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ABOUT THE ISSUE OF SUBSTANTIATION OF JUDICIAL ACTS OF AN ARBITRATION COURT, RENDERED ON THE CASES ARISING FROM ADMINISTRATIVE AND OTHER PUBLIC LEGAL RELATIONS

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In the article is represented author's point of view on the issue of increasing the legitimacy of judicial acts rendered by arbitration courts of the Russian Federation on cases arising from administrative and other public relations. Is given a critical analysis of the Arbitration Procedural Code of the Russian Federation regarding the regulation of the motivation part of judicial acts' content in various stages of the administration of justice. Suggests appropriate amendments to the APC RF, which ensure performing the obligations of court instances on the providing: a reasoned refusal to transfer the case to the Presidium of the Higher Arbitration Court, the reasons for which the court rejected this or that evidences, accepted or rejected arguments of persons involved in a case given in support of their claims and objections, as well as the reasons for which the court has not applied the laws and other normative legal acts to which referred persons involved in a case.

Key words: judicial acts of the court of arbitration; motivating part of a judicial act; cases arising from administrative and other public legal relations; substantiation of judicial acts.

By studying the issue of legality and validity of acts taken by the arbitration courts arising from public legal relations should be noted the lack of serious research on the issue. Legal scholars sidestep general theoretical aspects of administration of justice and do not deeply analyse the presence of diametrically opposed court's judgments on identical disputes of economic units with public authorities, sometimes unnecessarily referring to the difference of evidentiary in case materials.

In our view, the provisions of part 3 of article 189 of the Arbitration Procedure Code of the RF [1]: "*3. The burden of proving the circumstances, which have served as grounds for the adoption of the disputed act, the legality of the disputed decisions and actions (inaction) on the part of state bodies, local government bodies, other bodies and organizations vested by federal law with certain state or other public powers, is imposed upon the bodies and persons who adopted the disputed act or decision, or committed the disputed actions (inaction)*" – bring all disputes between economic units and public persons to one common denominator. However, arbitration judges, in giving judgments, are more oriented to the evidentiary basis provided by business entity to support its claim than to proof of legality of contested decisions and actions (inaction) of state bodies, local self-government bodies and other bodies and organizations that are given by federal law separate state or other public powers, officials, which is assigned to bodies and persons who took the contested act, decision, committed the contested actions (inaction).

One can argue endlessly about the balance of private and public interest, the procedural equality of the parties with regard to the obligation to provide evidence, etc. However, the purpose of this article is to consider other issue, and, in our opinion, important one – justification of taken judicial acts to be reflected in their motivation part. We think that it is because of poorly reasoned by legal norms position of Arbitration Court, which took this or that position in the dispute, the dispute has continuation up to the last court instance.

Legal scholars noted that "the level of currently ongoing judicial protection does not always meet the growing needs of the population" [7, 47]. As the considered measures of raising the level have been studied the issues of: electivity of president judge by judges of such courts, revival of the Institute of People's Representatives, load reduction, including through out of court and pre-trial settlement of disputes, introduction of a simplified procedure for consideration of some types of cases in arbitration proceedings, creation of its own security service to eradicate corruption in courts, allocation of a fixed percentage in the budget for the judicial system [7, 49]. Controversial, in our opinion, is the acceptance by Terekhin A. V. of the earlier idea of rejection to make a motivated court judgment for all cases, where

such a judgment will be obligatory only upon a complaint or request from participants in case.

Borisova E. A. wonders "why a court decision of first instance is checked again if it has already been checked by the court of appeal?" [4, 29], and then she states that "a court's judgment can be neither the object of the cassation appeal, nor object to cassation check" [4, 29]. With this position of the author we strongly disagree. The author, as we believe, overly relies on the potency of appeal instance in the correction of judicial errors of the first instance. However, in our opinion, an appeals instance resolution does not always "absorb" a court's judgment.

Of the numerous practices of disputes between economic units and public person, the authors note the "unity" of arbitration judges of appeal, cassation and supervisory instances of unwillingness to give reasoning on the provided arguments in the relevant complaint of a party of process. Appeal instance uses for this formal excuse – reconsideration of dispute on the merit not associating itself with the arguments of an appeal (only in the complained part of a decision, see article 268 of the Arbitration Procedure Code of the RF). Supervisory instance uses simplified formula – exposure of motives in a judicial act adoption, usually without any substantial reasoning (see paragraph 6 of article 301 of the Arbitration Procedure Code of the RF).

