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**CLAUSE ON PUBLIC ORDER AS A GROUND FOR REFUSAL
OF RECOGNITION AND ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS IN RUSSIA**

Abstract

The article analyzes judicial enforcement experience, legislation and Russian doctrines as to refusing to recognize and execute foreign arbitration awards as this contradicts public order. A division is made between the categories of domestic public order and international public order. The major methods applied in the paper are comparative analysis and comparative law. The article touches upon the problems of material public order. A conclusion has been made that defining this category poses a serious problem. In comparison, the category of procedural public order is easier to define. Judicial practice does not give a definition of material public order but the underlying principle is that the system of principles and values embodying a national public order cannot be recognized even in international cases. Russian legislation does not operate the concept of international public order, but the analysis of legal norms allows making a conclusion that when recognizing and enforcing foreign arbitration awards, not a public order of the Russian Federation is meant but public order taking into account international obligations of the RF and the character of relations containing a foreign element. The research has allowed making the following conclusions. Russian legislation regulating the issues of recognizing and enforcing foreign arbitration awards needs to include the concept of international public order understood as fundamental legal principles of mandatory nature, universal character, special public significance and being the basis for economic, political, legal system of the RF considering its international obligations and the character of relations related to foreign enforcement.

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The main international instrument in the field of commercial arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 July 1958 (hereinafter - the New York Convention). 149 countries ratified the Convention, including Russia. The New York Convention should be applied in all Member States in deciding on the Recognition and Enforcement of Foreign Arbitral Awards. At the same time, art. VII § 1 of the New York Convention provides that an interested party has the right to benefit from the provisions of the national legislation of the country where the recognition and enforcement of an arbitral award.

The New York Convention in the art. V § 2 (b) does not specify on the domestic or international public order. However, the developers of the Convention sought to provide the most favorable regime of Foreign Arbitral Awards, and proceeded from the narrow conception of public order. Commentators of the Convention clearly indicate that the text implies the international public order: “Although in the art. V § 2 (b) is not explicitly indicated, no one will deny that, along with the public order of the country of execution can be understood here as the international public order”². This concept was accepted in the jurisprudence of the participating countries in an applying the provisions of the Convention. The literature indicates that the entire judicial practice relating to the use of the art. V § 2 (b), either explicitly or hidden, but always made a distinction between domestic and international public order³. The point of view is expressed that the difference between domestic public order and the international public order justified is such a recognized principle of international arbitration as the finality of international arbitral award⁴.

The art. V § 2 (b) of the New York Convention unequivocally establishes the application of *lex fori* to issues of public order. The mechanism of public order is applicable on the initiative of a court, and not on the initiative of persons involved in the case (without prejudice for the interested party the right to appeal to the public order). The court must

² P. Fouchard, E.Gaillard, B.Goldman *Traité de l'arbitrage commercial international* // Litec. 1996. N 1710., 1012.

³ S.V. Krokhaev *Category of international public order in international civil procedure. M.*, 2010 // RRS (Reference Retrieval System) Consultant Plus; A.J.Van den Berg *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation.* Deventer, 1981.

⁴ A.J.Van den Berg *Refusal of Enforcement under the New-York Convention 1958* // ICC Bulletin. 1999., 86.

give an interpretation of the concept of “public order.” The provisions of the art. V §2 (b) limit the ability of foreign arbitral awards at the behest of the State whose court considers the question about the performance of such design: persons involved in the dispute (including referees) can not affect this will; they can only take note the law of the Forum State and take them into account when formulating their position⁵.

In Russia there is a dualism of civil process, and therefore the order of the application for recognition and enforcement of a foreign arbitral award is governed by the rules of Chapter 31 (art. 241-246) of Arbitration Procedural Code of the Russian Federation (hereinafter – APC RF) and the provisions of Chapter 45 (art. 409-417) of the Civil Procedure Code of the Russian Federation (hereinafter – CPC RF). Thus, there are two procedural forms of recognition and enforcement of foreign arbitral awards – under the state arbitrazh⁶ proceeding and civil proceeding, and in some cases these procedural forms have significant differences.

Competence of state arbitrazh courts or courts of general jurisdiction depends on the character of the dispute. State arbitrazh has jurisdiction if the decision was made on the dispute related to business and other economic activities. In other cases, the general court has jurisdiction. An international commercial arbitration decision, adopted on the consideration of an international commercial dispute, subjects to recognition and enforcement of Russian state arbitrazh⁷. If a foreign arbitration shall decide the dispute related to the family, inheritance, labor, copyright, the decision recognized and enforced by a court of general jurisdiction⁸.

In Russia, there is the system of the exequatur. A foreign arbitral award is executed enforce without any transformation in court decision according to the rules of enforcement proceedings, applicable at the time of execution, on the basis of the competent state court an enforcement order⁹.

⁵ B.R.Karabelnikov *Performance and contesting the decisions of international commercial arbitration. Comment to the New York Convention of 1958 and chapters 30 and 31 APC RF 2002. 3rd ed., Rev. and add. M.: Statute, 2008* // RRS Consultant Plus.

⁶ In Russia, the term “arbitration, arbitrage” is used in two fundamentally different semantics. The term “arbitration” at the same time represents the state court of special jurisdiction (on disputes related to business (commercial) and other economic activities – f.e. Federal Arbitration Court of the Moscow District) and non-state, the arbitral tribunal (f.e. International Commercial Arbitration Court of the Russian Federation). Official normative acts regulating activities of the state commercial courts use the term “arbitration”. Russian legal practice (but not judicial practice!) and Russian doctrine use in writing, the term “**arbitrazh**”, “state arbitrazh” to refer to the state commercial courts in order to distinguish between the arbitral tribunals and state commercial courts. Arbitral tribunals (and international commercial arbitration) in the Russian legal literature are designated by the term “arbitration”.

