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Bribery of an Arbitrator (Arbitral Referee): Criminal Characteristics

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Abstract. In 2020, Chapter 22 of the Criminal Code of the Russian Federation was amended by Article 200.7, stipulating liability of arbitrators (arbitral referees) for corruption-related crimes. Such a decision of the law-maker is differently weighed by criminalists, namely, given that the object under protection is referred to the sphere of economics. Although, the explanation of this approach is connected with the fact that the activities of arbitrators, though performed within the system of justice, meaningfully affects a complicated network of relations in the economic sphere.
The article thoroughly analyzes the proposals on criminalization of illicit activities of arbitrators both in Russia and on the international level and in foreign states, gives examples of relevant case-law of those countries where such norms are applied.
The authors elaborate a detailed criminal and legal characteristics of the analyzed deed, revealing the features of all its elements, including the rights and obligations violated by arbitrators which are enshrined in the blanket legislation (first and foremost, in the Federal Law "On Arbitration Tribunals in the Russian Federation"), evaluative features of elements of a crime, a moment of accomplishment of a crime, setting up a correspondence between the elements of a subject and legal provisions of sector specific legislation etc.
Based on the analysis of the case-law on related elements of a crime: bribes, commercial bribe, the article proposes solutions of the problems which will definitely occur in determination of a deed. In particular, given that an arbitration tribunal considers a dispute by three arbitrators, with every one of them participating in making an arbitration award, the authors point out, which exactly actions one arbitrator should perform as a subject of passive bribery and how an issue on determination will be solved if all three arbitrators are bribed.

Keywords: criminal liability, arbitrator, corruption-related crimes, bribery, arbitration award.

Research area: law.

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Подкуп арбитра (третейского судьи): уголовно-правовая характеристика

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Аннотация. В 2020 г. глава 22 Уголовного кодекса РФ дополнена статьей, предусматривающей ответственность арбитров (третейских судей) за коррупционные преступления. Такое решение законодателя по-разному оценивается криминалистами, в том числе ввиду отнесения объекта охраны к сфере экономической деятельности. Однако объяснение такого подхода связано с тем, что деятельность арбитров хотя и осуществляется в системе правосудия, однако содержательно влияет на сложный комплекс отношений в области хозяйствования.

В статье подробно анализируются предложения о криминализации неправомерной деятельности третейских судей как в России, так и на международном уровне, в зарубежных странах, приводятся примеры из судебной практики тех стран, где существуют аналогичные нормы.

Авторы разрабатывают подробную уголовно-правовую характеристику анализируемого деяния, раскрывая признаки всех его элементов, в том числе нарушаемые арбитрами права и обязанности, закрепленные бланкетным законодательством (в первую очередь Федеральным законом «О третейских судах в Российской Федерации»), оценочные признаки состава, момент окончания преступления, установления соответствия признаков субъекта положениям отраслевого законодательства и др.

На основе анализа судебной практики по смежным составам преступления – взятки, коммерческого подкупа – предлагаются решения проблем, которые неизбежно возникнут при квалификации деяния. В частности, с учетом того, что дела в третейском суде рассматриваются тремя судьями, каждый из которых участвует в принятии решения, авторы указывают, какие именно действия должен совершать один арбитр как субъект пассивного подкупа и как будет решаться вопрос квалификации, если подкуплены все трое третейских судей.

Ключевые слова: уголовная ответственность, арбитр, коррупционные преступления, взяточничество, подкуп арбитра.

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Introduction. One of the most vivid indicators of the intention of a state to prevent any manifestations of corruption imply numerous changes in the legislation permanently extending the scope of criminal liability for illegal gratification of executive officers, persons discharging managerial functions in a profit-making organization and some other categories of persons

for performance (ommission) of actions in the course of exercise of their powers.

