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Kizilov V. V.

RULING OF THE HIGHER ARBITRATION COURT OF THE RUSSIAN FEDERATION ON REFUSAL TO TRANSFER A CASE TO THE PRESIDIUM OF THE HAC RF: IS IT A PROCEDURAL JUDICIAL ACT OR AN ACT OF JUSTICE?

Kizilov Viacheslav Vladimirovich,
c.j.s. (PhD of jurisprudence), Editor in chief of the maga-zine "The Topical Issues of Public Law", Omsk.
attorney1961@mail.ru

Based on the legal position of the Constitutional Court of the Russian Federation regarding the qualifications of the HAC RF ruling on the refusal to transfer a case to the Presidium of the HAC RF the author discusses options for compensation for damage caused by this ruling (as judicial tortious act) in the case of its non-conformity to the law or the legal position of the Constitutional Court of the RF. There is noted a feature of the HAC RF ruling on the refusal to transfer a case to the Presidium of the HAC RF, which has a dual nature – of a procedural judicial act and an act of justice.

Keywords: ruling of arbitration court, procedural judicial act, act of Justice, the refusal to transfer a case to the Presidium of the HAC RF.

Return to the issue of qualifications the ruling of the Higher Arbitration Court of the Russian Federation on the refusal to transfer a case to the Presidium of the Higher Arbitration Court of the Russian Federation is not accidental. It would seem that the Constitutional Court of the Russian Federation clearly defined its purpose and legal content [5, 6], but, in our view, not all the provisions of the supreme judi-

cial body of the country we can accept. About the conformity of the established by the legislator in the APC RF [2] proceedings procedure in supervisory instance to the Constitution of the Russian Federation [1] was mentioned in the Ruling of the Constitutional Court of the Russian Federation No. 160-O from April 21, 2005 [6].

We should agree that the method and procedure of judicial contesting in arbitration proceedings are determined by the APC RF on the basis of the Constitution of the Russian Federation, its articles 46, 123 and 128. This provision applies to the review of the decisions of arbitral courts, including the final decisions.

Determining cassation instance as final one, which still allows a trial and taking final decision on a case, the legislator in order to check the quality of judgments held introduced a procedure for the review of judicial decisions by way of supervision with special provisions that protect, as we believe, the judicial system from excessive use by participants of arbitration disputes the right to appeal court decisions.

Proceeding from the provision that a supervisory appeal passes the validation procedure for the presence of reason to transfer it along with the case to the Presidium of the HAC of the Russian Federation, we can say that the revision of entered into legal force court decisions by way of supervision is exceptional and occurs only in cases under article 304 of the APC RF when a contested legal act:

1) breaks the uniformity in the interpretation and application of law norms by arbitral courts;

2) violates civil rights and freedoms of man and citizen in accordance with universally recognized principles and norms of international law, international treaties of the Russian Federation;

3) infringes rights and legitimate interests of an indeterminate number of persons or other public interests.

However, the refusal of the HAC RF to review by way of supervision entered into legal force court's judgments cannot, in our opinion, be considered only as a procedural act completing a preliminary review of an application or presentation for revising the judicial act by way of supervision by collegial panel of judges of the Higher Arbitration Court of the Russian Federation, which, without considering the merits of the case, resolved only the issue of availability of the grounds for review the judicial act by way of supervision by the Presidium of the HAC RF.

It should be remembered that the ruling of refusal to transfer the case to the Presidium of the HAC RF, in some cases (in the context of articles 311, 312 APC RF) can form the basis of review judicial acts under new circumstances. In accordance with paragraph 5 part 3 article 311 of the APC RF in the ruling of refusal to transfer

the case to the Presidium of the HAC RF can be mentioned the possibility of revising entered into legal force court decisions due to the fact that in the decision of the Plenum of the HAC RF or in the decision of the Presidium of the HAC RF, taken before the ruling of refusal, was defined or changed the practice of applying a law norm, on which relied courts in passing contested judicial acts. This provision is confirmed by the norm of article 312 of the APC RF, which establishes the procedure and time of filing application for revising a judicial act under new or newly discovered evidence, including in the case of getting by the applicant the ruling of refusal to transfer the case to the Presidium of the HAC RF.

Such a ruling of the HAC RF on refusal hardly can be attributed simply to a procedural act of arbitration court, because it is actually an obliging document for the lower courts, which will be obliged at the request of a participant to re-examine a case in view of the legal position of the HAC RF.

