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## THE PROSPECTIVE EFFECT OF A PLEA AGREEMENT AT THE JUDGE'S DISCRETION AND OF AN ARBITRATION AGREEMENT AT THE ARBITRATOR'S DISCRETION: COMPARATIVE LEGAL ASPECT

**Abstract. Purpose.** The purpose of the article is to confirm the hypothesis of the existence of a prospective effect of the plea agreement at the discretion of the judge and the arbitration agreement at the discretion of the arbitrator.

**Research methods.** The methodological basis of the study is the comparative method. Along with it, the author used historical method and general scientific methods: analysis, synthesis, induction, and deduction.

**Results.** It is established that the main category that influences whether the analyzed agreements will be concluded is the common will of the parties. However, the agreement of the alternative judgment of the parties in a single procedural agreement is inextricably linked to the consensus of such an agreement. Both agreements affect the further discretion of the parties to the agreement and to the related parties. Based on the range of powers, the prosecutor's discretion has the most remarkable influence on the judge's discretion. At the same time, the judge's discretion may also take precedence over the prosecutor's discretion. However, the judge's discretion may be limited by law in the context of a plea agreement. On the contrary, the functions of the arbitration agreement directly affect the arbitrators' discretion because, without the existence of this agreement, the arbitrators' discretion is impossible to resolve a dispute in international commercial arbitration. It is established that arbitration discretion acts as a generalizing, generic concept that includes two forms – the parties' discretion and the arbitrators' discretion.

**Conclusions.** The hypothesis of the existence of a prospective effect of the plea agreement at the judge's discretion and the impact of the arbitration agreement at the discretion of the arbitrator is proved. It is established that the impact of the arbitration agreement is much more significant than the impact of the plea agreement, primarily due to the peculiarities of the arbitration procedure, which in turn corresponds to the fact that these procedures are provided by private law. The fact is revealed that there is a much greater possibility for discretion in private law, especially in international commercial arbitration. There is no reason to deny the existence of discretion under public law. However, such discretion is more limited than discretion in private law, as the leading method of regulation is imperative. That is why the task of arbitration experts is to study arbitration as the most favorable environment for discretion. It is necessary to derive the general laws of discretion and extend them to all other areas, including public law.

**Key words:** plea agreement, arbitration agreement, judge, arbitrator, discretion, consensus.

### 1. Introduction

It would be fair to mention that an opinion of Anthony E. Davis prompted this study: "The reduction or dismissal of charges as part of a plea agreement is merely a less direct way of affecting the sentence ..." (Davis, 1971, as cited in

Alschuler, 1976, p. 1074), as well as the position of the United States Court of Appeals for the District of Columbia Circuit set out in the *United States of America v. Robert Louis Ammidown* (497 F.2d 615): "The most frequent motive behind [a plea agreement involving

a plea to a lesser included offense] is to circumscribe the judge's discretion in pronouncing sentence" (D.C. Circuit, 1973, p. 621).

Therefore, the purpose of the article is to confirm the hypothesis of the existence of a prospective effect of the plea agreement at the discretion of the judge and the arbitration agreement at the discretion of the arbitrator.

The methodological basis of the study is the comparative method. The historical method and such general scientific methods as analysis, synthesis, induction, and deduction were used.

In the study, we resort to a particular analogy using the term "prospection" in a sense adopted in philology – "grammatical category that combines different linguistic forms of attribution of semantic and factual information to what will be discussed in subsequent parts of the text" (Shelkovnikova, 2017, p. 127). However, we should not forget the term's etymology, which comes from the Latin *prospectus* "distant view, look out; sight, faculty of sight" (Harper, n.d.). Therefore, the term "prospective influence" means the impact of these agreements on the discretion of judges and arbitrators, precisely in terms of future impact, correcting, procedural decisions, and decisions on the merits of the case that they may make.