As testimony to the above trend those included:

- Supplementing a group of legal rules on liability for corrupt business practices and bribery (Articles 204, 290 and 291 of the Criminal Code of the Russian Federation) with articles on mediation in corrupt business practices and small-scale corrupt business practices, and on mediation in bribery and small-scale bribery (Articles 204.1, 204.2, 291.1 and 291.2 of the Criminal Code of the Russian Federation);
- Criminalization of bribery of a contract employee, contract executive manager, member of a procurement commission (Article 200.5 of the Criminal Code of the Russian Federation);
- Criminalization of bribery of an arbitrator (arbitral referee) (Article 200.7 of the Criminal Code of the Russian Federation).

Statement of the problem. The reforming has least of all touched upon Article 184 of the Criminal Code of the Russian Federation envisaging criminal liability for exerting influence on the results of professional sport competitions or entertainment profit-making contests. Over the last 25 years of history of this legal provision, it has been amended twice – to correct a title, to introduce a part on mediation and specify in a footnote conditions to discharge from responsibility.

Based on the records of the Judicial Department of the Supreme Court of the Russian Federation, data from legal reference systems and the Internet-based resource "Judicial and Normative Legal Acts of the Russian Federation (sudact.ru), it should be concluded that the above legal provision was absolutely deadborn – between 2012 and 2020 no person[1] was convicted under that legal provision, it was not possible to find earlier or later judgments either. Assuming that the findings of journalist investigations are true[2], the latency of crimes is absolute.

Before proceeding to the analysis of the criminal legal characteristics of bribery of an arbitrator (arbitral referee), one should uphold the conclusion on systematic shortcomings evincing in supplementing of the criminal law with the analyzed legal provision.

Thus, on evaluating a legislative decision to supplement the law with a legal provision on bribery of an arbitrator, A. V. Ivanchin pointed at:

– inconsistency of a law-maker in questions of inclusion of the elements of giving and taking of a bribe in a single article, as it was done in Articles 184, 204 and 200.5 of the Criminal Code of the Russian Federation as opposed to division into separate articles in respect to giving and taking of a bribe;

– similar incoherence in respect to the institute of mediation, because in certain elements it was singled out in a separate article (for example, Article 291.1 of the Criminal Code of the Russian Federation), in others – it was included in one of the parts of the article (for example, Article 184, Part 5 of the Criminal Code of the Russian Federation), in the new one – it was missing at all, whereupon the institute of accomplice should be used for criminal and legal evaluation of a relevant act;

– absence – once again in violation of logical supplement of the criminal law with legal rules on small-scale bribery and minor corrupt business practices – of liability for small-scale bribery of an arbitrator (Ivanchin, 2020).

A. N. Kameneva partially upholds the proposals to "single out" giving to and taking a bribe by an arbitrator likewise the appearance of a separate legal provision on mediation, on the whole positively evaluating the elements of crime introduced by the law-maker (Kameneva, 2021).

Although, the fact of imposition of criminal liability for arbitrators in the absence of law-based guarantees of their independence and security, which protect government judges, is evaluated controversially, because "there is no official data that the cases of receiving illegal gratifications by arbitrators occur widely (and especially in the "post-reform" period) while there are risks of ungrounded instigation of criminal cases against arbitrators in the

[1] Judicial Statistics on Corruption-Related Cases, Judicial Department at the Supreme Court of the Russian Federation. Available at: http://www.cdep.ru/index.php?id=150

[2] Tricking with Bets: "Leaks" of Rigged Matches – All Schemes and Disclosure. Details on the "Chempionat"]. available at: https://www.championat.com/bets/article-3719927-razvod-v-stavkah-na-sport-sliv-dogovornyh-matchej—-shemy-i-razoblachenie.html?utm_source=copypaste (in Rus.)

above described circumstances, and they are quite substantial" (Il'ichev, Savranskii, 2020).

It appears that such concerns should not prevent from execution of legislative initiatives on imposition of liability for these or those socially dangerous acts. Although, the question on criminalization of such acts is not expressly solved throughout the world.