⁷ N.Y.Erpyleva, *Private international law: the textbook*. M., 2011.

⁸ See, eg.: Decision of the Moscow City Court on 6 April 2011 in the case N 3m-11/3-2011 // RRS Consultant Plus.

⁹ See: S.A. Kurochkin, *Recognition and enforcement of arbitral awards and international commercial arbitration* // Law. 2008. N 7., 189.

Foreign arbitral awards entered into force shall be recognized and enforced in Russia if their recognition and enforcement is provided for an international treaty and a federal law. A petition for recognition and enforcement may be based on reciprocity or international comity. Possibility of recognition and enforcement of foreign arbitral awards on the basis of reciprocity or comity is not directly attached in the Russian legislation, but follows from its provisions, and confirmed by the jurisprudence¹⁰.

In the Russian civil procedural law and arbitrazh procedural law the New York Convention provisions are implemented, establishing the grounds for refusing recognition and enforcement of foreign arbitral awards. The provision of the art. V §2 (b) of the New York Convention, according to which the state has the right to refuse recognition and enforcement of foreign arbitral award, if such performance is contrary to the public order of this state, is enshrined in art. 417 CPC RF and art. 244 APC RF¹¹.

Russian procedural law does not operate on the concept of “international public order”, on the contrary, in all legislation there is explicitly stated - **“public order of the Russian Federation.”** However, the Russian doctrine states that public order as an object of protection clause has two types. The first applies only to internal relations, the second must be observed in the application of foreign law, recognition and enforcement of foreign judgments and arbitral awards¹². The concept of “international public order” is used in the Russian judicial acts¹³. It

¹⁰ See, eg.: Ordinance of the Federal Arbitration Court of the Moscow District. April 19, 2012 N A40-119397/11-63-950 : «Under P. 4 Art. 15 of the Constitution of the Russian Federation recognized principles and norms of international law are an integral part of the legal system of the Russian Federation. These recognized principles of international law include the principles of reciprocity and comity. The principle of international comity requires States to relate to foreign legal order with courtesy and politeness... Even in the absence of a treaty between the Russian Federation and the State on the recognition and enforcement of the judgment is claimed in a Russian court, this foreign judgment is enforceable under the principles of reciprocity and international comity... Due to the fact that ... English law provides for the recognition and enforcement of decisions of Russian courts and also due to the fact that the decisions of Russian courts recognized and enforced by the courts of the United Kingdom, court correctly concluded that the injunctions in any case shall be recognized and enforced in the territory of the Russian Federation on the basis of reciprocity and comity » // RRS Consultant Plus.

¹¹ See, eg.: Art. 417 CPC RF “Refusal of Acknowledgment and Execution of Foreign Arbitral Awards (Judgments made by Foreign Arbitration)”: 1. The acknowledgment and execution of foreign arbitral award may be rejected of on the following grounds: ... 2) if court establishes a dispute not to be subject to arbitration according to federal law, or acknowledgment and execution of this foreign arbitral award to contradict public order in the Russian Federation.

¹² Y.G.Morozova, *Clause on public order: theoretical foundations and practical application in Russia* // *Arbitration practice*. 2001. № 06 (06).

¹³ For example, “... The fundamental principles of independence and impartiality of arbitrators in disputes are the basis of procedural *international public order* and are therefore subject to the unconditional defense. “ See: Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards “. 26 February 2013 N 156 // RRS Consultant Plus.

seems that the design terminology, fixed in art. 417 CPC RF and Art. 244 APC RF, implies precisely the international public order in the sense that it is possible to talk about the “public order” only when the legal disputes associated with foreign law.

Chapter 30 APC RF (Art. 230-240) regulates the procedure for challenging the decisions of arbitration courts and issue writs for the enforcement of arbitral awards. The scope of chapter 30 RF APC is the arbitral awards and international commercial arbitral awards rendered in the territory of the Russian Federation, namely Russian, not foreign arbitral awards. The challenging and enforcement of the decisions of international commercial arbitration in ch. 30 APC RF are not related to the place of their education or finding of arbitration, there are connected with a place of this decision (the territory of Russia). The arbitration institute itself can be formed, to hold a hearing or have a permanent location in Stockholm, London or Paris¹⁴.

The state arbitrazh court overturns the decision of the arbitral tribunal or refuse to issue a writ of execution for its enforcement, if such decision violates the fundamental principles of Russian law (par. 2 part 3 art. 233, par. 2 part 3 art. 239 APC RF). Almost identical formulations enshrined in par. 2 part 3 art. 421 and par. 2 part 2 art. 426 CPC RF¹⁵. It must be emphasized that, according to those standards CCP RF and APC RF the decision of the arbitral tribunal shall be canceled or not executed, if the decision itself violates such principles (and not its execution, as it is in the relation to foreign arbitral awards!). From this we can conclude that the grounds for refusal of enforcement of foreign arbitral awards relating to public order, must be interpreted more narrowly than the grounds for refusal to enforce international arbitral awards made in the territory of the Russian Federation¹⁶.

Fundamental principles of Russian law are the estimated category sufficiently elastic as there is not any (and can not) its regulatory definition¹⁷. In practice of the state arbitrazh courts the fundamental principles of Russian law are defined as its fundamental, basic principles, which have the versatility, higher mandatory and special universal significance¹⁸.

In Russian doctrine emphasizes that the category of “fundamental principles of Russian law” in the practice of state arbitrazh courts is understood narrowly and is not identified with mandatory national law.

¹⁴ See: Commentary on the Arbitration Procedural Code of the Russian Federation (Article by article). 3rd ed., Rev. and add. / Ed. prof. V.V. Yarkov. M., 2011 // RRS Consultant Plus.