The norm of law, which establishes requirements for the content of the ruling on refusal to transfer a case to the Presidium of the HAC RF (article 301 of the APC RF), in itself cannot be regarded as breaching any constitutional rights of citizens and organizations [6]. And this should be accepted. However, application by the Higher Arbitration Court of the Russian Federation this norm in law enforcement practice can lead, we believe, to a violation of the rights of subjects, who have applied with a supervisory appeal (application in the context of the APC RF) to arbitration court.

In our opinion, the possibility of occurrence a tort legal relation lies in the discretionary powers of judges who consider a supervisory complaint (presentation), in the absence of normative consolidation in article 301 of the APC RF at least indicative list of reasons for the refusal to transfer the case to the Presidium of the HAC RF to review a judicial act by way of supervision. Expectation that the HAC RF panel of judges will output grounds for refusal from the absence of reasons for review by way of supervision judicial decisions provided for by article 304 of the APC RF, in our opinion, is not justified.

Moreover, a set of norms of articles 311 and 312 of the APC RF as a ground for refusal to transfer a case to the Presidium of the HAC RF actually provides for a conflict norm in relation to the norm of article 304 of the APC RF. Presence of circumstances listed in article 304 of the APC RF, which must guide the panel of judges of the HAC RF in deciding the issue of transfer a case to the Presidium of the HAC RF, is crossed out by the occurrence of the legal position of the HAC RF, which is expressed in the Resolution of the Plenum of the HAC RF or Presidium of the HAC RF regarding the norm of law, which until the issuance of the specified

decision was incorrectly applied by arbitration courts (i.e., there was a judicial mistake, if to call a spade a spade), and its application was contested in a supervisory complaint (application).

The absence of a list of motifs in the norm of law will always generate dissatisfaction of the party in an arbitration dispute who has filed a supervisory appeal to the Presidium of the HAC RF and is refused in its consideration, particularly if the legal position of the complainant is based on the grounds provided for in article 304 of the APC RF, and moreover, when the panel of judges of the HAC RF in the ruling of refuse to transfer the case to the Presidium of the HAC RF to revise the judicial act by the way of supervision establishes the facts of violations of uniformity in the interpretation and application by arbitration courts of law norms and violations of rights and legitimate interests of an indefinite range of people, but because of the lack of the legal position of the Presidium of the HAC RF on the norms of law applicable in the case the panel does not find reasons at least for a revision the case on new circumstances by lower courts.

In this case, it should be noted the identity of the de facto on the legal consequences of the ruling on refusal to transfer a case to the Presidium of the HAC RF to review judicial act by way of supervision and the resolution of the Presidium of the HAC RF on abandonment application by way of supervision. Despite the fact that the panel of judges of the HAC RF does not make any new solution, differently defining the rights and responsibilities of persons involved in the case, for a supervisory complaint applicant terminated statutory means to appeal court's judgments made by lower court instances of arbitration court, and thus there is placed a final point in the arbitration dispute of adversaries. It is impossible to do by any other procedural judicial act (not resolving case on the merits) in other (lower) instances of arbitration court. Therefore, it would seem, that a purely procedural judicial act of the HAC RF judicial board on a supervisory complaint (the ruling of refuse to transfer the case to the Presidium of the HAC RF to revise judicial act by way of supervision) has an effect identical to the judicial act, which resolves the case on the merits, that is to say, it is equal in power to an administered justice.

Thus, the legal consequences of the ruling on refusal to transfer the case to the Presidium of the HAC RF to revise judicial act by way of supervision are completely identical to decree of the Presidium of the HAC RF, which has left the contested judicial act unchanged, and the application (supervisory appeal) or presentation without satisfaction (see paragraph 1, part 1, article 305 APC RF). Therefore, in our opinion, the position of the Constitutional Court of the RF on the issue of qualification of the HAC RF ruling on refusal to transfer the case to the Presidium of the

Russian Federation, according to which it does not refer to judicial decisions that resolve the dispute on the merits, is questionable. In fact, this ruling serves as an approval (upholding) of complained court's judgments of earlier court instances of arbitration court, but not as an ordinary procedural document. Therefore, a ruling on refusal to transfer the case to the Presidium of the HAC RF should be seen as a judicial act resolving the case on the merits in supervisory instance with negative result for a petitioner.

