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Public Policy Exception under Russian Law as a Ground for Refusing Recognition and Enforcement of Foreign Arbitral Awards

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This paper studies legal regulation of the public policy exception in the Russian Federation and domestic judicial practice on the issue. It reviews current legislation and analyzes a number of recent court cases where an arbitral award rendered by a foreign arbitration body was refused recognition and enforcement based on public policy violation. By doing so, it contributes to the knowledge on the concept of public policy in the Russian legal system and how public policy can affect the process of recognition and enforcement of foreign arbitral awards on its territory.

The review of court cases demonstrates different aspects of how the public policy exception can be applied by Russian arbitrazh courts. Such decisions can provide a clearer picture of the kinds of situation that can lead to invoking the public policy clause by the court. Also, it is of practical value as persons preparing to file a claim or to be a defendant in a Russian court can be required to present existing court decisions in support of their claim or defence.

Key Words : Public Policy, Recognition and Enforcement of Arbitral Awards, Russian Arbitration, Grounds for Setting Aside Arbitral Awards, International Commercial Arbitration

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Ⅰ. Introduction

Being a contracting state to New York Convention, the Russian Federation undertook the obligation to recognize and enforce arbitral awards rendered by foreign arbitration bodies. According to the Arbitrazh Procedure Code of the Russian Federation[1], Russian arbitrazh[2] courts recognize and enforce decisions of foreign courts and arbitral awards if the recognition and enforcement of such decisions and awards is provided for by an international treaty which the Russian Federation is party to or by federal law.

Consequently, there are cases where Russian domestic courts can refuse recognition and enforcement of an arbitral award. Under the New York Convention (1958) there are two groups of circumstances that can serve as grounds for refusing recognition and enforcement of an arbitral award. The first group includes such grounds as invalidity of the arbitration agreement, lack of proper notice of the appointment of the arbitrator, dispute matter falling outside of the scope of the arbitration agreement and so forth. Such circumstances must be proven by the party against whom the award is invoked. The second group is different because it does not require said party to bring the circumstances to the attention of the court, and an award can be refused recognition and enforcement on the initiative of the court itself. Such circumstances include inarbitrability of the dispute subject matter and contradiction of an award to the public policy of the state where recognition and enforcement are sought.

Public policy is both a widely applicable and fundamentally important part of private international law. It defines the limits of the tolerance of difference implicit in rules on choice of law and the recognition and enforcement of foreign judgments (Mills, 2008). Public policy developed as a concept of private international law and at the same time, by its nature, public policy is inseparable from a national legal system. Understanding and interpretation of the concept varies by state, and highly depends on the principles and values imbedded in a state's legal, political, and economic systems. Therefore, one of the aspects of research on public policy exception is that it is country-based. In

1) Article 241 of the Arbitrazh Procedure Code of the Russian Federation

2) Russian domestic commercial courts are called "arbitrazhniye sudy". Sometimes the term is translated as "arbitration courts", however, in order not to confuse with commercial arbitration as a private system of adjudication of disputes, the correct translation, and the one that will used hereinafter, is "arbitrazh courts".

relation to commercial arbitration, knowledge on public policy of a particular country can play an important role in choosing applicable law and in the overall arbitration process, especially at the stage of having an award recognized and enforced by a domestic court.

This paper focuses on legal regulation of the public policy exception in the Russian Federation and domestic judicial practice on the issue. Through the review of current legislation, and the analysis of a number of recent court cases where an arbitral award rendered by a foreign arbitration body was refused recognition and enforcement based on public policy violation, this paper contributes to the knowledge on the concept of public policy in the Russian legal system, and how it can affect the process of recognition and enforcement of arbitral awards on its territory.

The structure of this article is as follows: Chapter II studies the theoretical background on public policy as a ground for setting aside of an arbitral award including a review and analysis of the current legislation on the public policy exception in Russia; Chapter III analyzes five recent court cases including the court's reasoning for refusing recognition and enforcement of an arbitral award; and, the Conclusion discusses what implications the provided analysis can have for international business.

Ⅱ. Public Policy as a Ground of Arbitral Award Cancellation

1. Public Policy against Recognition and Enforcement of Arbitral Awards

Once an arbitral award is rendered, it should go through the process of recognition and enforcement in the state where the award is to be executed. Although recognition and enforcement are used as if they are the same words under most international conventions and the law of states which have adopted the UNCITRAL Model Law[3],

3) Article.1.1, New York Convention; Article.35, UNCITRAL Model Law; Article.1, Geneva Convention.

they have different meanings in a legal context. Enforcement is stronger in terms of its effect. Enforcement of an arbitral award is sought when the losing party is forced to comply with the award. On the other hand, recognition of an arbitral award means that the award has the same value as a decision which is made by a court. It has res judicata; the same case cannot again be brought to either a court or arbitration. Especially, for a foreign arbitral award, in order to enforce the award, recognition should be made first; if the award is not recognized, it cannot be enforced. Regardless of the legal effects of recognition and enforcement, they are essential stages to be required when the winning party needs the losing party to comply with the conditions of the award if they do not do so voluntarily.

