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Kizilov V. V.

PROCEDURAL LEGAL SUCCESSION IN ARBITRATION. IS IT AN ABSOLUTE OR RELATIVE RIGHT?

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

This article discusses the main shortcomings of the legal regulation of the legal succession institute and related difficulties in judicial practice. The author introduces the analysis of the cases of settlement by arbitration courts procedural legal succession in cases arising from public legal relations, notes law enforcer errors.

Keywords: procedural legal succession, material legal succession, arbitration proceedings, grounds of a legal succession.

Analysis the norms of procedural legal succession institute in the APC of the RF [1] (article 48, paragraph 3 of part 1 of article 143, paragraph 2 of article 144, paragraph 6 of part 1 of article 150 APC RF) shows a lack of uniformity in the legal regulation and its imperfection.

Despite the fact that part 1 of article 48 of the Code provides for succession at any stage of an arbitration process, the right to join in the process of a new entity to replace a leaving party, in our opinion, is not absolute. That is why the second part of the article of the APC of the RF, which has been changed and in the new edition came into force on October 19, 2009, provides for the possibility of refusal of the court to replace a party by a successor (in the context of the article – the possibility to appeal court decision on the refusal of the court to replace a party by a successor).

We believe that there are two main reasons for the rejection of absolute right and realization of relative one at resolving issues of legal succession in the arbitration. The first is the possibility to carry out faulty transactions themselves, on the basis of which implements a legal succession in substantive law. The second – by

virtue of direct bans on the application the norms of the Civil Code of the RF, which provide for a substitution of parties in obligations, to the taking place legal relations of parties.

Open list of grounds of legal succession in material legal relations – an reorganization of a legal entity, assignment of a claim, assumption of debt, death of a citizen and other cases of change of persons in obligations (see part 1, article 48 APC RF) should not mislead in respect of indisputability the right of the person concerned in legal succession of a leaving litigant. For example, relations regulated by legislation on taxes and fees provide for a limited amount of legal succession compared with the norms of the Civil Code of the RF [2], because tax obligations must be executed personally by a taxpayer or a tax agent (by a debtor in the context of the obligation law under the Civil Code of the RF). This provision is consistent with part 1 of article 129 of the Civil Code of the RF, which stipulates that the objects of civil rights may be freely alienated or transferred from one person to another by way of universal legal succession (for example, reorganization of a legal entity) or otherwise, if they are not withdrawn from turnover or restricted in turnover by law (for example, the rules on the transfer of creditor rights to a third party are not applied to recourses (see article 382 of CC RF). Norm of article 383 of the Civil Code of the RF exactly sets legal restrictions on legal succession – "the transfer to the other person of the rights, inseparably linked with the creditor's personality, in particular, with the claims for the alimony and for the compensation of the harm, caused to the life or to the health, shall not be admitted".

Commenting on article 48 of the APC of the RF, A. P. Ryzhakov pointed out that "elimination of a legal entity shall entail its termination without the transfer of rights and obligations in the order of legal succession to the other persons, except as provided by federal law (part 1 of article 61 CC RF)" [12].

Without calling into question the procedural legal succession arising out of material one D. B. Abushenko notes the issues of singular succession. In his view, as a result, we may find that there have never been any material legal relations, for example, between the plaintiff and the defendant [11]. D. B. Abushenko wonders "should an arbitration court, allowing procedural legal succession, assess the juridical reality of the very cession (agreement on the transfer of debt) and the main obligation – the obligations of which is assigned a claim right (transferred debt)? If yes, what should be such check? What to do in cases where only part of the claim is assigned (transferred a part of debt)?" [11]. We support the legal position of D. B. Abushenko taken by him in response to the above questions, in terms of the fact that the base of procedural legal succession at assignment of claim and transfer

of debt is very these transactions (assignment of claim and transfer of debt) without regard to the validity of a principal obligation (for a procedural legal succession availability (reality) of the principal obligation generally should not be matter) [11]. Otherwise, if we assume the contrary, then the arbitration court, replacing the successor will prejudge resolution of a case on the merits, what is clearly not within the procedural regulations of the consideration of a case in the arbitration court of first instance [11].

In the course of solving the issue of legal succession in transactions of cession and transfer of debt, the arbitration court must, in our opinion, check the fulfillment of imperative statutory norms concerning the cession and transfer of debt. In the case of non-compliance with the requirements on inadmissibility of assignment and transfer of debt (paragraph 2 of article 382, art. 383, art. 388, paragraph 1 of article 391 CC RF), on the form of assignment and transfer of debt (article 389, paragraph 2 of article 391 CC RF) the arbitral court certainly precludes procedural legal succession.

We should agree that "the assignment of a part of claim creates an interesting legal situation" because "at cession of the right of claim from one plaintiff's claim an initial claimant cannot drop out of procedural legal relation, since due to the cession the amount of its alleged substantive rights have been reduced, but it continues to be a creditor in a material legal relation. At the same time, it would be illogical to deny the acquirer of a part of claim the intervention to the process: claims transferred to him have already been stated in the process, on the base of them has already been instituted a court proceeding and there are no any procedural reasons not to consider them on the merits" [11].