¹⁵ See: art. 421 CPC RF “Grounds to Reverse the Arbitral Award”: 3. Court shall also reverse an arbitral award, if established the following:...2) the arbitral award violates fundamental principles of Russian law.

¹⁶ B.R.Karabelnikov, *Performance and contesting the decisions of international commercial arbitration*.

¹⁷ See: Commentary on the Code of Arbitration Procedure of the Russian Federation.

¹⁸ Ordinance of the Federal Arbitration Court of the North-West District. January 16, 2003 N A66-8050/02 // RRS Consultant Plus.

Narrow concept of the understanding of this category as “leitmotif runs in decisions passed by the courts”¹⁹. Judicial acts indicate that the “fundamental principles of Russian law” are “not private legal norms governing the rights and obligations of participants in economic activity in a particular case, there are the general principles of economic and business activities such as equality of participants, freedom of contract, civil stability and the main economic traditions, reflected not only in the civil legislation of the Russian Federation, but at first and foremost in the Constitution of the Russian Federation”²⁰.

Fundamental principles of Russian law can be defined as domestic public order, is not applied to foreign arbitral awards and is applied exclusively to Russian arbitral awards. Although the concept of “fundamental principles of Russian law” (internal public order) and “public order” (applied for on PIL / ICP) in the Russian judicial practice is virtually identical²¹, terminology legislator distinguishes between these concepts. About public order is only mentioned in the norms governing international civil procedure and international commercial arbitration. At trial of Russian domestic disputes unrelated to the foreign law, the category of “public order” is not applicable.

It seems that the part 2 art. 244 APC RF is a “shifting of” to legal category of “international public order.” Arbitrazh court refuses in the recognition and enforcement of a foreign arbitral award on the grounds provided in par. 7 part 1 art. 244, if other is not stipulated by an international treaty of the Russian Federation. This rule confirms that the definition of public order (and even the absence of such ground for refusal) may take place at the international (bilateral or regional) level, namely “the public order of the Russian Federation” is defined with regard to its international obligations. The norm of relevant international treaty will have precedence over the provisions of the Russian legislation.

Unfortunately, the design of the public order in the Code of

¹⁹ S.V.Krokhalev, *Category of international public order in international civil procedure*.

²⁰ Ordinance of the Federal Arbitration Court of the Moscow District. July 21, 2004 N КГ-А40/5789-04; Ordinance of the Federal Arbitration Court of the Moscow District. July 26, 2004 N КГ-А40/5907-04 // RRS Consultant Plus.

²¹ For example: Ordinance of the Federal Arbitration Court of the Moscow District. April 3, 2003 N КГ-А40/1672: “... The decision of the arbitral tribunal can be recognized as a violation of fundamental principles of Russian law (a contrary to the public order of the Russian Federation) if as a result of its implementation will be made or action expressly prohibited by law, or prejudicial to the sovereignty or security of the state, affecting the interests of large social groups, incompatible with the principles of construction of economic, political and legal system, affecting the constitutional rights and freedoms of citizens, as well as contrary to the fundamental principles of civil law, such as the equality of participants, the inviolability of property, freedom of contract “ // RRS Consultant Plus; Decision of the Supreme Arbitration Court, 26.07.2012 N BAC-6580/12 case N A40-119397/11-63-950: “... The public order of the Russian Federation, under which it should be understood a set of components such fundamental principles of law, that is, its basic principles, which have the versatility, higher mandatory and special universal significance”// RRS Consultant Plus.

Civil Procedure Code contains sufficient serious contradictions. In art. 417, which is a special rule that establishes the grounds for the refusal to recognition and enforcement of foreign arbitral awards, is used only the concept of “public order.” Art. 412 formulates the similar base much wider - the refusal to enforcement of a foreign judgment is allowed if its execution may impair the sovereignty of the Russian Federation or threatens the security of the Russian Federation, or is contrary to public order of the Russian Federation²². This norm is common - in accordance with the rules of art. 416 CPC RF the §. 5 part 1 art. 412 applies to foreign judgments and foreign arbitral awards (judgments made by arbitrations)²³.

In Russian literature is noted that the grounds for the refusal in the enforcement of foreign decisions stated in § 1 part 5 art. 412 are the most difficult to disclosure of their content and application in practice. § 1 part 5 art. 412 identifies three provisions prohibiting execution imperative: the possibility of injury to the sovereignty of the Russian Federation, Russian Federation security threat, contrary to the public order of the Russian Federation. And there are not referring the procedural errors, there are mainly the substantive aspects of the act of a foreign court²⁴. Naturally, the question arises: in what cases the court refusing enforcement of a foreign arbitral award because it is contrary to public order, should refer to the article. 412, and in which - to the art. 417? Apparently, in relation to foreign arbitral awards should always be guided by art. 417, but “the concept of “ public order “ should be interpreted broadly including the threat of damage to the sovereignty or security of the State, as provided by § 5 part 1 art. 412 CPC RF”²⁵. At the same time, the acts of the higher courts and Russian scientists²⁶ point to the inadmissibility of a broad interpretation of public order, especially in the enforcement of foreign arbitral awards. Conversely the refusal of execution on this ground can take place only in exceptional cases. For this reason the approach of Russian legislator seems at least strange, and the provisions of art. 412 require a new version.

The definition of public order has by virtue of its nature some uncertainty (and even indeterminacy) because it is impossible to predict

²² See: art. 412 CPC RF “Refusal of Compulsory Execution of Foreign Court’s Judgment”: 1. Refusal of compulsory execution of the judgment made by foreign court shall be allowed if... 5) execution of the judgment may cause the damage to sovereignty of the Russian Federation or is threatening to security of the Russian Federation or conflicting with public order in the Russian Federation.

²³ See, eg.: Decision of the Moscow City Court. April 6, 2011 N 3М-11/3-2011 // RRS Consultant Plus.

