ԲԱՆԲԵՐ ԵՐԵՎԱՆԻ ՀԱՄԱԼՍԱՐԱՆԻ. ԻՐԱՎԱԳԻՏՈՒԹՅՈՒՆ
2023. № 2. 54-60 *Սահմանադրական իրավունք*
https://doi.org/10.46991/BYSU:C/2023.14.2.054

THE ISSUES OF IMPROVEMENT FOR THE INSTITUTE OF CLAIM SECURITY IN ADMINISTRATIVE PROCEDURE

SAYAD BADALYAN

The Code of Administrative Procedure (CAP) in the Republic of Armenia needs to improve its regulations for the institute of securing a claim. Chapter 15 of the CAP (Claim Security) has imperfect regulations that are not in line with current procedural legislation. Adjustments in Article 83 and Chapter 15 of the CAP could contribute to the improvement of the institute of securing a claim in administrative procedures. Article 83 of the CAP is one of the most discussed articles since it entered into force. It introduced the suspension of an administrative deed by force of law and not by the court, which poses inevitable risks, such as an opportunity for plaintiffs to abuse their rights. Overall, the issues with Article 83 and Chapter 15 of the CAP highlight the need for consistent adjustments and a systemic solution to the problem in order to improve the institute of securing a claim in administrative procedure. In this context, it is proposed that the general rule should not be the suspension of the administrative deed, and then the definition of exceptions to that rule, but Article 83 of the CAP should define only those cases when accepting a challenging claim suspends the performance of the administrative deed. However, it's important to note that this does not imply that the execution of an administrative deed should never be suspended in cases not listed in Article 83 of the CAP. In such instances, the court may still order suspension as a means of securing the claim if there are pertinent grounds.

Keywords: *institute of securing a claim, administrative procedure, Code of Administrative Procedure, suspension of an administrative deed, temporary protection, administrative deed, challenging claim*

The institute of securing a claim is currently one of those needing improvement in administrative procedure. Chapter 15 of the Code of Administrative Procedure of the Republic of Armenia (hereinafter referred to as “the CAP”) (Claim Security) is notable for its incomplete and imperfect regulations, which are not in line with the current trends in the development of procedural legislation. Meanwhile, it is impossible to consider the issues of the institute of securing a claim in the administrative proceedings and to find effective solutions without also referring to the provisions of the suspension of the administrative deed, as defined by Article 83 of the CAP. Under such conditions, only consistent adjustments in Article 83 and Chapter 15 of the CAP could contribute to the improvement of the institute of securing a claim in administrative procedure.

In general, Article 83 of the CAP is one of the most discussed articles of the Code since it has entered into force. The matter is that the mentioned article introduced into the legislation an essentially new institute for procedural legislation: suspension of an administrative deed by force of law and not by the

court. Still, the further practice of applying this article revealed the inevitable risks associated with it, which remain relevant to a certain extent, despite a number of amendments made to the CAP since its adoption.

It should be noted that the legal consequence of the suspension of an administrative deed in case of a challenging claim is not unique, it works in one form or another in several European states as well (e.g. Germany[1], Georgia[2]). Also, many are states which legislation does not provide for the suspension of an administrative deed by virtue of accepting the claim into proceedings. (eg. Czech[ia3], Estonia[4]). In this case, the issue is solved using the general procedural institute of securing the claim[5]. Thus, this matter has no uniform international (European) standards.

The most significant risk associated with Article 83 of the CAP was, of course, the creation of a great opportunity for the plaintiffs to abuse their rights in the form of applying to the court with apparently groundless claims and avoiding the performance of the administrative deed until the trial is completed. That was the reason that, after the adoption of the CAP, supplementations were made to Article 83 aimed at expanding the list of exceptions to the rule of suspension of the performance of an administrative deed. Currently, the number of these exceptions is 8 instead of the initial 2. We are sure that the number of these exceptions will rise over time unless the logic of this article changes, that is, the general rule should not be the suspension of the administrative deed, and then the exceptions defined to this rule, but Article 83 should define only those cases when accepting a challenging claim suspends its performance. Of course, the foregoing does not mean that the performance of an administrative deed should not be suspended in cases not listed in Article 83 of the CAP, it's simply in that case the suspension can already be done by the court as a means of securing the claim, if there are relevant grounds.

