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LEGAL PROCEDURAL SIGNIFICANCE OF ARBITRATION AWARDS IN CIVIL PROCEEDINGS OF UKRAINE

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1. INTRODUCTION

The existence of legal disputes solution not only with the help of state courts system possibility, the main task of which is to protect the violated, unrecognized challenged rights, freedoms and interests of individuals and legal entities and via alternative to this system ways of solving private law conflicts, one of which is the arbitration proceedings as well, is one of the hallmarks of a developed democratic society. The legal basis for this alternative dispute resolution was the consolidation by Art. 55 of the Constitution of Ukraine the clause that guarantees for everyone the protection of his or her rights and freedoms from violations and illegal encroachments with any means not prohibited with law. Nevertheless, the Constitutional Court of Ukraine, while determining the status of arbitration court in the system of subjective rights, freedoms and interests of individuals and legal entities protection, in its decision of 10.01.2008 № 1-rp/2008 noted that arbitration courts are non-governmental, independent bodies of protection property and non-property rights and lawful interests of individuals and/or legal entities in the field of civil and commercial relationships that do not administer justice, their decisions are not acts of justice, and they are

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not included in the system of courts of general jurisdiction[1]. However despite such its "independence", arbitration court is in close cooperation with the courts of general jurisdiction, which is manifested firstly in the need to obtain a state court decision on granting an executive document to enforce arbitration awards (here we can talk about certain dependency or subordination of arbitration courts to state courts), and, secondly, the legal ramifications of arbitration courts adopted on the dispute between the same parties on the same subject and on the same grounds as the matter of the proceedings which opened in the court of general jurisdiction.

2. THE IMPORTANCE OF ARBITRATION AWARDS WHEN CONSIDERING IDENTICAL CASE IN THE STATE COURT

Under the civil procedural legislation of Ukraine, as a general rule, the retrial of the same case is not allowed not only in the same or another arbitration court, but in the court of general jurisdiction either, if during the consideration and resolution of civil cases by the court of general jurisdiction it is found that the dispute between the same parties on the same subject and on the same grounds has already been the subject of arbitration and the examination completed decision on the stated requirements' merits.

The existence in civil proceedings of the requirement on identical case in a court of law reconsideration after its consideration and adjudication in arbitration court impossibility has been explained by researches in such a way that arbitration awards in their essence are the same acts with the courts of general jurisdiction decisions, so that as the latter they can be executed on the basis of the writ issued by the state court, not the arbitral tribunal[2], as well. So that arbitration award as well as the decision of the

[1] The Constitutional Court of Ukraine decision of January 10, 2008 № 1-rn/2008 in the case of the constitutional petition of 51 Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of the provisions of paragraphs 7, 11 of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII «Tertiary government "Law of Ukraine" on Arbitration Courts "(right of the task of the arbitral tribunal). // Bulletin of the Constitutional Court of Ukraine. – 2008. – № 1. – P. 40-41.

[2] Pushkar Y. On the closure of the proceedings in civil matters / Eugene Pushkar // Soviet law. – 1968. – № 2. - P. 34.

courts of general jurisdiction, while coming into force, acquires such attribute as exclusiveness, which prevents reconsideration of identical lawsuits in the court of law, particularly in the state court[3].