²⁴ See: Commentary to the Civil Procedure Code of the Russian Federation / ed. V.M. Zhuykov, M.K. Treushnikov, 2007 // RRS Consultant Plus.

²⁵ See: Commentary to the Civil Procedure Code of the Russian Federation.

²⁶ See: S.V.Krokhalev, *Category of international public order in international civil procedure*.

all potential conflicts²⁷. In this connection the determination of public order is an almost impossible task, but it is possible to identify some general principles. The fundamental principles of law and order of the court issuing the exequatur, which are usually divided into substantive and procedural public order, only relate to public order in the context of recognition and enforcement of foreign arbitral awards²⁸.

Tendency to concretization of the public order and the existence of the procedural and substantive public order takes place in Russia²⁹. Clause extends to the decisions of international arbitral award rendered in violation of fundamental procedural principles of good faith, fairness and adversarial (the incompatibility of arbitral awards with the constitutional guarantees of judicial protection - part 1 art. 46 Constitution RF). In this an application for clause about violation of public order requires the presentation of undisputed evidence of impaired of fundamental procedural rights party's losing arbitration³⁰.

The general concept of substantive public order originally formed in conflicts of laws - in private international law, and then it spread to the sphere of international civil process. The doctrine states that a definition of "material public order" is of particular complexity³¹.

The Russian judicial practice also states that "in accordance with Article 1193 of the Civil Code of the Russian Federation under the public order is going to understand the foundations of law and order of the Russian Federation, which primarily include the fundamental principles of Russian law, such as the principle of the independence and impartiality of the court, the principle of legality of the decision"³². It should be noted that these formulations include into the definition of public order using in PIL / ICP, the fundamental principles of Russian law, that is, and domestic public order. As a result, a literal interpretation of such judicial acts may cause to the conclusion that public order for the purposes of PIL / ICP fully, without any limitations includes internal public order. Moreover,

²⁷ See: E.Kurzinski-Singer, V.L.Davydenko, Substantive ordre public in the Russian judicial practice in cases of recognition and enforcement or canceling of decisions of international commercial arbitration // Law. 2009. September // http://www.iurisprudencia.ru/alternative/files/Ordre_public.pdf; L.A.Luntz, *The course of private international law*: in 3 v. Moscow, 2002. 271; B.R.Karabelnikov, *The problem of public order in enforcement of decisions of international commercial arbitration* // *Journal of Russian law*. 2001. N 8. 103.

²⁸ O.Sandrock, *Gewöhnliche Fehler in Schiedsprüchen: Wann Können sie zur Aufhebung des Schiedspruchs führen?* // *Betriebsberater*. 2001. N 43., 2175; B.R.Karabelnikov, *The problem of public order in enforcement of decisions of international commercial arbitration*.

²⁹ Y.G. Bogatina, *Clause on public order in private international law: theoretical problems and modern practice*. M.: Statute, 2010 // RRS Consultant Plus.

³⁰ B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration*.

³¹ E.Kurzinski-Singer, V.L.Davydenko, Substantive ordre public in the Russian judicial practice in cases of recognition and enforcement or canceling of decisions of international commercial arbitration.

³² Ordinance of the Federal Arbitration Court of the Moscow District. May 17, 2012 N A41-21119/11 // RRS Consultant Plus.

it seems that public order is a broader category than the “fundamental principles of Russian law.” Moreover, in practice, very often there are situations where a party contesting recognition and enforcement of foreign arbitral award, claims that the arbitral award at the same time contradicts the fundamental principles of Russian law and public order³³.

Practice of Russian state courts (both arbitrazh and general jurisdiction) on the application of the concept of “public order” after the entry into force of the acts interdisciplinary codification Russian PIL / ICP (Civil Code, CPC RF and APC RF) is very inconsistency and unpredictability. The Russian legislator did not want (or could not) to determine the content of public order by the specific regulations, the use of which would not confronted with disputes and uncertainties³⁴. In the legislation the content of the term “public order” is not disclosed. Already during the adoption stage of modern Russian regulation in PIL / ICP (2002) Russian experts expressed their serious concerns that the vague and undefined concepts of “public order”, “the fundamental principles of Russian law”, “the basics of the law” will result in their extended treatment and unnecessarily frequent use. The worst expectations which had the specialists in 2002, fully are justified, and Russian courts have taken a lot of acts in which these concepts are unjustifiably broad interpretation³⁵.

Reference to public order remains one of the most popular arguments for the party losing arbitration. Often, the party seeks to convince the Russian court that the reasoning about abstract concepts such as “the principle of legality” and “fundamental principles of law”, is compelling enough to justify a revision of the award being in the process of its contesting or enforcement³⁶. However, in recent years courts have gradually cease to take into consideration such “abstract” arguments of the losing party. In judicial acts is emphasized that the violation of public order should be a violation of specific fundamental principles of law and have legal consequences for the applicant in the form of infringement of his rights and legitimate interests³⁷. The applicant shall indicate which specific fundamental principles of Russian law the recognition and enforcement of a controversial decision contradicts³⁸. If any interested party has not provided evidence to support reasonable grounds for

³³ See: Ordinance of the Federal Arbitration Court of the Central District. October 17, 2012 N A35-3974/2012 // RRS Consultant Plus.

³⁴ B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration*.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Ordinance of the Federal Arbitration Court of the West-Siberian District. September 24, 2012 r. N A45-19171/2012 // RRS Consultant Plus.

³⁸ Ordinance of the Federal Arbitration Court of the Moscow District. July 23, 2012 N A40-14982/12-68-133 // RRS Consultant Plus.

refusing recognition and enforcement of an arbitral award, the decision is subject to recognition and enforcement³⁹.

