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UNLAWFUL ACTIONS OF THE SUPERVISION INSTANCE OF ARBITRATION COURT OF THE RUSSIAN FEDERATION: RULING ON REFUSAL TO TRANSFER A CASE TO THE PRESIDIUM OF THE HIGHER ARBITRATION COURT OF THE RF WITH A VICE OF MOTIVE

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Here is considered a situation when a taken judicial act of the supervisory instance of arbitration court – ruling to refuse to transfer a case to the Presidium of the HAC RF contains the motive, which is not lawful from the standpoint of the main provisions of the Arbitration Procedural Code of the RF, and the ruling, in fact, illicitly finishes the process of arbitration court acts' appeal. The author draws a line between tort and lawful conduct of judicial panel of the HAC RF in making a ruling on refusal to transfer a case to the Presidium of the HAC RF in determining or changing the practice of application a legal norm.

Keywords: tort in legal proceedings, ruling of the HAC RF, refusal to transfer a case to the Presidium of the HAC RF, supervisory instance of arbitration court, revision of judicial acts that have entered into legal force, defining or modifying the practice of law, determining or changing the practice of application a legal norm.

Having analyzed the norms of Arbitration Procedural Code of the Russian Federation (hereinafter APC RF) [1], which govern proceedings on the revision of judicial acts by way of supervision (chapter 36 of the APC RF) and proceedings on the revision of judicial acts entered into legal force due to new or newly revealed

circumstances (chapter 37 of the APC RF), you involuntarily ask yourself about correspondence of these norms to the common principles and objectives of proceedings in arbitration courts that are set out in chapter 1 of Arbitration Procedural Code of the Russian Federation. Even more questions arise after getting acquainted with the judicial acts of supervisory instance of arbitration court taken on similar cases that are in its proceedings.

It is no secret that the decisions taken by judicial panels of the Higher Arbitration Court of the Russian Federation (hereinafter HAC RF) that settle the issue of the transfer of a case to the Presidium of the HAC RF on similar cases may be diametrically opposed. However, the reason for this should be different factual circumstances of particular cases, but not different approaches to the application of law norms.

Considering the supervisory instance as ultimate one in the row of appeals against court decisions, people involved in a case, logically believe that outcome will be a legitimate and fair resolution of dispute. However, the possibility of filing an application to the Higher Arbitration Court of the Russian Federation (in the context of part 2 article 292 APC RF – exercising of the right to contest court decisions by way of supervision) by persons participating in a case is linked to the conditions, which do not correspond to the grounds for revision judicial acts by way of supervision (see article 304 of the APC RF).

We believe, and this is confirmed by the practice, the judicial Board of the HAC RF, setting in motion a person's application on revision of judicial acts by way of supervision, in fact is guided by the provisions of article 304 APC RF, while formally noting the existence in the application of circumstances provided for in article 292 of APC RF (which actually are the cause of applying to the supervisory instance). In our opinion, the judicial panel of the HAC RF does not care about violation or incorrect application of norms of material or procedural law by the arbitration court, if:

- a judicial act disputed by way of supervision does not violate the uniformity in the interpretation and application of law norms by the arbitration courts, including due to the lack of the formed legal position of the Presidium of the HAC RF on the application of these norms;

-an applicant has failed to bind into a single chain a significant violation of its own rights and legitimate interests in the sphere of entrepreneurial and other economic activity with violation of rights and freedoms of man and citizen in accordance with universally recognized principles and norms of international law, international treaties of the Russian Federation;

- an applicant has failed to prove that in addition to a significant violation of its own rights and legitimate interests in the sphere of entrepreneurial and other economic activity the challenged act of arbitration court violates the rights and legitimate interests of indefinite range of persons or other public interests.

Actually, analysis of the norms contained in articles 292 and 304 of the APC RF does not reveal their collision (see Table 1). Their inconsistency is quite understandable. Thus, we believe that the legislator has shielded the Presidium of the HAC RF (but not the judicial board of supervisory instance) from the flow of applications on supervisory revision of arbitration court judgments. As a result, the Presidium of the Russian Federation considers only those cases that are much more serious than the violation of the rights and legitimate interests of individuals in the sphere of entrepreneurial and other economic activity. Therefore, it seems to us that those, who rely on the possibility of appeal judicial acts of arbitration court by way of supervision, should learn how to derive generalizations from particular, know their constitutional rights and universally recognized principles and norms of international law accepted by the Russian Federation.

