases, completely depriving an expert of their right to refuse undermines the positive effects intended by these legislative changes. We hope that emerging judicial practice will prioritize protecting expert's rights in these situations.

Exploring abuse of rights in the context of non-payment for expert examinations

Does the introduction of amendments to the procedural legislation mean that we will no longer need to reference the definition provided by the Constitutional Court of the Russian Federation to protect the rights and legitimate interests of parties involved in the process and experts?

We believe that this is not the case. As noted earlier, the decisions of the Constitutional Court of the Russian Federation apply directly and do not require confirmation by other bodies or officials. Given that the changes made to the legislation are minimal, referring to the decision of the Constitutional Court remains relevant.

The resolution of the Constitutional Court indicates that a refusal to pay for an expert examination – when not due to the applicant's financial situation – may constitute an abuse of rights. However, the current wording of Article 79 of the CPC RF does not mention abuse of rights. The court simply rejects requests for expert examinations if there is no advance payment and no grounds for appointing it at budgetary expense.

In cases where issues are resolved over several court hearings, if an applicant was given a time limit for making an advance payment but failed to do so despite having sufficient financial resources, this could indeed be considered an abuse of rights and a delay in the process.

In such situations, according to paragraph 6 of Part 7 of the resolution of the Constitutional Court of the Russian Federation No. 43-79 dated July 20, 2023, the court may apply Article 79 of CPC RF by analogy and recognise facts for which confirmation was sought through an expert examination, depending on its significance for a party that evades making a deposit.

It is important to note that Article 79 of CPC RF addresses consequences related to evading participation in expert examinations and failing to provide experts with necessary materials for research. It does not specifically mention non-payment for expertise. Given that courts rarely apply legal analogies without impetus from the Constitutional Court, such an approach would likely not have been possible otherwise.

Now, if a similar situation occurs in the proceedings, the opposing party can reference the Constitutional Court's resolution to request that the court recognize as proven those facts that could have been established in their favor based on results from an expert examination that was not conducted due to another party's abuse of rights.

At the same time, party seeking to conduct an expert examination should exercise caution in their requests. To avoid negative consequences, it is advisable to submit a motion for an expert examination with evidence of prepayment or confirmation of their financial situation so that the court can resolve all related issues in one court hearing. In this scenario, there should be no questions regarding abuse of rights.

Exploring the right to be paid: Implications for forensic experts

There are ongoing disputes in the scientific literature regarding the legal nature of payment for expert examinations. Does the obligation to pay arise exclusively from procedural relations within the framework of the court – expert relationship, as noted by M.V. Zhizhina (Zhizhina, 2023:89), or does the expert operate under civil law for the provision of services, as suggested by A.A. Mokhov (Mokhov, 2006:11) or S.V. Lazarev (Lazarev, 2012:65)? Alternatively, should we consider the “agreement” between the expert and the court as a procedural agreement with specific property content, as proposed by D.Y. Zatonov (Zatonov, 2020:14)?

The legal qualification of the relationships between the court, the expert, and the participants in the proceedings is indeed crucial for proper regulation of these interactions. However, when it comes to payment for an expert examination, we suggest that courts prioritize paragraph 4 of Part 2 of Resolution No. 43-P of the Constitutional Court dated July 20, 2023. This paragraph states that “*The activity of an expert in providing assistance to justice on the basis of a court ruling has public legal significance. Ensuring appropriate conditions for it, **including arrangements for payment**, is the duty of the State to guarantee everyone a governmental protection of human and civil rights and freedoms, including judicial protection*”.

Therefore, regardless of whether we classify this relationship as one involving services or view it solely as a procedural relationship, payment must be made.

Unfortunately, in practice, even when there are funds in the court's deposit designated for expert examination payments, those funds do not always reach the expert promptly. Expert organizations frequently encounter situations where, following the hearing in which the expert opinion was examined or at the conclusion of the proceedings, judges fail to decide on transferring of funds to the expert from the court's account.

According to paragraph 27 of Resolution No. 23 of the Plenum of the Supreme Commercial Court of the Russian Federation dated April 04, 2014⁶, if the issue of payment of expenses incurred by an expert in connection with the examination is not resolved by the court, the expert (or expert institution) has the right to apply to the court for payment of those expenses. The court must consider such applications in accordance with the rules outlined in Article 112 of the Commercial Procedure Code of the Russian Federation.

A similar approach can be applied by analogy in civil proceedings. The resolution of issues related to court costs is governed by Article 103.1 of the Civil Procedure Code. For example, the Supreme Court of the Russian Federation notes that Article 112 of the Commercial Procedure Code and Article 103.1 of Civil Procedure Code regulate similar legal relationships and essentially have the same content⁷.

