

The issues of recognizing foreign arbitral awards by the Russian judicial system

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Abstract. This article deals with the recognition of decisions coming from the foreign arbitration by the courts of the Russian Federation. The authors analyze in detail the international legislation, as well as the legislation of the Russian Federation and foreign states, which regulate the procedure for recognizing foreign arbitral awards. A comparative analysis of the laws of a number of foreign countries in this area was carried out. Despite the presumption of voluntary execution of arbitral awards by the parties to the dispute, in practice, the institution of their enforcement acts. A writ of execution issued by a state court guarantees state coercion in the enforcement of an arbitration award. The topic under consideration is of particular importance for the cross-border regions.

Keywords: arbitral award, arbitration, court, legislation, dispute

1. Introduction

It can be argued that the activities of international commercial arbitration are based on a large number of international conventions and agreements.

The Constitution of the Russian Federation indicates that the norms of international law and international treaties of the Russian Federation are an integral part of the Russian legal system. In addition, international treaties of the Russian Federation have priority over national legislation, as specified in Article 15 of the Constitution of the Russian Federation of 1993.

We note that an international treaty of the Russian Federation is an international agreement concluded by the Russian Federation with a foreign state or with an international organization in writing and governed by international law. "International legal acts, as well as numerous bilateral and multilateral treaties of the Russian Federation with foreign states are a type of international treaties of the Russian Federation" [1].

In this article, the authors consider in detail the international conventions governing the recognition of foreign arbitral awards. Particular attention will be paid to the grounds for refusal to recognize and enforce the above arbitral awards. For this, a comparative analysis of legislative acts of the Russian Federation, legislative acts of foreign states, and international legal acts will be carried out.

2. Materials and Methods

The institution of arbitration is a complex legal phenomenon, including, on the one hand, the regulation of individual issues by international law. On the other hand, a large number of issues are governed by the

norms of national legal systems. Accordingly, an integrated approach to the consideration of legal relations arising in the field of arbitration is used in the study. An integrated approach is to use the methods used by both the science of private international law and the science of civil and arbitration process. The topic of this scientific paper is connected with the need to study various legal systems. The basis of this research was the comparative legal and analytical methods in combination with a systematic approach to the analysis of problems in the recognition of foreign arbitral awards in the Russian Federation and their subsequent execution. Of particular importance is the use of the comparative legal method, since the concept of this article includes a comparative analysis of Russian, foreign, and international legislation in the field of arbitration.

3. Results

We consider the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention of 1958). The Convention establishes a strictly limited list of grounds for refusal to recognize and enforce foreign arbitral awards. This list is exhaustive, and it is not subject to broad interpretation. The list includes 5 grounds for refusal to recognize and execute a decision, to which the party that lost the arbitration can refer. Also, the list includes 2 grounds for refusal on the initiative of the competent authorities of the state where recognition and execution is sought due to public policy considerations.

Recognition and enforcement of an arbitral award may be refused at the request of the party against whom it is directed. This can happen only if this party provides evidence in the following cases: “the parties to the arbitration agreement were legally applicable to them and to some extent incompetent or this agreement is invalid; the party against whom the decision was made was not duly notified of the appointment of the arbitrator or of the arbitral proceedings; an arbitral award rendered in a dispute not provided for or not subject to the terms of an arbitration agreement; the composition of the arbitration body or the arbitration process is not consistent with the agreement of the parties; the decision has not yet become final for the parties or was canceled or suspended by the competent authority of the country where it has been made, or by the competent authority of the country whose law is applied” (Article 5, Paragraph 1, New York Convention of 1958).

Recognition and enforcement of an arbitration award may also be denied if a competent authority of the country in which recognition and enforcement is sought finds that “the object of the dispute may not be subject to arbitration under the laws of this country; recognition and enforcement of this decision is contrary to the public policy of this country” (Article 5, Paragraph 2, New York Convention of 1958).

The European Concept of International Trade Arbitration of April 21, 1961 (European Convention of 1961) restricts the application of the provisions of the 1958 New York Convention to cases expressly stipulated by the provisions. This means that the abolition of the arbitral award in the country where it was rendered serves as a basis for refusing to recognize and enforce it on the territory of the states-parties of the European Convention of 1961. This happens if such cancellation is made on the following grounds: the parties to the arbitration agreement were incapacitated or the agreement was invalid; the party demanding the cancellation of the decision was not duly notified of the appointment of the arbitrator or of the arbitral proceedings; the aforementioned decision was made in a dispute not provided for or not subject to the terms of the arbitration agreement; the composition of the arbitral tribunal or the arbitration procedure did not comply with the agreement of the parties (Article 9, Paragraph 1, European Convention of 1961).