Table 1

The sufficient and necessary conditions for revision of judicial acts by way of supervision

Sufficient conditions for the exercising of the right to appeal against court judgments by way of supervision (article 292 of the APC RF)	Conditions necessary for the review of judicial acts by way of supervision (article 304 of the APC RF), which should be set out in claim (paragraph 3) part 2 article 294 of the APC RF)
- *the rights and legitimate interests* in the field of entrepreneurial and other economic activities *of the person that files an application* to the supervisory instance have been substantially *violated*;	- there is a *violation of the rights and freedoms of man and citizen* according to the universally recognized principles and norms of international law, international treaties of the Russian Federation; - there is a *violation of the rights and legitimate interests of indefinite range of persons* or other public interests;
- there is a *violation or misuse of the norms* of substantive or procedural law *by the arbitration court, which adopted the contested judicial act.*	- *a judicial act* that is contested by way of supervision *violates the uniformity in the interpretation and application of law norms by the arbitration courts.*

However, as we see it, the legislator made a mistake in the heading of article 304 of the APC RF – "Grounds for the Supervisory Review of Effective Judicial Acts and for Awarding a Compensation for the Violation of Right to a Fair Trial within

a Reasonable Time". According to the content of the article it should be regarded as "Grounds for Cancellation or Modification by Way of Supervision of Judicial Acts that have entered into Legal Force, and Awarding a Compensation for the Violation of the Right to Trial within a Reasonable Time".

Unfortunately, there is no such ground like a "violation or misuse of the norms of substantive or procedural law by the arbitration court, which has taken the contested judicial act" among the grounds listed in this article (the check of judicial acts of arbitration court on this ground ends in cassation instance).

Proceeding from the analysis of the provisions of article 304 of the APC RF and judicial acts taken by judicial panel and the Presidium of the HAC RF (compiled by legal reference system "GARANT" with reference to article 304 of the APC RF), we can conclude that the main purpose of supervisory instance is avoidance of the going beyond the limits of arbitration and, in general, national court proceedings of persons having evidence of violation by arbitration court of the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law, international treaties of the Russian Federation and persons seeking a just resolution of their case in other instances, for example, the Constitutional Court of the Russian Federation, the European court of Human Rights, etc. This conclusion is also supported by the content of the decision of the Plenum of HAC RF No. 52 from June 30, 2011 "On the Application the Provisions of the Arbitration Procedural Code of the Russian Federation in the Revision of Judicial Acts on New or Newly Discovered Circumstances [3]. As a condition of judicial review on new circumstances, paragraph 9 of the decree stipulates the recognition by a decision of the Constitutional Court of the Russian Federation of not correspondence to the Constitution of the Russian Federation of the law applied by the court in a particular case, in connection with a judicial act, regarding which an applicant has appealed to the Constitutional Court of the Russian Federation. Paragraph 10 of the same decree of the Plenum of the HAC RF provides for judicial review on new circumstances due to the established by the European Court of Human Rights violations of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in the consideration of a particular case by the court of arbitration in connection with a judicial act regarding which an applicant has appealed to the European Court of Human Rights.

Practice shows that the Presidium of the HAC RF rarely carries out the adjustment of law enforcement, basically if there is a change in the legislation of the Russian Federation. In all other cases, the Presidium of the HAC RF applies fairly wide discretion.

It's no secret that the "filter" of entered into legal force court decisions, consisting of courts of cassation, does not notice due to subjective reasons judicial acts of previous instances of arbitration courts with errors of justice. However, a judicial error is also possible during the administration of justice in the courts of arbitration as a result of judges' compliance with the current legal position of the HAC RF regarding the application of the law norm that is laid down in the rulings of the Plenum or the Presidium of the HAC RF. The fact that the HAC RF may be mistaken in the interpretation of the law norms derives from such concept as a change in judicial practice, when the HAC RF, in fact, recognizing the mistakes of the previous interpretation of a law norm, issues an act to change the practice of application of the law norm. Mistake of the HAC RF can also be associated with unconstitutionality of certain norms of laws, with unconstitutional interpretation (application) of law norms in a particular case. However, the very fact of recognizing of past mistakes does not entail the resolving of a case in the HAC RF in favor of the applicant. In this case, at the discretion of the judicial panel of the HAC RF, can be taken three acts that are different in legal consequences:

- ruling on refusal to transfer a case to the Presidium of the HAC RF without reference to the possibility of revising of entered into legal effect court's judgments on new circumstances (under part 8 article 299 of the APC RF in the absence of grounds under article 304 of the APC RF, the court makes a ruling on the refusal to transfer a case to revise judicial act by way of supervision to the Presidium of the HAC RF);

- ruling on refusal to transfer a case to the Presidium of the HAC RF with reference to the possibility of revising of entered into legal effect court's judgments on new circumstances (according to part 8.1 of article 299 of the APC RF, if circumstance provided for by paragraph 5 part 3 article 311 of the APC RF is found in considering an application or presentation for revision of a judicial act by way of supervision, the collegial panel of judges of the HAC RF make a ruling to refuse to transfer the case to the Presidium of the HAC RF, in which it points to the possibility of judicial review of the contested judicial act on new circumstances in time under part 1 article 312 of the APC RF);

- ruling on transfer a case to the Presidium of the HAC RF for making decision (in accordance with Part 4 article 299 of the APC RF if there are grounds under article 304 of the APC RF, the court makes the decision to transfer the case for judicial review of the contested act by way of supervision).

