Transnational Propagation Agreements in Russian and Chinese Law

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ABSTRACT
The rapid growth of international private law relations is accompanied by an increase in the number of legal disputes arising from them. In many cases, the parties intend to select the competent judicial institution of their choice. However, the modern laconic design of the norms of the Civil Procedure and Arbitration Procedure Codes of the Russian Federation in practice causes many problems. It is these rules that govern the contractual jurisdiction of cross-border disputes. The article presents a critical view of the existing normative regulation in the Russian Federation, as well as a comparative legal analysis of the institution under consideration in the law of the Russian Federation and the People's Republic of China as states leading a very active investment and foreign economic policy. The research done allowed making several proposals for improving the current Russian procedural legislation. The research demonstrates that it is necessary to bring uniformity to the provisions of Art. 404 of the Code of Civil Procedure of the Russian Federation and Article 249 of the Arbitration Procedure Code of the Russian Federation and expand their content by regulating the form of the propagation agreement, taking into account the existing clarifications of the Supreme Court of the Russian Federation and the norms of the Laws "On Arbitration (Arbitration)" and "On the International Commercial Arbitration Court". The existing terminology should also be streamlined by using the term "propagation agreement" or "agreement on the jurisdiction of the dispute to an arbitration court". The study of judicial practice, as well as a comparative analysis of Russian and Chinese legislation in the area under consideration, showed the need to establish requirements for the content of propagation agreements. Propagation agreements should include the intention of the parties to go to a specific court, the subject of the proceedings, as well as the composition of the arbitrators (in commercial arbitration), which will significantly reduce the risk of invalidation of agreements. Equally valuable is the aspect of law enforcement practice would be the consolidation of the provision that all doubts arising from the inaccuracy of the wording of the propagation agreement should be interpreted in favour of recognizing the competence of the judicial institution chosen by the parties.
Keywords: *international jurisdiction, contractual jurisdiction, cross-border disputes, arbitration agreement, arbitration clause, progression agreement)*

1. INTRODUCTION

The rapid growth of international private law relations, which is so clearly traced at present, is accompanied by an increase in the number of legal disputes arising from them. At the same time, in many cases, the parties wish to choose at their discretion a competent judicial institution. If we are talking about a business dispute, commercial arbitration (arbitration tribunals) often becomes such an institution.

Party autonomy is one of the principles of civil procedure law and international arbitration. Traditionally it is explained by way of the possibility to freely dispose of one's civil law substantive rights (which are subject of the dispute). The substantive civil rights do not change its dispositive nature even when they are challenged or defended in the court. The only difference between disposing of rights in substantive legal relations and during court proceedings is that during court proceedings disposing of substantive rights has to have established procedural form [1].

Modern business international transactions are multiparty and complicated. Such contracts are usually composed of several contracts which can contain bilateral dispute resolution arrangements. According to the principle of parties autonomy dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will be resolved by arbitration exclusively between these two parties. Other parties cannot participate in the resolution of the dispute through

arbitration, even if they have played an active role in the actual project [4].
Since this trend is manifested in world practice, it will be interesting to have a comparative legal analysis of the norms in this area of domestic legislation and the experience of the People's Republic of China, taking into account the active policy of this state in investment and foreign economic activity.

2. GOALS, OBJECTIVES AND METHODS OF RESEARCH

2.1. Purpose of the study

The study aims to identify topical theoretical and practical problems of the institution of contractual jurisdiction of cross-border disputes in the law of Russia and China, as well as to search for ways to improve the legal regulation of the legal relations in question.

2.2. Research objectives

The main tasks aimed at achieving this research goal are the follows:
- carrying out a comparative legal analysis of the regulation of the contractual jurisdiction of cross-border disputes in the law of Russia and China;
- study of modern scientific opinions on existing problems of theory and practice;
- putting forward proposals for improving domestic legislation in the area under consideration.

2.3. Research methods

In the course of the study, general scientific (analysis, synthesis, induction, deduction, generalization) and special scientific methods (formal-legal, method of interpreting legal norms, comparative jurisprudence, comparative analysis) were used.

3. PROGRAMMING AGREEMENTS IN RUSSIAN LAW

The norms establishing the rules for determining contractual jurisdiction, including in cross-border disputes, are enshrined both in the Code of Civil Procedure of the Russian Federation (Articles 32, 404) [3] and in the Arbitration Procedure Code of the Russian Federation (Articles 37, 249) [4]. However, they are extremely laconic and besides, in fact, the conceptual definition of the possibility of the parties to the dispute choosing a competent institution, they do not answer many other questions that often arise in law enforcement practice.