In addition, the court practice emphasizes that the concept of “*public order of the Russian Federation*” does not coincide with content of national legislation of Russia. As Russian law allows the application of foreign legal norms, the presence of a fundamental distinction between the Russian law and the law of another state by itself can not be the basis for the application of the public order. Such application of this clause would mean a principal refusal of the possibility to application in Russian foreign law⁴⁰. It should also be noted that in the Civil Code, and in the practice of Russian courts there is constantly emphasized the *extraordinary* nature of the application of the public order⁴¹, the possibility of its application only in *individual exceptional cases*, only if the implication’s effects of foreign norms manifestly contrary to the public order⁴². Despite the lack of uniformity in judicial practice, the Russian doctrine notes that the distinction of domestic and international public order begin to take root in the Russian legal system⁴³. In this in the sphere of PIL / ICP public order acts more gently. It establishes the rights and obligations arising out of foreign acts more “*preferential regime*”, involving a legal compromise for the sake ensuring freedom of international commercial trade⁴⁴.

In addition, it must be emphasized that under Federal law from 30.09.2013 № 260-FZ “*On Amendments to the third part of the Civil Code of the Russian Federation*”,⁴⁵ the wording of art. 1193 Civil Code has undergone serious change of meaning. The current edition of the Civil Code of the Russian Federation stipulates that foreign law does not apply if the consequences of its use contrary to the public order of the Russian Federation *with regard to the nature of relations, complicated by a foreign*

³⁹ Ordinance of the Federal Arbitration Court of the Moscow District. November 23, 2012 N A40-66856/12-25-303 // RRS Consultant Plus.

⁴⁰ Ordinance of the Federal Arbitration Court of the North-Western District. December 28, 2009 N A21-802/2009 // RRS Consultant Plus.

⁴¹ Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «*Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards*”.

⁴² f.ex.: Ordinance of the Federal Arbitration Court of the North-Western District. March 18, 2010 N A56-82470/2009: “*In applying § 7 part 1 art. 244 APC RF should be borne in mind that the clause on a public order is possible only in those individual cases where the application of foreign law could give rise to a result that is not valid in terms of the Russian sense of justice*” // RRS Consultant Plus.

⁴³ S.V. Krokhaev, *Category of international public order in international civil procedure*.

⁴⁴ Y.G. Morozova, *Clause on public order: theoretical foundations and practical application in Russia*.

⁴⁵ Federal Law of 30.09.2013 N 260-FZ “*On Amendments to the third part of the Civil Code in the Russian Federation*” // RRS Consultant Plus.

*element*⁴⁶. Obligation of the court to consider when applying of the public order nature of the relationship, complicated by a foreign element, was previously missing in Russian PIL. This change was made in the new edition of the Civil Code in accordance with the Concept of development of civil legislation in the Russian Federation⁴⁷, in which, in particular, it was noted that the legislation and jurisprudence of many foreign countries makes a distinction between domestic and international public order. In this connection the formulation of art. 1193 needs to be clarified in terms of its application specifically to relations with a foreign element⁴⁸.

Changes of the text of art. 1193 Civil Code are aimed at improving its provisions from the point of view of legal technique, in order to promote their correct application by the courts⁴⁹. Currently, a foreign element in the civil relations is an additional criterion for deciding on the application of foreign law, the consequences of which may be contrary to the public order of the Russian Federation. It may lead to expansion of the limits of discretion of the court in deciding on the admissibility of the application of foreign law⁵⁰.

It seems that the best solution would be a direct fixation in the text of the law the term “international public order.” This may combine to achieve greater certainty in the application of clause, would allow more accurately to differentiate concepts “international public order” and “internal public order.” At the moment essentially in the Russian legislation there are a few concepts - the fundamental principles of Russian law (“domestic public order”), the public order of the Russian Federation with regard to the nature of the relationship, complicated by a foreign element (obviously, this is the “international public order”), and the public order of the Russian Federation (as it is understood in the APC RF and the CPC RF). At the same time, none of these concepts has any certain content.

⁴⁶ See: § 1 art. 1193 Civil Code RF: «A norm of a foreign law subject to application in keeping with the rules of the present section shall not be applicable in exceptional cases when the consequences of its application would have obviously been in conflict with the fundamentals of law and order (public order) of the Russian Federation taking into account the nature of the relationship, complicated by a foreign element “(in red. Federal Law 30.09.2013 N 260-Ф3).

⁴⁷ The Concept of development of civil legislation in the Russian Federation (approved by the decision of the Presidential Council for the codification and improvement of civil law 07.10.2009) // RRS Consultant Plus.

⁴⁸ See: p. 2.2 ch. VIII Concept of development of civil legislation in the Russian Federation: “It is desirable to clarify some of the provisions of Article 1193 of the Civil Code (“Public Order Clause”) in order to better define the conditions under which may be refused in the application of foreign law. The national legislation and jurisprudence of some foreign countries makes a distinction between domestic and international public order applicable to purely internal relations and public order, used to regulate relations complicated by foreign element. While maintaining the overall flexibility of the protective mechanism of the public order it is appropriate to provide appropriate clarification in Article 1193, stating that its application shall be based on complex relations a foreign element.”

⁴⁹ Explanatory note to the draft Federal Law “On Amendments to the first, second, third and fourth of the Civil Code of the Russian Federation, as well as to certain legislative acts of the Russian Federation” // RRS Consultant Plus.

⁵⁰ Projected changes of the third part of the Civil Code of the Russian Federation // RRS Consultant Plus.

As far as one can imagine the developers of the Concept and the new edition of Civil Code came from the concept of “flexible” nature of the public order, and as a priority preferred to keep the overall flexibility of the protective mechanism of the public order. It seems, however, that in this case the flexibility causes serious damage to the principle of certainty of law and could again result in broad interpretation and overly frequent use of this protective mechanism.

