

ГРАЖДАНСКОЕ ПРАВО И ПРОЦЕСС

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APPLICABILITY OF ENGLISH LAW IN THE PRACTICE OF RUSSIAN ARBITRATION COURTS

Annotation

The article analyzes key issues related to the application of English law by Russian arbitration courts. The author shows rare cases when the parties to the contract chose English law as the applicable law. It is noted that when considering a claim based on a contract falling under English law, the Russian court applies the provisions of English law on the limitation period, which is fully consistent with the global trend, taking into account practical considerations and the fact that limitation period issues arise in specific civil legal relations. Based on the study, it is concluded that the issues of the application of English law in the jurisdiction of Russian courts, often raised in legal literature, concern various ways of establishing the content of foreign law and the need for analytical reviews of judicial practice and recommendations of cassation instances and the Supreme Court of the Russian Federation is shown.

Key words: English law, contractual terms, application of English law in the arbitration jurisdiction of Russia. Arbitration courts of Russia, international private law, applicable law, arbitration proceedings, choice of law, contractual relations, jurisdiction.

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АҒЫЛШЫН ҚҰҚЫҒЫНЫҢ РЕСЕЙЛІК АРБИТРАЖДЫҚ СОТ ТӘЖІРИБЕСІНДЕ ҚОЛДАНЫЛУЫ

Аңдатпа

Мақалада ресейлік арбитраждық соттардың ағылшын құқығының қолданылуына қатысты өзекті мәселелер талданады. Автор шарт тараптары қолданылатын құқық ретінде ағылшын құқығын таңдаған сирек жағдайларды көрсетеді. Ағылшын құқығына жататын шартқа негізделген талап арызды қарау кезінде ресейлік сот практикалық пайымдауларды және нақты азаматтық-құқықтық қатынастарда талап қою мәселелері туындайтынын ескере отырып, әлемдік тенденцияға толығымен сәйкес келетін талап қою мерзімдері туралы ағылшын құқығының ережелерін қолданатыны атап өтілген. Зерттеудің негізінде заң әдебиетінде ағылшын құқығының ресейлік соттардың юрисдикциясында қолданылуына қатысты жиі қойылатын сұрақтар шетел құқығының мазмұнын анықтаудың әртүрлі тәсілдеріне қатысты деген қорытындыға келеді, сот тәжірибесіне аналитикалық шолулар мен кассациялық сатылардың және Ресей Федерациясы Жоғарғы Сотының ұсынымдарының қажеттілігі көрсетіледі.

Түйінді сөздер: ағылшын құқығы, шарттық шарттар, Ресейдің арбитраждық юрисдикциясында ағылшын құқығының қолданылуы. Ресейдің арбитраждық соттары, халықаралық жеке құқық, қолданылатын құқық, арбитраждық іс жүргізу, құқықты таңдау, шарттық қатынастар, юрисдикция.

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ПРИМЕНИМОСТЬ АНГЛИЙСКОГО ПРАВА В ПРАКТИКЕ РОССИЙСКИХ АРБИТРАЖНЫХ СУДОВ

Аннотация

В статье анализируются ключевые вопросы, связанные с применением английского права российскими арбитражными судами. Автор показывает редкие случаи, когда стороны договора выбрали английское право в качестве применимого права. Отмечено, что рассматривая иск, основанный на договоре, подпадающем под действие английского права, российский суд применяет положения английского права об исковой давности, что полностью соответствует мировой тенденции, учитывая практические соображения и тот факт, что вопросы исковой давности возникают в конкретных гражданских правоотношениях. На основании исследования делается вывод, что часто поднимаемые в юридической литературе вопросы применения английского права в юрисдикции российских судов касаются различных способов установления содержания иностранного права, показывается необходимость аналитических обзоров судебной практики и рекомендаций кассационных инстанций и Верховного Суда РФ.

Ключевые слова: английское право, договорные условия, применение английского права в арбитражной юрисдикции России, арбитражные суды России, международное частное право, применимое право, арбитражное разбирательство, выбор права, договорные отношения, юрисдикция.