In international commercial arbitration, generally there are two opportunities where a losing party makes an arbitral award ineffective. The first case is when they try to set aside an arbitral award in the state where the award is rendered. If it is not successful, the second chance is when they bring the award to the court for non-recognition and non-enforcement in the state where the award is executed. In any case, the court will decide on its cancellation based on the grounds which are regulated by states' law. Most states, including the New York Convention and the UNCITRAL Model Law, stipulate almost the same grounds for cancellation of arbitral award and among these grounds, the most ambiguous and unpredictable ground is public policy.

Since there is no clear and uniform definition about public policy, it is sometimes unpredictably interpreted and applied. Moreover, it may work as an excuse for non-recognition of foreign arbitral award. (Mauro Rubino-Sammartano, 2001) Public policy is distinguished as an excuse that is procedural and substantive. Simply, procedural public policy is found in procedural law while substantive public policy appears in substantive law. Depending on an issue, however, there are cases where this distinction is not easy in an international context. As one simple example, assume that there is a dispute regarding insurance contracts. Under Italian law, these contracts, as evidence, must be provided in written form and producing evidence like this is governed by procedural law. On the contrary, under other legal systems, these contracts must be concluded in writing. It means having a written contract is a legal requirement to be a valid agreement and this matter is governed by substantive law. In class actions, as another example, under U.S. law, the claim will be heard in a

court without written authority by all members who participate in the class action, but an Italian court will hear the claim only when there is written authority by all members if one member presents the claim on behalf of all other members. Due to this dual character, the scope of public policy is broad and not definite, and should be discussed state by state.

2. Regulation of the Public Policy Exception under Russian Law

Russia is party to the New York Arbitration Convention (1958). In 1960, the USSR made a reservation (which is still in force) that reciprocity shall apply to non-parties to the Convention. Under the Convention, an arbitral award shall not be recognized and enforced if the competent authority in the country where recognition and enforcement is sought finds that "the recognition or enforcement of the award would be contrary to the public policy of that country."[4)]

The Arbitrazh Procedure Code[5)] of the Russian Federation contains a provision[6)] equivalent to the one in the Convention (1958). Both the law "On International Commercial Arbitration" and the federal law "On Arbitration in the Russian Federation" state that an award can be set aside by the competent court if it finds that the arbitral award is contrary to the public policy of the Russian Federation[7)]. Finally, pursuant to the Civil Code of Russia[8)], a rule of foreign law shall not be applied in exceptional cases where the consequences of its application would clearly contradict the fundamentals of the rule of law (public policy) of the Russian Federation.

The public policy clause can be found in several laws at the federal level but none of them offer a definition for it. One of the first official interpretations of public policy

4) Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

5) The Arbitrazh Procedure Code regulates judicial procedures of resolving commercial disputes by domestic commercial (arbitrazh) courts.

6) Article 244 of the Arbitrazh Procedure Code of the Russian Federation

7) Article 34(2) of the Law of the Russian Federation dated July 7th, 1993 #5338-1 (as amended on December 30th, 2020) "On International Commercial Arbitration"

8) Article 1193 of the "Civil Code of the Russian Federation (Part Three)" dated November 26, 2001 N 146-FZ (as amended on July 1, 2021)

came from the Supreme Arbitrazh Court in 2005 and read as follows:

"The public policy of the Russian Federation implies good faith and equality of the parties entering into relations regulated by private law, as well as the proportionality of civil liability measures to the guilty offense.[9]"

In 2016, the same Supreme Arbitrazh Court came up with a new definition:

"Public policy is constituted by fundamental legal principles that possess the highest imperative value, universality, exceptional social and public significance, and form the basis of the economic, political, and legal systems of the state. Such principles, in particular, include a ban on committing actions expressly prohibited by the super-imperative norms of Russian legislation (Article 1192 of the Civil Code of the Russian Federation), if these actions damage the sovereignty or security of the state, affect interests of large social groups, violate constitutional rights and freedoms of individuals."[10]

The same definition was reaffirmed by the Supreme Court of Russia in 2019[11], and has been cited multiple times by domestic commercial (arbitrazh) courts. When comparing the original (2005) and the later (2016) definitions, the former reflected the principles of private law while the latter defined public policy through the principles of public law. Although commercial arbitration is aimed at resolving disputes in the sphere of private law, the shift towards explaining public policy through the basic principles of public law seems more coherent considering its nature.