It should be noted that, according to the Civil Procedural Code of Ukraine (hereinafter – the CPC of Ukraine), inability of identical case by a court of law reconsideration after its consideration and decision by the arbitral tribunal can be expressed in two forms: in the form of the decision on the proceedings refusal adoption (paragraph 4 of Part 2 of Art. 122 CPC of Ukraine) or in the form of the proceedings closing (paragraph 5 of Part 1 of Art. 205 CPC of Ukraine). The difference between these two forms lies only in timeframes of finding out by a court of law the existence of arbitration awards in identical lawsuit, as long as the effects they have are common – the inability to reapply with identical request to the court of general jurisdiction (Part 7 of Art. 122 and Part 2 of Art. 205 CPC of Ukraine). This means that in accordance with the CPC of Ukraine provisions in the case of detection by a court of general jurisdiction of arbitration awards issued with regard to the dispute between the same parties on the same subject and on the same grounds as stated in the lawsuit, filed in the state court while deciding the issue on the opening of proceedings in a civil case, the court has to refuse in its opening (Section 4 Part 2 of Art. 122 CPC of Ukraine), on the other hand in the case of detection of such a decision after the enactment of the decree on the proceedings in civil case opening – to finish the case without deciding the dispute on merits in the form of closing the proceedings in the civil case (paragraph 5 of Part 1 of Art. 205 CPC of Ukraine).

According to the jurisprudence, frequently the court of law becomes aware of the arbitration awards in identical lawsuit existence only after the opening of proceedings in the civil case, due to the fact that the source of this information is the same defendant in the case, which is in the proceeding of the state court, so that he is the most interested not to undergo the same procedure for the second time. The abovementioned can explain the fact that the percentage availability of arbitration awards in identical lawsuit

[3] Borysova V.F. Institution of civil proceedings / ed. Doctor of Law, Professor, Honored Worker of Science M.A.Vikut / Borysova Victoria Fedorovna. – M.: Yurlitinform 2009. – P. 108.

prevails in using it as a reason for closing the civil proceedings, rather than failure to initiate proceedings in the case (however, in order to inform the court of law about the existence of such a decision the defendant himself has to be informed of the presence in the proceedings of the court of general jurisdiction of the similar case, and this will be possible only after the court has rendered an award on opening the proceedings in civil case).

Application by the court of such reasons as availability of arbitration awards, received within its competence, of the dispute between the same parties on the same subject and the same reason to close the proceedings, according to the rules of Ukrainian civil procedural law attests not only about the illegitimacy of the process in the absence of a plaintiff's right to appeal to the court for consideration and decision of the case in civil proceedings (as it would be in the event of a court in proceedings for this reason), but the correction the court mistake admitted under opening of proceedings.

3. TERMS OF CLOSING THE PROCEEDINGS IN CIVIL CASE OWING TO THE PRESENCE OF ARBITRATION AWARD MADE ON IDENTICAL LAWSUIT

The fact of arbitration award existence is not enough to close the proceedings in civil litigation, it is necessary for all conditions of this provision admissibility under paragraph 5 of Part 1 of Art. 205 CPC of Ukraine to be in conjunction. Above all, there has to be the coincidence in the case, in which the arbitration award has been made, and a civil case that is being heard in a court of general jurisdiction, the parties, the subject of the appeal and the grounds and the conformity of the award made by arbitration court of its jurisdiction.

As to the first condition, it should be noted that the court may close the proceedings on the grounds provided by Section 5 of Part 1 of Art. 205 CPC of Ukraine, only when it has no doubt that the arbitration award on the dispute between the same parties on the same subject and the same reason as in the case, which is being heard by this court. Change of at least one of these three elements of identity prevents the use of Section 5 of Part 1 of Art. 205 CPC of Ukraine, and, consequently, the closure of the proceedings.

Expressed by scholars' observation, that nevertheless while formulating the abovementioned ground for civil proceedings closure attachment of parties, object and grounds should be made to the dispute, but it should be remembered that these elements (object, reason demands and sides) are the way of distinction of a lawsuit, not a dispute should be admitted as correct[4].

In the scientific literature the subject to a lawsuit is commonly understood as the specific substantive requirements expressed by interested person (the plaintiff) and the defendant regarding whom the court has to make a decision[5], and under the cause of action – the factual circumstances of the case for the plaintiff's demands reasoning[6].