The practice of arbitration courts knows rare cases when the parties to a contract choose English law to be applied to their rights and obligations under this contract. We would like to refer to some illustrative examples:

1. Jurisdiction of which country concerning the limitation period shall a Russian court apply when dealing with a claim based on English contract law? Will the outcome be different if the Russian court establishes that rules on the limitation period of England are procedural rules?

Considering the claims of the Royal Bank of Scotland to some Russian debtor companies on recovery of debts against a loan or an English law indemnity contract, the arbitration court of the first instance satisfied its claims. In their appeals the respondents stated that the court should have applied the Russian term of the limitation period (but not the English one), because the limitation period in England is an institute of procedural law.

Under Article 1210 (1) of the Civil Code of the Russian Federation (further the RF Civil Code), when entering into a contract or at a later date,

parties to a contract are free to agree upon the law to be applied to their rights and obligations under the contract. Article 1215 of the RF Civil Code contains a non-exhaustive list of issues to be regulated by the contract statute. Under Article 1208 of the RF Civil Code, the limitation period also refers to the sphere of law application; the limitation period is determined under the law of a country to be applied to the corresponding relation. A prevailing opinion in the Russian doctrine is that due to the imperative character of Article 1208 of the RF Civil Code the parties to a contract cannot choose law to be applied to the limitation period separately from the law to be applied to the essence of the contract (for example, Commentaries to the Civil Code of the Russian Federation [1, p. 388]. This conflict of laws rule determines the rules of establishing the limitation period, its beginning, interruption, suspension, restoration.

Thus, considering a claim based on an English law contract, the Russian court shall apply the English law provisions concerning the limitation period. Such an approach of the Russian legisla-

tor stipulated by Article 1208 of the RF Civil Code fully complies with the world trend taking into account practical considerations and the fact that issues concerning the limitation period do arise in particular civil relations.

For example, under Article 12 (1) (d) of Regulation No. 593/2008 of the European Parliament and EU Council "On the Law Applied to Contractual Obligations" (adopted in Strasbourg on June 17, 2008), the law applied to a contract shall regulate different issues, including the limitation period and loss of the right due to the expiration of the time period [2].

The answer to the question shall not change if the Russian court determines that English provisions concerning the limitation period are procedural rules (though under the general rule, Russian courts do not apply rules of foreign proceedings). However, it is important to underline that historically English common law does not have a typical division into public and private law. Neither does it have any division into branches of law due to two factors. The **first factor** is that all courts have general jurisdiction and can try different categories of cases concerning both public and private law. The **second factor** is that England does not have any branch codes, making the English lawyer think that law is homogeneous. Any rule of conduct contained in legislation, judicial precedents and customs is a legal norm [3, Pp. 14, 15].

The national legal doctrine has long established the opinion that "...foreign qualification of the limitation period as an institution of procedural law does not prevent our court or arbitration from applying the limitation period under the relevant foreign legislation" [4, P. 303], "norms on the limitation period are to be applied regardless of the fact whether such norms are considered norms of procedural or substantive law in the relevant state" [5, P. 29]. Moreover, the Russian legislator is of the same opinion.

Clear provisions of Article 1208 of the RF Civil Code concerning the law of a state to be applied to a certain relation are designed to overcome a possible conflict connected with the fact whether the limitation period is related to procedural or substantive law in different legal systems. **Consequently**, under the provisions of Article 1208 of the RF Civil Code, the procedural or substantive character of foreign law norms concerning the limitation period does not matter for the Russian court since such norms shall be applied any way.