Before proceeding to the analysis of modern aspects of the arbitration agreement and the plea agreement, in our opinion, it is worth giving a little historical background.

It is known that the precondition for arbitration in ancient Rome was the fact of concluding two treaties, thanks to the preserved monuments of Roman law. According to the first compromise agreement concluded between the parties, they undertook to refer the dispute to one or more arbitrators. This is the primary image of the arbitration agreement. Under another agreement, the parties entered into an agreement with a third party, who assumed the duties of an arbitrator (Prytyka, 2005, p. 16). Through the coordination of a common position on the choice of alternative jurisdiction for the dispute, we can talk about the implementation of the parties' discretion at the stage of the arbitration agreement. Nowadays, the reasons for alternative dispute resolution are not very different from those of that time.

Symbolic is that Digest 4.8.1 *Corpus iuris civilis* begins with a fragment of Paul: "A compromise is similar to judgments in court, and it establishes the end of a dispute (*Compromissum ad similitudinem iudiciorum redigitur et ad finiendas lites pertinet*"). It can be interpreted as the primary goal of arbitration – the final conclusion of the dispute. The authors supported this opinion (Milotić, 2013).

It is worth noting that in the references to the arbitration practice of the Roman Empire,

there is no information about the agreements that directly define the general rules of arbitration procedure or procedural methods that the arbitrator had to follow. Scholars believe that the choice of procedural rules is possible, but the procedure and procedure were modeled similarly to a standard trial (Milotić, 2013).

If we talk about the historical origins of the institution of a plea agreement, we can find evidence that there was a concept of the reconciliation agreement in Roman times. The perpetrator had to repent, and the victim apologized and received monetary compensation (Sayenko, 2017, p. 20). Under the influence of evolutionary changes, this most straightforward form of reconciliation agreement was transformed into a plea agreement over time. It is believed that the institution of plea agreements, in their modern sense, was formed in the United States in the early XIX century.

The authors point out that the emergence of the institution of an agreement in the United States is not only the result of a complex legal procedure for criminal proceedings. According to the scientist, the essential task of litigation should be to resolve social conflicts. Establishing a criminal case's circumstances is of secondary importance, as it is only a means to achieve the final main result. If the conflict can be resolved satisfactorily for both parties, the need to establish all the circumstances of the criminal proceedings disappears" (Novak, 2013, p. 146). This view deserves to be considered close enough to the purpose of the plea agreement from a procedural point of view.

Currently, Ukrainian legislation criminal proceedings based on agreements, including plea agreements, are regulated by Chapter 35 of the Criminal Procedure Code of Ukraine (hereinafter – the CPC of Ukraine). Furthermore, the Law of Ukraine "On International Commercial Arbitration" establishes the requirements for the arbitration agreement and procedural and substantive aspects of the international commercial court in Ukraine.

## 2. Consensus

As the well-known German lawyer Rudolf von Jhering noted: "A lawyer defines a contract as a combination of wills (consensus) of two people. From a legal point of view, this is correct because the will is the connecting element of the contract" (Jhering, 1881, p.56). This maxim has been repeatedly questioned by researchers. However, in the context of this work, it should be recognized that the main category influencing whether the analyzed agreements will be concluded is the parties' common will.

This view is confirmed by scholars who consider the basis for the conclusion of a plea

agreement "mutual consent of the suspect / accused and the prosecutor to apply this compromise procedure" (Globa, 2021, p. 112). Following Part 2 of Art. 469 of the CPC of Ukraine, the plea agreement may be concluded upon the initiative of the public prosecutor or the suspect or accused (The Criminal Procedural Code of Ukraine, 2012). Scholars rightly emphasize the crucial role of the prosecutor in concluding a plea agreement (Trekke, 2018, p. 93) because it is due to the prosecutor's own discretion that the process of concluding a plea agreement may be further continued.