Acts of the Supreme Arbitration Court⁵¹ correct practice of the lower courts. In the Information Letter from February 26, 2013 № 156 the Presidium of the Supreme Arbitration Court emphasized that under the public order for the application of art. V §2 (b) of the New York Convention and § 1 part 7 art. 244 APC RF (in fact, under international public order) are understood fundamental legal basis (principles), which have the highest imperativity, universality, social and special public importance, are the basis of development of the economic, political and legal system⁵². In general, it can be argued that in the Russian judicial practice the approach has formed that the reference to the violation of public order may lead to a refusal of recognition and enforcement of foreign arbitral awards only as ultima ratio, that is, if there are violated fundamental norms, rules-principles of the Russian law⁵³. If a foreign court unreasonably and incorrectly applied the separate rules of law, it can not be considered as a violation of the public order of the Russian Federation⁵⁴. However, neither the judicial practice, neither the legislator nor the doctrine can not give a definite answer to the question, what provisions of Russian law must be assessed as rules-principles.

In Russian judicial acts there is emphasized that the violation of public order can take place only in the case on application of foreign legal norm which contradicts the fundamental principles of the Russian law. Application of international commercial arbitration the rules of the national (Russian) law excludes the possibility to reference to the

⁵¹ In the autumn of 2013 Supreme Arbitration Court RF has been eradicated; its functions were transferred to the Supreme Court of the Russian Federation.

⁵² See: Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards“. 26 February 2013 N 156.

⁵³ E.Kurzinski-Singer, V.L.Davydenko, Substantive ordre public in the Russian judicial practice in cases of recognition and enforcement or canceling of decisions of international commercial arbitration.

⁵⁴ Decision of the Supreme Arbitration Court RF. 06.12.2007 N 13452/07 case N A40-694/07-68-7; Ordinance of the Federal Arbitration Court of the Moscow District. 14.02.2006 N A40-51576/05- 60-397 // RRS Consultant Plus.

violation of public order of the Russian Federation⁵⁵.

However, for many Russian judges (especially in remote Russian regions) is still a “the seditious” the idea that the relations with the participation of Russian companies can be regulated by foreign substantive law⁵⁶. Indicative in this respect the Ordinance of the Federal Arbitration Court of the Volga-Vyatka District from May 25, 2006 is, in which the court refused on enforcement of a foreign arbitral award with the following formulation: “The decision of a foreign state contradicts the public order of the Russian Federation, because the rules of Russian law have not been applied “⁵⁷.

Fortunately, this practice is quite rare and mostly only in the courts of the first instance. As a rule, higher courts cancel these decisions. In addition, the jurisprudence in full compliance with Art. 1193 Civil Code declares that “the refusal to recognize the decision taken on the basis of foreign law may not only be due to difference of legal, political or economic system of the respective foreign state from the legal, political or economic system of the Russian Federation”⁵⁸. If the arbitral award decided on the basis of Russian law, the violation of public order can only be non-compliance with the fundamental principles of Russian procedural law, violation of the procedural rights the respondent⁵⁹.

Russian doctrine also notes that a violation of public order can not be referenced when the substantive law applied to the transaction is the law of the State in which recognition and enforcement of a foreign judgment are requested. This is connected with the legal nature of the public order designed to eliminate the possibility of the application of foreign law, and not law of the country in which the court regarded the question of recognition and enforcement of international arbitral award⁶⁰. This provision could be argued as a universally recognized presumption.

It should be added that the recognition and enforcement of a foreign arbitral award can not be contrary to public order of the Russian Federation on the sole ground that in the Russian law, there are no rules,

⁵⁵ Ordinance of the Federal Arbitration Court of the Moscow District. November 18, 2002 N КТ-А40/7628-02: “According ZAO “Pricewaterhouse Coopers Audit “ the violation of public order by the arbitral tribunal is expressed in the violation of legal principles enshrined in § 2 art. 1, § 1 art. 9, § 3 arti. 10, articles 309 and 328 of the Civil Code RF. Arguments of the complaint is not based on law. From the meaning of art. 1193 of the Civil Code RF the violation of public order can take place only in the case on application of foreign legal norm which contradicts the fundamental principles of the Russian law “// RRS Consultant Plus.

⁵⁶ B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration*.

⁵⁷ Ordinance of the Federal Arbitration Court of the Volga-Vyatka District. May 25, 2006 N А82-10555/2005-2-2 // RRS Consultant Plus.

⁵⁸ Ordinance of the Federal Arbitration Court of the Central District. March 19, 2009 N Ф10-770/09 // RRS Consultant Plus.

⁵⁹ Decision of the Supreme Arbitration Court on December 6, 2007 N 13452/07 // RRS Consultant Plus.

⁶⁰ B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration*.

analogous standards for the applicable foreign law. Only the lack of a complete analog of some legal institution in the Russian legislation, if such institution generally follows the basic rule of law of the Russian Federation, can not be grounds for the application of the public order⁶¹.

Before entry into force of the interbranch codification of Russian PIL / ICP (2002-2003) in the Russian jurisprudence the cases of the revision of foreign arbitral award on the merits met⁶². Perhaps it was, in particular, associated with the interpretation of the public order in the Decision of the Supreme Court RF on 25.09.1998, the case N 5-G98-60⁶³. In the Decision was noted that the court considering petition for setting aside an award, is not entitled to revise on the merits the conclusions of international commercial arbitration, except for cases of violation of public order of the Russian Federation. Thus, on the one hand the Decision established the principle of the impossibility of revision of the conclusions of the arbitration, on the other hand, it pointed to the clause on public order as a permissible exception⁶⁴.

Since 2002 in the Russian judicial and arbitration practice a uniform approach established – a verification of international commercial arbitral award on conformity of public order does not mean in any way that it is permissible to its revision on the merits⁶⁵. In the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation № 156 is directly emphasized that when assessing the consequences of foreign arbitral awards in terms of its compliance with public order of the Russian Federation a state court is not empowered to revise this decision on the merits⁶⁶.

