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MATERIAL RESPONSIBILITY OF ARBITRATION COURT

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In the article the problematic issues of bringing to material responsibility judicial bodies of arbitration court, which caused harm to legal entities by unlawful actions (or inaction) while administration of justice, are explored. The position of the Constitutional Court of the Russian Federation concerning the referring of judicial act of the Higher Arbitration Court of the RF – ruling on refuse to transfer the case in the Presidium of the Higher Arbitration Court of the RF to the ordinary procedural acts of arbitration court, which do not resolve a dispute on the merit, is criticized. The author suggests normative regulation of proceedings in the Arbitration Court supervisory instance, which will exclude illegal rejection the giver of a supervisory complaint to consider its case at the Presidium of the HAC of the RF.

Keywords: illegal action (inaction) of arbitration court, the material responsibility of arbitration court, tort responsibility, compensation for the violation of right on court proceedings.

Despite the fact that article 1069 of the Civil Code of the RF [2] enshrines the norm on responsibility of state authorities, local self-government bodies and their officials for the damage caused to an individual or a legal entity as a result of illegal actions (inaction) of state bodies, local self-government bodies or their officials, including as a result of adoption an act of state body or local self-government body which does not meet the law or another legal act, the issues of responsibility of the judiciary is still unresolved.

Came into force on the 4th of May, 2010 the Law "On Compensation for the Violation of the Right to a Trial within a Reasonable Time or the Right to Execution a Judicial Act within a Reasonable Term" [3] (hereinafter referred to as the Compensation Act), in our opinion, is not very effective because of its reservation clauses, such as "a violation of the stipulated by the laws of the Russian Federation terms for court proceedings or execution of a judicial act by itself does not mean violation of the right to trial within a reasonable term or the right to execution a judicial act within a reasonable term" (see part 2 of article 1 of the Act) and enshrined in it procedural rules for getting compensation.

We believe that the Compensation Act enshrines the norms that implement the provisions of article 1069 of the Civil Code of the RF regarding material responsibility of courts for inaction, and thus, is a special, one can say the procedural, law in relation to the Civil Code of the RF.

Also, special norms of material responsibility for damage caused to legal entities are the provisions of article 1070 of the Civil Code of the RF, which cover only a particular case of inflicting harm by the judiciary – as a result of unlawful bringing to administrative responsibility in the form of an administrative suspension of activity. Besides, the obligatory condition of compensation for damage, caused in the administration of justice, is a determination of a judge's guilt in the court verdict, which came into effect.

Such special condition of responsibility for damage caused at the administration of justice, as stated in the Resolution of the Constitutional Court of the RF No. 1-P from January 25, 2001, "is related to the features of the judiciary functioning enshrined by the Constitution of the Russian Federation (chapter 7) and specified by procedural legislation (adversary character of a judicial process, considerable freedom of judicial discretion, and etc.), as well as to the special order of revision the acts of the judiciary. Proceedings for review judicial acts, and, consequently, the assessment of their legality and validity, are implemented through special procedures established by the procedural legislation – through the examination of a case in appeal, cassation and supervisory instances. Review of a court decision through

court proceedings on the claim of a citizen for damages caused during the administration of justice, in fact, would be reduced to the assessment of legality of court (judge) actions in connection with the adopted act, that is, would mean one more procedure of legality and validity check of already taken court decision, and, moreover, would create the possibility of replacing by the choice of a person concerned the established procedures for inspection of judicial decisions to their contesting through filing tort claims" [4].

Thus, the legislation of the Russian Federation has only two grounds for tort revision of held court decisions – the presence in actions of a judge of criminally punishable offenses:

- knowingly giving an unjust judgment, decision, or any other juridical act (article 305 of the Criminal Code of the RF),

- non-performance or improper performance by judges (in the context of article 293 of the Criminal Code – by an official) their duties as a result of careless or negligent attitude to the service, if it causes a fundamental breach of the rights and legitimate interests of citizens.

Bringing a judge to responsibility under the said articles of the Criminal Code of the RF gives the go-ahead for filling and satisfaction of a claim for damages.

However it seems problematic to prove the guilt of a collegiate judicial body, especially when questioned the legitimacy of taken judicial acts of appeal, cassation or supervisory instances.