Such justice recalls a dispute of a deaf with mute. An understandable expectation of a procedural party complaining the decision of arbitration court is often not satisfied by appeal instance, as the complainant does not receive a response to his, set out in the complaint, legal position and his own understanding (interpretation) of the law norms and actual events. As we see it, the panel of judges, which considers an appeal, resorts to this "trick" (ignoring of appeal arguments) in those cases where the very court's decision is poorly justified, but appeal instance intends to uphold its operative part for particular (including subjective) reasons. And practice has shown that such cases occur more often when a weak decision has been made in a dispute in favor of a public authority (usually arbitration courts do not take weak decisions in favor of economic units in disputes of economic units with public persons)

Let us consider another case of a "legal" substantiation (of motive in the context of article 301 of the Arbitration Procedure Code of the RF) of refusing to meet complaints on judicial decisions rendered by lower instances in the supervisory instance of arbitration court. This is the direction of court to form the legal position of court by the Presidium of the Higher Court of Arbitration of the Russian Federation after adoption of contested judicial acts. For example, in the case

No. A57-3530/2008 judicial panel denied the applicant the transfer of the case to the Presidium on the grounds that: "... as the legal position on this issue has been formed by the Presidium of the Higher Arbitration Court of the Russian Federation in decision No. VAS-14140/11 from 17.04.2012, that is, after the adoption of the contested judgments, there is no reasons to satisfy the application of company "Elton" on the transfer of the case to the Presidium" [3]. In our opinion, with such motive supervisory instance recognizing judicial errors of the arbitration courts in respect of misuse of law norms and by denying the applicant settlement of the case in accordance with the rule of law, in fact, refuses to exercise the functions conferred on the Court – administration of justice. The lack of legal positions of arbitration court is similar to ignorance of a student the answers to an exam ticket. However, the student receives "F", but the acts of the arbitration court are a priori considered legitimate (i.e., assessed at "A").

Dissatisfaction with justice among the participants of public-law disputes is caused by another formulation of refusing motive of the supervisory instance on the complaint that is set forth in the following sentence: "Having considered the application of the antimonopoly body, a panel of judges considers that it contains arguments that show that there are no grounds provided for by article 304 of the Arbitration Procedural Code of the Russian Federation for transferring the case to the Presidium of the Higher Arbitration Court of the Russian Federation to revise the contested judicial acts by way of supervision" [2]. This formulation is often used by supervisory instance, with the difference from the above example that in it are replaced the names of persons, in satisfaction of whose applications is refused.

Only cassation instance of arbitration court follows the rule of maximum justification of its judicial acts. However, limits for examination of a case in arbitration court of cassation instance limit the potency of the instance to correct judicial errors of lower instances of arbitration court, unless there are no violations of norms of procedural law, which, in accordance with part 4 of article 288 of the Arbitration Procedural Code of the Russian Federation, are the grounds for the annulment decisions of the arbitration court of the first instance, arbitration court of appeals instance (see part 2 of article 286 APC RF), and the courts' conclusions, which are set out in contested acts, consistent with the description of detected circumstances and evidences forming the basis of court's judgments (see part 3 article 286 APC RF). The problem of contesting judicial decisions up to the last instance, we believe, lies in the absence of proper descriptions in the motivation part of judicial acts the reason of failure to accept this or that evidence of the dispute parties. Court instances

are too lazy to justify in writing their views on the evidences that are not laid down to the basis of acts taken, that is perceived by a procedural party, which lost a dispute, as an evasion from the estimation of evidences, and convinces of the rightness of its own position, resulting in the filing of complaints in the next arbitration court instance.

Analysis of the norms of the APC RF that establish requirements for the content of judicial acts, shows that the operative part of the judicial acts taken on the cases arising from administrative and other public relations is subject to the main regulation. For example, article 195 of the APC RF establishes the requirements for the operative part of the decision on contesting a normative legal act:

"3. The operative part of the decision on a case of contesting a normative legal act must contain:

1) the name of the body or person who adopted the disputed act, its name, number and date of adoption of the act;

2) the name of the normative legal act of greater legal force, for the conformity to which the disputed act was checked;

3) an indication to the recognition of the disputed act's conformity to the normative legal act of greater legal force and to the refusal to satisfy the stated claim, or to the recognition of the disputed act's non-conformity to the normative legal act of greater legal force and to its full or partial invalidation".