Besides, Article 1208 of the RF Civil Code is interconnected with Article 1187 (1) of the RF Civil

Code; under the latter, in determining the law to be applied the Russian court interprets legal concepts in accordance with the Russian law if not stated otherwise by law. It means that the concept of the "limitation period" shall be interpreted by the Russian court as a substantive law notion because it is most often understood as such in the Russian law [6, P. 70; 7, Pp. 223 – 231; 8, P. 67; 9, P.26]. From the viewpoint of substantive law, the limitation period is an institution of civil law, i.e. a separate body (group) of legal norms designed to regulate relatively independent public relations within a certain branch of law [7, P. 67]. In accordance with Article 195 of the RF Civil Code, the limitation period is a period of time within which a person whose rights have been violated can protect their rights. Indeed, the institution of the limitation period has not only substantive but also procedural importance. However, we agree with the opinion that there is no point in continuing long discussions concerning the right to sue substantively or procedurally. "An action is a category of civil procedural law. Thus, a substantive law institution does not need any other term referring it another branch of law" [11]. The link between the limitation period and the action is obvious but not absolute.

Another example for comparison: a remedy and an action. A remedy is a category of substantive (civil) law. We should distinguish a remedy and a procedural form. For example, a popular remedy is a restoration of a situation existing before the violation of the right (vindication). On the other hand, such a procedural form as a vindictory action is often used in both literature and practice. Therefore, we cannot equal such notions as "a vindictory action" and "vindication as a means of protecting civil rights" [12, P. 380].

Finally, it should be noted that applicable norms of international agreements entered into by the Russian Federation concerning the limitation period prevail over the norms of Article 1208 of the RF Civil Code. An example of such norms is Article 11 (i) of the Kiev Agreement of March 20, 1992 "On the Procedure of Settling Disputes Connected with Economic Activity" and Article 43 of the Minsk Convention of January 22, 1993 "On the Remedy and Legal Relations in Civil, Family and Criminal Cases" (though in fact they are practically identical in their meaning with Article 128 of the RF Civil Code) – controversial issues concerning the limitation period are to be settled in accordance with the legislation of a state to be applied to a certain type of relations. It is logical!

A few words about the Limitation Act 1980. The Law establishes different periods of limitation depending on the nature of a violation and the subject of the action. The longest period is 12 years (in particular, it is established in claims to restore the right to land) and the minimum period is one year. And only in one case the Law (Article 21) does not limit the right to bring an action by any period of time. It is a fraudulent violation of trust.

In English law and theory, the construction of an unenforceable contract is significantly different from that in the Russian doctrine. Such a contract is of a substantive nature; however, it is impossible to bring an action on its ground. Cheshire and Fifoot state, "Undoubtedly, an unenforceable contract is more of a procedural rather than substantive law nature" [13, P. 206]. In their opinion, the source of such a discrepancy is in the adoption of the Statute of Frauds 1677, therefore they had to analyze the legal history of the Statute and judicial practice.

Taking into account the said peculiarities of the unenforceable contract, the English doctrine and judicial practice allow for a possibility to apply non-judicial remedies by the aggrieved party. Thus, if a claim under which the limitation period expired is secured by a pledge or lien, the creditor is entitled to satisfy their claim from the pledged property or goods regardless of the expiration of the limitation period [14, Pp. 112-121]. Noteworthy is the recognition of a substantive claim after the expiration of the limitation period, especially in cases of inherited property. The executor can satisfy any liability of the property owner from their inherited property under which the limitation period expired. Moreover, it is possible even in those cases when the amount of inherited property is not enough to cover all the liabilities of the property owner.

Thus, an unenforceable contract does not cease upon the expiration of the limitation period as well as in other cases when a claim form is not applicable. Moreover, such a contract cannot be recognized *unenforceable*. A person whose subjective (substantive) right is violated is deprived of the procedural right to a legal remedy. Unlike the continental legal system, the English law does not have an institution to restore the missed limitation period. So, under Article 5 of the Limitation Act, an action arising from a simple contract cannot be brought if six years after such a right to sue occurred has expired [15, Pp. 83-98]. Another example: under Article 2 of the Law, there is a similar rule concerning a claim arising from damages.

2. Arbitration practice has faced a problem of differentiating the English concept "undue influence" and the Russian concept "abuse of right". Sometimes these terms are treated as identical, though there is a significant difference between them which we will consider below.

