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Public Policy in the International Civil Process in Russia: Current State

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ABSTRACT
The article is devoted to the study of the concept and application of the category of public policy in the international civil process in Russia. The analysis on the basis of Russian legislation and judicial practice in relation to the recognition and enforcement of foreign judicial decisions and decisions of international commercial arbitrations was carried out. The jurisprudence of recent years regarding the recognition and enforcement of foreign judicial decisions and decisions of international commercial arbitrations made outside the Russian Federation was studied.
The conclusion on the significant development of the concept and interpretation of public policy in the judicial practice of the Supreme Court of Russia, which coincides as a whole with the interpretation in foreign doctrine and judicial practice, is drawn. At the same time, an analysis of the decisions of the Russian courts in specific cases shows a wide variety of interpretations and application of the public policy category, which depend on the category of the case. The influence on the understanding of public policy and the possibility of its application, the presence of fiscal interest in a particular case, which can be expressed in the use of budget funds in the relations of the parties, etc., are noted.
Keywords: *public policy, recognition, enforcement, foreign judicial decisions, international commercial arbitration*

1. INTRODUCTION

The current understanding of public policy in Russian doctrine and judicial practice is ambiguous. It evolved gradually, with the formation of the new legal system of Russia. Indeed, back in the late 80s of the 20th century, in our country, recalling the famous words of V.I. Lenin, there was nothing private, everything was public.
After the beginning of economic reforms of the late 80s, early 90s of the XX century, a new legal system arose, which nevertheless is constantly reformed and developed. Judicial practice, which began to play a legislative role, plays a significant role in the development of the legal system.
For almost 30 years of the development of post-Soviet law, the public policy category has been enshrined in civil and procedural legislation, a relatively large judicial practice and doctrinal interpretation of public policy have been developed. A variety of approaches have been expressed, from overly broad, to carefully pragmatic, taking into account the experience of the legal systems of other states.
Therefore, it is important to proceed from the interpretation of public policy that is given to it in judicial practice, as well as in authoritative and universally recognized comments that correspond to the judicial practice of other states with a developed legal order.

2. STUDY DESIGN

During the study, general scientific and special legal methods were used.

3. RESEARCH RESULTS

The public policy (order public) issue is appropriate to start with a quote from the work of the French lawyer Malory, "Noone can determine its essence, everyone is completely ignorant and everyone uses it..." , who began with this words his work devoted to research public policy concept. Many international treaties and national legislation of many countries contain public policy category as a condition excluding the possibility of recognition and enforcement of judicial and arbitration acts. As H. Shak figuratively writes, if the result of the recognition of a foreign judicial decision is unacceptable for the rule of law of the recognizing state, an "emergency switch" is used by applying a reservation on public policy.
The concept of public policy is one of the most "sensitive" points of contact between international arbitration and foreign/international justice with the state judicial system. Debtors in our country often use references to a violation of public policy as an argument for legal protection from foreign judicial and arbitration decisions.

General principles of public policy regulation

They are enshrined in a number of provisions of Russian law, as well as international treaties.

Article 1193 of the Civil Code of the Russian Federation can be considered as the basis for understanding public policy in the field of private international law, according to which the rule of foreign law to be applied in accordance with the rules of Section VI of the Civil Code of the Russian Federation, is not applied in exceptional cases if the consequences of its application would clearly contradict with the foundations of the rule of law (public policy) of the Russian Federation. In this case, the corresponding norm of Russian law is applied if necessary. Refusal to apply a rule of foreign law cannot be based solely on the difference between the legal, political or economic system of the corresponding foreign state from the legal, political or economic system of the Russian Federation. The general conditions for the application of foreign substantive law rules are formulated from the point of view of the compliance criterion with the public policy of the Russian Federation, which can also be used in understanding the procedural public policy.

The public policy category is contained in the procedural legislation – the Arbitration Procedural Code of the Russian Federation and the Civil Procedural Code of the Russian Federation. According to Clause 7 of Part 1 of Article 244 of the Arbitration Procedural Code of the Russian Federation, one of the grounds for refusing recognition and enforcement of foreign court decision is to establish the fact that the execution of a foreign court decision would be contrary to the public policy of the Russian Federation. Clause 5 of Part 1 of Article 412 of the Civil Procedural Code of the Russian Federation refers not only to a contradiction to public policy but also to the possibility of damaging the sovereignty of the Russian Federation or a threat to the security of the Russian Federation. The content of the decision itself is not taken into account, its consequences and the possibility of obtaining a result that contradicts the foundations of the Russian law and order are significant.