In part 4 of article 201 of the APC RF fixed requirements to the operative part of an arbitration court decision, handed down on the case on contesting non-normative legal acts, decisions of the bodies exercising public powers, officials: "4. The operative part of the decision on a case of contesting of non-normative legal acts and decisions of bodies exercising public powers, and of officials must contain:

1) the name of the body or person who adopted the disputed act, decision; the name of the act or decision, the number and date of its adoption;

2) the name of the law or of another normative legal act, for the conformity to which the disputed act or decision was checked;

3) an indication to the recognition of the disputed act as invalid or the decision as unlawful, fully or in part, and the duty to eliminate the committed violations of the applicant's rights and lawful interests, or to the refusal to satisfy the applicant's claims, fully or in part".

The operative part of the decision on a case of contesting actions (inaction) of bodies exercising public powers and officials, and of contesting refusals to perform actions and take decisions must contain:

"1) the name of the body or person who performed the disputed actions (inaction) and refused to perform actions and take decisions; information regarding actions (inaction) and decisions;

2) the name of the law or of another normative legal act, for the conformity to which the disputed actions (inaction) and decisions were checked;

3) an indication to the recognition of the disputed actions (inaction) as unlawful and the duty of the appropriate bodies exercising public powers and officials to perform certain actions, to take decisions, or in another way to eliminate the committed violations of the applicant's rights and lawful interests within the term established by court, or to the refusal to satisfy the applicant's claims, fully or in part" (see part 5 of article 201 of the APC RF).

Article 206 and 211 of the APC RF also determine the main content of the operative part of the decision of arbitration court in cases on bringing to administrative responsibility and cases on contesting decisions of administrative body respectively.

Despite the fact that arbitration court in cases arising from administrative and other public relations, in session performs examination of a contested act or some of its provisions, contested decisions and actions (inaction) and determines their compliance with the law or another normative legal act, establishes presence of powers of a body or a person who took the contested act, decision or committed disputed actions (inaction), and establishes whether the rights and legitimate interests of the applicant in the field of entrepreneurial and other economic activities are violated by the contested act, decision and actions (inaction), Motivation Part of handed down judicial acts leaves much to be desired.

Regulation of part 1 of Article 189 of the APC that cases arising from administrative and other public relations, are considered by the general rules of action proceedings provided for the APC, with features defined in Section III of the Code, in our opinion, does not require arbitrators strictly follow the provisions of Article 170 of the APC in the manufacture of a judicial decision.

Normative position of part 1 of article 189 of the APC RF about that cases arising from administrative and other public relations are considered by the general rules of action proceedings provided for by the APC RF, with features defined in Section III of the Code, in our opinion, does not require arbitrators strictly follow the provisions of article 170 of the APC RF in the making of a judicial decision. That is, we believe, judges complying with the procedural aspects of the very proceedings on a case and resolving in court proceedings issues provided for by article 168 of the APC RF and based on their own discretion determine the scope

of the motivation part of decision and its contents on cases arising out of administrative and other public relations, that ultimately affects the reasonableness and, consequently, the legality of the decision taken.

From the specified in paragraph 4 of article 170 of the APC RF list of reflected issues relating to the motivation part of the decision, in our view, in many cases there are no grounds on which the court rejected certain evidence, accepted or refused the arguments given in support of claims and objections of persons involved in the case, as well as the grounds on which the court did not apply laws and another normative legal acts, to which referred persons involved in the case.

Recognition by legal scholars the need for compliance of made texts of solutions on cases arising from administrative and other public relations with the requirements of article 170 of the APC RF as an axiom [5, 6], does not mean adhering this rule by the whole judicial community. Therefore, we believe, we need a mandatory enshrining of requirements for the content of the motivation part of decisions and subsequent judicial acts on this category of cases considered by arbitration courts.

The absence in the motivation part of a judicial act of reasons on which the court rejected certain evidence, accepted or refused the arguments given in support of claims and objections of persons involved in the case, as well as reasons for which the court did not apply the laws and other normative legal acts, to which referred persons involved in the case, must lead to the abolition of the judicial act. In such circumstances, articles 170 and 271 of the APC RF defining the content of judgments and decisions of the appeal instance of the arbitration court, respectively, will fully "work" in cases arising from administrative and other public legal relations.

