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**GENERALIZATION AND ANALYSIS OF COURT LAW-ENFORCEMENT  
PRACTICE AS A WAY TO MINIMIZE LEGAL RISKS DURING  
PARTICIPATION IN ARBITRATION PROCESS**

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The author provides thesis on mini-  
mization of legal risks when prepara-  
tion for court proceedings in arbitration  
through a careful study of law-enforce-  
ment practice of courts in similar legal sit-  
uations, as well as on the need for certain  
analytical skills of the subjects of law. In  
connection with it he discloses the main  
directions of study the law-enforcement  
practice of the Higher Arbitration Court  
of the RF.

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It is generally recognized that the analytical work, which includes the study and generalization of court practice, of course, plays a critical role in the activity of arbitration courts and is primarily aimed at ensuring uniformity in law-enforcement.

At that, M. A. Lapina and D. V. Karpukhin rightly single out risks of law-enforcement nature as a separate category of administrative-legal risks [6, 63-76].

Since arbitration (and any other) courts are certainly law-enforcement bodies, in such kind of risks may also occur in their activity. At that, they can affect

both participants in an arbitration process (performance of a judicial act not in their favor, without taking into account the existing law-enforcement practice) and the judges themselves (possible cancellation of their judicial act, which is taken without taking into account the existing law-enforcement practice, by a higher court).

We recall that in the legal literature the court law-enforcement practice is understood, in particular, as a number of judicial decisions taken by various courts on identical cases that contain a single legal position concerning settlement of a dispute, recognized lawful and justified by a higher court. In addition, judicial practice can be considered "full-fledged" after the confirmation by the highest courts of legal positions expressed in the judicial decisions of lower courts concerning considering of certain legal disputes [5].

Chairman of the Higher Arbitration Court of the Russian Federation (hereinafter - HAC RF) A. A. Ivanov rightly noted that "... Each judge must take as an imperative the setting for the resolution of disputes in accordance with the current court practice - so, as this kind of cases is usually solved. This setting should be developed by a judge itself, and it will require a specific approach to the resolution of cases, maybe even contrary to any personal or scientific beliefs of the judge, sometimes even to its notions of justice" [3, 9].

Thus, it is clear that not only judges, but also representatives of parties, with the purpose of minimization of legal risks in preparation for trial need careful study of law-enforcement practice of courts for similar legal situations.

We would like to touch briefly on the main directions of this work, regarding participation in an arbitration process:

### **1. Examination of law-enforcement practice of HAC RF.**

This appears to be the main activity on the considered issue. At that, the most convenient way to implement this task is to work with the site of HAC RF (<http://arbitr.ru>), which provides all the necessary materials, and also with the server "Card-file of Arbitration Cases" (<http://kad.arbitr.ru>).

At the same time, since January 2012, the Department of Private Law of HAC RF has been preparing and publishing on the above website in section "Legal Positions of the Presidium of HAC RF" ([http://arbitr.ru/pravovie\\_pozicii\\_prezidiuma\\_vas\\_rf](http://arbitr.ru/pravovie_pozicii_prezidiuma_vas_rf)) reviews of decisions by the Presidium concerning private-law disputes.

Unfortunately, the Department of Private Law and Process of HAC RF does not yet implement preparation of similar materials.

Study of law-enforcement practice of HAC RF can be carried out in the following main directions:

**1.1. Analysis of legal situations, which have become the subject of consideration by HAC RF, which includes:**

**- the study of legal situations considered by the Presidium of HAC RF in the discharge the functions of Court of supervisory instance.** In this case, if the question is just submitted for consideration, it is advisable to familiarize yourself with the legal position as set out in the relevant ruling of HAC RF panel of judges, determine the date, on which the meeting of the Presidium is scheduled, as well as to keep track the date of making (the announcement of operative part) and publication of final decision. This is done, inter alia, also for further bringing to the attention of court conducting proceedings on a similar case the information about the presence of controversial legal situation, which is the subject of consideration by HAC RF;

**- analysis of HAC RF decisions taken on cases considered in first instance,** primarily on cases of contesting normative legal acts in the field of interest for a corresponding subject (in particular, the Government of the Russian Federation, the Ministry of Finance, Ministry of Fuel and Energy, Ministry of Economic Development, Ministry of Culture, Ministry of Health, Ministry of Education and Science, Federal Anti-Monopoly Service, Federal Financial Markets Service, Federal Tariff Service, Federal Tax Service and Federal Customs Service);

**- consideration of the most interesting legal positions formulated in the rulings of HAC RF panels of judges on refusal to transfer cases for consideration by the Presidium HAC RF.** However, as rightly pointed out by the Chairman of HAC RF A. A. Ivanov, "...there is no need to rush into drawing conclusions based on negative rulings. This practice cannot be equated to the practice of decisions of the Presidium HAC RF. It should be understood that the denial is an opinion of three judges, other judges at their place could take an opposite decision. Rulings are, if I may say so, a more weakened branch of practice" [4].