We will also turn to foreign law at the conclusion of plea agreements. Thus, under paragraph 11 (c) (1) of the Federal Rules of Criminal Procedure in the United States, "An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions". The rules do not provide for the victim's participation in the process of concluding a plea agreement. Therefore, the parties to the contract are, de facto, the prosecutor and the defendant's lawyer (except in cases where the accused refuses counsel), while, de jure, the parties are the prosecutor and the accused (18 U.S.C.).

According to Article 9.4 of the Code for Crown Prosecutors in the United Kingdom, "prosecutors must never accept a guilty plea just because it is convenient" (The Code for Crown Prosecutors, n.d.). It limits the possibility of agreeing contrary to morality and public order. Such a narrowing of the possibility of finding a consensual way to reconcile the will of the prosecutor and the accused differs somewhat from the opinion we have already quoted about the purpose of the criminal proceedings. In the classical sense, such state intervention in a possible consensus of the parties is inherent in public law. However, in our opinion, in this case, morality is still more important than reducing the time for litigation, and such interference is justified.

On the contrary, consider how consensus manifests itself in the conclusion of an arbitration agreement.

The legal definition of an arbitration agreement in the legislation of Ukraine is defined in Article 7 of the Law of Ukraine "On International Commercial Arbitration." According to it, "Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or of any defined legal relationships, whether contractual or not. An arbitration agreement may be concluded in the form of an arbitration clause in a contract or in the form of a separate agreement" (On International Commercial Arbitration, 1994).

Researchers quite rightly emphasize that "parties to arbitration enjoy certain degrees of freedom given that the arbitration agreement, which is the foundation of any arbitral process, is the product of the parties' consensual agreement" (Fagbemi, 2015, p. 239). This thesis also confirms our assumption of reconciling the alternative judgment of the parties in a single procedural agreement.

Given the historical origins of the arbitration agreement, it is not surprising that it is sometimes called a "compromise" (Malskyi, 2013, p. 60). In addition to reconstructing the historical name, such a designation also indicates that this agreement results from a joint compromise between the parties. Of course, not on the substance of a future dispute, which may not arise, namely the procedure for resolving such a dispute. Given that the arbitration agreement is concluded, it is often possible to negotiate between the parties so that the parties are aware of the "advantages and disadvantages of their negotiating positions" when concluding an arbitration agreement (Malskyi, 2013, p. 60).

We believe that the concept of "arbitration agreement" as a generic or wider, means both the actual procedural agreement in the form of a separate agreement of the parties, and the arbitration clause, which in its form is part of the main contract between the parties. This is also evidenced by the principle of autonomy of the arbitration agreement under which the validity of the arbitration clause remains unchanged in the event of loss of the main contract, part of which it is, in fact, such parity provides a common notion of the existence of a fiction of separation of this agreement from the substantive contract between the parties (Malskyi, 2013, pp. 29-31).

Thus, the conclusion of both agreements is inextricably linked to their consensus and depends on the subject composition. However, both agreements affect the further discretion of both the parties to the agreement and the parties to such agreements. In particular, by consensual creation of discretionary norms, "for themselves by the subjects of legal relations" (Haydulin, 2020, p. 563), especially when concluding an arbitration agreement.

### 3. Implementation

The hypothesis of limiting the powers of the judge and arbitrator, which is considered in this study, is confirmed by the views of other authors. In particular, "...the discretion of an adjudicator is typically constrained by the discretion exercised by others, which in turn shapes the observer's perceptions of how discretion is exercised" (Lempert, 1989, p. 24). This highlights an essential aspect of the influence of the judgment of one subject on the judgment

of another. In addition, the author focuses on the study of judgment that cannot exist in pure, crystallized form due to its dependence on some factors influencing its implementation. One such factor is internal and external boundaries and limitations of discretion.

Significantly, only the prosecutor is entitled to change the charges, file additional charges, and drop them (Torbas, 2020, p. 150). It is logical that due to this range of powers, the prosecutor's discretion has the most significant influence on the judge's discretion. At the same time, the judge's discretion may also take precedence over the prosecutor's discretion.