For example, in the United Arab Emirates the effective criminal liability of arbitrators for taking a bribe enshrined in Article 257 of the Penal Code was excluded in 2018, obviously, due to unfavourable "arbitral climate" in the country in view of possible criminal liability of arbitral referees[3].

At the same time, in Great Britain, which is considered to be one of the most often chosen jurisdictions for dispute settlement, criminal liability of arbitrators is provided for widely enough – both by common rules (fraud[4], breach of confidence in relation to entrusted information, bribery), and special rules. However, only a few such cases are reported in the literature, therefore, it is difficult to find relevant practice, because the parties choose an arbitrator, based on his/her high moral and ethical personal features[5].

Criminal liability is envisaged in other countries too. Thus, in the Republic of Colombia and Federative Republic of Brazil arbitral referees, in the context of criminal legislation, are equated with government judges and, for example, Article 269 of the Penal Code of the Argentine Republic specifically states which parts of the article apply to, particularly, arbitrators[6].

Therefore, the legislation of foreign countries is not uniform in terms of criminalization of this deed, on the whole, and singling it out into a separate legal provision, in particular. Naturally, the countries which are interested in popularization of their jurisdictions chosen for arbitration agreements try to minimize criminal risks because they complicate the procedure of selection of arbitrators and formation of an arbitral panel (for example, the UAE). Although, those countries, where this institute is nevertheless widely used, on the contrary, strengthen the guarantees of honesty and impartiality of arbitrators, applying more criminal legal provisions to them (for example, Great Britain).

Corpus Delicti. By Article 200.7 "Bribery of an Arbitrator (Arbitral Referee)" the Criminal Code of the Russian Federation is supplemented with Federal Law No. 352-FZ dd. 27.10.2020 and, pursuant to the Explanatory Report[7] to the draft law, it resulted from execution of requirements of the Additional Protocol of 2003[8] to the Council of Europe Convention on Criminal Law Convention on Corruption of January 27, 1999[9]. In spite of the fact that the Protocol had been just signed, it was not however ratified by the Russian Federation within the third evaluation by the international organization GRECO (Group of States against Corruption) of fulfillment by Russia of provisions of the Convention, in the domestic legislation numerous recommendations were given, in particular, on criminalization of bribery of national and foreign arbitrators.

The content of the **object** of the analyzed deed became a matter of discussion, which some of participants ignored a circumstance that in the course of definition of this element of the act in question, one should take into account the provisions of the civil procedural law as a branch positively regulating relations,

[3] Criminal Liability of Arbitrators Repealed in the UAE. Available at: https://www.jdsupra.com/legalnews/criminal-liability-of-arbitrators-69719/ (accessed August 8, 2021).

[4] Thus, for example, one of the three arbitrators was charged with fraud committed by a group of persons in the case of Bernard Tapie for own actions in his favour as agreed with his lawyer. The Arbitrator's Liability Report (2017). In Le club de jurists, Ad hoc committee, Paris, 45.

[5] Le The Arbitrator's Liability Report (2017). In Le club de jurists, Ad hoc committee, Paris, 39, 114.

[6] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000–19999/16546/texact.htm#25 (accessed August 8, 2021).

[7] Legislative Activities Support System, Draft law 931211–7 On Amendments to the Criminal Code of the Russian Federation and Article 151 of the Code of Criminal Procedure of the Russian Federation, available at: https://sozd.duma.gov.ru/bill/931211–7

[8] Presidential Decree 158-rp of March 16, 2009 On Signature of the Additional Protocol to the Criminal Law Convention on Corruption, In Collected Legislation of the Russian Federation, 12, Article 1419.

[9] Ratified by the Russian Federation in 2006. Federal Law 125-FZ of July 25, 2006 On Ratification of the Criminal Law Convention on Corruption, In Collected Legislation of the Russian Federation, 31 (1 part), Article 3424).

which were protected by application and threat of application of the commented criminal legal provision.