Paragraph 11 of the Decision of the Plenum of the HAC RF No. 52 from June 30, 2011 just describes the variants and cases of formation of specified by us

rulings of the HAC RF on refusal to transfer a case to the Presidium of the HAC RF in case of defining or change in the practice of application legal norms by the HAC RF. For example, in the Decision of the Plenum of the HAC RF there are cases of retroactive application of legal position on cases, in which the appeal procedure, provided for by the HAC RF, ended on terms at the time of making decisions of the Plenum or the Presidium of the HAC RF with a new legal position formulated in them.

However, as we see from the practice, there is possible a double understanding of outspread of retroactive effect on entered into legal force judicial acts of arbitration courts, taken on the basis of the rule of law in the interpretation differing from an interpretation newly defined or modified by an appropriate judicial authority of the HAC RF. We may well assume non-proliferation of retroactive effect of new legal position, formulated in the decree of the Presidium or Plenum of the HAC RF, on the judicial acts, the time terms of appeal of which have expired (a kind of amnesty for arbitration courts that have done improper application of law norms, because in the absence of this kind of "amnesty" it would be not possible, in principle, to correct miscarriages of justice). And in no way we can agree with the non-proliferation of retroactive effect on the taken with the use of "old" legal position judicial acts that are still under appeal in the various instances of arbitration courts, especially at the stage of supervision proceedings.

Legal position of the HAC RF formulated in the decision, which does not contain a special clause, for example, "entered into legal force court decisions of arbitration courts on cases with similar factual circumstances, adopted on the basis of the rule of law in the interpretation at variance with the interpretation contained in this decision, may be revised on the basis of paragraph 5 part 3 article 311 of the APC RF, if there are no other obstacles" [3], in our opinion means that this legal position should be taken into account by all courts (all instances of arbitration courts) in consideration of similar cases only from the date of the publication of such decision (by virtue of the provision laid down in the seventh paragraph of part 4 article 170 of the APC RF).

For decisions that do not contain clauses about retroactive effect, the Plenum or Presidium of the HAC RF "can define the limits of application of the formulated by it legal position, in particular by reference to the date of occurrence or change of legal relations, to which it is applied" [3].

We believe that paragraph 12 of the decision of the Plenum of the HAC RF No. 52 from June 30, 2011 confirms the presence of discretionary powers of judicial board that takes the decision not to transfer a case to the Presidium of the HAC RF,

because of which an individual approach to each case should be carried out, with taking into account all the factual circumstances (the board may indicate or not indicate the possibility of judicial review of a contested act on new circumstances). It is at this stage of the proceedings of arbitration court's supervisory instance the tortious conduct of judges (judicial board) and taking an illegal judicial act are possible. For example, there are possible different outcomes for different categories of applicants of supervisory complaints and participants of cases in the same circumstances and in the application of the same law norms.

Potential of tort, in our opinion, contains both subjective and inadequate understanding by judges of the concept of "defining the practice of application of a law norm" (article 311 of the APC RF). The matter is that the decision of the Plenum of the HAC RF, which we have discussed before, does not contain an explanation of how the practice of application of a law norm should be formulated, but only contains the model wordings of legal position in the decisions of the Presidium or Plenum of the HAC RF, what is not the same. Legal positions of the specified judicial bodies expressed by the sentences:

- "Entered into legal force court decisions of arbitration courts, adopted on the basis of a norm of law in the interpretation at variance with the interpretation contained in this decision, may be revised on the basis of paragraph 5 part 3 article 311 of the APC RF, if there are no other obstacles",

- "Entered into legal force court decisions of arbitration courts on cases with similar factual circumstances, adopted on the basis of a norm of law in the interpretation at variance with the interpretation contained in this decision, may be revised on the basis of paragraph 5 part 3 article 311 of the APC RF, if there are no other obstacles",

in our opinion, constitute only resolutive part of defining the practice of application of a law norm. The very same defining of practice should include the reasoned conclusion on the norm of law and its proper practical applying in arbitration courts. Otherwise, the defining the practice of application of a law norm will be identical with the law-enforcement interpretation of a law norm, given by the highest judicial authority in any decision of the Presidium of the HAC RF handed down in consideration of any case by way of supervision. The defining the practice of application of a law norm, in our opinion, should answer the question of how and when in resolution of cases should be applied this or that legal norm, including, possibly with an indication of the errors of arbitration courts.