Public policy is mentioned in a number of international treaties of the Russian Federation with other countries in one way or another, for example, in Clause 6 of Article 18 of the Treaty between the USSR and Spain on legal assistance in civil matters, Article 20 of the Treaty between Russia and China.

The foundations for public policy for refusing recognition and enforcement of foreign arbitrational decision are contained in Article 36 of the Law of the Russian Federation "On International Commercial Arbitration", as well as in Article 34 of this Law as a basis for canceling arbitrational decision if it is disputed in a state court. A number of international legal aid treaties contain a public policy clause in the field of arbitration, for example, Subclause "b" of Clause 2 of Article V of the Convention on the Recognition and Enforcement of Foreign Arbitration Decisions, etc.

Doctrinal understanding of public policy

Given the absence of a legislative definition of the public policy concept, the most justified approach is based on the identification of its content through the study of judicial practice, as well as authoritative and generally recognized comments, doctrinal sources.

Different countries have an ambiguous understanding of the public policy category. As the author of one of the most serious public policy studies, S.V. Krokhalev, noted, this is one of the most volatile, elastic and rubber legal categories, which is in constant motion and development.

The category "contradiction to the public policy of the Russian Federation" is evaluative. Many authors pay attention to this. However, the use of evaluation categories in this case is very important. This was brought to the attention of French professor K.Verbar, who analyzed this problem by the example of its long development in the Civil Code of France with its 200-year history. She fairly writes that the public policy concept is often blamed for its vague nature. However, a public policy without a doubt is an elastic concept necessary for law, which is established to streamline a "living" object. This nature of this concept makes it very practical because it allows to cover all possible situations and give each of them a special, own regulation.

The following is noteworthy when characterizing public policy. Categories of international and national public policy are singled out separately in many countries. Even if the basis of the case is the international order, it is determined by the judge according to the rules of his national law. According to A.-Ya. Van den Berg, the international and national public policy in some countries are separated in law (France), in others – such a difference does not matter (Germany) since the concept of public policy is not developed in law (but by it can be meant the existence of a number of peremptory norms that cannot be ignored.

As H. Shack writes, the previous legislation in Germany understood a public policy as a violation of "good morals or goals of German law". Currently, with reference to fundamental rights, it is said that the result should be clearly incompatible with the essential principles of German law. French law has the concept of public policy in Article 6 of the Civil Code of France, which states: "It is forbidden to violate laws relating to public policy and good morals by private agreements." In fact, although the French Civil Code contains an indication of public policy, it is not clearly defined anywhere. Therefore, the main load on creating the appropriate definition rests with the doctrine and judicial practice.

In Russia, most experts assess the "contradiction to the public policy of the Russian Federation" as a contradiction to the foundations of the legal system of our country, as defined in the Constitution of the Russian Federation. For example, V.F. Yakovlev believed that the application of the public policy clause occurs when there is a violation of any fundamental provisions of the law, as a result of which the rights of one party to this conflict are clearly violated and do not find legal protection. M.M. Boguslavskiy and B.R. Karabelnikov, referring to Article 1193 of the Civil Code, emphasize the connection between public policy and the foundations of the rule of law of Russia, emphasizing the moral and philosophical connotation of

this category. A.S. Komarov understands "a contradiction to the public policy of the Russian Federation" as a contradiction to the second Chapter of the Constitution of the Russian Federation "Human and civil rights and liberties", contradictions to public legal consciousness and fundamental principles of law.

A number of other specialists offer a broader interpretation of the public policy clause. For example, T.N. Neshatayeva understands by it as the foundations of antitrust laws, laws on privatization, the fundamental legal foundations of commercial turnover, legislation on competition, bankruptcy, city-forming enterprises, etc.

However, as Professor K. Verbar rightly writes, public policy cannot be mixed with public law. Public policy is a concept common to the entire system of law, relating to all legal branches, both public and private. Public law in itself in France is not a priority over private law. These two parts of the legal system are not different in terms of level, differing from one another in the respective scope of application. The last remark very accurately captures that aspect of this problem on which there is controversy in Russia.