At the same time, neither Article 103.1 of the Civil Procedure Code, nor Article 112 of the Commercial Procedure Code of the Russian Federation acknowledges that the timing of payment for expert examination costs is linked not to the conclusion of the proceedings but to the court session in which the relevant expert opinion was examined. Consequently, based on these articles' wording, an application for reimbursement of expenses must be submitted within three months from the date when the last judicial act came into force, concluding the resolution of the case.

For this reason, when submitting an application for payment of expenses under Article 103.1 of the Civil Procedure Code or Article 112 of the Commercial Procedure Code of the Russian Federation, it is advisable to reference paragraph 26 of the Resolution No. 23 of the Plenum of the Supreme Commercial Court of the Russian Federation dated April 04, 2014, if the proceedings are conducted in Commercial courts. If the proceedings are civil, you should indicate of Part 3 of Article 97 of the Civil Procedure Code.

It is also important to note that there are some differences between these articles. From the expert's perspective, Article 103.1 of the Civil Procedure Code looks more attractive than Article 112 of Commercial Procedure Code of the Russian Federation.

In civil proceedings, the court does not require a hearings to resolve issues related to the recovery of court costs⁸. In contrast, in commercial proceedings, according

⁶ Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation No. 23 dated April 04, 2014 On Certain Issues of the Practice of Applying the Legislation on Expert Examination by Commercial Courts.

⁷ Definition of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation No. 48-KG22-18-K7 dated September 20, 2022.

⁸ Ruling of the Fourth Cassation Court of General Jurisdiction dated April 28, 2023 in case No. 88-13796/2023

to Part 1 of Article 159 of the Commercial Procedure Code, such applications must be resolved by the commercial court after hearing from other participants in the case, meaning a separate court hearing is necessary.

This approach is applicable when determining how court costs are distributed among the parties. However, since the amount payable to the expert has already been considered by the court at the stage of appointing the expert examination, if the expert examination is paid at the same amount previously established by the court, it should not be subject to a dispute in a separate court hearing.

It is worth noting that most commercial courts apply this approach and issue decisions on transferring funds to an expert organization or individual expert without requiring separate court hearings if, for any reason, the issue of transferring funds was not resolved earlier.

Therefore, if immediately after or during the hearing in which the expert opinion was examined, the court did not issue a ruling on reimbursement of expenses, then regardless of how the trial concludes, the expert organization or individual expert should submit an application for reimbursement with references to Article 103.1 and Part 3 of Article 97 of Civil Procedure Code or Article 112 of Commercial Procedure Code and Paragraph 26 of the Resolution No. 23 of the Plenum of the Supreme Commercial Court of the Russian Federation dated April 04, 2014, if the proceedings are conducted in a commercial court.

We are also aware of instances where expert organizations submit an application for reimbursement of expenses to the court simultaneously with the expert report, hoping that this application will be considered during the same court session in which the report is examined, or immediately afterward.

Unfortunately, practice shows that even this approach does not guarantee that the judge will promptly decide on transferring funds from the court's deposit to cover the forensic examination.

Moreover, in the court's incoming correspondence, this documentation may be treated as merely an expert report received by the court, which is understandable since the application was submitted alongside the expert report. The subsequent handling of the application for reimbursement largely depends on the diligence of the judge and their assistants.

In such situations it may be prudent to duplicate the application for reimbursement in a separate document through the electronic system "my.arbitr.ru" immediately after the court session in which the expert opinion was examined. This way, an electronic record of the submitted application will exist, and the judge will have a registered procedural document to which they are obliged to respond.

Please note that there is a limited timeframe for submitting such application. An application for court costs must be filed within three months from the date when the last judicial act entered into force, concluding the consideration of the case on its merits. If there was an appeal or cassation in the case, this time limit begins

to run after decisions are made in those instances. There is established practice regarding this issue⁹.

While it is possible to restore the deadline for submitting an application for payment of expenses, this topic warrants a separate research. In any case, it is essential to understand that valid reasons are required to restore the deadline. If we are discussing an expert organization rather than a specific individual, providing such reasons may be particularly challenging.

Regarding the timing of the court's response to such an application, neither the Commercial Procedure Code, nor the Civil Procedure Court establishes such deadlines. However, a reasonable timeframe should be set, which is determined by the court. In our opinion, if the resolution is made without a court hearing, the reasonable time limit should not exceed one month. If a hearing is required, then two months would be appropriate. The proposal for a reasonable period of two months is supported by recommendations from the working group discussing issues arising in the application of the Commercial Procedure Code of the Russian Federation¹⁰.