Whether can under this approach an acquirer of a part of claim be considered as a successor of procedural rights and obligations of the initial plaintiff or will it be an entry into the plaintiff's side of a third person who asserts independent claims?

It is no secret that the procedural practice is dominated by the position that procedural rights and obligations are always transferred to an assignee in full. However, in our view, regardless of the legal qualification of an action for entry into succession process (third person who asserts independent claims), the acquirer of a part of claim should, in the order of procedural succession, get from the initial plaintiff those procedural rights and duties relating to the assigned claim.

As follows from the interpretation of article 48 of Administrative Procedural Code of the RF, procedural succession takes place when material succession appeared already after the institution of an arbitration case. Furthermore procedural succession excludes simultaneous participation in a case (within a particular

plaintiff's claim) both predecessor and successor with the same claims. Thus, regardless of the grounds of material legal succession procedural succession is permitted only after replacing in material legal relations.

The legislator has not defined a particular judicial act, which should resolve the question of succession, that leads, we believe, to errors when using the discretionary powers of the Court to resolve the matter. This legal regulation is criticized by legal scholars. For example, D. B. Abushenko believes that "it is totally unacceptable when arbitration court postpones resolving of petition on replacement till the decision (final court decision for a particular instance): this approach violates the right to a court protection, since it prevents the entry into the process of a proper entity" [11], and complicates the implementation of the rights of a successor.

A good example of this situation is the violation of successor's rights in case A57-3530/2008, when after the tax dispute and the statement of judicial costs by the taxpayer (who won in the tax dispute), the right to collect judicial costs from the tax authority was transferred to a third party under assignment agreement. The Arbitration Court of Saratov region had been resolving the petition on replacement of a party until the final decision – determination and distribution of judicial costs, which was overturned on appeal. Consideration of successor's complaint in cassation instance did not result in cancellation of the judicial act of appeal instance, since the full consent of the Judicial Board of the Federal Arbitration Court of the Volga region with motifs of the appeal instance. Judicial board of the Higher Arbitration Court of the RF, considering a supervisory complaint of the successor, although had recognized the violation of the party's right, decided not to transfer the case to the Presidium of the Higher Arbitration Court of the Russian Federation, explaining its decision as follows: "as the legal position on this issue has been formed by the Presidium of the Higher Arbitration Court of the Russian Federation in the decision No. VAS-14140/11 from 17.04.2012, that is, after the adoption of the disputed judicial acts, there are no basis for satisfaction the statement of enterprise "Elton" on transfer the case to the Presidium" [5].

As we see it, in the case A57-3530/2008 arbitration courts since appellate instance have made a mistake in determining the moment of emerging the party's right to recover court costs because of carrying identity between the emerged right and determination by court instance of the right's size (setting a specific amount, to be recovered from a party). We believe that the right to recover court costs from a losing party arises for a winner in a dispute from the entry into force of a court decision that resolves the dispute. However, the right's possession of a winning party does not lead to the automatic exercising of the obligation of a losing party, which

corresponds with the specified right of the winner, because the loser of the dispute seeks to minimize its material losses to compensation court costs of its procedural opponent, as well as to distance in time "the day of reckoning".

Courts instances that have abolished in the case A57-3530/2008 the judicial act of the Arbitration Court of Saratov region on recovery court costs from the tax authorities, as well as supporting the position that the right to court costs of the tax-payer relates to the future, we believe, allowed the identification of the emergence of the very right and the moment of its procedural implementation. In the judicial act is stated that "the transferred under the controversial contract Company's right to claim for judicial costs from the inspection on the moment of its conclusion has not yet occurred and not confirmed by court decision of the arbitral court, that is the subject of the contract is a future right" (this is not true, because the assignment was made after commencement of proceedings on the statement for the recovery of court costs by a legal predecessor), which, in our opinion, is a legal mistake made by judicial panel that considered the case. If a party would transfer its successor the right to recover court costs from the tax authority after a judicial act, it would be not a substitution of parties in the process, but replacement of recoverer within execution proceeding.

The result is that the material successor recognized by judicial panel of the HAC RF in the case A57-3530/2008 as a result of implementation discretionary powers of the courts of appeal and cassation was deprived of the procedural status of a party in the case – satisfaction of statement for change the party by its successor was refused, proceedings on the statement of the party to recover legal costs was terminated.

Motive of judicial panel of the HAC RF, which denied successor to transfer the case to the Presidium of the Higher Arbitration Court of the Russian Federation, deserves separate assessment – "since the legal position on this issue was 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 impugned acts, there are no basis for the satisfaction the statement of LLC "Elton" on transfer the case to the Presidium" [5]. This motive, we believe, serves in greater for the protection of "esprit de corps" than for administration of justice on a case. As we see it, there is a supervisory instance to correct errors of justice committed by the previous court's instances. Moreover, the case A57-3530/2008 was in proceeding in supervisory instance when the legal position of the court was forming. Even more, the proceedings on the case A57-3530/2008 was suspended up to the resolution of the issues raised in another case.