The new definition explains public policy through the so-called super-imperative norms by referencing Article 1192 of the Civil Code of Russia. This article contains the definition of rules of immediate effect, or mandatory rules of law. In both Russian la w[12] and private international law, a norm is considered mandatory in the sense that

9) Clause 29 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated December 22, 2005 No. 96 “Review of cases on the recognition and enforcement of decisions of foreign courts, on contesting arbitral awards and on issuing writ of execution thereof”

10) Information letter No. 156 “Overview of the practice of consideration by arbitration courts of cases on the application of the public policy exception as a ground for refusing to recognize and enforce foreign court decisions and arbitral awards” dated February 26, 2013.

11) Decree of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 N 53 "On assistance and control regarding arbitration proceedings and international commercial arbitration performed by the courts of the Russian Federation"

12) Article 1192 of the "Civil Code of the Russian Federation (Part Three)" dated November 26, 2001 N 146-FZ (as amended on July 1, 2021)

a court must apply that norm, even if the court, under the usual operation of its conflict of law rules, would ordinarily apply some other body of law (often referred to casually as "the otherwise applicable law") (Bermann, 2010). However, it is important to understand that public policy and mandatory rules of law are not the same but rather adjacent notions. Mandatory rules of law are explicitly defined in the state's legislation and are to be applied regardless of any other factors such as parties' agreement, rules of law etc. On the other hand, it is practically impossible to determine the range of norms that constitute public policy, since they are the basis of the national legal system, the national legal consciousness (Vareilles-Sommieres and Getman-Pavlova, 2015). Public policy clause rather relies on unexpressed norms and is applied in situations where it is difficult to find a specific rule of law (Novikova, 2013). The public policy clause protects such principles as fairness and proportional liability, good faith, the legality of transactions and actions, the inadmissibility of abuse of rights, violation of imperative norms, deceit and fraud. Today these principles can be considered common for most countries (Bogatina, 2010), including the Russian Federation.

The definition of public policy suggested by the Supreme Arbitrazh Court is highly abstract. On one hand, it is unavoidable due to the nature of the function that the public policy clause performs. At the same time, it makes it difficult for courts to apply the public policy clause with a certain degree of consistency. It also expands the limits of court's discretion when it comes to refusing recognition and enforcement of arbitral awards based on the public policy exception. However, it is possible to discern some guidelines on public policy clause application from the mentioned clarifications provided by the Supreme Arbitrazh Court and by the Supreme Court of Russia.

First of all, the suggested definition implied that a combination of two circumstances should be present and proven by a court applying the public policy exception. First, it must prove a violation of the fundamental principles of the economic, political, or legal system of the Russian Federation; second, such violation should impair the sovereignty or security of the state, affect interests of large social groups or violate constitutional rights and freedoms of individuals or legal entities[13]. Based on Article

13) Decree of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 N 53 "On assistance and control regarding arbitration proceedings and international commercial arbitration performed by the courts of the Russian Federation"

V(2)(b) of the New York Convention (1958) and the correspondent provisions of Russian legislation, recognition and enforcement of an award shall be refused if it would be contrary to public policy of the state, which means that violation of mandatory rules of law will happen only if an award is enforced. In such a case, the court cannot prove a violation that hasn't yet occurred, so it is evident that the court must substantiate which fundamental rules of law exactly would be violated and how it would infringe on the sovereignty of the state or other persons' rights and freedoms.

Regarding the infringement of other persons' rights, there have been contradicting statements issued by the Supreme Court. For example, in the ruling[14] of the Supreme Court made in 2015, it was stated that the court cannot independently, without a claim filed by third parties, establish that a foreign court decision violates their rights, and hence Russian public policy, because third parties who have learned about such a violation are not deprived of judicial protection. Several years later, the same department of the Supreme Court released recommendations on how to verify whether an arbitral award is a part of a fictitious insolvency scheme[15]. According to the document, legal protection of third parties' interests (including in regard to an insolvent debtor) is an important function of justice, which is also an element of the public policy of the state. Therefore, when considering an application for recognition and enforcement of an arbitral award, the issue of protecting the interests of third parties is subject to judicial control as an element of the public policy of the state where such enforcement is sought.