If we consider article 1070 of the Civil Code of the RF as containing provisions on responsibility of special subjects (out of state bodies and their officials stand out the police, prosecutors and courts), it is possible to come to an unreasonable, as we believe, conclusion on the non-application of article 1069 of the Civil Code of the RF to the court bodies, and therefore, the absence of material responsibility of judicial bodies without guilt determination.

The harm caused by the judiciary (judges) is not hypothetical, and, as practice shows, ways of infliction damage (harm) to legal entities by the judiciary are not limited to the suspension of the activity of the legal entity or omission in the administration of justice.

Considering the above issues of the committing judicial errors in tax disputes [10], we noted the possibility of adoption judicial act that does not match the facts of the case, and contrary to the rule of law, but, nevertheless, allowed in the higher court instances. In such cases, we believe, there is no question of the damage caused by illegal actions (inaction) of the court (but who does qualify this illegality?).

Only in rare cases where a judicial error of arbitration court is recognized by the Constitutional Court of the Russian Federation (comes of the legal position of the Constitutional Court of the RF) or international courts, it is possible, we believe, to exercise the provisions of article 1069 of the Civil Code of the RF on the material responsibility of arbitral court for the harm inflicted to a legal entity.

In the case when the Constitutional Court of the Russian Federation detects the fact of application by an arbitration court a normative act in a particular case with an interpretation that is incompatible with the constitutional and legal sense, identified by the Constitutional Court of the RF, judicial acts of the arbitration court shall be reviewed in accordance with the law. Otherwise would mean that the arbitration court may make the interpretation of an act, giving it a meaning different from one revealed as a result of check in constitutional proceedings, and thus replace the Constitutional Court, what it does not have rights to do under articles 118, 125, 126, 127 and 128 of the Constitution of the Russian Federation [4].

It is no secret that, in practice, there is a great dependence of the result of administration of justice from the judicial discretion, and therefore it is difficult to implement separation of unlawful decisions taken with or without fault of a judge. But that should not leave unpunished, in fact, poor administration of justice.

By the administration of justice is understood not all court proceedings, but only that part of it, "which is the adoption of acts of the judiciary to resolve the cases subordinate to court, i.e., court acts resolving a case on the merits. The trial ends with the adoption of just such acts, which express the will of the state to resolve the matter referred to the jurisdiction of court" [4]. Consequently, the resolution of the arbitration court a case results in: elimination of the dispute, ensuring the possibility to unimpeded implementation of rights and legitimate interests, protection of violated or challenged substantive rights and legitimate interests. Resolving a case and taking a decision in accordance with the law, the arbitration court administrates justice properly, which is the purpose of arbitration proceedings. In acts, resolving a case on the merits, the arbitration court determines the actual material and the legal status of the parties.

Judicial acts, which do not resolve cases on the merits and do not determine substantive status of parties, we believe, are not covered by the concept of "carrying out (administration) of justice" in the sense in which it is used in part 2 of article 1070 of the Civil Code of the RF. The Constitutional Court of the RF considers these acts as those in which "are solved mainly procedural legal issues arising in the course of a process – from accepting application and up to the execution of a court judgment, including at the ending consideration of case (termination of

proceedings and abandonment of the application without consideration)" [4]. We also would add here the definition of the supervisory instance of arbitration court on refusing to transfer a case to the Presidium of the HAC of the RF.

The Constitutional Court of the Russian Federation has determined that the provision on a judge guilt established by a court verdict "cannot be an obstacle to compensation for damage caused by actions (or inaction) of a judge in the course of civil proceedings, if he takes an illegal act (or shows a wrongful omission) on the issues defining not the substantive (resolving of a dispute on the merits), but procedural and legal status of parties. In such cases, including the case of an illicit deed of a judge, not expressed in a judicial act (violation of a reasonable time of a trial, another gross violation of the procedure), its guilt can be established not only by a court's verdict, but also by another court's decision. At this, the provision on the presumption of guilt of a tortfeasor, provided for by paragraph 2 of article 1064 of the Civil Code of the Russian Federation, has no effect" [4].