Keeping up with the policy of defining exceptions in Article 83 of the CAP will deviate from the path of giving a systemic solution to the problem and will lead to only ad hoc solutions. For example, why the administrative deed on termination of the subsoil use right is on the list of exceptions, while the administrative deed on termination of any conditional water use permit that causes irreversible damage to water resources is not on that list. Or why the administrative deeds adopted by the Compulsory Enforcement Service are on that list, and, for example, the administrative deeds of the Urban Development, Technical, and Fire Safety Inspection Authority are not among the exceptions.

The next problematic issue related to Article 83 of the CAP is the

[1] The Code of Administrative Procedure of Germany, Article 80, https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.pdf

[2] The Code of Administrative Procedure of Georgia, Article 29, https://matsne.gov.ge/en/ document/download/16492/48/en/pdf

[3] The Code of Administrative Procedure of Czechia, § 73, https://unece.org/fileadmin/DAM/env/pp/compliance/C2016-143_Czech/ Annex5_CodeAdministrativeJustice.pdf

[4] The Code of Procedure of the Administrative Court of Estonia, § 249, https://www.riigiteataja.ee/en/eli/527012014001/consolide

[5] The European experience in this field is more thoroughly analyzed in the justifications for the adoption of the Law HO-384-N "On Supplementations and Amendments to the Code of Administrative Procedure of the Republic of Armenia".

following: what is suspended when the court accepts the challenging claim into proceedings? It is noteworthy that according to Article 83, not the administrative deed is suspended, but its performance. This allows us to conclude that the goal of the legislator was originally to provide for the suspension of only those administrative deeds that imply performance, for example, administrative deeds on imposing administrative liability in the form of a fine, administrative deeds on public legal monetary claims, etc.. Meanwhile, there are administrative deeds that do not even imply performance, for example, the state registration of ownership rights to real estate. Does accepting a claim to invalidate the state registration of ownership rights to real estate suspends the performance of the state registration or, in general, what does "suspension of the state registration" mean, what legal consequences does it cause for the owner, etc.? Of course, the development of judicial practice has ignored this issue, and all administrative deeds, regardless of whether they imply performance or not, have been considered within the scope of Article 83 of the CAP. The foregoing is clearly proved by points 4 and 4.1 of Part 1 of Article 83 of the CAP, which set exceptions to the suspension of administrative deeds on imposing an administrative penalty in the form of suspending or depriving the right to drive vehicles and of administrative deeds on termination or suspension of the right to subsoil use. If the administrative deed has terminated any permit, then such legal relationship has already ceased, and even if we consider such administrative deed to be enforceable, then it has already been performed and the fact of the termination of the permit exists. Does later submission of a challenging claim by the addressee of the permit restore the operation of the permit? We think it does not. In such conditions, the means of temporary protection of the rights of the addressee of the permit should not be considering the performance of the administrative deed as suspended by accepting the challenging claim into proceedings but applying the means of securing the claim at the request of the addressee of the permit, for example, "temporary satisfaction of the plaintiff's claim", if there are sufficient grounds for measures to secure the claim.

Taking the above into account, in our opinion, Article 83 of the CAP should be put down in the context of its original purpose, which, we believe, the legislator wanted to put in the norm, that is, to provide the consequence of suspension by force of law only for those administrative deeds that imply performance in the form of confiscation of funds from the addressee of the administrative deed in favor of the state or municipal budget (first of all, these are the administrative deeds regarding administrative liability in the form of a fine and public legal monetary claims). This solution, we believe, will also ensure a reasonable balance between public and private interests. For example, even if a person goes to court only to delay the payment of a public legal monetary claim, then this itself will not be very problematic in terms of public interest, because if the claim is really groundless, the money will sooner or later be confiscated (moreover, the administrative court has also the opportunity, upon the petition of the administrative body, to place a lien on the plaintiff's property in the amount of the public monetary claim until the end of the case examination). The situation is different when the performance of the

administrative deed does not imply confiscation of money, but elimination of violations of legislation by the addressee in any field. For example, if the Urban Development, Technical, and Fire Safety Inspection Authority, by its administrative deed, obliged an entity to eliminate the violations of fire safety requirements, then the mechanical suspension of the performance of such an administrative deed, which can be done by filing an apparently groundless claim, violates the balance of public and private interests to the detriment of public interest. Surely, in this case, the plaintiff should not be deprived of the legal opportunity to achieve the suspension of the performance of the administrative deed, but this should happen by the court taking a measure to secure the claim, if there are relevant grounds. Of course, the mentioned opportunity can work only upon the improvement of the institute of securing a claim in administrative proceedings which will be referred to below.