Another important point made by the Supreme Arbitrazh Court is when Russian law does not contain any rules corresponding to the ones of the foreign law applied by an award, it cannot be the sole ground for applying the public policy exception. For example, Russian law does not provide for institutions of contract law such as liquidated damages[16], which can not be a sole reason for the court to refuse recognition and enforcement of an award[17]. It is only when the amount of liquidated

14) Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation of July 29, 2015 No. 310-ES15-5564, Case No. A23-3876/2014

15) Ruling of the Supreme Court of Russia dated April 28th, 2017, Case # 305-ЭС16-19572

16) Liquidated damages - a fixed or determined sum agreed by the parties to a contract to be payable on breach by one of the parties.

17) Information letter No. 156 "Overview of the practice of consideration by arbitration courts of cases on the application of the piblic policy exception as a ground for refusing to recognize and

damages is so extraordinarily large that it by multiple times exceeds the amount of damages that the parties could reasonably foresee at the moment of conclusion of the agreement (which would contradict the principle of the compensatory nature of contractual liability) an award cannot be recognized.

Lastly, the Supreme Court emphasized that an arbitral award can be set aside or recognition and enforcement of an award can be refused on the basis of public policy violation in exceptional cases only[18]. To the contrary of said rule, sometimes courts exercise such exception so freely that it is seen as the universal ground, which can allow blocking of the enforcement of an arbitral award on Russian territory. In this author's opinion, the main difficulty when applying the public policy exception, is that the courts exercise a high level of discretion (due to the broad definition of public policy), but are only supposed to apply it in exceptional cases, which calls for a very delicate balance that can not often be found.

Ⅲ. Case Analysis

In this chapter recent cases where arbitral awards rendered by foreign arbitration bodies were set aside by Russian Arbitrazh Courts based on public policy violation will be analysed. Since, according to both the New York Convention (1958) and Russian law, an arbitral award can be refused recognition and enforcement at the initiative expressed by the court and does not require a request by one of the parties, the cases analysed below do not include claims and supporting arguments of the parties to the dispute and solely focus on the reasoning offered by the court.

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enforce foreign court decisions and arbitral awards" dated February 26, 2013.

18) Decree of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 N 53 "On assistance and control regarding arbitration proceedings and international commercial arbitration performed by the courts of the Russian Federation"

1. Case 1[19]: an award can be refused recognition and enforcement by a Russian national court if it is rendered by an arbitration body that was not recognized as a permanent arbitration institution by the government of the Russian Federation.

(1) Circumstances of the Case and the Court' s Reasoning

The claimant sought to enforce an award rendered by the Helsinki International Arbitration Center which the defendant would not voluntarily comply with. The decision prescribed that the defendant repay the debt originated under the contract for supply, assembly and installation of architectural constructions. The dispute was tried by the Helsinki Arbitration Court based on the arbitration clause included into the contract.

The court confirmed the intention of the parties to have their dispute to be resolved in the Helsinki IAC, however, according to the law of the Russian Federation[20], only organizations that have been accredited (received the status of a permanent arbitration institution) by the government can administer commercial arbitration.

After November 01, 2017, arbitration courts that have not received the right to exercise the functions of a permanent arbitration institution are not allowed to carry out the administration of commercial arbitration. At the time of this court's decision, the list of both Russian and foreign arbitration bodies recognized as permanent arbitration institutions in the Russian Federation, did not include the Helsinki IAC.

According to the Civil Code of the Russian Federation[21], actions bypassing the law with an unlawful purpose, as well as other obviously unfair exercises of civil rights (abuse of rights) are not allowed. Since the claimant requested recognition and enforcement of an award that was not rendered by an institution recognized in the Russian Federation, the actions of the claimant were construed as an abuse of their rights.

19) Ruling of the Arbitrazh Court of the Moscow Region from September 23rd, 2021, Case No. **A** 41-54601/2021

20) Federal Law No. 382-FZ of December 29, 2015 (as amended on December 27, 2018) "On Arbitration in the Russian Federation"

21) Article 10 (1) of the Civil Code of the Russian Federation

(2) Comment

In 2015 the Russian Federation attempted to reform its system of commercial arbitration. A new law on domestic commercial arbitration[22] was adopted instead of the law[23] that was previously in effect, and certain provisions of the federal law regulating international commercial arbitration[24] were amended. One of the objectives of the reform was to reduce the number of arbitration courts in the country. Previous legislation allowed for a rather simple procedure of establishing arbitration courts and ad hoc tribunals which often led to their misuse because many companies created affiliated arbitration courts and ad hoc tribunals which would later render decisions in their favour (sometimes referred to as "pocket courts"). For arbitration to regain the trust of companies and individuals, according to the new law, only arbitration institutions accredited by the government are allowed to administer arbitration and related activities.