Also, the wording of these provisions has some differences. Thus, the Code of Civil Procedure of the Russian Federation does not establish requirements for the form and content of propagation agreements. However, it indicates that the parties can change the jurisdiction of the dispute (including those complicated by a foreign element) at their discretion before the court accepts the case for proceedings.
The contractual jurisdiction in arbitration disputes with the participation of foreign persons is expressed as an agreement by which the parties can determine the competence of the Russian court before it accepts the case for proceedings, however, if this does not affect the exclusive competence of the foreign court (Clause 1 of Article 249 of the Arbitration Procedure Code of the Russian Federation). This provision echoes the corresponding provision of clause 2 of Article 404 of the Code of Civil Procedure of the Russian Federation, according to which the exclusive jurisdiction of cases with foreign persons cannot be changed by agreement of the parties. An indication of the need to comply with the written form of the agreement is contained only in clause 2 of Article 249 of the Arbitration Procedure Code of the Russian Federation, however, without detailing the requirements for its content.
Given that, as noted above, many cross-border disputes related to the implementation of economic activities are often considered in commercial arbitration, in this case, it is appropriate to refer to the Federal Law "On Arbitration (Arbitration Proceedings)" [5], and the Law "On International Commercial Arbitration court" [6], mainly since the norms of these acts include detailed (and practically identical) provisions on the content and form of the arbitration agreement.
By its legal nature, content, form, methods of implementation (types), applicable principles (voluntariness and autonomy), the arbitration agreement concluded for the consideration of disputes in international commercial arbitration and arbitration of internal disputes coincides and has the same legal character [7].
These laws not only define an arbitration agreement as an agreement of the parties to refer to arbitration all or certain disputes that have arisen or may arise between them in connection with any particular legal relationship or part of it, regardless of whether such a relationship was contractual or not. The form in which this agreement should be made is detailed. Thus, it is mentioned that the agreement can be expressed as an arbitration clause in the text of the agreement or exist as a separate document. The concept of a written form of agreement is also detailed, including in the form of an electronic message or the possibility of exchanging a statement of claim and withdrawal.
It is noteworthy that the Supreme Court of the Russian Federation undertook the Resolution of the Plenum of June 27, 2017, N 23 "On Consideration by Arbitration Courts of Cases on Economic Disputes Arising from Relationships, complicated by a foreign element" [8].
In clauses 6-11 of the said Resolution, the Supreme Court explains in detail the nature and underlying conditions for

the validity of an arbitration agreement, using a term widely used in the doctrine of private international law, but not legally enshrined in the Arbitration Procedure Code of the Russian Federation (but having in Article 404 of the Code of Civil Procedure of the Russian Federation) – propagation agreements. Moreover, attention is drawn to the interpretation of the norms of Article 249 of the Arbitration Procedure Code of the Russian Federation in strict accordance with the provisions of the Federal Law "On Arbitration (Arbitration)" and the Law "On the International Commercial Arbitration Court" discussed above, for example, in terms of the form of agreement and validity in case of change of persons.

The explanations that have been released do not, however, solve similar problems in terms of prophetic agreements in civil proceedings, which in practice leads to very different consequences. In particular, the absence of specific guidance on the choice of the competent court may lead to both the invalidation of the agreement [9] and not give rise to such consequences [10].

However, experts note that there is a significant difference between the choice of international jurisdiction and contractual jurisdiction for internal disputes. Thus, N.A. Bogdanova notes that international treaty jurisdiction is not aimed at delimiting the competence between specific state courts within one state. However, its primary purpose is to determine the competence of a court of a particular state. Subsequently, the court for direct consideration of the dispute on the merits can be determined based on the general rules of jurisdiction and jurisdiction of this state [11, 12].

Discrepancies in the understanding of propagation agreements on cross-border disputes in the Code of Civil Procedure of the Russian Federation and the Arbitration Procedure Code of the Russian Federation were also reflected in the Concept of the Unified Civil Procedure Code of the Russian Federation. In paragraph 56.3 of this document, in particular, it is said that regarding the contractual jurisdiction of cases involving foreign persons, with some difference in the interpretation of Art. 404 Code of Civil Procedure and Art. 249 Arbitration Procedure Code of the Russian Federation, it is necessary to take the norms of Art. 249 Arbitration Procedure Code of the Russian Federation [13].

It is difficult to disagree with this proposal. However, the wording of Article 249 of the Arbitration Procedure Code of the Russian Federation is far from perfect, and not only because of its excessive brevity.

So, severe criticism in the scientific community is caused by the use of the term "agreement on the determination of the competence of arbitration courts in the Russian Federation" Puchkov V.O. in his study of this issue notes that from the standpoint of both the doctrine and practice of Russian law, this should be replaced by the traditional (and more relevant from a legal and technical point of view) term "agreement on the jurisdiction of the dispute to an arbitration court" [14].