Thus, some authors point out that "inclusion of this article in Chapter 22 of the Criminal Code of the Russian Federation is not justified so far as the crime obviously infringe the interests of justice, and therefore the main direct object of the crime concerned could be defined as social relations ensuring the interests of lawful and just arbitration (arbitral) proceedings" (Esakov, 2021). Although, one should address, first and foremost, the legal nature of the institute of arbitrators in the Russian Federation in order to understand whether it can refer to infringement on justice in case of bribery of an arbitrator.

Articles 2 through 4 of the abovementioned Additional Protocol focus on active and passive bribery of domestic and foreign arbitrators (i.e., on giving and taking of a bribe). Here, an arbitrator shall be understood as a person by reference to the national law of the State Parties, but shall in any case include a person who by virtue of an arbitration agreement is called upon to render a legally binding decision in a dispute submitted to him/her by the parties to the agreement (Article 1, part 1 of the Additional Protocol). The above GRECO Report dated March 22, 2012, contained recommendations in point 69, and recommendation "ii" was directly dedicated to arbitrators[10]. At the same time, the first Report of the Russian Federation[11], adopted by GRECO on 16–20 June, 2014, the Russian representatives referred, first of all, to the draft Federal Law "On Introduction of Amendments to Legislative Acts of the Russian Federation for the purposes of strengthening of liability for corruption" elaborated by the Prosecutor General's Office of the Russian Federation, considered at an on-site meeting of the Committee of the State Duma on Security and Combating Corruption, and which was at that time "a matter of public discussion where it was proposed to supplement the Criminal Code of the Russian Federation with Article 202.2 (point 13 of the Report). It quoted the text of the draft law which was close to the existing version, although it offered to criminalize a proposal to take or promise to give money, securities and etc. to an arbitrator, and also an agreement of an arbitrator to take the above property assets.

In the same Report, Russia referred to the draft federal law which would supplement a note to Article 285 (abuse of official powers) of the Criminal Code of the Russian Federation with point 6 stating as follows: "6. For the purposes of application of Articles 290, 291, 291.1 and 304 of this Code, an official should be understood as an arbitrator (arbitral referee), considering a dispute in compliance with the legislation of the Russian Federation on arbitral tribunals and international commercial arbitration". It also specified that Article 290 of the Criminal Code of the Russian Federation would be supplemented with point 3, intended to state that "a crime envisaged by part 1 of that Article shall be considered to be committed by an arbitrator (arbitral referee) in case of taking by him/her personally or through a mediator of a bribe in the form of money, securities, other property or in the form of illegal provision of property-related services, illegal entitlement of other property rights for commission of actions (omission) in the interests of a giver or persons he/she presented within the framework of discharge of functions of an arbitrator (arbitral referee) in a particular case".

Considering the fact, that none of the draft laws at that time had been submitted to the State Duma, the recommendation was not accepted as being fulfilled. In 2016, the second Report on fulfillment of recommendations was issued[12], stating adopted and effective laws connected with organization of activities of arbitral tribunals aimed at creation of legal framework for criminalization of bribery of arbitrators (point 9 of the Report). Although, it specified that despite the previous position, the bribery of arbitrators would not be criminalized within the Chapter on Crimes against Civil Service, instead, Article 202 of the Criminal

[10] Evaluation Report on the Russian Federation Incriminations (ETS 173 and 191, GPC 2) (Theme I), available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

[11] GRECO RC–III (2014) 1E, available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

[12] GrecoRC 3(2016)9, available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

Code "Abuse of authority by private notaries and auditors" and Article 204 of the Criminal Code "Bribery in a profit-making organization" would be expanded in view to spread their action to cover arbitrators (arbitral referees), including foreign ones. Such a draft law was indeed submitted to the State Duma [13], whereby GRECO admitted the recommendation to have been partially fulfilled. Although, the draft law was returned by the relevant committee of the State Duma to the subject of the right of legislative initiative to comply with the rules and provisions of the Constitution of the Russian Federation (Article 104) and Regulations of the State Duma of the Russian Federation (Article 105) dd. 23.05.2017.