For example, in accordance with paragraph 1 of Part 3 of Art. 314 of the CPC of Ukraine, the court, refusing to approve the agreement, which was submitted to the court together with the indictment, may return criminal proceedings to the public prosecutor for a continuation of pre-trial investigation (The Criminal Procedural Code of Ukraine, 2012). Thus, it can be observed that a judge, in a way, has the opportunity to exercise his own discretion "higher" than the discretion of the prosecutor, of course, due to the powers of the court.

In some ways, the judge's discretion may be limited by law in the context of a plea agreement, such as in the United Kingdom Sentencing Act 2020, section 73, which stipulates, *inter alia*, that a judge must impose a penalty "which is not less than 80 per cent of the term which would otherwise be required" (this rule applies to certain categories of serious crimes) (c.17 UK).

With regard to the arbitration agreement, it should be emphasized that it performs a number of different functions. First, it proves the agreement of the parties to submit their disputes to arbitration. Second, it establishes the jurisdiction and powers of arbitration over state courts. Third, it is the main source of power for arbitrators. In their arbitration agreement, the parties may extend or limit the powers normally conferred on arbitral tribunals under applicable national law. In addition, the arbitration agreement establishes the obligation of the parties to conduct the arbitration. Thus, the arbitration agreement is both contractual and jurisdictional. That is, the arbitration agreement is contractual on the basis of the good faith agreement of the parties. Nevertheless, it is also jurisdictional due to the arbitral tribunal's jurisdiction. However, all these functions directly affect the discretion of the arbitral tribunal. In fact, without the existence of this agreement, the discretion of the arbitral tribunal is impossible to resolve a dispute in international commercial arbitration.

Thus, there is a prospective effect of the plea agreement and the arbitration

agreement on the exercise of the discretion of the judges and arbitrators, respectively.

#### 4. Impact

The search for manifestations of the impact of plea agreements and arbitration agreements on the discretion of judges and arbitrators leads us to believe that there are significant differences between how these agreements affect the discretion of the parties concerned.

Relationships formed within the process of concluding a plea agreement have a more formalized order, probably because such an agreement is regulated within the framework of public law. The discretion of the accused and the prosecutor does not interact in that close controversial synergy as strongly as it does when concluding an arbitration agreement. And the result of concluding a plea agreement can still be rejected by the court on the grounds of non-compliance with the terms of the agreement with the interests of society (paragraph 2, part 7 of Article 474 of the CPC of Ukraine). Even more important is the ground for refusing to approve the agreement, the terms of which violate the rights, freedoms, or interests of the parties or other persons (paragraph 3 of Part 7 of Article 474 of the CPC of Ukraine).

Thus, the parties' discretion regarding the plea agreement does not have such a strong, unavoidable prospective effect on the judge's discretion, in contrast to the parties' discretion regarding the arbitration agreement.

It turns out that although a compromise in the conclusion of the investigated agreements is an integral part of them, at the same time, there may be cases in which such a compromise in the conclusion of a plea agreement will not occur.

In conclusion, we assume that the discretion initiated during the conclusion and approval of the plea agreement is approved by society, as it must be in its interests. Thus, such an exciting feature of reason as its morality and integrity is revealed.

In our opinion, the arbitration agreement is less limited by legislation and more effective in influencing the discretion of another entity.

In arbitration, where two categories of persons (parties and arbitrators) are endowed with discretionary powers, "arbitration discretion" acts as a generalization, a generic concept that encompasses two forms – the parties' discretion and the arbitrators' discretion.

The concept of "autonomy of the will" is close to the discretion of the parties. This category has become commonplace due to the autonomous theory of arbitration (Koch, 2021, p. 48). The idea of conditional autonomy of arbitration is complemented by the theory of "excess of authority" according to this theory, arbitrators are not entitled to take any action

without the sanction of the parties, and the arbitral award rendered in violation of the interests of the parties should not be executed (Koch, 2021, p. 56).