This conclusion of the author seems to be justified since the competence is the scope of the powers of the court as a state body, which cannot be changed by the agreement of private individuals by the provisions of Article 71 of the Constitution of the Russian Federation [15]. Also, in the explanations mentioned above, the Supreme Court of the Russian Federation operates with the concept of "prophetic agreement", which seems to be more logical and understandable to use, as a concept that has steadily developed in doctrine and law enforcement. These points emphasize the need to revise the considered provisions of the Code of Civil Procedure of the Russian Federation and the Arbitration Procedure Code of the Russian Federation.

4. PROGRAMMING AGREEMENTS IN CHINESE LAW

In order to study international experience in resolving the issue under consideration, let us turn to the norms of procedural legislation of China.

One can find that Chinese civil procedure law is a mixture of Soviet procedural concept, local Chinese culture, and western procedural concept and rules. It is still a developing procedure and experiences a process from resisting western procedural concept to gradually accepting and learning from it. It used for being a supra-inquisitorial trial model with an overwhelming focus on conciliation, but is now transforming to a party disposition trial model with preference to conciliation under the premise of voluntariness. With the globalization of the economy, the international cooperation of China, especially with the BRICS countries, will also become more and more crucial [16].

In the course of the ongoing reform of the Chinese legal procedure (its liberalization, in particular), there is a noticeable expansion of the competence of arbitration, the subject of consideration of which can be all civil cases, including disputes over marriage, family and inheritance issues [17].

Even before the recent past, Chinese arbitration institutions were divided into resolving only internal disputes and resolving only disputes related to foreign countries [18]. However, now arbitration tribunals have the right to work with their favourite types of disputes, although all legal disputes related to commercial activities and complicated by a foreign element, as a rule, are considered in the international arbitration procedure by the China International Economic and Trade Commission and its divisions [19].

At the same time, the PRC government continues to pursue a policy of creating the most favourable conditions for resolving commercial disputes in the arbitration commissions of China by issuing state guarantees that ensure not only the execution of their decisions but also the independence of arbitrators. Consider international commercial disputes; it is planned to create a whole network of International Commercial Courts, two of which are already operating as a pilot project in Shenzhen and Xi'an [17]. Also, other arbitration institutions are being created at the municipal level, one of the most

authoritative of them being the Beijing Arbitration Commission.

Territorial jurisdiction refers to jurisdiction over cases arising in or involving persons residing within a defined territory. In China, the establishment of territorial jurisdiction is based on the defendant's domicile, subject to certain exceptions. According to the CPL, the doctrine of jurisdiction may change from the defendant's domicile to the plaintiff's domicile when the defendant is in custody; the defendant of a personal status case is not in China or missing; the defendant's household registration is cancelled, or the defendant's domicile is not as clear as the plaintiff's domicile in maintenance cases and divorce cases. In tort and contract cases, parties are given more jurisdiction choices [20].

The rules for determining international jurisdiction are defined in Chapter 26 of the Civil Procedure Code of the People's Republic of China [21]. This chapter regulates the competence of the people's courts to consider cross-border disputes, taking into account the presence of specific criteria that are also known to Russian law, for example:

- if the performance under the contract that became the basis for the claim took place in China;
- if on the territory of the People's Republic of China there is a thing that is the subject of the claim, or other property of the defendant that can be seized;
- if the defendant has a representative office in China.

The consolidation of the above criteria for determining international jurisdiction does not exclude; however, the possibility of the parties to independently choose a competent court. The written form of the relevant agreement, as well as the actual connection of the dispute with the jurisdiction of the desired court, are indicated as mandatory conditions for the validity of such a choice. The ban on violation of the provisions of procedural rules concerning the general and exclusive jurisdiction of the Chinese courts if a dispute is referred to the jurisdiction of the people's courts of the People's Republic of China is specially stipulated.

The rule may cause interest from the point of view of a domestic researcher that the failure of the defendant in a cross-border dispute to submit objections to the competence of the people's court with the simultaneous presentation of a response to the claim is considered as recognition of the competence of this court. There is no identical rule in Russian procedural law, but the provisions of the Federal Law "On Arbitration (Arbitration Proceedings)" and the Law "On the International Commercial Arbitration Court" concerning the written form of the arbitration agreement, which can mean the choice of jurisdiction made in the statement of claim and response to it.

The specifics of determining contractual jurisdiction in arbitration disputes are provided for by the Law of the People's Republic of China "On Arbitration" [22]. This law, although it was not based on the UNCITRAL Model Law [23], in general, contains provisions corresponding to it on most issues [24].