In 2018 after sharing of additional information between the parties, the Annexes were elaborated to the Second Compliance Report [14], stating that on July 24, 2017 draft Federal Law No. 232807–7 "On Amendments to the Criminal Code of the Russian Federation" was registered to strengthen the liability for corruption", which further amended Articles 202 and 204 of the Criminal Code of the Russian Federation.

The draft law was excluded from consideration because it was revoked by the subject with the right of legislative initiative. At that, an official revocation of the Government of the Russian Federation published on November 25, 2017 stated that the Government did not uphold the draft law in the presented revision. In support of that two arguments were made. First, all above-considered draft laws contained as an addition of the subject matter (for all corruption-related crimes) with non-profitmaking services, which, according to the Government, could lead to complications connected with evaluation of the amount of gratification and problems in the law-enforcement practice.

Although, of the utmost interest is an argument based on the fact that the indication mentioned in the draft law on actions (omission) falling within the office duties of an arbitrator (arbitral referee), will lead to the formation of ambiguous law-enforcement practice due to the fact that office duties of these persons are not defined by the Federal Law "On Arbitration (Arbitral Tribunal) of the Russian Federation.

Finally, on March 26, 2020, Federal Law No. 931211–7 "On Amendments to the Criminal Law of the Russian Federation" and Article 151 of the Code of Criminal Procedure of the Russian Federation (with respect to imposition of liability of arbitrators (arbitral referees) for corruption)" was registered in the Russian State Duma. After its numerous discussions and technical modifications, on October 27, 2020, by Federal Law No. 352-FZ Article 200.7 of the Criminal Code was added to Chapter 22 "Crimes in the Sphere of Economics".

Pursuant to Article 31 of the Federal Law "On Arbitrators in the Russian Federation", the parties who have concluded an arbitration agreement shall assume responsibility to **voluntarily** execute an arbitral award. In professional literature, therefore, arbitral tribunals are denied to be referred to the bodies administering public justice.

The substantiation of that lies, first of all, in "significant differences in the reasons for origination of terms of reference of arbitrators and government judges, and also in procedures and legal results of arbitration proceedings" (Mezhdunarodnyi…, 2018). The key differences are indicated below, in particular:

- Imperative initiation of procedural form of government proceedings, at the same time when basically the parties participate in the arbitration;
- Absence of delegation of a public and procedural function for administration of justice by the government;
- Determination of the nature of an arbitration agreement as a private procedural agreement;
- Significant difference of the legal force of an arbitral award from acts of state courts.

Such an approach is quite widespread in the doctrine. Thus, it is rightfully to argue that arbitration proceedings is a private form of law-enforcement and arbitration tribunals are not included in the government system of justice

[13] Draft Law 3633–7 On Amendments to the Criminal Code of the Russian Federation and Code of Criminal Procedure of the Russian Federation for the Purposes of Strengthening of Liability for Corruption, registered on 11.10.2016, available at: https://sozd.duma.gov.ru/bill/3633–7

[14] GrecoRC 3(2018)5, available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

which results from their legal nature (Iarkov, 2020), and also arbitration tribunals (arbitrages) are not included in the government judicial system and cannot administer justice which is a prerogative of government courts (Ruzakova, Gaifutdinova, (2018).

The Constitutional Court of the Russian Federation also highlighted that arbitration tribunals do not execute government (judicial) powers and are not included in the judicial system of the Russian Federation consisting of government courts[15]. Based on this postulate, the Constitutional Court confirmed that arbitration tribunals did not administer justice, which fell within the exclusive prerogative of state courts (Mezhdunarodnyi…, 2018).

In view of the above analysis, consistent attempts of criminalization of the discussed deed, it becomes evident that the law-maker does not also consider arbitrational tribunals to be referred to the system of justice because none of the draft laws has ever contained proposals to include this crime in Chapter 31 of the Criminal Code of the Russian Federation.