However, we do not see non-constitutionality in granting by the Presidium of the HAC RF the judicial panel of the HAC RF the powers on so-called negative verdicts. The Presidium of HAC RF would be just overwhelmed with supervision complaints and presentations, formally complying with the requirements of the APC RF for content of a supervisory appeal (as it take place in cassation instance especially on tax disputes where a complaint of the tax authority repeats word for word the appeal complaint or answer to the request of the taxpayer in first instance). We consider justified a kind of filter before the Presidium of the HAC RF, mostly chipping off supervisory complaints and presentation of judicial acts, which really do not contain grounds for revision by way of supervision. In this case, the panel of judges of the HAC RF accelerates administration of justice through ending an arbitration dispute participant's appeal procedure, not placing on the Presidium of the HAC RF the burden of making "negative" decision on an application.

According to legal position of the Constitutional Court of the RF, laid down in the decision No. 1-P from January 25, 2001, under administration of justice understand not a whole court proceeding, but only the part, which "lies in adoption acts of judicial power on resolving cases subordinate to court, i.e., judicial acts resolving cases on the merits. Judicial process is finished by taking such acts, which shows the will of state to resolve a case that is within the jurisdiction of court". Hence we can conclude that the judicial acts that do not resolve cases on the merits, do not define material and legal status of the parties, 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 [2]. Constitutional Court of the RF attributes to such acts, for example, those ones, in which "solved mainly procedural legal issues arising in the course of proceedings – from acceptance of application and up to the execution of judgment, including at the completion of a case (termination of proceedings and abandonment of application without consideration)" [5].

The qualifications issue of the HAC RF ruling on refusal to transfer the case to the Presidium of the HAC RF is not idle, depending on its attribution to dispensed justice or procedural judicial decisions here are provided for different mechanisms

of compensation for harm inflicted by the given ruling in the case of determination in it a tort content (nature). Russian law does not preclude the possibility of taking illegal court decisions, including those in the form of a ruling on refusal to transfer the case to the Presidium of the HAC RF, as well as provides for appropriate material responsibility (responsibility for damage caused by the judicial bodies and their officials).

Russian Constitution provides for the right to state compensation for damage caused by unlawful actions (or inaction) of state power bodies (and hence the judiciary) or their officials (article 53). The rights of victims of crime and abuse of power are also protected by the law, and the state declares in the constitution of the country the ensuring victims (individuals or legal entities) access to justice and compensation for damages (article 52 of the RF Constitution).

According to the legal position of the RF Constitutional Court, the harm caused in the administration of justice by unlawful actions (or inaction) of the judiciary and its officials, including as a result of the abuse of power, is compensated by the state regardless of their guilt, if these actions do not apply to the category of direct administration of justice. In order to provide the general legal principle of fairness and establishment the balance of constitutionally protected values and goals the legislator has established in part 2 of article 1070 of the Civil Code of the RF, that damage caused in the administration of justice shall be compensated in the event of a judge guilt is ascertained by a court verdict, which came into force, excluding tort actions, where the right of citizens and legal persons to damage compensation is not related to the presence of a judge guilt (see part 1 of article 1070 of the RF Civil Code):

1) in the case of harm to a citizen as a result of:

- unlawful conviction,
- unlawful bringing to criminal responsibility,
- unlawful applying as a preventive measure taking into custody or recognizance not to leave,
- unlawful bringing to administrative responsibility in the form of administrative detention;

2) in the event of infliction harm to a legal entity as a result of unlawful bringing to administrative responsibility in the form of administrative suspension of activity.

Thus the provision of part 2 of article 1070 of the RF Civil Code not only excludes the tortfeasor presumption of guilt, but assumes as an additional prerequisite for state compensation for damages the ascertainment of a judge guilt by a

court verdict and, therefore, binds the responsibility of the state with a judge tort committed intentionally (article 305 of the RF Criminal Code "Knowingly Giving an Unjust Judgement, Decision, or any Other Juridical Act") or by negligence (non-performance or improper performance by a judge as an official of court its duties due to fraud or neglect to the service, if it causes a significant breach of the rights and legitimate interests of citizens – article 293 of the RF Criminal Code "Neglect of Duty").

As indicated by the RF Constitutional Court, "such a special condition of responsibility for damage caused in the administration of justice is due to the peculiarities of the functioning of the judiciary that are enshrined by the Constitution of the Russian Federation (Chapter 7) and particularized by procedural legislation (adversary character of a judicial process, considerable freedom of judicial discretion, and etc.) as well as by special procedure for revision acts of judicial authority" [5]. It should be recognized that "judicial review by the way of court proceedings on a citizen's claim for compensation damages inflicted in the administration of justice, in fact, would be reduced to the assessment of the legality of court (judge) actions in connection with the adopted act, that is, would mean another procedure to check the legality and substantiation of the already taken court's judgment, and, moreover, would create the possibility of replacing (on the choice of the person concerned) the established procedures for inspection judicial decisions on their contesting by bringing tort actions" [5].