However, we should note that the very Constitutional Court of the RF and international courts, whose decisions are executed in Russia, do not ascertain the guilt of judges, who have taken the contested in the Constitutional Court of the Russian Federation or the international court judicial act, and this judicial act must be repealed. In fact, in this case, an impugned illegal court's action (enshrined by a judicial act), and, as a rule, damage subject to compensation in accordance with the provisions of the Civil Code of the RF takes place. Criminally unpunishable, but illegal guilty actions (or inaction) of a judge in arbitration proceedings must be considered as a violation of the right to a fair trial under the provisions of part 2 of article 1070 of the Civil Code of the RF, which implies compensation for the harm caused by the violation of this right.

Position of Constitutional Court of the RF set out in the Ruling No. 160-O from April 21, 2005 [5], and adopted by lawyers, who comment on chapter 36 of the APC RF, in respect to the refusal of supervisory instance to transfer a case to the Presidium of the HAC RF for reviewing judicial acts of lower arbitration courts, we believe, requires clarification. We agree with B. J. Polonsky, who repeats the legal position of the Constitutional Court of the RF that "the applying to the HAC RF is carried out, as a rule, after a case has been heard in appellate and cassational procedure, i.e., when, at the discretion of the person concerned have been used other opportunity to review, refusal at this stage cannot be regarded as infringement of the right to judicial protection. This right is exercised within the framework of the procedural law: a case is considered on the merits by the court of first instance, checked in full in appeals instance, and finally, the legitimacy of taken

judicial decisions is checked in cassation instance" [11]. However, the reasons for the refusal to transfer the case to the Presidium, which are obligatory elements of a ruling's content (paragraph 6 of article 301 of the APC RF), may contain a flaw – to ignore the existence of grounds for supervisory review of judicial decisions that have entered into force, which are provided for by article 304 of the APC RF. Such rulings of the HAC of the RF, in our view, are tort. If the judicial board of the HAC of the RF, having established (having specified in a definition) the reasons for supervisory review of judicial decisions of lower court instances, makes a resolution on their absence, in this case, there is an abuse of power [9, 51-52].

We fully admit the possibility of abuse of the right by a party of arbitration process, explained by the desire to win the dispute. However, this abuse is limited by procedural rights to appeal court decisions of the arbitration court and less dangerous for the being protected rule of law than the abuse of the right by judicial bodies of the arbitration court.

Check of arbitration court judgments, adopted at first instance, mainly carried out in the appellate and cassation procedure. Meanwhile the appeal instance takes the final decision on a case. However, the law provides for the possibility of check and review of taken judicial acts in supervisory instance, which is the final for disputes considered in arbitration courts. Thus, a possible mistake of the arbitration court in the resolution of a case may be corrected both before the supervisory instance and within it.

Given that the review of a judicial act, which has come into legal force, by way of supervision is of exceptional nature and occurs only in the case where the disputed legal act violates the uniformity in the interpretation and application the rule of law by arbitration courts, violates the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and international treaties of the Russian Federation, violates the rights and legitimate interests of indefinite range of persons or other public interests, it can be argued that it is the supervisory instance is responsible for preventing tort harm to legal persons in the administration of justice.

We cannot agree with the legal position of the Constitutional Court of the RF about that "in itself refusal of supervisory review of court decisions entered into legal force cannot be regarded as a violation of the right to judicial protection enshrined in article 46 of the Constitution of the RF" [5].The Constitutional Court of the RF justifies its position by the procedure provided for in article 299 of the APC RF [1] in which "there is only a preliminary review of an application or production on the revision of a judicial act by way of supervision by collegial panel of judges of

the Higher Arbitration Court of the Russian Federation, which, without considering a case on the merits, addresses only the issue of the grounds for the review of the judicial act by way of supervision in Presidium of the Higher Arbitration Court of the Russian Federation" and "herein, any new decision differently defining the rights and responsibilities of persons involved in the case must not be taken by the panel of judges" [5]. However, the highest judicial body in the country does not consider that resolving of the issue on the grounds for the review of a judicial act by way of supervision in Presidium of the Higher Arbitration Court of the Russian Federation can be vicious, for example, to ensure the "triumph of public interest" to the detriment of the rule of law, if there is an interest and etc.