In order to make possible for the court to allow proceedings in the certain case closure due to the presence of arbitration awards in identical lawsuit, it is necessary to identity between the suit, which was considered by the arbitration court and lawsuit pending in a court of law, not only persisted on the subject and grounds, but on parties to such lawsuits as well. However, in the event of a parties' subject composition change we cannot talk about keeping the identity of lawsuits.

Nevertheless, according to the rules of civil judicature in certain cases, the identity of lawsuits is maintained even when the actual subjective composition of the dispute parties has been changed. In particular, according to the identity of subject composition is maintained in case of succession[7], as successor replaces the previous person and all procedural actions taken

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[4] Shyrokopoyas Y.A. Acts of general jurisdiction of the end of the proceedings without a judicial decision: Author. dis. on scientific. Ph.D. degree. jurid. Sciences. : Spec. 12. 00.15 "Civil process; arbitration process" / Y.A. Shirokopoyas. – Saratov, 2006. – P. 13.

[5] Senyk S.V. Civil procedural law: studies. manual / S.V. Senyk, R. J. Lemyk. – Lviv: Publishing Center of Ivan Franko Lviv National University, 2010. – P. 142; Solovyova T.V. Return claim in civil proceedings / Tatyana Solovyova. – Saratov: Izd HPE "Saratov State Academy of Law", 2008. – P. 129

[6] Senyk S.V. Civil procedural law: studies. manual / S.V. Senyk, R. J. Lemyk. – Lviv: Publishing Center of Ivan Franko Lviv National University, 2010. – P. 143; Shimanovich O. Legal force of court decision / Olga Shimanovich // Enterprise, economy and right. – 2004. – № 10. – P. 99.

[7] Baranov I.V. On the basis of a civil proceedings / Ivan V. Baranov // Arbitration and civil procedure. – 2005. – № 5. – P. 10; Borisov V.F. Institution of civil proceedings [ed. doctor jurid. Sciences, prof., deserved. Worker of Science MA Vikut] / Victoria F. Borisov. - M.: Yurlitinform 2009. – P. 103; Action proceedings: monograph / V. Ko-

by the previous person, are necessary for him[8], when prosecutor, public authorities, local governments, individuals and legal entities refer to court to protect rights, freedoms and interests of others, if there is a decision out of the request of the disputed relationship subject[9], etc.

In our opinion, the sole match of parties, subject matter and cause of action is not enough for the court to close the proceedings in connection of arbitration awards existence, as such that adopted by identical lawsuit, the match of lawsuits' content (type of remedy requested by the plaintiff) in the lawsuit that was the subject of the arbitrary, and by which a decision, and the lawsuit that is pending in a court of general jurisdiction is necessary as well.

Thus, as it is correctly emphasized by R. Havrik, only a simultaneous match of the lawsuit elements (contents, grounds and subject of the lawsuit) would mean an identity of the law suit in general and, accordingly, inability of its re-submit[10].

Basing on literal interpretation of paragraph 5 of Part 1 of Art. 205 CPC of Ukraine, the court may admit the closing of the proceedings for this reason not only because of the arbitration awards, adopted on the dispute between the same parties on the same subject and the same reason, presence but merely when such an award would have been made by the arbitrary within its competence. As such the court of general jurisdiction can answer to the question of presence or lack of arbitrary competence

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marov, D. Luspenyk, P. Radchenko et al., Ed. Vladimir Komarov. – H.: Right, 2011. – P. 424.

[8] Civil Procedural Law: Textbook. / Under total. Ed. prof. L.V. Tumanova. – M.: TC Welby, Izd Prospectus 2008. – P. 276; Senyk S.V. Civil procedural law: studies. manual / S.V. Senyk, R. J. Lemyk. – Lviv: Publishing Center of Ivan Franko Lviv National University, 2010. – P. 170.