As we see it, an increase in the time to produce a reasoned judicial act will be repaid a hundredfold in its future appeal, in view of the fact that the maximum justified and lawful decision (resolution) of arbitration court will eliminate the illusion of the parties of a public legal dispute concerning the prospects of its appeal. The loser of a dispute will have clear understanding of errors made in the application of law norms and the assessment of actual circumstances.

Additionally it is recommended to stay on the norm of article 301 of the APC RF, which includes to the content of the court's judgment on refusal to transfer the case to the Presidium of the Higher Arbitration Court of the RF **reasons for refusal** of the case transfer to the Presidium for review of a judicial act by way of supervision. As motive in psychology is understood a perceived reason underlying the choice of actions and behavior of a person [8], impulsive cause (reason) to

any action, arguments in favor of something [9], i.e. quite certain subjective characteristics of a person. Establishing of direct dependence of justice in supervisory instance on a subjective factor is unlikely to contribute to the formation of economic units' trust in justice administrated to them and acceptance as a legitimate and fair a judicial act taken by supervisory instance. We do not exclude the abuse of the right to appeal by a procedural party, but in respect of it there are effective countermeasures of assignment court costs on such a party.

However, in order to avoid such wordings of motives, as we discussed earlier, it seems useful to refine the norm of the APC RF on the issue by introducing the following note to article 301:

Note. Under the motive in the context of this article is understood the presentation of reasons on which the court rejected certain evidences, accepted or refused the arguments given in support of claims and objections of a person that had lodged a complaint on the review of judicial acts by way of supervision

References:

1. Arbitration Procedural Code of the Russian Federation from July 24, 2002, No. 95-FL [Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii ot 24 iyulya 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.

2. Ruling of the Higher Arbitration Court of the RF No. VAS-10912/11 from August 31, 2011 "On refusal to transfer the case to the Presidium of the Higher Arbitration Court of the RF" [Opredelenie VAS RF ot 31 avgusta 2011 g. № VAS-10912/11 «Ob otkaze v peredache dela v Prezidium VAS RF»]. *System GARANT* [Electronic resource], Moscow: 2012.

3. *Ruling of the Higher Arbitration Court of the RF No. VAS-11732/10 from August 03, 2012 "On refusal to transfer the case to the Presidium of the Higher Arbitration Court of the RF"* [Opredelenie VAS RF ot 3 avgusta 2012 g. № VAS-11732/10 «Ob otkaze v peredache dela v Prezidium VAS RF»]. Available at: http://kad.arbitr.ru/PdfDocument/faf01446-4039-4bd1-a20b-0d4abb4b45f0/A57-3530-2008_20120803_Opredelenie.pdf (accessed: 04.08.2012).

4. Borisova E. A. The sequence for appealing court decisions in arbitration and civil procedure [Borisova E. A. Posledovatel'nost' obzhalovaniya sudebnykh aktov v arbitrazhnom i grazhdanskom protsessakh]. *Arbitrazhnyi i grazhdanskii protsess – Arbitration and Civil Procedure*, 2012 no. 8, p. 29.

5. Guev A. N. Article by article commentary to the Arbitration Procedural Code of the Russian Federation – System GARANT, 2010 [Postateinyi kommentarii k Arbitrazhnomu protsessual'nomu kodeksu RF - Sistema GARANT, 2010]. *System GARANT* [Electronic resource], Moscow: 2012.

6. *Commentaries to the Arbitration Procedural Code of the Russian Federation (article by article)* [Kommentarii k Arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii (postateinyi)]. Under edition of Yarkov V. V., 3rd edition, changed and added, Infotropik Media, 2011.

7. Terehin V. A. Problems of increasing the efficiency of justice and credibility to judiciary: continued discussion [Problemy povysheniya effektivnosti pravosudiya i doveriya k sudeiskomu korpusu: prodolzhenie diskussii]. *Rossiiskaya yustitsiya – Russian Justice*, 2012, no. 8, p. 47.

8. *http://www.psychologist.ru/dictionary_of_terms/index.htm?id=1209* (accessed: 04.08.2012).

9. *http://www.slovochel.ru/motiv.htm* (accessed: 04.08.2012).