As we see it, a judicial act of supervisory instance that contains in the reasoning part the following wording – "In these circumstances, contested court decisions are

subject to cancellation by virtue of paragraph 1 part 1 article 304 of the Arbitration Procedural Code of the Russian Federation as violating uniformity in the interpretation and application of law norms by arbitration courts" – does not define the practice of application of legal norms. With this formulation the judicial act, in our view, states the taking place error of arbitration courts, which have issued contested in supervisory instance judicial acts, with the establishment of provided for by article 304 of the APC RF reason for their cancelation (because there are other legal acts, in respect of which the contested acts violate uniformity and interpretation of legal norms). In another interpretation any ruling of the Presidium of the HAC RF will be the defining the practice of application of law norm, this will unreasonably provide supervisory instances (especially judicial board that defines the procedural fate of the application of a person contesting judicial acts in supervisory instance) broad discretion in administration of justice and lead to the threat of abuse of the right in administration of justice.

The desire to reduce the burden on the Presidium of the Russian Federation, as well as possibly for other purposes, the panel of judges, which considers applications from persons of the review of criminal acts in the exercise of supervision, under various pretexts, can with impunity refuse to transfer the case to the Presidium of the Russian Federation, taking into account that in itself refusal does not violate the rights of a person in the administration of justice [8, 25-36], and the possibility to appeal against the ruling on refusal to refer the case to the Presidium of the Russian Federation is missing (not a party to the arbitration process will be able to appeal to the Constitutional Court a violation of their rights and legitimate interests, also to appeal to international courts).

Trying to reduce the workload of the Presidium of the HAC RF, as well as possibly for other purposes, the panel of judges, which considers applications from persons on the review of judicial acts by way of supervision, under various pretexts, with impunity can refuse to transfer a case to the Presidium of the HAC RF, taking into account that refusal itself does not violate the right of a person to administration of justice [8, 25-36], and there is no possibility to appeal against the ruling on refusal to transfer a case to the Presidium of the HAC RF (not every party of arbitration process will be able to appeal violation of its rights and legitimate interests in the Constitutional Court of the RF, as well as to apply to international courts).

All this leads judicial board of the HAC RF to the temptation of tort actions. A practical example of such a tort, in our opinion, is the action of the judicial board on the application of LLC "Trade house "Elton" in the case No. A57-3530/2008 [10]. The appeal of LLC "Trade House "Elton" to the supervisory instance of

arbitration court was connected with the violations committed by the appeal instance of arbitration court, which after cancelation the decision of the Arbitration Court of Saratov Region terminated the proceedings on the case by refusing procedural succession of a party in the case. Judicial act of appellate instance was supported by the cassation instance of arbitration court. The company applied to the supervisory instance on February 10, 2012 (as supplemented). The Chronology of the case in supervisory instance was as follows:

- 10.02.2012 was handed down the ruling on accepting application (presentation) for proceedings,
- 7.03.2012 was issued a ruling of certiorari,
- 12.05.2012 was issued a ruling on the suspension of the proceedings [9],
- 3.08.2012 was issued a ruling on the resumption of the proceedings,
- 3.08.2012 was issued a ruling on refusal to transfer the case to the Presidium of the HAC RF for the revision of the judicial act by way of supervision [7].

The peculiarity of proceedings on the case in the supervisory instance lies in the fact that the process was suspended in connection with the consideration of the similar case No. A27-17017/2009 (the motivation of the ruling on suspension of proceedings on the case is following – "Because the above case cannot be considered until resolution by the Higher Arbitration Court of the Russian Federation of the case No. A27-17017/2009 of Kemerovo Region Arbitration Court, which has been transferred by panel of judges to the Presidium of the Higher Arbitration Court of the Russian Federation for the review of judicial acts by way of supervision by ruling dated 20.01.2012, the proceedings on the case have to be suspended in accordance with paragraph 1 part 1 article 143 Arbitration Procedural Code of the Russian Federation"), and after the resumption of proceedings was made a decision to refuse the transfer to the Presidium of the HAC RF on the following grounds:

"Having checked the validity of the arguments set out in the application, and having studied the materials of the case, the panel of judges considers that there are no grounds provided for in article 304 of the Arbitration Procedural Code of the Russian Federation to transfer the case to the Presidium of the Higher Arbitration Court of the Russian Federation in virtue of the following.

The courts found that the company "Elton" (assignee) and society (the assignor) 20.09.2010 entered into a contract of assignment of claim of the last from inspectorate in the amount of 406,524 rubles 81 kopecks in respect of compensation judicial costs associated with consideration of the case No. A57-3530/2008 at the Arbitration Court of Saratov region.

The Court of First Instance during satisfying the application of the society on procedural succession has come to the conclusion that the right to claim judicial costs transferred to the company "Elton" under the assignment agreement has arisen by virtue of law (chapter 9 of the Code) and an entered into legal force court decision.