However, the RF Constitutional Court does not recognize the ruling of the HAC RF on the refusal to transfer a case to the Presidium of the HAC RF as an act of justice, ranking it as an ordinary procedural document of arbitration court.

By justice in accordance with the legal position of the RF Constitutional Court recognized only certain actions of court, that part of it, which lies in the adoption acts of the judicial power to resolve cases subordinate to court , i.e., court decisions resolving a case on the merits. "Judicial process ends with the adoption of such acts, which express the will of the state to resolve a case that is under court jurisdiction" [5].

Indeed, from articles 18, 118 (parts 1 and 2), 125, 126 and 127 of the RF Constitution follows that the "administration of justice is associated, first of all, with resolving relevant cases in such acts, which define legal relations of the parties or other legal circumstances, eliminate controversy, provide opportunities of smooth implementation of rights and legally protected interest and the protection of violated or disputed substantive rights and legitimate interests. In acts resolving a case on the merits, the court defines the actual material and legal situation of the parties,

that is, applies law norms to a particular case in a dispute about a right. Exactly through resolving a case (articles 126, 127 and 128 of the Constitution of the Russian Federation), and taking a decision in accordance with the law (article 120 of the Constitution of the Russian Federation), the court shall administer justice in the true sense of the word ..." [5].

Judicial acts, which do not resolve cases on the merits and do not define material and legal situation of the parties, are not covered by the term of "administration of justice" in the sense in which it is used in provision of paragraph 2 of article 1070 of the RF Civil Code. "Such acts solve mainly procedural legal issues arising in the course of proceedings – from acceptance of application and up to the execution of judgment, including at the completion of a case (termination of proceedings and abandonment of application without consideration)".

Taking the specified position of the RF Constitutional Court regarding the ruling of the HAC RF on refusal to transfer a case to the Presidium of the HAC RF, it should be noted that in this case the provision on ascertainment of judge guilt in a court verdict does not apply to the mentioned judicial act (if it is of tort nature). For compensation for damage caused by judge actions (or inaction) in the course of proceedings, if it takes an illegal act (or shows a wrongful omission) on the issues defining not substantive (resolving of a dispute on the merits), but procedural and legal status of the parties, for example:

- violation of the reasonable time of proceedings,
- unlawful denial of succession,
- unlawful termination of proceedings,
- another grave violation of procedure

the guilt of a judge can be ascertained by another judicial decision (at least in the form of negligence). Since, criminal non-punishable, but unlawful guilty actions (or inaction) of a judge in civil (arbitration) proceedings must be regarded as a violation of the right to a fair trial, which requires reasonable compensation to the person who has suffered from violation of this right [5].

The state is obliged to compensate the damage caused by unlawful actions (or inaction) of a court (judge) in the implementation of civil (arbitration) proceedings in the cases where the dispute is not resolved on the merits, when the guilt of the judge is ascertained not by a court verdict, but by another appropriate court judgment. However, what court does ascertain the guilt of a court for unlawful ruling of the HAC RF on refusal to transfer the case to the Presidium of the HAC RF?

In our opinion, there is allowed bringing of an action to the Higher Arbitration Court for damages compensation in the case of illegal ruling of the HAC RF

on refusal to transfer a case to the Presidium of the HAC RF, the alternative of which may be only the determination in the Constitutional Court of the RF unconstitutional law norms application by the HAC RF in a particular case (law enforcement decisions based on the act, which although as a result of resolving the case in the constitutional proceedings is recognized consistent with the Constitution of the Russian Federation, but to which in the course of applying to an individual case the arbitration court gave an interpretation at variance with its constitutional-legal sense that has been identified by the RF Constitutional Court [5]).

Unfortunately, the Federal Law No. 68-FL from April 30, 2010 "On the Compensation for the Violation of the Right to Trial within a Reasonable Time, or the Right to the Execution of a Judicial Act within a Reasonable Time" [4] does not cover all the admissible in court proceedings procedural violations and the thus contributes to reduce the sense of responsibility of certain members in the judicial community.

In addition it should be mentioned that such acts of justice (passed by appeal and cassation instances of arbitration court), as the provisions containing in the operative part the issues of succession, termination of proceedings on procedural aspects, not resolving a case on the merits and not defining a substantive status of the parties, in the context of legal provisions of the RF Constitutional Court, are not covered by the concept of "administration of justice". And, therefore, can also be considered as potential targets of lawsuits for compensation damages inflicted by State authorities.

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