### 5. Conclusions

The study gives us reason to draw the following conclusions:

1) we consider proven the hypothesis of the existence of a prospective effect of the plea agreement on the discretion of the judge and the impact of the arbitration agreement on the discretion of the arbitrators.

2) the impact of the arbitration agreement is much more significant than the impact of the plea agreement, primarily due to the peculiarities of the arbitration procedure, which, as

a result, corresponds to the fact that these procedures are provided by private law.

3) there is a much greater possibility for discretion in private law, especially in international commercial arbitration.

4) there are no grounds to deny the existence of discretion under public law. However, such discretion is more limited than discretion in private law, as the leading method of regulation is imperative.

Consequently, the task of arbitration experts is to study arbitration as the most favorable environment for discretion. It is necessary to derive the general laws of discretion and extend them to all other areas, including public law.

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## ПРОСПЕКТИВНИЙ ВПЛИВ УГОДИ ПРО ВИЗНАННЯ ВИНУВАТОСТІ НА РОЗСУД СУДДІ ТА АРБІТРАЖНОЇ УГОДИ НА РОЗСУД АРБІТРА: ПОРІВНЯЛЬНО-ПРАВОВИЙ АСПЕКТ

**Анотація. Мета.** Метою статті є підтвердження гіпотези про існування проспективного впливу угоди про визнання винуватості на розсуд судді та арбітражної угоди на розсуд арбітра.

**Методи дослідження.** Методологічною основою дослідження є компаративний метод. Поряд з ним застосовані історичний метод, а також такі загальнонаукові методи, як аналіз, синтез, індукція та дедукція.

**Результати.** Встановлено, що основною категорією, яка впливає на те, чи будуть укладені аналізовані угоди, є саме спільна воля сторін. При цьому узгодження альтернативного розсуду сторін в єдиній процесуальній угоді нерозривно пов'язане з консенсуальністю такої угоди. Обидві угоди впливають на подальший розсуд як сторін угоди, так і пов'язаних осіб. Виходячи зі спектра повноважень, розсуд прокурора має найбільший вплив на розсуд судді. Водночас розсуд судді також може мати перевагу над розсудом прокурора. Однак розсуд судді може бути обмежений законодавством у контексті угоди про визнання винуватості. На противагу, функції арбітражної угоди прямо впливають на розсуд арбітра, адже без існування цієї угоди неможливий розсуд арбітра у разі вирішення спору у міжнародному комерційному арбітражі. Встановлено, що арбітражна дискреція виступає як узагальнююче, родове поняття, яке включає у себе дві форми – розсуд сторін та розсуд арбітрів.

**Висновки.** Доведено гіпотезу про наявність проспективного впливу угоди про визнання винуватості на розсуд судді, і вплив арбітражної угоди на розсуд арбітра. Встановлено, що вплив арбітражної угоди є значно більшим, ніж вплив угоди про визнання винуватості, насамперед через особливості процедури арбітражного розгляду, що своєю чергою співвідноситься з тим, що ці процедури передбачені нормами приватного права. Виявлено той факт, що у приватному праві значно більша можливість для існування дискреції, особливо у міжнародному комерційному арбітражі. Відсутні підстави заперечувати наявність розсуду у рамках публічного права. Однак такий розсуд є більш обмеженим порівняно з розсудом у приватному праві, оскільки провідним методом регулювання є імперативний. Саме тому завдання фахівців у сфері арбітражу – дослідити арбітраж як найбільш сприятливе середовище для дискреції. Необхідно вивести загальні закономірності дискреції і поширити її на всі інші сфери, в тому числі і публічно-правові.

**Ключові слова:** угода про визнання винуватості, арбітражна угода, суддя, арбітр, розсуд, консенсус.

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