The fact that the assigned on a controversial contract right to claim judicial costs from the inspectorate has not occurred and has not been confirmed by the judicial act of arbitration court at the time of conclusion of the contract, that is ***the subject of the contract is a future right****, does not contrary to paragraph 4 of the Information Letter of the Presidium of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007 "Review of the practice of applying by arbitration courts of provisions of chapter 24 of the Civil Code of the Russian Federation".*

The Court of First Instance rightly has not taken into account the argument of inspectorate about the impossibility of replacing the company by its successor in view of liquidation of the company (05.05.2011), because at the time of conclusion and execution of the contract on the assignment of claim from 20.09.2010 the society existed as a legal entity.

However, since ***the legal position on this matter has been formed*** *by the Presidium of the Higher Arbitration Court of the Russian Federation* ***in its resolution No. VAS-14140/11 from 17.04.2012****, that is, after the adoption of the contested judicial acts, there are no grounds for satisfaction of the application of the company "Elton" on the transfer the case to the Presidium"* [7].

This ruling of the HAC RF, in our opinion, is illegal and violates the rights of the applicant. First, the ruling of the Constitutional Court of the RF No. 22-O of February 20, 2002 "On the claim of JSC "Bol'shevik" on violation of constitutional rights and freedoms by the provisions of articles 15, 16 and 1069 of the Civil Code of the RF" defines the legal nature of judicial costs in a tax dispute. Judicial costs – a specific type of loss, the procedure of compensation of which is defined by procedural legislation (APC RF).

The Constitutional Court of the Russian Federation stated that "article 1069 of the Civil Code of the Russian Federation provides that the harm inflicted on an individual or a legal entity as a result of unlawful actions (inaction) of state and local self-government bodies or of their officials, including as a result of the issuance of an act inconsistent with the law or any other legal act of a state or self-government body, shall be subject to redress at the expense of the state treasury of the Russian Federation, the respective subject of the Russian Federation or the respective municipal body. Satisfying a claim for damages pursuant to article 1082 of the Civil Code of the Russian Federation, the court depending on the circumstances of the case requires the person responsible for the damage to compensate the damage in

kind or to compensate the losses caused. The concept of damages appears in paragraph 2 article 15 of the Civil Code of the Russian Federation: under losses shall be understood the expenses, which the person, whose right has been violated, has made or will have to make to restore the violated right, as well as loss or harm inflicted to its property (actual damage), and also the non-derived income, which this person would have derived under the ordinary conditions of the civil turnover, if its right have not been violated (loss of profit).

The legislator does not set any limits on compensation of property costs of representation in court the interests of a person whose right has been violated. Otherwise would be inconsistent with the duty of the State to guarantee the constitutional rights and freedoms.

Direct enshrining in article 91 of the RSFSR Code of Civil Procedure the provision on imposing on the losing party of a dispute the payment of expenses on a representative of the one who wins the dispute does not mean that because of the lack of similar norm in the Arbitration Procedural Code of the Russian Federation similar costs cannot be exacted in the protection by parties of their rights in the procedure of arbitration proceedings. Otherwise would be contrary to the principle embodied in article 19 (1) of the RF Constitution, the principle of equality before law and court.

The disputed articles along with adjusting the terms, conditions and procedure for compensation for damages, including by providing reimbursement of expenses incurred for the restoration of a violated right, also implement the enshrined in the RF Constitution principle of the protection of private property rights by law (article 35, part 1) and provide constitutional guarantee of the right to qualified legal assistance (article 48, part 1)" [2].

It should be noted that the Constitutional Court of the Russian Federation has issued this ruling with the negative assessment of the arbitration court activity in the dispute of OJSC "Bolshevik" with the tax authority – "the exclusion of costs for representation in court and for providing legal services from the losses, which are to be compensated in accordance with articles 15, 16 and 1069 CC RF in system connection with its article 1082, indicates that the interpretation of the mentioned norms aimed at ensuring the restoration of the violated rights of citizens and legal entities, including by way of compensation for damage caused by unlawful actions (or inaction) of State power authorities (article 53 of the Constitution of the Russian Federation), when considering a particular case was made against their constitutional and legal sense, which the courts were not entitled to do" [2].

Thus, in the event of a decision on a dispute in favor of a taxpayer (tax agent), legal qualification of judicial costs in the dispute with a tax authority provides the taxpayer the right to compensation while imposing on the responsible party an obligation for compensation for this type of loss (harm in the context of article 1069 of the Civil Code of the RF). The subject of the transaction on the assignment of rights (claims) in the case No. A57-3530/2008, on the basis of which was carried out the procedural succession (intervention of LLC "Trade House "Elton") of the party, was not the future right (as the judicial panel of supervisory instance of the arbitration court qualified), but real losses of the taxpayer to restore its violated rights (court costs).