Currently, instead of the several thousands of arbitration bodies that had previously existed, as few as eight permanent arbitration institutions are qualified to administer arbitration in Russia. Along with them, four foreign arbitration courts were accredited by the Ministry of Justice to administer arbitration on the territory of the Russian Federation: Hong Kong International Arbitration Centre, Vienna International Arbitration Centre, Singapore International Arbitration Centre, and the International Commercial Arbitration Court.

The law is clear on which institutions are allowed to administer arbitration in Russia, however, it does not directly preclude Russian courts from recognizing and enforcing arbitral awards rendered overseas. In the case analysed, the court answered the question whether such awards are enforceable, and according to its interpretation if an arbitration body is not a recognized arbitration institution any awards rendered by it would not be recognized either. Having been upheld by the higher-level court, such a ruling can create a blanket policy in respect to arbitral awards rendered by foreign arbitration centers and ad hoc tribunals making them unenforceable on Russian

22) Federal Law "On Arbitration in the Russian Federation" dated December 29, 2015 N 382-FZ (last edition)

23) Federal Law "On Arbitration Courts in the Russian Federation" dated July 24, 2002 N 102-FZ

24) Law of the Russian Federation "On International Commercial Arbitration" dated July 7, 1993 N 5338-1

territory.

The allegation that the claimant's actions constituted an abuse of rights is deemed an exaggeration for the following reason. Actions of the claimant lack several elements that constitute an abuse of rights. To be more specific, they neither violate the rights or freedoms of another person or entity[25] nor did they have an illegal purpose to them as seeking to enforce an arbitral award (even one that can not be enforced) does not constitute an illegal action. Therefore, with a high degree of certainty it can be asserted that in the case analysed the court attempted to justify its decision by referring to one of the basic imperative principles of Russian Civil law, exercising one's rights in good faith. Such a link was necessary as it gives the court grounds to meet the standard of the public policy exception.

2. Case 2[26]: an award rendered by a foreign arbitration body can be refused recognition and enforcement by a Russian domestic court if the relationship between the parties to the dispute can be described as intra-corporate, i.e. the parties are affiliated entities, or one of them controls the other.

(1) Circumstances of the Case and the Court' s Reasoning

The claimant sought to enforce an arbitral award rendered by the London International Arbitration Centre against the defendant. The application was accepted by the Arbitrazh Court of the City of Moscow; however, the decision was overturned by the Arbitrazh Court of the Moscow Region based on the complaint filed by the receive r[27]. The original claim was based on a debt that had arisen from a loan agreement between the claimant and the defendant.

25) According to the Ruling of the Constitutional Court of the Russian Federation of July 17, 2014 #1808-O the norms of the Civil Code on abuse of rights are aimed to ensure implementation of the principle declared in Article 17 (part 3)of the Constitution of the Russian Federation which states that exercising of human and civil rights and freedoms must not violate the rights and freedoms of other persons.

26) Ruling of the Arbitrazh Court of the City of Moscow dated October 8th, 2020, Case No. **A** 40-20248/16-68-168

27) A receiver is a person appointed as custodian of a person or entity's property, finances, general assets, or business operations, in this case appointed by the court as a part of the bankruptcy procedure.

Since, in the case analyzed, the claimant is a majority shareholder of the defendant, the Court qualified their relationship as intra-corporate. This means that the controlling person (the shareholder) completely determines the actions of the controlled person (the affiliated entity) by giving mandatory instructions, among others. In such case, the enforcement of a foreign arbitration award contradicts the meaning and objectives of judicial proceedings[28] since all settlements between such persons must be done by making appropriate corporate decisions[29].

The court concluded that recognition and enforcement of the award would violate the public policy of the Russian Federation. To be more specific, this would be a violation of such general principles of law as legality, good faith, and inadmissibility of abuse of rights, as well as more specific legislation such as rules of resolving intra-corporate disputes.

(2) Comment

According to the text of the decision, since the claimant is a majority shareholder of the defendant, the relationship between the claimant and the defendant indicates an internal corporate nature of the dispute because it should be regarded as a distribution of risks between members of the same group (who are therefore jointly liable for the debt).

According to Russian Civil Code, bankruptcy laws and Supreme Court clarifications, a person who can determine the actions of a legal entity, including giving instructions to authorized persons or appointing such persons, can be considered a person controlling the entity, even without being directly affiliated with it.