Moreover, the inclusion of bribery of an arbitrator into the system of crimes against justice should have led to introduction of amendments to Article 295 of the Criminal Code "Encroachment on the life of a person administering justice or engaged in a preliminary investigation", punishable, all the way to, by capital punishment (changed, at present time, for deprivation of liberty for life). Encroachment on the life of other participants of arbitration proceedings would happen to be equated to other crimes against justice. It appears that there are no grounds for such an expansion of the scope of provisions of Chapter 31 of the Criminal Code.

Thus, it can be argued that justice cannot be an object of the considered crime.

The immediate object of bribery of an arbitrator (arbitral referee) shall constitute public relations in the sphere of legitimate and impartial execution of functions of an arbitrator (arbitral referee) in compliance with the legislation on arbitration and arbitration agreement.

The subject-matter of bribery shall constitute money, securities, other property, and also property-related services, property rights. In view of understanding of these categories in the criminal law doctrine and law-enforcement practice, property-related services have a significantly wider interpretation rather than the services are understood in the civil law. The Supreme Court of the Russian Federation refers to such services, namely: provision of any property benefits, including discharge it from property-related obligations (for example, granting of a low-interest rate loan for its use, free of charge package tours, apartment renovation, construction of a summer home, transfer of property, in particular, of a motor vehicle, for its temporary operation, fulfillment of obligations to other persons). If the subject-matter of bribery constitutes "property-related rights, the person … awarded such an illegal award, shall have a possibility to take possession or dispose of someone else's property as his/her own, requires that the debtor shall discharge property-related obligations in his/her favour, generates revenues from usage of non-documentary securities or digital rights etc. The property given as a bribe or a subject-matter of commercial bribery, rendered property-related services or granted property-related rights shall have a monetary value based on the evidence provided by the parties, including, where applicable, in view of an expert opinion or expertise"[16].

The objective element of a crime consists either of illegal giving (Part 1 – Part 4) to an arbitrator (arbitral referee) of a bribe for commission of actions (omission), if they fall within the powers of an arbitrator or if they facilitate performance of the above actions (omission)

[15] Ruling 10-P of the Constitutional Court of the Russian Federation dd. 26.05.2011 "In the Case of Verification of Constitutionality of Provisions of Article 11, Point 1 of the Civil Code of the Russian Federation", Article 1, Point 2 of the Federal Law "On Arbitration Tribunals in the Russian Federation", Article 28 of the Federal Law "On Government Registration of Rights to Real Estate Property and Transactions Therewith", Article 33, Point 1 and Article 51 of the Federal Law "On Mortgage (Mortgage of Real Estate) in view of the request from the Higher Court of Arbitration of the Russian Federation". (2011), Sobranie zakonnodatelstva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation], (23), 3356.

[16] Point 9 of Resolution 24 of the Plenum of the Supreme Court of the Russian Federation dd. 09.07.2013 "On Bribery and Other Corruption-Related Crimes Case Law".

due to his/her position; or illegal acceptance by an arbitrator (arbitral referee) of a bribe for performance of the above actions (omission) or facilitation of their performance.

The complicated issues of admittance of the discussed deed to be complete shall be solved in view of the position stated in the precedent-creating document of the higher court – Resolution 24 of the Plenum dd. 13.07 2013. Considering the above, the rules of definition of a bribe of an arbitrator as a completed deed shall consist of the following:

a crime shall be considered to have been completed if an arbitrator accepted at least a part of given valuables (for example, from the moment they were given personally to an arbitrator, placing them to an account he/she provided, "E-wallet"); at that, as a completed crime shall be determined taking and giving a bribe in case when, as previously agreed, a bribe-giver puts valuables into a pointed place, which an arbitrator has an access to, or receives an access after the valuables are placed in it;