Secondly, part 1 article 382 of the Civil Code of the RF, which stipulates that the transfer of creditor rights to another person occurs on the basis of commitments, in conjunction with the norm of part 2 article 307 of the Civil Code of the RF on the grounds of commitments emergence (in this case, infliction of loss (harm)), does not requires from the arbitration court neither ascertainment of the fact of emergence of the tax authority's commitment to the taxpayer in part of court costs compensation, nor ascertainment of a non-existent earlier commitment of the tax authority. The role of a judicial body is reduced only to compliance with the statutory procedures to meet the requirements of a taxpayer in that part of the loss (harm inflicted by illicit decision (action) of a tax authority), which is defined in the procedural legislation as court costs, taking into account the ensuring a balance of the interests of parties (the questions of incurred court costs reasonableness are resolved).

According to article 110 of the APC RF, court costs incurred by individuals involved in case, in whose favor a judicial act is taken, shall be exacted by arbitration court from the party that has lost a dispute.

The disposition of the article does not assume and does not denotes the actions of a party, in whose favor a judicial act was taken, on the proof of emergence the right to compensation for judicial costs, as well as does not require evidence of the occurrence of the other party duties on their payment.

Content of the norms of chapter 9 of the APC RF enshrines the right of a party, in favor of which a judicial act is taken, to choose to recover court costs from the losing party or refuse to claim for their recovering. In this case, a party to the proceedings obtains the right to apply to court for the recovery of court costs as soon as the last non-disputed judicial act, which satisfies the claims, has been adopted.

Thus, from the moment of the ruling of the Court of Cassation from 30.04.2010 on the case No. A57-3530/2008, which declared the decision of the tax authority

unlawful, LLC "Teploenergopribor", in accordance with article 110 of the APC RF, obtained the right to appeal to the Arbitration Court of the Saratov region with an application on the allocation of court costs, because in the taken judicial acts on the case in the resolution of the dispute on the merits the issue on court costs had not been resolved. The very same right to claim against the debtor (the amount of claim, which was the subject of consideration in the arbitration court) was being formed outside the relationship "applicant – tax authority", the amount of claim of the applicant was determined by the contract with JSC "SANAR" and its actual performance (formed costs).

From the legal position reflected in the newsletter of the Higher Arbitration Court of the Russian Federation No. 120 from 30.10.2007, it follows that the assignment of right (claim) is admissible provided that the assigned right is indisputable, appeared before its cession. Claim to the Interested person had been formed by the Applicant before filing an application for compensation of court costs, at the time of conclusion of the contract of cession with LLC "Trade House "Elton".

As we see it, if one does not make an extraction from the decision of the Presidium of the HAC RF No. VAS-14140/11 from 17.04.2012, there will not be visible delinquency in actions of the Judicial Board of the HAC RF, which in the case No. A57-3530/2008, in our opinion, just evaded the administration of justice itself and deprived the applicant an opportunity to correct a miscarriage of justice by reviewing the court decision in appeal instance on new circumstances.

"The courts, having applied the provisions of paragraph 1 article 61 of the Civil Code of the RF on the impossibility of succession in the event of liquidation of a legal entity and the provisions of article 384 of the Code on the transition the right of an original creditor to a new creditor only to the extent that was at the time of transfer of the right, have come to a conclusion about the impossibility of replacing society that is a claimant by another person in the presence of a court ruling on partial satisfaction of a claim for compensation of judicial costs.

There is agreement on the assignment of rights (cession) from 21.02.2011 in the records of the case, according to which the company "KemerovoAgroStroyProekt" has yielded, and the citizen Belousov A. V. has taken the rights to the reimbursement of judicial costs incurred in connection with consideration of this case, as the evidence of succession in the material legal relation.

In accordance with paragraph 1 article 382 of the Civil Code the right (claim) that belongs to the creditor on the basis of an obligation may be transferred by it to another person in a transaction (assignment of a claim), or pass to another person on the basis of the law.

The contract of cession from 21.02.2011 was concluded in respect of the right to claim compensation in the amount, which the company was claiming after applying to the arbitration court with an application for reimbursement of judicial costs.

Conclusion of this cession contract during assignor liquidation procedure leads to transition to the assignee in the performance of only that part of stipulated in the contract rights that the assignor had as a creditor at the time of conclusion of the contract on the designated in it subject (singular succession). The fact that the assignee has not acquired all the rights that the assignor had as a legal entity at the time of liquidation (universal succession) does not mean the assignee's lack of procedural succession in the case considered by the arbitration court on the subject of the contract with the participation of the assignor prior to the termination of its activities.

Satisfaction by the court the claims of the assignor for the reimbursement of judicial costs in the amount less than has been stated in the application for compensation of judicial costs is not a legal obstacle to the inclusion in the contract of cession the right of the claim that is yielded to the assignee in the amount calculated by the assignor. This also is not an obstacle for entering the assignee in the appeal process that has already been instituted on the appeal of the assignor, for maintaining by the assignee the right of claim transferred to it in an amount determined in the contract.