Unjustified refusal in the case A57-3530/2008 to replace a party by successor prevented the proper entity from meet its material claims and consequently relieved the tax body from material responsibility in the form of court costs.

Everything is not so simple with the succession in Arbitration courts; many authors have been noting problems in law enforcement, specifying the sources of these problems.

As rightly believes Professor L. Gros', "procedural succession is based on succession in material legal relation, acceptable and coming, confirmed by a court decision on the court proceeding's audit of the admissibility of succession in the material legal relation and reality of its grounds" [9]. Indeed, having received a statement to replace a party, arbitration court, generally, establishes substantive grounds of such replacement, and justifies its conclusion on its validity (invalidity) in the ruling of approval or denial of statement satisfaction. However, when the Court is not interested in proceedings, it makes "mistakes", providing benefits to any of the parties in a process.

One has to agree with Professor L. Gros' that courts make mistakes in deciding on the admissibility of succession in material rights and obligations, and, therefore, in a process. Analysis of judicial practice by Professor indicates a "lack of uniformity in the resolution of specific situations of the procedural succession, because of ***the errors in substantive regulation of its grounds***. Evidence of violations the norms of succession in material, and then in procedural law is a significant amount of judicial practice, including the European Court of Human Rights" [9]. Conclusion of Professor L. A. Gros' about the mistakes of substantive regulation of succession grounds is not unfounded and supported by real examples of life.

For example, there are some problems in disputes with the participation of JSC "Russian Railways", associated with the state established procedure to create JSC "Russian Railways", which, as L. Gros rightly points, does not correspond either to the norms of the Civil Code or the provisions of the Federal Law No. 178-FL from 21.12 .2001 "On Privatization of State and Municipal Property" [3].

The said scholar notes the problems of succession relating to the legal status of peasant (farmer) enterprises (for example, "the issues of substantive and procedural succession arise in situations where a peasant (farmer) enterprise established as a legal entity under the Law of the RSFSR from 22.11.1990, brings its status into line with the Federal Law from 11.06.2003" [9]).

Another problem noted by scholars in law enforcement is linked to the succession in substantive and procedural legal relations at the reorganization of municipal formations in accordance with the Federal Law No. 131-FL from 06.10.2003

"On General Principles of Local Self-Government Management in the Russian Federation" [9].

Practitioners also address to the issues of legal succession. For example, the assistant judge V. Archinova from Vladikavkaz, considering the unadjusted by law cases of succession, draws attention to the potential possibility for re-examination of the application on procedural succession under article 48 of the APC RF on the same grounds. "The APC RF has no prohibition on re-application for establishing procedural succession with submission of appropriate evidences. And there is also no consensus on the posed question about re-examination of the application on the procedural succession in the practice of arbitration courts" [7]. The law does not stipulate a ban on re-filing an application with the submission of appropriate evidences for establishment procedural succession [4]. The following example deals with the transfer of the rights and obligations of a party in the dispute from an individual entrepreneur to a physical person in connection with the assignment of rights (claims), where the author describes the procedure for resolution the issue of succession, depending on the stage of arbitration process.

Regrettable the fact of delaying by arbitration courts timing of consideration an application on procedural succession. V. Archinova mentions cases where an application for procedural succession is considered within 7 months. We must agree with and support the proposal of the author on the introduction of a norm in Arbitration Procedural Code, limiting the duration of consideration an application on procedural succession

Head of the department of analysis and generalization of judicial practice, legislation and statistics of fourth Arbitration Court of Appeal O. Gertsenshtein believes that flaws in the regulation of procedural succession take place [8]. However, the question of qualification procedural succession as a right or obligation, in our view, does not have such an impact on law enforcement, as qualification of judges. Noteworthy the statement of O. Hertsenshtein on the order of resolution the issue of succession in cases of bankruptcy – "replacing a creditor on demand for inclusion in the register of creditors' claims in a bankruptcy case should be conducted in two stages: first, the replacement is made by the court, which has established the amount of claim, and then – by the arbitration court, which has included the creditor-predecessor to the register of creditors' claims" [8].

In summary, can be summarized as follows:

- Russian legislation does not establish an absolute procedural right of a party to join the process as a result of obtaining the rights and duties of a participant in arbitration process on a material legal relation;

-arbitration court shall be also responsible for official red tape in the issues of resolving statements for legal succession;

- assignment of a right (claim) by a party to any person should not lead to termination of proceedings in case in view of the jurisdiction of a dispute with a new person (successor) to another court;

- assignment of right (claim) by a party to any person shall implicate procedural legal succession, with the exception of cases stipulated by law, when there is a legal ban on an assignment;

- invalidity of the transaction involving the assignment of rights (claims) implies the denial of procedural succession for the party, which has committed the transaction. Due to the fact that the legislation does not contain provisions on the possibility of violation the rights and interests of a debtor by an assignment of the right (claim) to a compensation for harm, the right (claim) to a compensation for harm [6] (including court costs, as a special kind of loss [10, 76]) can be assigned to any third party.

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