A good demonstration of the above, in our view, is the ruling of the HAC RF No. VAS-11732/10 from August 03, 2012 on refusal the transfer the case (No. A57-3530/2008) to the Presidium of the HAC RF [7]. Considering this ruling in relation to:

- ruling of the HAC RF No. VAS-11732/10 [12] from May 12, 2012 on suspension of proceedings on the case,
- ruling of the Presidium of the HAC RF No. 14140/11 from April 17, 2012 [6],
- ruling of the Seventh arbitration appellate court from August 31, 2012 on the case No. A27-17017/2009 [8] (in the part of legal succession of the party declaring the distribution of judicial costs),

becomes visible tort nature of the ruling on refusal to transfer the case to the Presidium of the HAC RF.

In the mentioned judicial acts was being resolved the issue of change (legal succession) of person seeking the exaction of court costs, which enter into arbitration proceedings at its different stages (in first and second instances). The essence of supervisory complaints consists in disagreement of the successor with the refusal of appeals and cassation courts to accept the legal succession of judicial costs, accompanied by the termination of the proceedings.

Tort nature of the ruling No. VAS-11732/10 from August 03, 2012 on refusal to transfer the case (№ A57-3530/2008) to the Presidium of the HAC RF consists in the fact that the panel of judges of the HAC RF exactly violated the uniformity in the interpretation and application by arbitration courts the rules of law – in the case No. A27-17017/2009, having decided the complaint on the merits, they admitted illegal the refusal of succession of court costs taken by previous arbitration court instances, and in the case No. A57-3530/2008 did not found it necessary to transfer the case for consideration to the Presidium of the HAC RF. Diametrically opposite

attitude of the judicial panel at resolution of one and the same issue – the issue of the succession of the party claiming to recover court costs, we believe, is due to the fact that in the case No. A57-3530/2008 court costs to be recovered have been presented to the public entity – the tax authority, which has lost the dispute.

Contrived motive of the refusal – "because the legal position on this issue has been formed by the Presidium of the Higher Arbitration Court of the Russian Federation in its decision No. VAS-14140/11 from 17.04.2012, that is, after the adoption of the disputed court judgments, there are no basis to satisfy the statement of company "Elton" on the transfer the case to the Presidium" [7] is not merely unjustified, but also does not comply with the constitution, as it allows the Higher Arbitration Court to evade administration of justice in supervisory instance with reference to the absence of a formed position (and indeed ignorance). The mentioned motive may lead to such an absurd when in the absence of practice of resolving any cases (that is, a single case, constituting a precedent) in the courts of arbitration, any supervisory complaint by any formal ground can be left without the permission of its issues.

We believe that in this case, the panel of judges of the HAC RF abused the right, realizing finality of its verdict in the appeal process, in the hope that the successor has exhausted legal options for fair resolution of the dispute.

Summarizing the discussed in the article problem of the implementation of provisions on the material responsibility of arbitration courts for illegal actions (inaction), leading to violation of legal rights and property interests of legal entities, it should be noted that there are gaps in the legal regulation of compensation for harm illegally caused by court, but in the absence of judge's guilt (or lack of evidence).

In our opinion, seems to be questionable the position of the Constitutional Court of the RF on the issue of qualification of the HAC RF ruling on the refusal to transfer the case to the Presidium of the HAC RF, according to which it does not apply to judicial decisions that resolve the dispute on the merits. In contrast to the procedural judicial decisions of other arbitration court instances, which can be appealed, the ruling of the HAC RF is the last judicial act for many applicants for supervisory review. In fact, this ruling serves as an approval (leaving in force) of complained court judgments of earlier arbitration court instances, and not the function of an ordinary service document. Therefore, the ruling on refusal to transfer the case to the Presidium of the HAC RF should be considered as a judicial act that resolve a case on the merits in supervisory instance with a negative result for the complainant.

Hence it is needed to introduce a normative regulation of issuing this ruling of the HAC RF that prevents other motives except provided for under article 304 of Arbitration and Procedural Code of the RF, and, therefore, provides for material responsibility for unlawful refusal the applicant of supervisory appeal to transfer a case to the Presidium of the HAC RF.

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