If the court does not respond within a reasonable time to an application for payment submitted by the expert, it is advisable to use Article 6.1 of the Commercial Procedure Code or 6.1 of the Civil Procedure Court, which allow for an application to be made to the court chairman requesting expedited consideration of the case. Such an application must be considered by the chairman within five days of receipt. Following this review, the chairman issues a reasoned ruling, which may set a specific deadline or outline actions needed to expedite the case.

In addition to applying for court costs, you can also request an additional decision from the court. For example, Part 1 of Article 201 of the Civil Procedure Court states that a court that has issued a decision on a case may, either on its own initiative or at the request of a party involved in the case, issue an additional ruling if it has not resolved the issue of court costs.

While formally an expert is not considered a party involved in the case, since the distribution of court costs directly affects their interests, such a letter or application to the court requesting an additional decision should not encounter procedural obstacles. Moreover, the court itself may initiate such an additional decision on its own accord.

From a legal point of view, all these applications and petitions appear logical and reasonable. However, from a practical standpoint, they represent additional and unnecessary work for experts, who frequently lack the energy, time, or resources to manage such tasks.

As V.A. Epshtein rightly points out, while submitting relevant petitions is technically feasible, it requires expert organizations to continuously monitor the progress of cases. This is clearly impractical given the high volume of expert examinations and

⁹ For example, the ruling of the Second Cassation Court of General Jurisdiction dated December 21, 2022 in case No. 88-31144 / 2022.

¹⁰ Recommendations of the working group on discussion of issues arising in the Practice of Applying the Commercial Procedure Code of the Russian Federation No. 1/2018 dated March 06, 2018 (as amended on September 20, 2019). Published in the ConsultantPlus system.

would necessitate hiring additional staff or creating a dedicated unit for case monitoring and preparation of necessary motions (Epshtein, 2023:168).

There may be a need to continue improving the procedural legislation by explicitly mandating that court issue rulings on the transfer of funds to experts for work performed, except in cases where the operative part of the court's decision on the merits is announced during the same hearing in which the expert's opinion is examined. In such instances, the order to transfer funds should be included in the operative part of the court decision and be executed immediately, regardless of the further progress of the case or issuance of a final decision.

Exploring the reduction of expert costs in legal proceedings

When determining the amount of the court costs to be recovered as compensation for the parties, the court may not arbitrarily reduce these costs unless the opposing party objects and provides evidence of the excessive expenses¹¹.

This principle is clearly articulated in a definitions from the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation: *“The right of an expert to receive payment for work performed in conducting a forensic examination and compensation for related expenses is not contingent upon the court's acceptance of the expert's conclusions. Procedural law does not specify conditions under which expenses related to conducting a forensic examination, recognized by the court as relevant and admissible evidence, are not subject to compensation. The exercise of this right cannot be denied due to the court's disagreement with the expert opinion”*.¹²

The issue of payment for expert examination results is not comprehensively addressed in paragraph 25 of the Resolution No. 23 of the Plenum of the Supreme Commercial Court of the Russian Federation dated April 04, 2014 On Certain Issues of the Practice of Applying the Legislation on Expert Examination by Commercial Courts. If an expert fails to answer all questions or cannot complete the examination and prepare an opinion, they are entitled to payment for the portion of the research they actually conducted, taking into account the financial justification provided by the expert.

Additionally, in cassation ruling No. 22-KAD23-1-K5 dated February 14, 2024, the Judicial Board for Administrative Cases of the Supreme Court stated that if an expert independently collects materials they are not authorized to collect, makes conclusions based on documents they should not have considered, fails to substantiate their conclusions, or does not answer all questions posed by the court, then their opinion may be recognized as partially unreliable evidence. Consequently, their remuneration could be reduced.

¹¹ Part 11 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 dated January 21, 2016 On Certain Issues of Applying the Legislation on Reimbursement of Costs Pertaining to Consideration of Cases.

¹² Cassation ruling of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation No. 22-KAD23-1-K5 dated February 14, 2024.

The rising costs of expert examinations: Challenges and solutions

Our study would not be complete without addressing the issue of potential increases in expert examination costs that were accounted for when the court appointed an expert.

As a general rule, an expert's performance of additional work or an increase in the number of hours spent on the examination – if not due to circumstances beyond the expert's control – does not justify a change in the amount of remuneration. Similarly, if the expert examines issues that were not presented to them, this cannot serve as a basis for requesting additional payment.

Evidence indicating the need for additional payment may include instances where the court raises new questions for the expert or provides additional materials for analysis that were not considered when agreeing on the costs of the expert examination.