if a bribe constitutes an illegal provision of property-related services, the crime shall be deemed to be complete from the beginning of performance of, when agreed by an arbitrator, actions directly aimed at deriving property-related benefits (for example, from the moment of destruction or return of a promissory note, transfer of property to another person towards performance of obligations of an arbitrator, conclusion of a loan agreement with deliberately low interest-rate for its use, from the beginning of renovation works at a deliberately low cost);

if an arbitrator intended to achieve a bribe on a considerable, large-or especially large scale, although, the illegal gratification he/she actually received, did not reach the above scale, the deed shall be determined as a completed crime, respectively, on a considerable, large-or especially large scale;

taking or giving of a bribe, if the above actions were performed in the conditions of operative and search activities, shall be determined as a completed crime, in particular, in case when the valuables were confiscated by law-enforcement authorities immediately after they had been taken by an arbitrator;

if, as agreed between an arbitrator and mediator, the money and other valuables received for transfer as a bribe, remain with the mediator, then illegal transfer and taking of a bribe shall be deemed to be complete from the moment of receipt of valuables by the mediator, whose actions are determined as complicity in commission of a crime envisaged by Article 200.7 of the Criminal Code of the Russian Federation;

a crime shall be deemed to be complete from the moment of taking of a bribe by at least one of the arbitrators included in a criminal group of arbitrators. Although, in case the organized criminal group acknowledges bribe-taking, the crime shall be deemed to be complete from the moment of taking of an illegal gratification by any of the group members.

In cases, when an arbitrator deceives a giver whether he/she obtains one or another powers (i.e., when in fact he/she cannot perform or facilitate performance of these actions (omissions), which he/she takes a bribe for), his/her actions shall be determined as fraud pursuant to Article 159 of the Criminal Code of the Russian Federation. The giver in such situations shall bear liability for attempted bribery.

A subject of the crime envisaged by Article 200.7, Parts 1 through 4 of the Criminal Code of the Russian Federation, is general, and by Parts 5 through 7 hereto, – special, that is an arbitrator (arbitral referee), which definition is given in Federal Law No. 382-FZ dd. 29.12.2015 "On Arbitration (Arbitral Proceedings) in the Russian Federation[17]. In compliance with Article 2, an arbitrator (arbitral referee) – is a natural person, chosen by the parties or selected (appointed) in accordance with the procedure agreed by the parties or established by the federal legislation for resolution of a dispute by the arbitration tribunal.

The researchers note, that the "parties of arbitrational proceedings are free to form its board and may agree, at their option, a procedure of selection (appointment) of an arbitrator or arbitrators. At the same time, there are conditions based on requirements of the

[17] Rossiiskaia Gazeta (2015) [Russian Newspaper], 297 (6868), available at: https://rg.ru/2015/12/31/arbitrazh-dok.html

public order, which limit the freedom of the parties in formation of a panel of arbitrators. In the Russian Federation, such requirements are defined in Article 11 of the Federal Law "On Arbitration" (Arbitral Proceedings) in the Russian Federation, Article 11 of the Law of the Russian Federation "On International Commercial Arbitration" (Kurochkin, 2017). One of the conditions stated in Article 11 of the Federal Law "On Arbitration" (Arbitral Proceedings) in the Russian Federation, addressed to an arbitrator settling a dispute sitting alone, is a requirement "to have a higher legal education, supported by the standard form diploma issued in the territory of the Russian Federation" (Article 11, Part 6, Para. 1). In view of the above, the question arises as to whether a person could be referred to a number of subjects of a deed stipulated by Article 200.7 of the Criminal Code of the Russian Federation, selected or appointed by the court (Article 11, Part 3, Para. 2), but who has no higher legal education, at that either knowingly for the parties appointed him/her, or concealed that and submitted a fake diploma?

For determination of official crimes, this question is solved by the highest judicial body the following way: "if a person appointed to a post in violation of requirements or limitations, established by law or other normative legal acts, to a candidate to this post (for example, in case of absence of a higher education diploma, required work experience, in case of criminal record and so on), out of mercenary or personal interest, used duties of office contrary to the interests of office or performed actions apparently beyond the scope of his/her powers, which led to significant violation of the rights and legal interests of citizens or organizations, or legally protected public or government interests, then such actions shall be determined accordingly as abuse of office or exceed authority"[18]. Such an approach may be used for determination under Article 200.7 of the Criminal Code.