Judicial practice. Let us analyze the judicial practice on the recognition and enforcement of arbitration decisions related to the application of the public policy category. The following is said in one of the first judicial acts on this issue – the determination of the Supreme Court of the Russian Federation of September 25, 1998, issued in a particular case: by "public policy of the Russian Federation" it is meant to refer to the foundations of the social system of the Russian state. A public policy clause is possible only in those individual cases where the application of a foreign law could produce a result that is unacceptable from the point of view of Russian legal consciousness.

The Supreme Court of the Russian Federation in another case (determination of April 13, 2001, case No. 5-G01-35) rejected the debtor's arguments about the non-compliance of the arbitration decision with public policy as follows: "The content of the concept of the "public policy of the Russian Federation" does not coincide with the content of the norms of national legislation of the Russian Federation. Since the legislation of the Russian Federation allows the application of the norms of a foreign state (Article 28 of the Law "On International Commercial Arbitration"), the existence of a fundamental difference between Russian law and the law of another state in itself cannot be the ground for the application of a public policy clause. Such an application of this clause means a denial of the possibility of applying the law of a foreign state in general in the Russian Federation."

The Decision of the Presidium of the Supreme Arbitration Court of the Russian Federation dated October 23, 2012, No. 7805/12 with regard to case No. A56-49603/2011 on the recognition and enforcement of a decision of a foreign court in the Russian Federation states the following: the claim was refused since the extraterritorial application by the foreign court of the legislation of its state to a transaction concluded between Russian legal entities, the subject of which was shared in the authorized capital of a Russian LLC, could damage the sovereignty of the Russian Federation, in addition, the court resolved the issue of rights and obligations of the person not involved in the case.

The information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated February 26, 2013 No. 156 "Review of the practice of consideration by arbitration courts of cases on the application of public policy clause as a ground for refusing recognition and enforcement of foreign judicial and arbitration decisions" is of great importance for judicial practice. It is noted in Clause 1 of the Review that "by the public policy with the aim of application of the above norms, is meant fundamental legal principles that have the highest imperativeness, universality, special social and public significance, that are the basis for building the economic, political, legal system of the state."

From this clarification, it is obvious that an objective consequence of the autonomy of international commercial arbitration is a restrictive understanding of the public policy category in relation to the exercise of judicial control over its decisions. The public policy concept is a narrower category than the sectoral principles of law and does not coincide with the circle of peremptory norms of Russian law. It includes only the most fundamental values and principles of the Russian legal system, the violation of which in a particular case casts doubt on the stability of such a system and preservation of its balance.

A public policy clause can be applied only in exceptional cases – when there is a clear, undeniable violation by the arbitrational decision of the foundations of the legal system. The exclusivity of this foundation is additionally confirmed by the inadmissibility of a repeated consideration by the state court of the substance of the dispute investigated by the Arbitration Court, and adopted by the arbitration decision as a result of such a study.

However, the important significance in the interpretation of public policy, the presence of public interest should be borne in mind. So, the decision of a foreign court on collecting debts to the budgets on customs payments, taxes, penalties to the budget of a foreign state contradicts the public policy of the Russian Federation (Clause 29 of the Judicial Practice Review of the Supreme Court of the Russian Federation No. 2 (2017), approved by the Presidium of the Supreme Court of the Russian Federation dated April 26, 2017).

Another example is "the enforcement of a decision of a foreign arbitration court, the defendant of which is an organization whose ultimate beneficiary is the Russian Federation, and as part of this decision, the property of a person whose final beneficiary is also the Russian Federation, may damage the budget of the Russian Federation as a result of the withdrawal of funds to the accounts of foreign companies" (Resolution of the Arbitration Court of the Moscow District dated January 16, 2019 No. F05-15664/2018 with regaed to the case No. A40-117331/18).

Courts sometimes examine the size of sanctions as a criterion for public policy violation. For example, the Decision of the Arbitration Court of the Moscow District

dated July 24, 2019, with regard to the case No. A40-84581/19, stated the following: "The court of first instance, having examined and evaluated the evidence presented in the case file under the rules of Article 71 of the Arbitration Procedural Code of the Russian Federation, came to the conclusion that there are grounds for canceling the decision of the Arbitration Court as violating the fundamental principles of Russian law, contrary to the public policy of the Russian Federation, since the penalty imposed (0.4 percent for each day of delay) has an excessively high rate, many times exceeds the amount of a reasonable penalty, including the key rate of the Central Bank of the Russian Federation."

It is necessary to cite Clause 51 from the latest case law practice of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated December 10, 2019 No. 53 "On the fulfillment by the courts of the Russian Federation of the functions of assistance and control in relation to arbitration, international commercial arbitration", where the most detailed definition of public policy and the boundaries of its application were given.