The Supreme Court's Review[30] described a situation where there is a group of companies sharing common economic interests with the borrower and controlled by the same ultimate beneficiary. In a case where one of the persons belonging to the group receives credit funds, and other persons provide security at the time of receipt,

28) Article 2 of the Arbitrazh Procedure Code of the Russian Federation

29) Decree of the Plenum of the Supreme Court of the Russian Federation of December 21, 2017 N 53 "On some issues related to holding the persons controlling the debtor liable in bankruptcy"

30) Paragraph 16 of the Review of Judicial Practice of the Supreme Court of the Russian Federation No. 3 (2017) (approved by the Presidium of the Supreme Court of the Russian Federation on July 12, 2017)

it is assumed that the corresponding security is aimed at proportional distribution of the risk among all members of such a group of companies in a case where the main borrower fails to pay back the funds.

In the case analysed, it was determined by court that the claimant might have had control over conclusion of the loan agreement with the defendant. Due to the intra-corporate relationship between the claimant and the defendant the recognition and enforcement of the arbitral award was not possible as it would be a violation of norms on corporate dispute resolution.

As was mentioned in Section III, the more widely adopted approach calls for protection of legal interests of third parties, including its relations with an insolvent debtor, as an important function of justice, which is an element of the public order of the state. Therefore, when considering an application for recognition and enforcement of an arbitration award, the issue of protecting the interests of third parties is subject to judicial control as an element of public policy.

3. Case 3[31]: an arbitral award can be refused recognition and enforcement if it violates the rights of creditors of an insolvent debtor.

(1) Circumstances of the Case and the Court's Reasoning

The claimant sought recognition and enforcement of two arbitral awards rendered by the London International Arbitration Center that came into force, however, these were not complied with by the defendant. The bank (claimant) and New Century Distribution, LLC entered into a loan agreement. Two companies (that were affiliated with the borrower) acted as guarantors under the loan agreement. In respect to the borrower, New Century Distribution LLC, bankruptcy proceedings were initiated under the laws of Switzerland, a moratorium on debt recovery was introduced, based on the decision of the Court of Appeal of the Canton of Zug dated September 12th, 2019 which was submitted by the bank.

According to the Court, enforcing the award would violate the public policy of the Russian Federation, and to be more specific, the fundamental principle of equality of

31) Ruling of the Arbitration Court of the City of Moscow dated November 9, 2021 Case No. **A** 40-235180 / 20-141-1729

creditors in the process of liquidation (bankruptcy) of the main borrower. Since the bankruptcy procedure was initiated in respect to New Century Distribution, its property can only be disposed of in the manner defined by law. The court specified that the award cannot be rendered as it would violate the fundamental principle of equality of creditors of an insolvent debtor.

(2) Comment

The principle of equality of creditors is referred to as pari passu which in Latin means literally "on equal footing", in legal context - "equal in the right of payment". According to this principle, all unsecured creditors in insolvency processes, such as administration, liquidation and bankruptcy must share equally any available assets of the company or individual, or any proceeds from the sale of any of those assets, in proportion to the debts due to each creditor. It is considered one of the most fundamental principles of insolvency law (Thompson Reuters Practical Law Glossary, 2022). In Russian insolvency law the pari passu principle manifests itself in the definition of bankruptcy proceedings: it is a procedure applied in a bankruptcy case to a debtor who was declared bankrupt in order to adequately satisfy the claims of his creditors[32].

As it was clarified by the Supreme Court, public policy is defined as fundamental legal principles, which have the highest imperative, universal application, special social and public significance, and form the basis for building the economic, political, legal system of the state. Certainly, the principle of equality of creditors of an insolvent debtor is a fundamental principle of insolvency law, and therefore can be considered one of the key elements in regulating the economic system of the state. Many fundamental principles of law such as legality, equality, inadmissibility of abuse of rights are expressly declared in either the Constitution, or in other fundamental federal laws such as Civil Code, Criminal Code, Arbitral Procedure Code and so on. Unlike these, pari passu in the law itself is expressed rather indirectly, although is still recognized in both Russian legal doctrine and in the decisions of Constitutional Court of Russia. The case of pari passu makes a good example regarding what laws and

32) Paragraph 16 of Article 2 of Federal Law "On Insolvency (Bankruptcy)" dated October 26, 2002 N 127-FZ

principles can be construed as public policy of the state, as this case is an example of when a norm constituting public policy is not “lying on the surface”.

4. Case 4[33]: An arbitral award can be refused recognition and enforcement by a Russian domestic court if it leads to seizure of funds or property of an entity with government participation[34].

(1) Circumstances of the Case and the Court’s Reasoning

Based on the contract and the arbitration clause the claimant filed a claim against the defendant to the Ukraine International Arbitration Center. The claim was fully granted by the arbitral tribunal, and since the defendant did not comply with it the claimant sought to enforce the arbitral award in the Russian court.