The mere fact of termination of a legal person prior to consideration by the court of this legal entity application on leaving the process and its replacement by another person does not result in the termination of the proceedings when there is data on the conclusion of the agreement on assignment of claim of the leaving trial participant before its elimination.

In accordance with article 48 of the Arbitration Procedural Code of the Russian Federation in the event of leaving of one of the parties from a disputable legal relation or from a legal relation established by a judicial act of the arbitration court (reorganization of a legal entity, cession, assignment of debt, death of an individual and in other cases of changing of persons in obligations), the arbitration court replaces this party with its legal successor and indicates this in a judicial act. Succession is possible at any stage of the arbitration process.

All actions committed in the course of arbitration proceedings prior to the entry of a legal successor into the case are mandatory to the successor to the same extent, to which they have been mandatory for the person whom the legal successor replaces (part 3 article 48 of the Arbitration Procedural Code of the Russian Federation).

Despite the fact that the citizen Belousov A. V. became the successor of the company "KemerovoAgroStroyProekt" in the legal relations with the company "Azot" regarding compensation of judicial costs and stated this in the court of appeal, and the case materials contained the evidence to support the succession, the court of appeal instance terminated proceedings on the lawfully filed appeal, thereby depriving the purchaser of rights under

the contract of change of persons in an obligation the right to replacement in the process and to judicial protection of the transferred to it rights.

In these circumstances the contested judicial acts should be cancelled by virtue of paragraph 1 part 1 article 304 of the Arbitration Procedural Code of the Russian Federation as violating the uniformity in the interpretation and application of the rules of law by arbitration courts.

The case should be transferred to the Seventh arbitration court of appeals for consideration of the appeal" [4].

The difference of the case No. A57-3530/2008 from the resolved in the Presidium of the HAC RF previous similar case is that the successor entered into the process in first instance of arbitration court, where procedural succession was accepted and the case was considered on the merits (judicial costs were allocated), as well as the fact that party to the case was a public person – a structural unit of the Federal Tax Service of Russia.

The context analysis of the decision of the Presidium of the HAC RF No. VAS-14140/11 from 17.04.2012, as well as of the earlier defined practice of application of chapter 24 of the Civil Code of the RF [4; 6] and article 48 of the APC RF, suggests that the panel of judges of supervisory instance expressed an interest in the case in favor of a public person – a structural unit of the FTS of Russia, and also violated the basic provisions of the APC RF.

Coming back to the issue of determining legal position in a judicial act of the HAC RF, it should be noted that in the above cases the courts considered the transactions on assignment of rights as transactions, in which the subject of contract was the future right, and in respect of these transactions there had not been changes in the practice of application of legal norm from the moment of publication of the newsletter of the Presidium of the Higher Arbitration Court of the Russian Federation No. 120 from October 30, 2007 [5] (see paragraph 4 of the newsletter).

Legal position, as set out in this newsletter, is based on the fact that the current legislation does not prohibit the circulation of future rights, but on the contrary, in some cases, directly regulates transactions, the subject of which is future right.

It should be noted that paragraph 17 of the same newsletter provides that the assignment of the right (claim) to recover damages does not contradict legislation.

Thus, the panel of judges uniquely determined on the materials of the case No. A57-3530/2008, as we believe, the violation of uniformity in the interpretation and application of law norms by the arbitration courts, but due to the interest in favor of a public person – party in the case, issued a ruling on refusal to transfer the case to the Presidium of the HAC RF.

In order to avoid such cases, we consider it necessary to give more detailed regulation in the APC RF to the right of judicial panel of the HAC RF, which considers applications from persons on the review of judicial acts by way of supervision, to make rulings on the refusal to transfer a case to the Presidium of the HAC RF in the cases of defining or change the practice of application of law norms.

For clarity of the suggested by us provision on the need to limit judicial discretion in the supervisory instance let's consider, what legal consequences follow from the court judgments of supervisory instance of arbitration court and are applied to cases at various stages of the arbitration process and similar to the case, in which has been defined or changed the practice of law norms application by the Plenum or Presidium of the Higher Arbitration Court without reservation in the judicial act on retroactive application of legal position.

In our understanding, the issue of retroactive application of legal position generated by the Presidium or Plenum of the HAC RF in the decision, which has defined or modified the practice of law norms application, can only arise in respect of judicial acts regarding of which the appeal process in accordance with the APC RF in the whole chain of arbitration court instances has been completed or statute of limitations on filing an application for review of a judicial act by way of supervision has expired (see Table. 2).

Table 2

The legal consequences of cases similar to the case, in which the practice of law norms application has been defined or changed without reservation in the judicial act on retroactive application of legal position.