In short, undue influence is cases of moral duress, inexperience or lack of knowledge of a counterparty, superstition or helpless state. Very often cases of fraud and direct blackmail are also considered as undue influence. For example, in *Williams v. Bayley* 1866, the bank owners compelled the head of the family to give them their mortgage on property threatening the father to initiate criminal proceedings against his son. As a result, the contract was considered unenforceable because of undue influence [14, P. 255].

As we see, undue influence is a rather broad and vague concept, therefore in practice, while making a decision courts often take into account factual circumstances of a case. Thus, the presumption of undue influence is challenged if the party benefitting from the deal proves free expression of the will. The best way to prove it is to demonstrate that the party received independent advice (recommendation) before concluding the deal. The advice should be competent and based on relevant facts. An independent advisor was to approve the deal, and therefore the party followed his advice [16, P. 314]. A similar rule is applied even when the solicitor buys something from the client or sells something from the client. The solicitor should prove that the client has been informed of all the circumstances of the deal and that the deal was fair. The solicitor is expected to provide full information.

Law books and judicial practice underline that undue influence does occur especially in case of fiduciary relations. Thus, Samond and Williams distinguish two types of such relations: 1) relations recognized as such (i.e. fiduciary) by virtue of law; 2) relations in which a fiduciary element is not presumed by law but its existence has to be proved in each particular case. The first type of such fiduciary relations includes, for example, relations between trustees and beneficiaries, agents and principals, solicitors and clients, doctors and patients, clergymen and people, parents and children [17, P. 347]. In this case, *fiduciary relations* are such relations under which both sides shall in good faith inform each other of all either known or significant facts affecting the terms of the contract existing between them. However, in our view, the principle of utmost trust (*uberrimae*

fidei) of the parties to any contract has nothing to do with personal trust-based (fiduciary) obligations. But it is a separate topic for further research.

For the first time the legal definition of this principle was given in *Carter v. Boehm*, England, 1766: "Special information on which basis a possible chance is evaluated can be derived from the knowledge of the insuring party: the insurer trusts the statement made by the insuring party relying on the fact that the insuring party does not conceal any circumstances which could mislead the insurer and make the insurer believe that such circumstances do not exist. The concealment of such circumstances is considered fraud, and consequently, the insurance contract is void... The principle of utmost trust prohibits one of the parties to conceal knowledge known only by that party, thus involving the other party into the deal, taking advantage of the lack of knowledge with the other party which considers that circumstances are completely different..." [18, Pp. 80-81]. The principle of utmost trust in insurance is a private case of applying the fundamental civil law principle – good faith of participants of contractual obligations [17, Pp. 142-143]. Therefore, this principle should be stipulated by a special law on insurance, but not in the RF Civil Code. However, it concerns Russian, not English, law.

A regular remedy in case of undue influence is *cancellation of a deal*. The party whose rights have been violated is entitled to go to court with the claim to rescind the contract. The right to rescind the contract may be lost if third-party rights are concerned. Damages as such are not applicable in case of undue influence. If termination of the contract is impossible, the court may grant the aggrieved party whose rights have been violated a difference in the amount that the party expected from the deal and the cost at present [16, Pp. 446 - 463]. In case of undue influence remedies can be available even if the person who received a present or a promise does not get any benefit from such a present (or a promise). For example, a priest receives a present to be used for the benefit of his religious community.

To compare: the RF Civil Code (Article 10) interprets *abuse of right* as the exercise of civil rights with the aim to inflict harm to another person, to perform law-skirting actions pursuing illegal purposes, and any other deliberate unscrupulous exercise of civil rights. It is prohibited to exercise rights with the purpose to restrict competition and also to abuse the dominant position in the

market [20; 21; 22; 23, pp. 102 – 103; 24 and others.]. **Thus**, under the RF Civil Code, abuse of right is possible only when the holder of the right acting within the scope of their subjective right uses such forms of the right's realization which go beyond the limits established by law. Most often such limits of exercise of civil rights are determined by the exercise of rights in accordance with their aim. The Code distinguishes such forms of abuse as: **a)** deliberately inflicting harm to another person; **b)** law-skirting actions pursuing illegal purposes; **c)** deliberately unscrupulous exercise of civil rights; **d)** exercise of civil rights with the purpose to limit competition; **e)** abuse of the dominant position in the market. As we see, there is a significant difference between the Russian model of abuse of right and the English notion 'undue influence'.