[9] Baranov I.V. On the basis of a civil proceedings / Ivan V. Baranov // Arbitration and civil procedure. – 2005. – № 5. – P. 10; Borisova V.F. Institution of civil proceedings [ed. doctor jurid. Sciences, prof., deserved. Worker of Science M.A. Vikut] / Victoria F. Borisova. – M.: Yurlitinform 2009. – P. 103; Senyk S.V. Civil procedural law: studies. manual / S.V. Senyk, R. J. Lemyk. – Lviv: Publishing Center of Ivan Franko Lviv National University, 2010. – P. 170; Solovyova T. Return claim in civil proceedings / Tatyana Solovyova. – Saratov: Izd HPE "Saratov State Academy of Law", 2008. – P. 131.

[10] Havrik R. Exceptualityl as the judgment, which came into force, property in the civil case / Roman Havrik // Registered Ukraine. – 2010. – № 6. - P. 80.

for consideration of the certain case only after investigating terms of the certain arbitration agreement.

It should be noted that in such a prescription of Section 5 of Part 1 of Art. 205 CPC of Ukraine is seen certain dual control of arbitrary competence for consideration of the case, because, in accordance with Part 1 of Art. 27 of the Law of Ukraine "On arbitration courts", the arbitrary in compliance with the requirements of this Act, decides the question of the presence or lack of jurisdiction to review the case by itself. This means that primary enforcement jurisdiction of arbitrary to hear a particular case carries the arbitrary by itself, because if the arbitrary concludes its review regarding the impossibility of a particular dispute consideration due to lack of its jurisdiction, it has to close the case with making on this issue the appropriate decision (paragraph 5, 6 of Art. 27 of the Law of Ukraine "On arbitration courts").

4. EXEPTIONS TO THE RULE OF INADMISSIBILITY OF RETRIAL IN CASE OF ARBITRATION AWARDS RENDERED BY IDENTICAL CLAIM

As we have already noted, as a general rule, in the case of making by an arbitration court an award and its further entry into force (by the way, the Law of Ukraine "On arbitration courts" does not define the point at which the arbitration award is to enter into force, on the contrary the scientific literature advocates the position that this moment is the time of its proclamation, if a later date has not been set by the rules of the court or agreement of the parties[11]), the person may not reapply identical lawsuit in a court of general jurisdiction. However, paragraph 5 of Part 1 of Art. 205 CPC of Ukraine provides two exceptions to this rule. Thus, despite the availability of arbitration awards in identical lawsuit, it is possible to claim to resolve the dispute in court of law firstly, when court refused to issue a writ of execution for the enforcement of the arbitrary or, secondly, it has returned the matter back for a new trial before the arbitrary, which made an award, however, the proceedings in the same arbitration court was impossible.

[11] Law of Ukraine "On Arbitration Courts": Scientific and practical commentary / [P. Kuftyryev V., V.I. Nahnybida, R.O. Stefanchuk et al.], For the Society. eds. V. Belousov and V.P. Kuftyryeva. – K.: Legal Unity, 2008. - P. 204.

As to the first exception, the procedure for issuance of a writ of execution for the arbitration awards enforcement is regulated by the norms of the Law of Ukraine "On arbitration courts" (Art. 56), and norms of CPC of Ukraine, in particular, chapter 2, section VII[1] CPC of Ukraine (Articles 389[7]–389[11] CPC of Ukraine).

Thus, according to Art. 56 of the Law of Ukraine "On arbitration courts" application for issuance of an enforcement document may be submitted to the competent court within three years from the date of the decision by the arbitration court. Such application is to be heard by a competent court within 15 days of its receipt by the court. The parties are to be reported about time and place of the application, but the absence of the parties or of one of them does not preclude court hearing of the applications.

While considering the application for issuance of an enforcement document the competent court has to request the civil case, which has to be addressed to the competent court within five days from the date the request is received, from permanent arbitrary. In this case, the term to solve the application for an enforcement document issuance has to be extended up to one month.