**1.2. Study of judicial acts of HAC RF, published in full.**

HAC RF has established that it exactly from the date of placement of Decision of the Presidium in full on the web-site of HAC RF the practice of application of the legislation, on the provisions of which the Decision is based, is considered defined [2]. Therefore, for the correct forming of legal position in a court session, it is very important to keep track of when the text of judicial acts of HAC RF will be published on the corresponding web-site

This is particularly relevant in the light of the provisions of paragraph 5 part 3 article 311 of the Arbitration Procedure Code of the RF, in accordance with which a ruling or change in decision of the Plenary Session of HAC RF or in decision of the Presidium of HAC RF on application of a legal norm, if the corresponding act

of HAC RF contains reference to the possibility of revising of judicial acts entered into legal force, by virtue of this circumstances shall be recognized as new circumstance, under which arbitration court may reconsider a judicial act that has been taken by it and has entered into legal force.

The most effective way of such control, we believe, is registration of electronic subscription on the web-site of HAC RF.

*1.3. Tracking of publications of Decisions of the Plenary Session of HAC RF and Information letters of the Presidium of HAC RF* is also necessary with taking into account their key importance for the formation of unified court law-enforcement practice. It seems that corresponding acts must be monitored and analyzed even at the stage of draft, and, of course, immediately after their publication on the web-site of HAC RF.

Here we would like to draw attention to the fact that HAC RF not only makes available on its web-site in the section "Draft Documents of HAC RF" (<http://arbitr.ru/vas/proj>) drafts of key decisions of the Plenary Session, Information letters, explanations, but also invites all interested persons to submit their comments and proposals on their content. It appears that such a possibility should be actively used.

## **2. Analysis of judicial acts and reviews of practices of other arbitration courts.**

In preparing for a trial it seems appropriate, in addition to law-enforcement practice of HAC RF, also to examine judicial acts of arbitration courts of first instance, appeal and cassation instances, which dealt with similar disputes.

At that, it is recommended firstly to pay attention to the formation of law-enforcement practice exactly in the arbitration district (recall that in Russia there are 10 - Volga-Vyatka, Eastern-Siberian, Far-Eastern, West-Siberian, Moscow, Volga, North-West, North-Caucasus, Urals, Central), in the territory of which the dispute is considered, since it is no secret that in some cases the federal arbitration courts of different districts formulate different legal approaches to similar situations, what has repeatedly been pointed out by HAC RF, for example, in the rulings of HAC RF from 08.10.2012 No. VAS-10734/12, from 21.09.2012 No. VAS-10252/12, from 07.08.2012 No. VAS-6759/12.

All judicial acts of arbitration courts are available on the server of HAC RF "Card-file of Arbitration Cases" (<http://kad.arbitr.ru>), in addition it is advisable to use reference legal systems, the most famous of which are Konsul'tant Plyus, Garant, Kodeks.

Attention should also be given to thematic reviews of court practice prepared by arbitration courts of first, appeal and cassation instances.

At that, from September 2011 HAC RF changed the overall concept of organization of work for the study and generalization of court practice.

Earlier, in accordance with the Decree of HAC RF No. 35 from 06.05.2006, the arbitration courts of all instances prepared reviews of court practice in the form of a thematic collection of judicial acts setting out the thesis of legal position, which was laid down in the basis of their adoption and after their approval by the presidium of a corresponding arbitration court they were sent to arbitration courts carrying out verification of judicial acts taken by the arbitration court that had prepared the overview (arbitration courts, verification of the judicial acts of which was carried out by the arbitration court that had prepared the overview), as well as to the Higher Arbitration court of the Russian Federation for informational purposes.

At present, in view of the position set out in the Procedure for organization of work for the study and generalization of court practice in Federal arbitration courts of districts, arbitration appeal courts, arbitration courts of the constituent entities of the Russian Federation, approved by the order of HAC RF No. 87 from September 30, 2011, creation of legal approaches to the issues of law-enforcement is assigned to the Federal arbitration courts of districts.

These reviews are available in the section "Generalizations of Arbitration Courts of the Russian Federation" on the web-site of HAC RF ([http://arbitr.ru/as/pract/ac\\_prac](http://arbitr.ru/as/pract/ac_prac)) and on the web-sites of the respective courts. As an example, let's take generalization of the practice of Federal Arbitration Court of the North-West District on the issues of application chapter 28 of the Tax Code of the Russian Federation (vehicle tax) [8].