The revision's prohibition of foreign arbitral award on the merits is one of the few issues on which the Russian judicial practice, in general, shows unanimity. This approach can be considered one of the basic

⁶¹ Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards». 26 February 2013 N 156.

⁶² See f.e.: Decision of Judicial Collegium for Civil Cases of the Supreme Court RF on August 23, 2002 N 5-Г02-98 // <http://www.referent.ru/7/54941>

⁶³ Decision of Judicial Collegium for Civil Cases of the Supreme Court RF on 25.09.1998 N 5-Г98-60 // http://sudbiblioteka.ru/vs/text_big1/verhsud_big_2144.htm, 10.10.2014. This Decision has been canceled by Ordinance of the Presidium of the Supreme Court on December 2, 1998 N 161pv-98.

⁶⁴ R.A. Trasnov, *International commercial arbitration: the concept and criteria for the application of the public order* // RRS Consultant Plus.

⁶⁵ See f.e.: Decision of the Supreme Court of the Russian Federation on 04.03.2002 N 34-Г02-2; Ordinance of the Presidium of the Supreme Court of the Russian Federation on 12.09.2006 N 4485/06; Decision of the Supreme Arbitration Court on 07.02.2008 N 575/08 case N A06-6957-2/2006; Ordinance of the Federal Arbitration Court of the Moscow District. 14.02.2006 N *KT-A40/247-06*; Ordinance of the Federal Arbitration Court of the North-West District September 18, 2009 N A21-802/2009 // RRS Consultant Plus.

⁶⁶ Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards». 26 February 2013 N 156.

postulates and the basic principles of Russian legislation and the Russian judicial practice. At the same time it should be noted that in the Code of Civil Procedure of the Russian Federation, this principle is not directly attached. However, the absence of such an indication is not a sign on the right of courts of general jurisdiction to revise foreign decisions on the merits. The competent court considering the question of recognition and enforcement of foreign arbitral award, it is not entitled to revise it on the merits in terms of the correct application of the substantive law, of the definition of the subject of proof and assessment of evidence⁶⁷.

The prohibition of revision of international commercial arbitral award on the merits is an accepted norm of international civil proceeding. At the same time the principle of impossibility of revision of the arbitral award on the merits should not prevent the implementation of the principle of protection of public order⁶⁸. But due to the prohibition of revision a judge deciding the question of exequatur, deprived of authority to assess the validity of a foreign judgment in matters of fact and law. At check violation of material public order the judge can not doubt either the facts established by a foreign court nor undertaken by him legally qualified contentious relations⁶⁹. But the prohibition of revision should not be considered as blocking any controlling powers of the judge. In this regard, one of the most complex of issues is the amount of control exercised by a state court, because the judge is obliged to ensure effective control, but he does not prevent revision of the decision on the merits.

Russian doctrine suggests the following model of reasoning. Judge relies on the factual circumstances investigated of the foreign arbitration (without interpreting them differently) and the circumstances, the "external" with respect to the decision (which did not found their reflection in the text), but he is unable to verify the correctness of the legal qualification of the relationship by foreign arbiter. In this situation, the judge is obliged to check at first, if not contradict the public order recognition and enforcement of the resolution part of a foreign judgment based on the circumstances. In most cases, the courts confirmed the impossibility of verification of the correct application of the law by the arbiters⁷⁰.

In Russian doctrine one accord is noted that the violation of public order can not be referenced if the party opposing enforcement of international arbitral award, considers that the arbiters erred in the application of substantive law or applied an incorrect law. The court

⁶⁷ Commentary to the Civil Procedure Code of the Russian Federation / под общ. ред. В.И. Нечаева. М., 2008 // RRS Consultant Plus; S.V.Krokhalev, *Category of international public order in international civil procedure*.

⁶⁸ Y.G.Bogatina, Clause on public order in private international law: theoretical problems and modern practice.

⁶⁹ S.V. Krokhalev, *Category of international public order in international civil procedure*.

⁷⁰ Commentary on the Code of Arbitration Procedure of the Russian Federation (Article by article).

considering the issue of recognition and enforcement of a foreign judgment is not entitled to examine such arguments, since it would attempt to revise the arbitral award on the merits⁷¹. In judicial practice is also emphasized that the subject of assessment is to verify of conformity to the public order of the decisions of international commercial arbitration, and not the correct application of the substantive law⁷².

If we use the definition of public order, which the Presidium of the Supreme Arbitration Court of the Russian Federation proposed⁷³, we can safely assume that the conflict rules may not enter into the category of either domestic or international public order. Conflict rules have neither higher imperativity or a particular social and public significance; we can not say that they are the basis of development of the economic, political and legal system. Unlikely choice of the applicable substantive law, which does not coincide with the requirements of Russian conflict rules can cause damage to the sovereignty or security of the state, affects the interests of large social groups, violates constitutional rights and freedoms of private persons. In this regard, the application of a foreign law decision, incompetent in accordance with Russian conflicts rules, can not entail a refusal of recognition and enforcement of this decision by reason that it is contrary to the public order of the Russian Federation. Indirectly, this conclusion is confirmed by the jurisprudence⁷⁴.

At the end of the present study we can suggest the following conclusions.

The Russian legislation governing the recognition and enforcement of foreign arbitral awards, in fact distinguishes the concepts of “domestic” and “international” public order, although in a some terminology, which could lead to a violation the principle of certainty of law. Despite this, the Russian judicial practice in general shows a more “narrow” approach to the definition of public order at the recognition and enforcement of foreign

⁷¹ See f.e.: B.R.Karabelnikov, *Performance and contesting the decisions of international commercial arbitration*.

