

Newsletter

The Supreme Court of the Russian Federation clarified the issues on the application of conflict rules by Russian courts

August 9, 2019

Dear Ladies and Gentlemen,

On 09 July 2019, the Plenum of the Supreme Court of the Russian Federation enacted the Resolution "On application of conflict rules by the courts of the Russian Federation" (hereinafter – the "**Resolution**"). In this Resolution, the Supreme Court of the Russian Federation (hereinafter – the "**Supreme Court**") confirmed some approaches to interpretation of conflict rules elaborated in the court practice and the doctrine. Also, it established some new legal positions, which comply with current international approaches.

The explanations, provided in the Resolution of the Supreme Court, concern the following main issues:

The broad interpretation of the foreign element

The Supreme Court held that the list of foreign elements, which included the foreign party and foreign subject matter of legal relations, pursuant to para. 1 article 1186 of the Civil Code of the Russian Federation (hereinafter – the "**Civil Code**"), was not limited. In particular, actions and events, which took place outside of Russia and led to the creation, change or termination of legal relations, may be recognized as foreign elements as well. This interpretation aims to eliminate the lack of clarity in disputes between Russian parties, concerning acts effected abroad.

In practice, the presence of the foreign element could be useful, e.g. in this case parties may agree that the contract shall be governed by non-Russian law.

The definition of a close link between the legal relation and the law of the state

According to the general rule, when the applicable law cannot be defined, the court shall apply the law of the state, with which the legal relation has the closest link.

In this regard, the Supreme Court elaborated some criteria for establishing such a close link, which were: (1) the territorial link between elements of legal relations and the law (including place of residence / incorporation, location of the object of legal relations, place of fulfillment of obligations), and (2) the probability to effectuate common principles of civil law and separate legal institutions (e.g. the good faith principle) in the most effective way.

The application of mandatory rules

According to the current legislation, the courts must apply Russian compulsory rules, if such rules have a significant meaning for ensuring the rights and legal interests of parties, regardless the applicable law chosen by parties (mandatory rules overriding mandatory provisions).

The Supreme Court clarified that only those rules, which aim to defend the public interest, related to the basis of economic, political or legal system of the state (e.g. the prohibition for foreign parties to acquire land plots in Russia, in some cases) shall be deemed as mandatory.

In the Resolution, the Supreme Court established the volume of application of foreign mandatory rules. The Supreme Court stated that such rules could be applied only if their purpose and nature complied with the fundamental requirements of Russian legislation; did not interfere into the sovereignty, or security, of Russia and did not violate constitutional rights and freedoms of Russian individuals and legal entities.

The law applicable to the grounds of invalidation of transactions

According to the general rule, *lex contractus* applies to consequences of invalidation of transactions, regardless of grounds for such invalidation (para. 6 Sect. 1 Art. 1215 of the Civil Code).

In this regard, the Supreme Court stated that different conflict rules applied to different grounds of invalidation of contracts (e.g. if validity of the contract was challenged due to the breach of its form, the court shall apply the law which applied to a form of transactions).

However, if the contract is challenged due to the inconsistency between the will and expression of the will of parties, courts shall apply the law chosen by the parties. In a case when parties did not choose the law, the courts shall apply common conflict rules.

The choice of the applicable law by parties

The Supreme Court established the possibility to choose the rules of *lex mercatoria* (e.g. UNIDROIT Principles of international commercial contracts, Principles of European contract law, Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference and others) as applicable law (i.e. not only as subsidiary rules).

Moreover, the Supreme Court confirmed the possibility of parties to choose a neutral law, i.e. a law, which did not relate to parties, nor subject matter, of the contract.

The Supreme Court also confirmed the possibility of parties to apply a different law to different parts of contracts, if the application of the law did not entail either insuperable contradictions, or invalidation of the contract in full, or in part. Otherwise, the agreement on applicable law becomes unenforceable and courts shall establish the applicable law, according to general conflict rules.

The possibility not to apply conflict rules

The Supreme Court split conflict rules between mandatory, i.e. rules that shall be applied in any case, and optional, i.e. rules that may be not applied.

In particular, the Supreme Court confirmed the possibility of not applying conflict rules defining the law applicable to the contract (paras. 1 – 8 article 1211 of the Civil Code), if the court recognized that the contract had the closest link with the law of another state. Further, the Supreme Court stated that it was possible to recognize that

the buyer (not the seller) in the sale-purchase agreement was the party, which provided the characteristic performance, if this buyer undertook sufficient obligations (e.g. ensuring the advertisement of acquired goods).

Simultaneously, the Supreme Court stated that it was not possible to avoid application of some conflict rules (e.g. the conflict rule determining the law applicable to immovable properties).

The criteria of agreement on choice of the applicable law

The Supreme Court determined the criteria of implied choice of law: (1) parties referred to the separate civil law rules in the agreement, (2) parties referred to the same law when grounding their claims (e.g. in procedural documents), (3) the choice of the applicable law was made in an agreement, which closely related to other agreements between the same parties.

The Supreme Court also stated, that the choice of a seat of arbitration itself did not mean that parties chose the law of a seat of arbitration, as the law applicable to the contract.

The possibility of parties to enter into alternative agreement on a choice of the applicable law

The Supreme Court confirmed the possibility of parties to provide the condition that the choice of the applicable law should depend on the choice of the claimant, or to provide that the law of the claimant (or the defendant) shall apply (alternative (conditional) agreement on choice of the applicable law). The Supreme Court also stated that, in this case, the applicable law was fixed at the moment of bringing a first lawsuit and could not be changed later.

Simultaneously, the Supreme Court clarified that such an alternative agreement could not depend on the will of only one party to the contract. The violation of this rule leads to the invalidation of the agreement on choice of the applicable law.

In our opinion, the Resolution is important for court practice, as the Supreme Court established some new approaches to the understanding of private international law, that may be helpful for dispute resolution in Russian courts.

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