According to the explanation of the Supreme Court, one of the principles constituting public policy is the inadmissibility of actions expressly prohibited by the supra-imperative laws of the Russian Federation, if such actions damage the sovereignty or security of the state or violate the rights and interests or other persons or entities. As it was substantiated by the Court, in this case potential damage would be due to the fact that the foreign arbitration court had no jurisdiction over the dispute based on the following grounds.

The contract contains an arbitration clause. However, according to the contract, acceptance and transfer of goods was to be carried out at the warehouse of JSC Moscow Metallurgical Plant "Hammer and Sickle" in Moscow. Therefore, pursuant to the rules of the Civil Code, the place of performance of the contract was within the territory of Russia where the supplier of goods was located.

There is an agreement concluded by the member states of the CIS (the Commonwealth of independent States) on mutual recognition and enforcement of court decisions and arbitral awards[35]. The Court concluded that since the New York

33) Ruling of the Arbitrazh Court of the City of Moscow dated October 29th, 2021 Case #**A** 40-105707/21-107-692

34) Government participation means that a Russian government body or agency holds shares of a company.

35) Agreement on the Procedure for Resolution of Disputes Related to Economic Activities approved by Resolution of the Supreme Court of the Russian Federation of 09.10.1992 N 3620-1

Convention (1958) gives priority to bilateral and multilateral agreements on the recognition and enforcement of arbitral awards (Article VII part 1), it is the CIS Agreement that should be applied when deciding on jurisdiction over the dispute.

According to the Agreement and the Arbitrazh Procedural Code of Russia, if a commercial dispute involves foreign persons/entities and arises from a contract under which performance must take place or took place in the territory of the Russian Federation, such disputes are to be submitted to the national court in the place of the performance of the contract. Thus, a foreign arbitration center did not have jurisdiction over the dispute.

Secondly, the main shareholder of the defendant is the Federal Space Agency of Russia. The property of the Agency constitutes federal government property. Since the agency is a federal enterprise of strategic importance its property is managed by the Federal Agency for Property Management. Since the dispute brings about the seizure of the funds from the defendant (which is government property), according to the Arbitrazh Procedural Code, such disputes fall under exclusive jurisdiction of Russian domestic commercial courts. Therefore, the Arbitration Court did not have jurisdiction over the dispute.

(2) Comment

The Court gave two different reasons why it believed the Ukraine International Arbitration Center had no jurisdiction over the dispute, but in this author's opinion, only one of them has valid legal grounds.

The Court's first argument is that according to the multilateral agreement and the Arbitrazh Procedure Code of Russia the dispute should have been resolved by a Russian domestic court. The Court referred to the norms of the Arbitrazh Procedure Code that define the competence of arbitrazh courts to resolve disputes involving foreign persons. In the laws hierarchy these norms are of equal legal force to the general norms on competence of arbitrazh courts to resolve commercial disputes and other cases arising from civil legal relations. Parties are free to choose the jurisdiction for the disputes arising from their contract. The Supreme Court of Russia[36] indicated that according to the procedural laws only generic jurisdiction[37] and exclusive

36) Ruling of the Supreme Court of the Russian Federation dated May 25, 2017 #305-ЭС16-20255

territorial jurisdiction cannot be changed by agreement of parties. In the case analysed, the parties chose a foreign arbitration center as the designated jurisdiction, which the law does not preclude them from doing. The argument concerning the priority of bilateral and multilateral agreements is invalid in this regard as well, because such agreements have priority over the Convention but not over agreement of the parties to the contract.

The Court's second statement regarding domestic jurisdiction over the dispute is more appropriate. Disputes involving disposal of government property are the exclusive competence of Russian arbitrazh courts, and as mentioned above, exclusive jurisdiction cannot be changed by agreement of parties as it implies a prohibition for any other courts or institutions to resolve such disputes.

In the case analysed, the Court had proper reasons to refuse recognition and enforcement of the award due to lack of jurisdiction over the dispute. However, said ground is a special ground for refusal to recognize an award, and should have not been presented as potential public policy violation[38].

5. Case 5[39]: an arbitral award can be refused recognition and enforcement by a Russian domestic court if the court decides that the arbitral tribunal did not fully investigate all the material circumstances of the case. However, in our opinion, this case cannot define a trend in Russian judicial practice as it does not meet the requirements of a justified court decision.

37) Generic jurisdiction is the principle of distribution of cases by hierarchial levels in the system of arbitrazh courts or courts of general jurisdiction.

38) According to the Information letter No. 156 "Overview of the practice of consideration by arbitration courts of cases on the application of the public policy exception as a ground for refusing to recognize and enforce foreign court decisions and arbitral awards" dated February 26, 2013, arbitrazh courts must apply the public policy clause as a ground for refusing to recognize and enforce foreign arbitral awards in exceptional cases, and without replacing the special grounds for refusing such recognition and enforcement provided for by international treaties of the Russian Federation and the norms of the Arbitrazh Procedure Code of the Russian Federation.