### **3. The study of the legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights.**

With regard to this area of work we would like to draw attention to the following provisions:

- part 2 article 74 of the Federal Constitutional Law No. 1-FCL from 21.07.1994 "On the Constitutional Court of the Russian Federation" (in the current edition), pursuant to which the Constitutional Court of the Russian Federation shall pass the decision on the case assessing both the literal meaning of the act under consideration and the meaning attributed to it by an official and other interpretations or the prevailing law-applying practices, as well as proceeding from its place in the system of legal acts;

- part 5 article 79 of the Federal Constitutional Law No. 1-FCL from 21.07.1994 "On the Constitutional Court of the Russian Federation", which provides for that the position of the Constitutional Court of the Russian Federation

on whether the meaning of a normative legal act or of an individual provision thereof attributed to them by the law-applying practices conforms to the Constitution of the Russian Federation, expressed in the judgment of the Constitutional Court of the Russian Federation, including judgment in a case on verification, upon complaint against violation of constitutional rights and freedoms of citizens, of constitutionality of a law that has been applied in a specific case, or on verification, at request of a court, of constitutionality of a law that ought to be applied in a specific case shall be taken into consideration by the law-applying bodies from the moment of coming into force of the respective judgment of the Constitutional Court of the Russian Federation.

Paragraph 3.4 of the Decision of the Constitutional Court of the Russian Federation No. 1-P from 21.01.2010 indicates that in the Russian judicial system interpretation of law by the highest judicial bodies has a significant impact on the formation of court practice. By a general rule, it in fact – being based on the powers of the superior court instances dealing with the repeal and change of judicial acts – is obligatory to the lower courts for the future. However, as a legal consequence of such an interpretation in cases, where by reason of general legal and constitutional principles it becomes possible to provide it retroactive effect, it is permissible to reconsider and repeal of previously taken judicial acts that are based on a different interpretation of the applied norms.

Within the framework of this article we see it unnecessary to substantiate the obvious fact that the legal positions of the Constitutional Court of the Russian Federation have a significant impact on the formation of court practice (including cases involving tax legislation) and therefore should be mandatory studied.

In the same paragraph of the considered Decision of the Constitutional Court of the Russian Federation it is noted that the practice of the European Court of Human Rights contain cases of resolving cases, including on the complaints of Russian citizens, taking into account the legal positions previously elaborated for them on the basis of cases of similar categories. This shows that the European Court of Human Rights considers its legal positions as binding to a uniform approach in assessing of the single-type in their nature factual and legal grounds when resolving particular cases.

Indeed, the award of just compensation to injured party does not absolve State of the obligation to execute the final decisions of the European Court of Human Rights in cases to which they are parties (article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms). Exercising of these acts assumes in case of need an obligation on the part of the State to take measures of

a private nature, aimed to eliminate the violations of human rights under the Convention and the consequences of these violations to the applicant, as well as general measures in order to prevent the repetition of such violations [7].

At that, in accordance with paragraph 3 part 4 article 311 Arbitration Procedure Code of the RF, application on the revision of judicial acts on new established circumstances in connection with the detected by the European Court of Human Rights violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, when considering by the arbitration court of a particular case, may be submitted by those persons involved in the case, in connection with the taking of decision on which the appeal to the European Court of Human Rights has taken place, as well as by other persons not involved in this case, about the rights and obligations of which the arbitration court has taken judicial act [1].

The above also confirms the need for analysis of the legal positions of the European Court of Human Rights.

#### **4. Analysis of materials placed in print and electronic media, on information and legal portals and legal social networks.**

In addition to the study of information contained on the official web-sites of public authorities (in relation to the considered issue - of HAC RF and other arbitration courts, in the first place, of the corresponding arbitration district), it would also seem useful to carry out selective analysis of materials published in print and electronic media, on information and legal portals and legal social networks.

Special attention should be given to articles and reviews of court practice of the leading legal journals ("Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii", Vestniki arbitrazhnykh sudov okrugov, "Sud'ya", "Zakon", "Yurist", etc.).

A number of interesting publications is accumulated in the section "Press about HAC RF" (<http://arbitr.ru/press-centr/smi>) of the web-site HAC RF.

Among the Internet resources we would like to point out Pravo.ru (<http://pravo.ru>), Zakon.ru is the first social network for lawyers (<http://zakon.ru>), "Zakonniya" - information and legal portal (<http://www.zakonia.ru>).

Undoubtedly, in view of the ongoing judicial reform in our country, and in particular the formation of a unified Supreme Court of the Russian Federation, the described in this article activity to study and generalize law-enforcement practice of arbitration courts will significantly evolve, acquire new forms. At that, achievement of a positive result in any judicial processes, and minimization of risks of law-enforcement nature in any case requires not only thorough knowledge of legislation norms, but also the possession of skills of analytical work.

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