According to paragraph 24 of the Resolution No. 23 of the Plenum of the Supreme Commercial Court of the Russian Federation dated April 04, 2014, On Certain Issues of the Practice of Applying the Legislation on Expert Examination by Commercial Courts, there are exceptional cases where, due to objective reasons, an expert may be unable to calculate the costs of conducting an examination in advance – such as due to the nature and scope of the objects under investigation. In such cases, with agreement from the parties involved when appointing the expert examination, the court may determine a preliminary amount of remuneration. The expert must inform both the court and the parties about potential limits on cost increases due to their inability to calculate all costs in advance, as well as any circumstances that could affect research costs.

Once the court agrees on these cost limits, payments exceeding them should not be made to the expert. Therefore, experts or expert organizations should approach any forecasts used by the court to establish payment limits with care and responsibility.

Upon completion of the expert's duties, funds for preliminary remuneration should be paid from the court's deposit account. If the court has approved additional amounts not previously covered by the deposit, these amounts are recoverable from the parties involved according to the procedure specified by the court.

Considering the changes in the legislation regarding payment to experts for their work, along with the Constitutional Court's approach to ensuring payment guarantees, it would be reasonable to require that any anticipated additional expenses for an expert examination be placed in the court's deposit at the time of its appointment. This should occur within the limits established by the court, taking into account the expert's opinion. Currently, such a requirement is absent from the procedural legislation.

Conclusion

Overall, the recent legislative changes can be viewed positively by the expert community, as they are likely to significantly reduce the number of cases in which experts do not receive payment for their work.

Establishing the timing of payment to occur following the court hearing in which the expert opinion is examined will also help normalize the financing of expert activities.

However, further legislative development is needed to mandate that a court ruling on the transfer of funds to the expert be issued specifically during the court session, in which the expert's opinion is examined – except in cases where a decision on the merits is made during that hearing and reflected in the operative part of the judgment.

Additionally, the amendments to the civil procedure legislation that have come into force do not address the issue of previously conducted expert examinations for which payment has not been made. Unfortunately, this issue remains unresolved.

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About the authors:

Oleg A. Yastrebov – Doctor of Legal Sciences, Doctor of Economics, Full Professor, Head of the Department of Administrative and Financial Law, Law Institute, Rector, RUDN University; 6 Miklukho-Maklaya str., Moscow, 117198, Russian Federation

ORCID: 0000-0003-4943-6940, SPIN-code: 7824-4837, Author ID: 561300

e-mail: yastrebov_oa@pfur.ru

Svetlana A. Smirnova – Doctor of Legal Sciences, Full Professor, Honored Scientist of the Russian Federation, Honored Lawyer of the Russian Federation, Head of the Department of Judicial Activity, Law Institute, RUDN University; 6 Miklukho-Maklaya str., Moscow, 117198, Russian Federation

ORCID: 0000-0002-0063-5706, SPIN-code: 9628-3013, AuthorID: 812214

e-mail: smirnova_sva@pfur.ru

Maxim V. Mozgov – Candidate of Historical Sciences, Managing Director, Division for Judicial Recovery of Troubled Debts of Corporate Clients, Legal Department, Gazprombank (Joint-Stock Company); 24 Ozerkovskaya nab. Moscow, 115184, Russian Federation

ORCID: 0009-0006-5367-8706

e-mail: mozgov_maxim@mail.ru

Сведения об авторах:

Ястребов Олег Александрович – доктор юридических наук, доктор экономических наук, профессор, заведующий кафедрой административного и финансового права, юридический институт, Ректор, Российский университет дружбы народов им. Патриса Лумумбы (РУДН); 117198, Российская Федерация, г. Москва, ул. Миклухо-Маклая, д. 6

ORCID: 0000-0003-4943-6940, SPIN-код: 7824-4837, AuthorID: 561300

e-mail: yastrebov_oa@pfur.ru

Смирнова Светлана Аркадьевна – доктор юридических наук, профессор, Заслуженный деятель науки Российской Федерации, Заслуженный юрист Российской Федерации, заведующая кафедрой судебно-экспертной деятельности, юридический институт, Российский университет дружбы народов им. Патриса Лумумбы (РУДН); 117198, Российская Федерация, г. Москва, ул. Миклухо-Маклая, д. 6

ORCID: 0000-0002-0063-5706, SPIN-код: 9628-3013, AuthorID: 812214

e-mail: smirnova_sva@pfur.ru

Мозгов Максим Владимирович – кандидат исторических наук, управляющий директор Управления судебного взыскания проблемной задолженности корпоративных клиентов, Юридический департамент Газпромбанк (Акционерное общество), 115184, Российская Федерация, г. Москва, Озерковская наб., д. 24

ORCID: 0009-0006-5367-8706

e-mail: mozgov_maxim@mail.ru