39) Ruling of the Arbitrazh Court of the City of Moscow dated June 3rd, 2021 Case # **A** 40-57090/21-19-388

(1) Circumstances of the Case and the Court's Reasoning

The claimant sought recognition and enforcement an arbitral award rendered by the Ukrainian International Arbitration Center. The initial dispute is about recovering funds based on a contract for services.

The Court refused to recognize and enforce the award due to violation of public policy based solely on the following argument: "The principle of the legality of a judicial act, which includes in a broad sense the legality, validity, motivation, finality of a judicial act, is a fundamental principle of Russian law, since only such a judicial act establishes the legal certainty of disputed relations and determines the mutual rights and obligations of their participants. Thus, the finality of a judicial act and the legal certainty formed by it on a controversial issue are elements of the generally recognized principle of legality as part of the national public order. The court considers that the decision of the IAC at the Chamber of Commerce and Industry of Ukraine is contrary to the public policy of the Russian Federation, considering the fact that the court did not investigate all the circumstances in the case concerning the stated claim for debt collection". No further reasoning was offered by the court.

(2) Comment

The case described above is a clear example of abuse of court discretion. Since the court did not offer an explanation as to which circumstances of the case the arbitral tribunal failed to investigate this can not be considered a properly justified decision. According to the Arbitrazh Procedure Code[40] judicial orders, decisions, resolutions, rulings rendered by arbitrazh courts must be lawful and justified. A justified legal act implies that the court must correctly identify all the circumstances relevant to the case, prove all such circumstances took place, and the conclusions of the court must correspond with the established circumstances. A justified legal act also implies that the court offered appropriate reasoning for the final decision. The decision in the case analysed does not meet any of the aforementioned requirements, and therefore cannot be considered an act of justice.

40) Part 4 Article 15 of the Arbitrazh Procedure Code of the Russian Federation

Ⅳ. Conclusion

The article analyzes legal regulation of public policy and reviews recent cases where Russian courts refused to recognize and enforce arbitral awards rendered by foreign arbitration centers.

From the analysis of current legislation it can be concluded that on the federal level there is no concrete legal provisions that would guide courts in the process of applying the public policy clause. Most clarifications on the subject were provided by the Supreme Arbitrazh Court and the Supreme Court of the Russian Federation. The guidelines provided by the Supreme Court are of a general character, as they include what should be understood to fall under public policy, whether or not courts should ensure that an award does not violate rights of third parties, and that the public policy clause is to be applied as an exception rather than a rule. There is no clear guidelines on how to exercise the courts' discretion and the limits thereof, except for the recommendation that an award cannot be refused recognition and enforcement solely because Russian law does not have norms corresponding to the foreign norms applied.

The review of court cases demonstrates different aspects of how the public policy exception can be applied by Russian arbitrazh courts. Such decisions can provide a clearer picture of what kind of situations can lead to invoking the public policy clause by the court. Also, it is of practical value as persons preparing to file a claim or to be a defendant in a Russian court they can be required to present existing court decisions in support of their claim or defence.

Analysis of current court cases has implications for international business as well. First and foremost, it is highly advised to confirm that an international arbitration body is recognized as a permanent arbitration institution by the Russian government[41] prior to conclusion of the arbitration agreement or prior to submitting a dispute to a certain arbitration body. Secondly, it should be kept in mind that in cases where the parties to the dispute are affiliated entities, in other words, when the dispute is of

41) The list of foreign arbitration institutions accredited in the Russian Federation is maintained by the Ministry of Justice of the Russian Federation and can be found at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjyo9awodL5AhVuoosKHSkMBG8QFnoECAIQAQ&url=https%3A%2F%2Fminjust.gov.ru%2Fuploaded%2Ffiles%2Fperecheninostrannyharbitrazhnyhuchrezhdeniyvmac_nnPiCwp.docx&usg=AOvVaw1S0GJZ4VDcJCwiBtQuL6LO

intra-corporate nature, it is likely to be refused recognition and enforcement on Russian territory. To some extent, this approach is defined by the necessity to avoid fictitious insolvency. Issues related to insolvency such as protection of creditors rights, or protection of the rights of the insolvent debtor often become a stumbling rock on the path to recognizing and enforcing an arbitral award. Finally, when entering into an arbitration agreement with a company with government participation there is a risk that an award rendered by an arbitration body will not be recognized in Russia as disputes that may lead to disposal of government property are under exclusive jurisdiction of the Russian Federation.

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