As already mentioned, Chapter 15 of the CAP dedicated to the institute of securing a claim with its three articles is not in line with the current trends in the development of procedural legislation and needs a thorough revision. In particular, part 1 of Article 91 of the CAP defines only the possibility of the performance of a judicial act becoming impossible or difficult as a basis for applying a means of securing a claim. Meanwhile, there are practically many cases where failure to take measures to secure a claim will not make it impossible or difficult to perform a future judicial act, but if such measures are not taken, significant damage will be caused to the plaintiff or the protection of the latter's rights will be nullified.

For example, in the case of obliging claims, currently the remedy of "temporary satisfaction of the plaintiff's claim" can never be applied, even if the claim is apparently justified because even if the examination of the case lasts for several years, the plaintiff will eventually get the administrative deed they seek for, that is, there is no evidence of impossibility or difficulty in performing the judicial act. It is another matter that the absence of the administrative deed sought by the plaintiff during the examination of the case may cause irreparable damage to the plaintiff, and make the judicial protection of rights pointless. For this reason, we consider it important to include, in Article 91 of the CAP, the instances where failure to implement security measures may result in significant harm to the plaintiff or make it impossible to protect their rights, as a basis for the application of such measures.

The next issue is the limited measures of securing a claim defined by Article 91 of the CAP. In order to increase the efficiency of the institute of securing a claim, we consider it necessary to supplement that list with such measures of securing a claim, as prohibiting not only the participant in the trial, but also other administrative bodies or other persons from performing certain actions related to the subject of the dispute and obliging the participant in the trial, other administrative bodies or other persons to perform certain actions related to the subject of the dispute. Moreover, taking into account this recommendation, it is also necessary to make amendments to Article 19 of the CAP, so that the persons and bodies against whom the specified means of securing a claim have been applied, have the opportunity to acquire the status of a participant in the trial, which will enable the latter to use the procedural

opportunities related to the securing of the claim (for example, submission of petitions for counter-security, replacement, modification and cancellation of the security of claim)[6].

In the context of the amendments we proposed for Article 83 of the CAP, it is also essential to consider the inclusion of a provision in Chapter 15 of the CAP that envisages the suspension of the disputed administrative deed, either wholly or partially, as a means of securing the claim.

The next important issue is to determine the criteria for applying means of securing a claim under the CAP, which is completely absent in Chapter 15 of the CAP. We recommend to define the following as such criteria:

- the means of securing the claim shall be proportional to the submitted claim and the goal pursued by securing the claim;
- the means of securing the claim shall ensure a reasonable balance between the plaintiff, the other participants in the trial, and the public interests;
- when taking measures to secure the claim, the court shall also take into account the "prima facie" justification of the claim;
- the means of securing the claim shall not create obstacles or lead to the impossibility of any person's activity or of the exercise of the powers of the administrative body or lead to the latter's violation of the requirements established by the legislation.

Among the criteria mentioned above, the criterion of "prima facie" justification of the claim deserves special consideration. There prevails an erroneous stereotype in the RA legal practice, that if the court expresses an attitude regarding the justification of the claim in the context of this or that interim decision before the publication of the final judicial act, then this is an evidence of the court's bias and should have legal consequences of at least challenge or recusal petition presented to the judge. Meanwhile, when taking measures to secure a claim, the legislative confirmation of the criterion of "prima facie" justification of the claim is very important to have an effective institute of securing the claim and to prevent cases of abuse of procedural rights. In order not to give rise to speculations in any case, we propose to specially emphasize that taking measures to secure the claim by the court, taking into account the "prima facie" justification of the claim, cannot itself be considered as evidence of the bias of the administrative court, a basis for challenge or recusal, an appeal or review of a judicial act, as well as a basis for disciplinary action against a judge.

Therefore, the suggested solutions concerning the institute of securing a claim and suspension of administrative deeds in the event of a challenging claim align with the current trends in the evolution of procedural legislation. Implementing these solutions can significantly aid the reform of the institute of securing a claim in the administrative procedure by ensuring a reasonable balance between public and private interests in this domain and preventing instances of procedural rights abuse by parties involved in the proceedings.

[6] This issue is currently also present in civil procedure. Article 129 of the Code of Civil Procedure also provides for the possibility of applying the discussed means of securing the claim, but the persons, against whom these measures are applied, do not have the opportunity to become a person participating in the case in any status and to make use of the procedural tools related to securing the claim.