Mens rea of a crime shall be characterized by direct intent both in case of illegal giving and illegal taking of a bribe.

Aggravated and highly aggravated elements of a crime for illegal giving of a bribe for a person performing an illegal transfer, described in Parts 2–4, shall constitute giving of a bribe:

- on a large scale (Part 2);
- group of persons by previous concert or organized criminal group, for knowingly unlawful actions (omission), on a large scale (Part 3);
- on a specially large scale (Part 4).

Apart from the above-mentioned, a defining element of association with extortion of a bribe shall be envisaged for a person taking a bribe.

A considerable scale shall constitute an amount exceeding twenty-five thousand roubles, a large scale – one hundred thousand roubles, especially large scale – one million roubles.

In view of the fact that the subject of taking of a bribe is special, the alleged defining element of a group of persons by previous concert (Article 200.7, Part 7, Para. "a" of the Criminal Code) shall be possible in case there are two accessories complying with the elements of a special subject. Such a situation may occur, for example, if the parties did not define a number of arbitrators for dispute resolution: as a general rule, in this case three arbitrators shall be appointed[19]. The parties may determine a number of arbitrators in their own discretion; therefore, there may be more than three persons. In this case, taking of a bribe shall be covered by a single intent for the purposes of commission of one-directional actions in favour of a giver. For example, when two or three arbitrators agree to make a deliberately false arbitration award in favour of one of the parties, having taken an illegal gratification for that.

As for the organized criminal group, to define a deed according to this element, it is sufficient for the group to have just one person in it who would have elements of a special subject.

[18] Point 6 of Resolution 19 of the Plenum of the Supreme Court of the Russian Federation dd. 16.10.2009 "On Abuse of Office and Exceed Authority Case Law".

[19] Article 10 of Federal Law 382-FZ "On Arbitration "Arbitral Proceedings" in the Russian Federation" dd. 29.12.2015, (Rev. on 27.12.2018, rev.edit.), Rossiiskaia Gazeta [Russian Newspaper], 297 (6868), available at: https://rg.ru/2015/12/31/arbitrazh-dok.html

Point 2 of the Notes to Article 200.7 of the Criminal Code of the Russian Federation contains an imperative provision to exempt from criminal liability a person who has illegally given a bribe, if he/she actively facilitated detection and (or) investigation of a crime and either in relation to him/ her a bribe was extorted or that person voluntarily reported a crime he/she committed to a body empowered to instigate a criminal case.

At the same time, a perceived, to a certain extent, nature of that position is connected with evaluativity of such characteristics of facilitation of detection and (or) investigation of a crime, as active. "Active facilitation of detection and investigations of a crime, according to the highest judicial body, shall consist of performance by a person of actions aimed at exposure of persons involved in commission of the crime … detection of property given as a bribe or commercial bribe, and so on[20].

Conclusion

The criminal law was amended with a legal provision on liability for bribery of arbitrators owing to participation of Russia in international agreements fostering member-countries to fight against corruption manifestations in all possible spheres. The selection of Chapter 22 by the law-maker for inclusion of the analyzed article seems well-grounded because the Russian doctrine and relevant case-law do not acknowledge the system of arbitration tribunals as a part of the system of justice and arbitrators – as officials whilst their awards have a significant impact on a complicated network of economic relations.

For the purposes of generation of relevant case-law for application of Article 200.7 of the Criminal Code of the Russian Federation, it is acceptable to use explanations of the Supreme Court of the Russian Federation on determination of related elements of crimes – bribery and commercial bribe.

[20] Point 19 of Resolution 24 of the Plenum of the Supreme Court of the Russian Federation dd. 09.07.2013

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