"By the public policy with the aim of application of the above norms, is meant fundamental legal principles that have the highest imperativeness, universality, special social and public significance, that are the basis for building the economic, political, legal system of the Russian Federation.

To cancel or refuse to enforce the decision of the arbitration court on the grounds of violation of public policy, the court must establish the combined presence of two signs: firstly, a violation of the fundamental principles of building the economic, political, legal system of the Russian Federation, which, secondly, may have consequences in the form of damage to the sovereignty or security of the state, affect the interests of large social groups or violate the constitutional rights and liberties of individuals or legal entities.

The application by the arbitration court of norms of foreign law that have no analogs in Russian law; non-participation of the defendant in the arbitration proceedings; the debtor's failure to declare objections to the enforcement of the arbitrational decision by themselves do not indicate a violation of the public policy of the Russian Federation.

A contradiction to public policy as a basis for canceling a decision of the Arbitration Court or refusing enforcement of a decision of the Arbitration Court is applied by the court in exceptional cases, without substituting special grounds for refusing recognition and enforcement provided for by international treaties of the Russian Federation and the norms of the Civil Procedural Code of the Russian Federation and the Arbitration Procedural Code of the Russian Federation."

If the approach of this clarification of the Plenum of the Supreme Court of the Russian Federation is implemented in judicial practice, then it will basically coincide with its interpretation in the foreign legal systems of developed countries.

Contradictions of Russian and foreign judicial acts in the context of public policy. To what extent can the decision be considered of the Russian court to invalidate an agreement containing an arbitration clause as an obstacle to recognizing the legal consequences of an arbitrational decision.

For example, the recognition of a foreign arbitration decision was refused, since at the time of the impugned decision by the Russian arbitration court it had been decided to invalidate the disputed agreement and application of the consequences of invalidity. In addition, the recognition and enforcement of a foreign arbitration decision would lead to the existence on the territory of the Russian Federation of judicial acts of equal legal force containing mutually exclusive conclusions (the decision of the Federal Arbitration Court of the West Siberian District dated December 5, 2011, with regard to case No. A27-781/2011).

Another approach is to raise the question on contradicting the public policy of arbitration decisions only in cases where the transaction on which the arbitration decision was based was invalidated on the basis established by Article 169 of the Civil Code. An approach close to the stated position was set forth in the decision of the Federal Arbitration Court of the North-Western District dated September 23, 2005, No. A21-2499/03-S1.

Practice and part of the doctrine in France traditionally attribute the contradiction of a foreign decision to a delivered French decision to the field of public policy, as in the analyzed situation. Thus, the exequatur for a foreign decision will be rejected that does not correspond to any extent with a final decision made by a French court. J.B. Racine wrote: "In accordance with the principle of "relevance of public policy", the judge deciding the question on issuing an exequatur should proceed from the concept of public policy at the time of the decision of such a question in order to assess the presence or absence of a violation of public policy... Therefore, the actual circumstance that takes place after the decision, may, in some cases, make the execution of such a decision either appropriate or contrary to public policy. "

One review of judicial practice indicated the following: "Public policy is able to withstand a foreign decision incompatible with a French judicial decision to have consequences in France (Cass. civ. 1, 5 avril 1960, JDI 1960, 1070, observations Sialelli; Revue critique de droit international privé 1961, 389, note Weser; D. 1960, 717, note G. Holleaux).

Thus, the foregoing shows that this situation – the conflict of several judicial acts in conjunction with the category of public policy, causes various approaches in judicial practice and doctrine. Therefore, further study of this issue is necessary with the aim of a broader analysis of the situation.

4. CONCLUSION

Thus, the foregoing shows that a contradiction to public policy in Russian judicial practice is understood primarily as a contradiction to the fundamental constitutional principles of the legal system of our country. A public policy clause constitutes an ex officio basis and may be applied at the initiative of a judge. A contradiction to public policy as a basis for refusal to issue a writ of execution is subject to verification by the court on its own initiative at any stage of the consideration of the case, regardless of the arguments and objections of the parties (Clause 46 of the Review of the Presidium of the Supreme Court of the Russian Federation dated December 26, 2018, No. 96).

At the same time, a judicial practice sometimes attaches legal significance to a variety of factual circumstances, assessing their presence as incompatible with Russian public policy. Therefore, the question of the content and application of this category needs to be further researched.

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