ՍԱՅԱԴ ԲԱԴԱԼՅԱՆ – *Հայցի ապահովման ինստիտուտի կատարելագործման հիմնախնդիրները վարչական դատավարությունում* – Այս ինստիտուտը ներկայումս վարչական դատավարության կատարելագործման կարիք ունեցողներից է: ՀՀ վարչական դատավարության օրենսգրքի (այսուհետ՝ ՎԴՕ) 15-րդ գլուխը (Հայցի ապահովումը) աչքի է ընկնում ոչ ամբողջական կարգավորումներով, որոնք չեն համապատասխանում դատավարական օրենսդրության զարգացման արդի միտումներին: ՎԴՕ 83-րդ հոդվածի և 15-րդ գլխի համահունչ կարգավորումները կարող են նպաստել վարչական դատավարությունում հայցի ապահովման ինստիտուտի բարեփոխմանը: Առհասարակ, ՎԴՕ 83-րդ հոդվածն այդ օրենսգրքի ուժի մեջ մտնելուց ի վեր դրա ամենաքննարկված հոդվածներից է: Խնդիրն այն է, որ այդ հոդվածով ներմուծվել է դատավարական օրենսդրության համար ըստ էության նոր ինստիտուտ՝ վարչական ակտի կասեցում օրենքի ուժով և ոչ թե դատարանի կողմից, ինչը հայցվորների համար իրավունքի չարաշահման մեծ ռիսկ է ստեղծում: Այսպիսով, ՎԴՕ 83-րդ հոդվածի և 15-րդ գլխի հետ կապված հիմնահարցերը պահանջում են համահունչ և համակարգային կարգավորումներ վարչական դատավարությունում հայցի ապահովմանն առնչվող հիմնախնդիրներին լուծումներ գտնելու համար: Այս համատեքստում առաջարկվում է, որ ընդհանուր կանոնը լինի ոչ թե վարչական ակտի կատարման կասեցումը, իսկ այնուհետև այդ կանոնից բացառությունների սահմանումը, այլ ՎԴՕ 83-րդ հոդվածը պետք է սահմանի միայն այն դեպքերը, երբ վիճարկման հայցը վարույթ ընդունելը կասեցնում է դրա կատարումը: Իհարկե, ասվածը չի նշանակում, որ ՎԴՕ 83-րդ հոդվածում չթվարկված դեպքերում վարչական ակտի կատարումը չպետք է կասեցվի, պարզապես այդ դեպքում կասեցումն արդեն կարող է կատարվել դատարանի կողմից՝ որպես հայցի ապահովման միջոց՝ համապատասխան հիմքերի առկայության դեպքում:

Բանալի բառեր – *հայցի ապահովման ինստիտուտ, վարչական դատավարություն, ՀՀ վարչական դատավարության օրենսգիրք, վարչական ակտի կասեցում, հայցի ապահովում, վարչական ակտ, վիճարկման հայց*

САЯД БАДАЛЯН – *Проблемы совершенствования института обеспечения иска в административном судопроизводстве.* - В настоящее время институт обеспечения иска является одним из институтов административно-процессуального права, нуждающихся в усовершенствовании. Глава 15-ая (Обеспечение иска) Административно-процессуального кодекса РА (далее АПК), выделяется неполноценностью регуляций, которые не соответствуют современным тенденциям развития процессуального законодательства. Гармоничные регуляции статьи 83 и главы 15 АПК могут способствовать реформированию института обеспечения иска в административно-процессуальном праве. В целом, Статья 83 АПК является одной из самых обсуждаемых статей Кодекса с момента его вступления в силу. Вопрос в том, что с помощью данной статьи был внедрен новый, по сути, институт процессуального законодательства – приостановление действия административного акта в силу закона, а не судом, что приводит к возрастанию риска злоупотребления правом со стороны истцов. Итак, вопросы, связанные со статьей 83 и главой 15 АПК, требуют гармоничных и систематизированных регулирований для решений проблем, связанных с обеспечением иска в администра-

тивном судопроизводстве. В этом контексте предлагается отказаться от общего правила о приостановления исполнения административного акта, предполагающего установление отдельных исключений из этого правила. Вместо этого, в статье 83 АПК необходимо определить те случаи, когда принятие иска об оспаривании административного акта приостанавливает его исполнение. При этом, данный подход, конечно, не будет исключать приостановление исполнения оспариваемого акта и в других случаях, однако для этого уже потребуется определение суда об обеспечении иска, при наличии соответствующих оснований.

Ключевые слова: *институт обеспечения иска, административное судопроизводство, административно-процессуальный кодекс, приостановление действия административного акта, обеспечение иска, административный акт, иск об оспаривании*