According to Art. 389[10] CPC of Ukraine and paragraph 6. 56 of the Law of Ukraine "On arbitration courts" court dismisses the application for the issuance of an enforcement document if:

1. at the date of the decision on the application to issue an enforcement document adoption arbitration award has been canceled by a competent court of law;
2. the case, decision in which has been adopted by the arbitration court out of its competence in accordance with law;
3. deadline for application for the issuance of an enforcement document established in this Article has been omitted and the reasons for its admission were not considered valid by a court of law;
4. arbitration award has been made in the dispute, not provided by the arbitration agreement or the decision has solved issues that go beyond the arbitration agreement. If the decision of the arbitration court resolved the issues that go beyond the arbitration agreement, it can be canceled only that part of the decision relating to issues that go beyond the arbitration agreement;

5. arbitration agreement has been declared invalid by a competent court;

6. composition of the arbitration court, which has made an award, does not comply with the requirements of articles of the Law of Ukraine "On arbitration courts";

7. arbitration awards has the means of protecting rights and interests that are not covered by the laws of Ukraine;

8. permanent arbitration court had failed to request the appropriate case to the competent court of law;

9. arbitration court decided the question on the rights and obligations of persons not involved in the case.

Court's ruling on refusal to issue an enforcement document, unless it was challenged in appeal, has to come into force after the expiration of the terms to appeal challenge. If one challenges a ruling of the competent court of law in appeal, it is to enter into force after consideration of the case by the appellate court.

Parties have the right to challenge on appeal the competent court ruling on refusing to issue an enforcement document within 15 days after its raising this ruling. After the entry into force of the ruling on refusing to issue an enforcement document, the dispute between the parties may be settled by a competent court of law in a general manner.

As to the second exception – returning by the state court case for a new trial before the arbitration court, which had made a decision when the proceedings in the same arbitration court was impossible, it is necessary to agree with the comments made by the authors of scientific and practical commentary on the CPC of Ukraine, that this provision of Section 5 of Part 1 of Art. 205 CPC of Ukraine from a practical point of view can be applied because such powers as returning the case for a new trial before the arbitration court, which has made a decision cannot be included to the competence of the courts of general jurisdiction[12].

On the provisions of Part 6 of Art. 389^4 CPC of Ukraine upon consideration of the application for setting aside of the arbitration court or the

[12] "Civil Procedural Code of Ukraine". Scientific and Practical Commentary As of 01.01.2012 / under total. eds. Bohatyr V. – K. "Publishing house" Professional ", 2012. – P. 282.

court may render a ruling to reject the application and leave the decision of the arbitration court decision and on full or partial cancellation of the decision of the arbitration court as well.

As to the procedure of appeal and setting aside of the arbitral tribunal, it is settled by the norms of the Law of Ukraine "On arbitration courts" (Art. 51), and norms of the CPC of Ukraine, in particular Chapter 1, section VII[1] of CPC of Ukraine (Art. 389[1]–389[6] CPC of Ukraine) as well.

Thus, in accordance with Art. 51 of the Law of Ukraine "On arbitration courts" and Art. 389[5] CPC of Ukraine, a statement of cancellation arbitration awards may be submitted to the competent court, the parties, third parties within three months from the date of the decision by the arbitration court, and persons who are not involved in the case, if the arbitration court had decided the question of their rights and responsibilities – within three months from the day when they found out or should have known about the arbitration award.

The arbitration award can be appealed and canceled only for the following reasons:

1. the case, decision on which has been made by the arbitration court, is out of its competence in accordance with the Law of Ukraine "On arbitration courts";
2. arbitration awards made in the dispute, not provided by the arbitration agreement or the decision addressed issues that go beyond the arbitration agreement. If the decision of the arbitration court resolved the issues that go beyond the arbitration agreement, it can be canceled only that part of the decision relating to issues that go beyond the arbitration agreement;
3. arbitration agreement declared invalid by a competent court of law;
4. composition of the arbitration court, which has made an award, does not comply with the requirements of articles of the Law of Ukraine "On arbitration courts";
5. arbitration court decided the question of the rights and obligations of persons not involved in the case.