We turn to the Law of the Russian Federation on International Commercial Arbitration of July 7, 1993 (Law of the Russian Federation of 1993). One of the most important provisions of the Law are the rules on challenging an arbitration award. In our country, there are two legal regimes for challenging an arbitral award: regarding international commercial arbitration and internal arbitration. The grounds for annulment of an award made by international commercial arbitration are provided for in article 34 of this law. Almost all of them reproduce the norms of the 1958 New York Convention of and of the 1961 European Convention.

The aforementioned law allows the possibility of filing a motion to set aside an arbitral award as an exclusive means of challenging it. Grounds for challenging arise in the presence of various irregularities related to the arbitration agreement.

If the state court concludes that the object of the dispute cannot be subject to arbitration under the laws of the Russian Federation, or the arbitration decision is contrary to the public policy of the Russian Federation, this arbitration decision may be overruled.

The legislation of our country prescribes that regardless of whether the deadline for challenging the arbitration decision has passed on the basis of such a decision, the writ of execution can be issued, and it can be enforced. But if the application for cancellation or suspension of the execution of the decision of the arbitration court is under consideration in a competent court, the state court, which considers the application for issuance of a writ of execution to enforce this decision, may postpone consideration of the application for issuing a writ of execution, of course if it considers this case appropriate.

In the legislation of many countries of the world, as the basis for the cancellation of an arbitral award, the non-compliance of the arbitration tribunal with its form and mandatory details is specified (Korea, Brazil, Belgium, the Netherlands, Greece, France, Japan, Italy, etc.). As a separate aspect, the lack of motivation in the award is sometimes highlighted (Korea, Belgium, the Netherlands, Luxembourg, France, Japan, Israel, etc.).

The following grounds for the cancellation of an arbitral award can be defined as the failure of the arbitral tribunal to comply with the time frame for the arbitration agreement, which includes the following cases: the fact of not concluding an arbitration agreement (China, Austria), an arbitration agreement is terminated (Canada, Austria, Spain, Egypt, Brazil, Greece, France, Israel), the expiration of the time limit for making an award (Italy).

Another reason is an arbitrator or arbitrators committing unlawful actions related to deceiving the parties, committing embezzlement, receiving a bribe or other similar type of misdemeanor, indicating that the arbitral award has been obtained fraudulently (China, Canada, Scotland, Belgium, the Netherlands, Luxembourg).

The next reason is the award of an arbitral award by a disqualified arbitrator (Brazil) or by a person who could not perform the functions of an arbitrator due to the incompatibility of his social characteristics: minor, incompetent, bankrupt or government employee (Italy). Also, the reason is the adoption of an arbitration decision by a person who could not perform the functions of an arbitrator due to the inconsistency of his procedural characteristics by the analogy with the status of judges (Norway) by an arbitrator, the disqualification of which is unreasonably denied by one of the parties (Austria).

Another group of grounds relates to the lack of evidence base of the arbitral award is the falsification of evidence (China). Moreover, it must be confirmed by a valid judgment (Belgium), the emergence of a new evidence after the award was made, which would play a crucial role in resolving the dispute (Belgium, Norway, the Netherlands).

Some of the grounds relate to the vice of the award, which is its incompleteness, i.e. the absence of a decision on one or more issues referred to arbitration (Brazil, Belgium, Spain, Finland, Italy, Israel), the presence of conflicting provisions (Belgium, Greece) [2].

4. Discussion

At the end of the article, the question of the contradiction of the arbitral tribunal's decision to public order, as a basis for refusing to recognize and enforce the decision, should be further considered.

The issue of public policy and, therefore, the refusal to execute judicial decisions of foreign courts and international commercial arbitration bodies due to their contradiction with the public policy of the country are relevant in the contemporary Legal Science.

Cases where arbitration decisions are canceled on the grounds of their contradiction to public order are the most frequent of all the above. "A clause on public order is a generally recognized principle of law" [3]. The concept of public policy is not defined in the legislation of the countries, and the literature and scientific and practical comments give a variety of interpretations.