3. English law does not prohibit the parties when entering into a contract to provide for terms and conditions aimed at limiting or releasing the debtor from liability in case of their failure to comply with contractual obligations. Based on this general rule, the parties began to include similar provisions into their contracts, especially in case of adhesion contracts. As a result of a wider use of liability release conditions, the interests of buyers were left unprotected. The reaction of English courts towards this widespread phenomenon was drafting of 'the fundamental term' concept. Breaching the fundamental term would lead to the situation when any term excluding liability was considered void. Later, this concept was transformed into the doctrine of 'fundamental breach' according to which any limitations and exclusions from liability are considered void if the court qualifies the breach of contract as fundamental [25, Pp. 132 – 134; Pp. 26, Pp. 326 - 329]. In resolving disputes, the courts are guided by the rule that every concluded contract has its fundamental term which is regarded as something which is more important than warranties and conditions. It forms "the core" of the contract, so the parties cannot provide for clauses releasing from liability for the breach of the fundamental term [27, P. 122].

The Russian civil law, on the contrary, prohibits parties to agree upon a condition to release the debtor from liability. Under the general rule, the refusal of physical and legal entities to exercise their rights does not lead to the termination of these rights, except for cases provided for by law (Article 9 (2) of the RF Civil Code). Such terms and conditions are considered void as they violate the requirements of law (Article 168 of the RF Civil Code).

The list of cases of English contract law application in the jurisdiction of Russian arbitration courts can be continued. For example, English law permits the parties to a contract to include conditions concerning the payment of a certain sum of money in case of its breach. Courts consider this sum as a *liquidated damage* that can be caused by the breach or as a penalty. The term used by the parties for this sum of money, whether it is a liquidated damage or a penalty, has no legal significance for the court. The intent of the parties is more important than the content of the contract. For example, parties can define the agreed sum of money as "liquidated damage", but the court during the trial can conclude that it is a penalty. And, conversely, if the parties define the agreed sum of money as a penalty, but it is a liquidated damage, the court would consider it a liquidated damage [27, P. 359]. **Thus**, English courts pay much attention to the definition of terms and conditions in the contract, increasing the court's discretion.

The Russian Civil Code does not have a similar provision on abstract damages. At the same time, the provisions of Article 524 of the RF Civil Code contain an analogue to abstract damages when calculating damages in case of the delivery contract termination. **First**, this rule is limited by the scope of calculated damages when terminating a contract due to its breach by the buyer (or the

seller). **Second**, if under the English contract law (Articles 50, 51 of the Sales Law), abstract damages are calculated as the difference between the contract price and the market price, under Article 524 of the RF Civil Code they are understood as the difference between the contract price and the price of a later deal. Certainly, abstract damages can be different from the viewpoint of the simplified method of their calculation. Therefore, we support the initiative to complement the RF Civil Code by provisions on abstract damages both in general terms and in terms concerning contracts [28, pp. 660 - 661].

In any case, the topic of application of foreign law (in our case – English law) in the jurisdiction of Russian courts causes a lot of controversies and ideas. First and foremost, we need analytical reviews of judicial practice and recommendations of cassation instances and the RF Supreme Court. A difficult issue often raised in legal literature concerns different methods of establishing the content of foreign law. Such methods, in particular, include: requests to the RF Ministry of Justice and other bodies; receiving information from persons involved in the case; opinions of foreign experts; initiative learning of foreign law rules; interrogation of foreign law experts as witnesses by lawyers and any other experts [24]. In short, much work needs to be done.

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