Canceling the arbitration award by the court of law does not deprive parties of the right to re-apply to the arbitration court, except the cases provided by law (Part 3. 389[5] CPC of Ukraine). Furthermore, the law of Ukraine "On arbitration courts" notes that after the abolition of arbitration awards dispute cannot be a subject to further review in arbitration courts

only if a cancellation was: 1) due to the recognition of a competent court invalidate the arbitration agreement, and 2) because the decision adopted in dispute, not provided for the arbitration agreement, or the decision addressed issues beyond the arbitration agreement, or 3) a decision taken in the case is out of the arbitral tribunal jurisdiction.

Therefore, in the case of total or partial cancellation of arbitration awards, only the most interested person determines whether to apply it to a new trial before the arbitration court for the same requirement or not, but in any case, it is unable to be resolved by the court of law. If this party is willing to re-apply with the same dispute to arbitration court for a new trial, then, according to the Law of Ukraine "On arbitration courts", it may act in such a way only in the event that arbitration award for her previous claim was reversed by the court of general jurisdiction on the grounds: composition of the arbitration court, which has made an award, does not comply with the requirements of articles of the Law of Ukraine "On arbitration courts" or the arbitration court has decided the question of the rights and obligations of persons not involved in the case.

In this perspective, perceived need to harmonize the provisions of this paragraph 5 of Part 1 of Art. 205 CPC of Ukraine and other rules of the CPC of Ukraine, and in particular the words "remanded for a new trial before the arbitration court, which decided, but the proceedings in the same arbitration court appeared to be impossible" to replace the words "canceled the decision of the arbitration court and the case is same arbitration court appeared to be impossible".

5. CONCLUSION

Despite the isolation of arbitration court from the courts of general jurisdiction, the decision taken by the arbitration court has a direct impact on the proceedings in state court, in that case, if it is taken within its jurisdiction, between the same parties on the same subject and the same reason, because in this case the court of general jurisdiction, in accordance with national law, depending on the timing of detection of such circumstances must either refuse to initiate proceedings or discontinue the proceedings,

which has been before it without dispute, holding the ruling to close the proceedings.

However, to refuse to open or close the proceedings in connection with the presence of arbitration awards, such as that adopted by identical claim, the sole match of parties, subject matter and cause of action is not enough for the court to close the proceedings in connection of arbitration awards existence, as such that adopted by identical lawsuit, the match of lawsuits' content (type of remedy requested by the plaintiff) in the lawsuit that was the subject of the arbitrary, and by which a decision, and the lawsuit that is pending in a court of general jurisdiction is necessary as well.

Returning by the state court case for a new trial before the arbitration court, which had made a decision when the proceedings in the same arbitration court were impossible, as an exception to the provisions under Section 5 of Part 1 of Art. 205 CPC of Ukraine, has no practical application, because it is consistent with other provisions of the national legislation and regulations of CPC of Ukraine and the Law of Ukraine "On arbitration courts."

That is why, summing up all the abovementioned, we propose to change the provision of Section 5 of Paragraph 1 of Art. 205 CPC of Ukraine statement and to present it as follows: "there exists arbitration awards that are taken within its jurisdiction, between the same parties on the same subject on the same grounds, except when the court refused to issue a writ of execution to enforce decision of the arbitral tribunal or the arbitral tribunal overturned the decision and proceedings in the same arbitration court was impossible".

SUMMARY

The article investigates the issue of legal procedural significance of arbitration awards in civil proceedings, in particular, terms of closing the proceedings in civil case owing to the presence of arbitration award made on identical lawsuit on the dispute between the same parties on the same subject and the same reason as in the case, which is being heard by the court of general jurisdiction have been analyzed. The author analyses loopholes of investigated problem legal regulation and proposes to eliminate them as well.