The public order clause is a mechanism that secures the priority of national interests over private interests and thus protects the public policy of the state from any negative influences on it. That is, this reservation would not allow arbitration court decisions in the country if, as a result of its execution, actions are committed that are either expressly prohibited by the law or damage the sovereignty or security of the state.

The question of the final definition of the term public order should be considered. Due to the fact that “the definition of public order is regulatory and indefinite, in most states, its application and, consequently, the definition of its scope and content is provided to the courts” [4]. In our country, the criteria for applying the public order clause to business relations are only being formed, but there is criticism of the Russian courts for the unjustifiably frequent use of the public order clause. Therefore, in my opinion, a clear and consistent notion of public policy should be enshrined in the Russian legislation in order to avoid any contradictions in the interpretation of legal norms. Resolving the issue of determining public order directly by the court, in the process of examining a particular case, threatens the danger of subjectivity in the application of law and the interpretation of legislation.

I propose to give the following definition of public order. “Public order is the fundamental rules and principles governing the livelihoods of the state and society enshrined in legislative acts” [5]. This definition is not final and may be the subject of legal discussions. The main thing is not the very formulation of the definition of public order, but its presence in the legislation of the country. The legislator must give a clear and consistent definition of public policy so that this concept does not evoke different interpretations.

5. Conclusion

Finishing the study on the issues of recognition and enforcement of foreign arbitral awards in the Russian Federation, we should say that in the event of non-execution of an arbitral award voluntarily, there are opportunities to enforce them. The Russian legislation “provides for the judicial protection of civil rights” [6], which also includes the enforcement of arbitral awards.

The contemporary Russian and international legislation on the issue of enforcement of papers for foreign arbitral awards contributes to the development of arbitral proceedings. In most cases, appeals to the Russian state court occur on the issue of issuing a writ of execution for a foreign arbitral award, the latter being issued to the interested party in the proceedings.

It appears that any doubts about the existence of grounds provided by law or an international agreement for refusal to recognize and enforce such a decision should be interpreted in favor of the award.

The aforementioned possibilities of enforcing arbitral awards are of great importance for the implementation by arbitration courts of the protection of the rights and interests of business entities. Otherwise, the arbitration decisions would simply be a declaration, and the unscrupulous party to the proceedings could freely ignore their execution. The legislation of the Russian Federation provides for the “right to the free exercise of economic activity” [6], an integral part of which is the right to arbitration in disputes. The arbitral tribunal is “the most appropriate form of jurisdiction to market relations” [7].

But, as we said earlier, in domestic and international legislation, gaps on the definition of the term public policy exist. The contradiction of a foreign arbitral award to the public order of the state in whose territory it is to be executed is the grounds for refusing to recognize this decision by the judicial system of the given state. Accordingly, the arbitration award cannot be executed and turns into a simple declaration of intent. The question of the contradiction of the arbitral award to the public order is decided by the court on the basis of its internal conviction, which threatens the danger of subjectivism. Consequently, according to the authors' proposal, the definition of public policy must be enshrined in the law in order to exclude the possibility of contradictory interpretations of legislation.

It should be noted that, in general, despite some gaps in the legislation, the institution of recognition of foreign arbitral awards is fully regulated by the Russian, foreign, and international

legislation. Subjects of economic activity have the possibility of recognition and, if necessary, the enforcement of foreign arbitral awards in the Russian Federation.

References

- [1] Grigonis V P 2002 *Commentary to the Constitution of the Russian Federation* (St. Petersburg, Russia)
- [2] Bruntseva E V 2001 *International commercial arbitration* (St. Petersburg, Russia: September)
- [3] Kaldina M A 2005 Application of the public order clause *Journal Court of Arbitration* **3** p 35
- [4] Gavrilenko V A 2008 *Court decision in the arbitration of disputes* (Veliky Novgorod, Russia)
- [5] Gavrilenko V A 2006 *The arbitral proceedings of disputes as a guarantee of the protection of the rights and interests of business entities* (Abstract of the Dissertation of the Candidate of Legal Sciences) (Saint-Petersburg, Russia)
- [6] Vinokurov V A, and Nemchenko S B 2016 *Human and civil rights and freedoms: their restriction and protection* (St. Petersburg, Russia)
- [7] Gavrilenko V A 2007 *Arbitration of disputes* (Veliky Novgorod, Russia)