So, chapter III of this act is devoted to the content and conditions of the arbitration agreement. It should be especially noted that, in the sense of this law, an arbitration agreement is understood as an arbitration clause (arbitration record), a prerequisite for the validity of which is a written form, and regardless of whether it is implemented in the text of the agreement itself, which has become the subject of the dispute, or in an agreement on appeal to arbitration. It also does not matter how long such a clause is concluded – before or after the dispute arises.

The following are mandatory requirements for the content of the clause: the intention to apply to arbitration; the subject of the arbitration and the chosen arbitration panel. Moreover, if concerning the subject, there is any uncertainty of the provisions, it is possible to conclude an additional agreement; otherwise, the reservation will be considered invalid.

Other conditions for the invalidity of the agreement are the following:

- if the subject of the arbitration goes beyond the competence of the respective institution;
- if the agreement is concluded by a person who is wholly or partially with limited legal capacity;
- if the agreement was concluded as a result of coercion by one of the parties.

It is emphasized that the arbitration agreement is autonomous.

The Supreme Court of the People's Republic of China also takes an active position in clarifying some of the controversial provisions in the regulation of civil procedure. So, we note that in 2012. amendments were made to the Civil Procedure Code of the People's Republic of China. In 2014 the "Clarifications of the Supreme People's Court of the PRC on the Application of Certain Provisions of the CPC of the PRC" were issued, which "is a significant step in the modernization of the civil procedure of the People's Republic of China, the purpose of which is to create a fair, and effective, reputable judicial system.

The adoption of these measures is of great importance for the correct, uniform, strict and effective implementation of the new version of the Code of Civil Procedure, to ensure equality of procedural rights, guarantee the legality and fairness of justice. These measures also contribute to the development of the economy and society, ensuring harmony and stability in society, a more decisive construction of a socialist system of law and order with Chinese characteristics and a socialist rule of law, the formation of a positive image of the court and an increase in the authority of the judiciary" [20].

Similar attempts to clarify specific issues of legal proceedings, complicated by a foreign element, were made earlier. So, in 2006, clarifications were published regarding the application of the Law "On Arbitration", in particular, regarding the validity of the arbitration agreement. The Supreme Court noted that all doubts arising from the inaccuracy of the wording of the arbitration agreement should be interpreted in favour of recognizing the competence of arbitration. The competent authority for resolving such situations is the middle-level people's court.

5. CONCLUSION

Summing up the study, we note that the active policy of the People's Republic of China in the field of foreign investment and foreign economic relations, the continuing economic growth combined with the increase in the number (and their variability) of arbitration institutions can be considered as a key factor in increasing the effectiveness of contractual jurisdiction in cross-border disputes.

The growing number of arbitration institutions generates healthy competition between them, and, consequently, the provision of high-quality services, taking into account all modern trends not only in legislative but also in law enforcement practice. The above experience of the People's Republic of China, taking into account the existing shortcomings of domestic legislation, is of undoubted interest for Russian legal scholars and is of great importance for modern civil law.

The analysis of domestic legislation allows concluding that it is necessary to introduce uniformity into the provisions of Art. 404 of the Code of Civil Procedure of the Russian Federation and Article 249 of the Arbitration Procedure Code of the Russian Federation. However, in our opinion, one should not take as a basis the provisions of Article 249 of the Arbitration Procedure Code of the Russian Federation in the form in which these norms exist at the moment.

We believe it is necessary to expand their content through detailed regulation of the form of the propagation agreement, taking into account the existing clarifications of the Supreme Court of the Russian Federation and the norms of the Laws "On Arbitration (Arbitration)" and "On the International Commercial Arbitration Court".

The existing wording of Article 249 of the Arbitration Procedure Code of the Russian Federation "an agreement on the determination of the competence of arbitration courts in the Russian Federation" should be changed by using the term "propagation agreement" or "an agreement on the jurisdiction of a dispute to an arbitration court".

It is also necessary to regulate the requirements for the content of propagation agreements. Despite the doctrine's understanding of international jurisdiction as a definition, first of all, of the state whose court is competent to consider the dispute, the indication in the prophetic agreements of the parties' intentions to go to a specific court, the subject of the proceedings, as well as the composition of arbitrators (in the case of applying to commercial arbitration) to a large extent, will reduce the risk of the agreement being invalidated.

In our opinion, it would be fair to introduce into the texts of the norms under consideration the provision that all doubts arising from the inaccuracy of the wording of the propagation agreement should be interpreted in favour of recognizing the competence of the judicial institution chosen by the parties.

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