Stage of the arbitration process, in which is a similar case		Legal consequences applied in practice
1. Proceedings in the arbitration court of first instance		legal position on the practice of law norms application is taken into account when considering similar cases from the date of publication of the decision of the Plenum or Presidium of the HAC RF (by virtue of the provision set out in the seventh paragraph of part 4 article 170 of the APC RF, etc.).
2. Proceedings on the revision of the judicial acts of arbitration courts	2.1. Proceedings in the arbitration court of appeal instance	legal position on the practice of law norms application is taken into account when considering similar cases from the date of publication of the decision of the Plenum or Presidium of the HAC RF (by virtue of the provision set out in the seventh paragraph of part 4 article 170 of the APC RF).
	2.2. Proceedings in the arbitration court of cassation instance	legal position on the practice of law norms application is taken into account when considering similar cases from the date of publication of the decision of the Plenum or Presidium of the HAC RF (by virtue of the provision set out in the seventh paragraph of part 4 article 170 of the APC RF).
	2.3. Proceedings on the revision of judicial acts by way of supervision	similar cases are reviewed at the Presidium of the HAC RF with taking a judicial act with taking into account a particular (amended) practice of law norms application
		in a similar case, there is issued a ruling on the refuse to transfer a case to the Presidium of the HAC RF with reservation on the possibility to review the case on new circumstances in previous instances of arbitration court
		legal position is not taken into account when considering similar cases, the proceedings in supervisory instance are ended by the ruling on the refuse to transfer a case to the Presidium of the HAC RF without the possibility of revision on new circumstances
3. Proceedings on the revision of entered into legal force judicial acts on newly discovered and new circumstances		similar cases are not revised in arbitration court

However, supervisory instance has a different perspective on this issue. Judicial boards of the HAC RF that consider persons' applications on reviewing court decisions by way of supervision broadly interpret the provision on retroactive application of legal position in order to reduce cases, for which the revision of judicial acts in supervisory instance is possible.

It seems to us that HAC RF makes a mistake by applying the law norm from the grounds for the revision of judicial acts on new circumstances – paragraph 5 part 3 article 311 of the APC RF to the grounds for the revision of judicial acts by way of supervision.

In our opinion, the law norm that is set out in part 8.1 article 299 of the APC RF – "If during the consideration of an application or an representation on the revision of a judicial act by way of supervision has been established, that there exists a **circumstance, provided by paragraph 5 part 3 article 311** of this Code, the panel of judges of the Higher Arbitration Court of the Russian Federation issues a ruling on the refusal to transfer a case to the Presidium of the Higher Arbitration Court of the Russian Federation, in which it cites on the possibility of revision of the disputed judicial act on new circumstances within the term, provided by part 1 article 312 of this Code" – does not provide to judicial board of supervisory instance the right to make a ruling on the refuse to transfer a case to the Presidium of the HAC RF for the revision by way of supervision, if there are grounds under article 304 of the APC RF.

Analysis of the notion of **circumstances** set out in paragraph 5 part 3 article 311 of APC RF leads, as we see it, to its unambiguous understanding. It's not just the presence of the decision of the Plenum or Presidium of the HAC RF, which defines or changes the practice of law norm application, but also the presence in it of reference to the possibility of revising of judicial acts that have entered into legal force by virtue of this circumstance. Thus, the decisions of the Plenum or Presidium of the HAC RF that define or change the practice of law norm application, but which do not indicate the possibility of revising of judicial acts that have entered into legal force on new circumstances (due to defining or change of the practice of law norm application), do not create circumstances in the context of part 8.1. article 299 of the APC RF.

In our opinion, judicial board of the HAC RF must make a ruling on the transfer of a case that is in supervisory instance to the Presidium of HAC RF for revision by way of supervision, if there are grounds under article 304 of the APC RF, including, if in consideration of a similar case in the supervisory instance the practice of law norm application has been defined or changed, but the possibility of revision of judicial acts that have entered into legal force by way of supervision has not been indicated. That is, the supervisory instance is to review all cases in this instance of arbitration proceedings, which are similar to a case previously considered in supervision proceedings. In another legal consciousness and application of the norms of article 299, 304, 311 of the APC RF, Higher Arbitration Court of the Russian

Federation will be a generator of judicial torts – leaving in force judicial acts that have been appealed to the supervisory instance, which violate the uniformity in the interpretation and application of law norms by arbitration courts, the practice of application of which the HAC RF has already formed in the previous similar case.

In conclusion of the examined by us problem we believe that it is necessary to note that the defining of the practice of law norm application is a defining in several judicial acts, because one case is an isolated event. First of all, practice consists of multiple activities accompanied by development of certain skills. Court practice must express a certain tendency in resolving by courts (especially superior courts) of certain categories of cases, taking into account judicial acts that have entered into legal force. We have not seen the defining of practice in case No. VAS-14140/11 in this context.

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