⁷² Ordinance of the Federal Arbitration Court of the Moscow District. September 29, 2004 N KI-A40/7948-04 // RRS Consultant Plus.

⁷³ “Under the public order for the application of these rules should be understood as the fundamental legal beginnings (principles), which have the highest imperativity, universality, social and special public importance, are the basis of development of the economic, political and legal system. These principles, in particular, include a ban to act expressly prohibited by peremptory rules of legislation of the Russian Federation (art. 1192 Civil Code), if these actions are detrimental to the sovereignty or security of the state, affect the interests of large social groups, constitutional rights and freedoms of private persons “. See: Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards “. 26 February 2013 N 156.

⁷⁴ “... In itself incorrect application of law by the arbitral tribunal [not only material. - I. G.-P.] does not indicate a violation of public order of the Russian Federation. “ See: Ordinance of the Federal Arbitration Court of the Moscow District. April 15, 2004 N KI-A40/2498-04 // RRS Consultant Plus.

decisions. It is necessary to fix directly in the legislation the concept of “international public policy”, under which it is proposed to understand the fundamental principles of law, having the highest imperativity, versatility, special social significance and forming the basis of economic, political and legal system in accordance with international obligations of the Russian Federation and the nature of relations connected with foreign legal order.

In addition, in recent years in the Russian judicial practice (especially in the first instance) there are cases where judges include in the concept of public order absolutely illegal and indefinite categories. In particular, there are several decisions of the Federal Arbitration Court of the North-West District, defining public policy as follows: “Fundamentals of law order of the Russian Federation include, among foundations of morality, *the main religious postulates [Emphasis added. - I.G.-P.]*, the main economic and cultural traditions that have shaped the Russian civil society and the fundamental principles of Russian law”⁷⁵. This formulation is not only inadmissible broadly, but it is rather unconstitutional because it directly violates the provisions of Art. 14 of the Russian Constitution which clearly establishes the secular nature of the Russian state and the principle of separation of church and state⁷⁶. It is difficult to imagine that such formulation can take place in the judicial practice in civilized, democratic, legal state. However, one should emphasize that the referred formulation of public order is fortunately limited in its importance since it is found only in acts of one Russian state arbitrazh court – in acts of the Federal Arbitration Court of the North-West District.

For some unknown reason, the formulation proposed by in the decision FAS North-West District (№ A21-802/2009), fixed in the commentary to art. 1193 Civil Code proposed in Reference-Retrieval System “Consultant Plus”: “The foundations of law order (public order) include, for example, the foundations of the social structure of the Russian state, the foundations of morality, *the main religious tenets [Emphasis added. - I.G.-P.]*, the main economic and cultural traditions that have formed the Russian civil society, as well as the fundamental principles of Russian law, including the basic principles of civil law. It follows from available in the judicial practice conclusions”⁷⁷. It is a pity that such an

⁷⁵ Ordinance of the Federal Arbitration Court of the North-West District on September 18. 2009 case N A21-802/2009; Ordinance of the Federal Arbitration Court of the North-West District on March 6. 2012 case N A56-49603/2011 // RRS Consultant Plus.

⁷⁶ Article 14 of the Constitution of the Russian Federation (1993): “1. The Russian Federation is a secular state. No religion may be established as a state or obligatory. 2 Religious associations shall be separated from the state and equal before the law. “

⁷⁷ ConsultantPlus: Legal News. Special issue “Commentary to the draft amendments of the Civil Code of the Russian Federation”// RRS Consultant Plus.

unconstitutional definition of public order taken by such an authoritative legal information resources available huge number of users and is the most popular. This formulation is misleading many Russian lawyers and judges, especially beginners.

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**KLAUZULA JAVNOG PORETKA KAO RAZLOG ZA
ODBIJANJE PRIZNANJA I IZVRŠENJA STRANIH
ARBITRAŽNIH ODLUKA U RUSIJI**

Rezime

U članku se analiziraju iskustva u sudskom izvršenju, zakonodavstvo i doktrina u Rusiji u oblasti odbijanja priznanja i izvršenja stranih arbitražnih odluka u slučaju njihovog protivljenja javnom poretku. U radu se pravila razlika između domaćeg i međunarodnog javnog poretka. Glavni metodi koji se primenjuju u članku odnose se na analizu uporednog prava. U članku se razmatraju i problem vezani za materijalni javni poredak. Definicija ovog problema predstavlja ozbiljan problem. Sa druge strane, kategoriju procesnog javnog poretka je lakše definisati. Sudska praksa ne daje definiciju materijalnog javnog poretka, ali se može reći da system principa i vrednosti koje sadrži nacionalni javni poredak nije prepoznat ni u međunarodnim slučajevima. U ruskom zakonodavstvu se neprimenjuje concept međunarodnog javnog poretka, ali analiza zakonskih normi omogućava donošenje zaključka da kad se radi o priznanju i izvršenju stranih arbitražnih odluka, i kad se posmatra javni poredak Ruske Federacije, uzimaju se u obzir međunarodne obaveze Ruske Federacije i karakter odnosa koji sadrži element inostranosti. Istraživanje je dovelo do sledećih zaključaka. Rusko zakonodavstvo u regulisanju oblasti priznanja i izvršenja stranih arbitražnih odluka treba da obuhvati concept međunarodnog javnog poretka kao osnovni pravni princip obaveznog i univerzalnog karaktera, posebnog javnog značaja, kao osnov ekonomskog, političkog i pravnog sistema Ruske Federacije, obzirom na njene međunarodne obaveze i karakter odnosa u okviru njih.

Ključne reči: strana arbitražna odluka, priznanje i izvršenje, odbijanje, kontradikcija, materijalni javni poredak, međunarodni javni poredak, domaći javni poredak, Rusija, praksa, iskustvo u sudskom izvršenju.