

The application of international treaties of the Russian Federation in the legal proceedings in arbitration courts of Russia

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The article substantiates the necessity of a system analysis of the processes of application of the norms of international treaties by commercial courts of the Russian Federation. This need is justified, at least, by the following: an insignificant amount of special research in this field in comparison with a similar subject within the courts of general jurisdiction, the creation of a relatively new body of supranational control over compliance with the norms of international treaties in the field of commercial courts' practice.

The purpose of the study is to identify problems of application of international treaties of the Russian Federation arbitration courts of Russia.

The author uses methodology of formal legal analysis of Russian legislation and courts' decisions.

The results and scope of it's application. The author, taking into account the specifics of commercial proceedings and the nature of disputes heard in commercial courts, proposed legal grounds in a concentrated form which allow to state the existence of the obligation to apply the norms of international treaties by Russian commercial courts. Two levels of such grounds can be stated - international and domestic.

Publication of the texts of international treaties as a problematic segment of their applicability. The article highlights one of the problematic segments of the application process of the norms of international treaties for the purpose of more detailed reflection. The practice of commercial courts demonstrates that in both legislative acts and acts of applying law, the concepts of "official publication" and "bringing to the public" are alternated with each other. Despite the reform, the procedure of official publication has not acquired the character of a systemic institution of Russian law. This significantly complicates the activity of administering justice with respect to the legislative acts of international law.

Conclusions. From the point of view of international law, the state, independently determining the procedure and methods of implementing international treaties within its legal system, is not limited in its ability to burden itself with the need to abide by additional procedures not provided by the international legal system of procedures. Official publication, as a necessary procedure for the entry of a legislative act into the force, represents such an additional procedure designed to protect more effectively human rights and freedoms and to streamline law enforcement practice. In this connection, the author formulated the provisions, the implementation of which can help in matters of systematization of the institution of official publication of international treaties of the Russian Federation.

Keywords: international treaty, enforcement, commercial courts, official publication, source of official publication, promulgation.

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1. Introduction.

The integration processes of modern society increasingly lead the states to cooperation not only in the international sphere, but also in coordinated settlement of individual national issues. It has already been noted that "Subject to regulation by international law can not be considered more than just questions relating solely to the territory or jurisdiction of the States, it is increasingly beginning to participate in the regulation of specialized problems of modern society" [[1] , p. 57]. As stated by V.V. Gavrilov, "states are forced to work together to solve not only international problems, but also the tasks that were regarded as purely internal" [[2] , p. 75]. It can be stated the urgent need for changes in domestic law and order, a characteristic feature of which is considered to mark the "perception of international law as a regulator, covers only the area of international relations, and has no significance for the national courts" [[3] , p. 174].

An international treaty is a very flexible legal form , which is due to the combination of the agreement in the basis and the binding effect as a result. [4]

Being a component of the legal system of Russia, international treaties of the Russian Federation inevitably participate in the process of law enforcement.

Justice is a specific activity of the judicial bodies of Russia enforcing the norms of law, including the norms of international treaties of the Russian Federation.

A significant attention in the scientific literature is given to the study of the processes of application of the norms of international treaties of the Russian Federation by the courts of general jurisdiction. Unreasonably less attention is paid to participation in such processes of commercial courts.

A significant contribution to the study of theoretical and practical problems of judicial application of the norms of international law was made by monographs of B.L. Zimnenko [[5]], I.I. Lukashuk [[6]], S.Y. Marochkin [[7]]. Doctoral researches in this area have been made by R.V. Vinnikov in 2003 [[8]] V.V. Tereshkova in 1998 [[9]] I.V. Fedorov in 2002 [[10]], B.L. Zimnenko in 1999 [[11]], N.A. Tsivadze in 2005 [[12]]. However, despite the fact that the issues of application of the norms of international treaties by commercial courts were touched upon in the works of these authors, they have the character of more general studies devoted to the entire system of justice bodies with an emphasis, usually on the activities of courts of general jurisdiction or the Constitutional Court of the Russian Federation. A significant part of the above studies in this area was carried out before the adoption of the Code of Arbitration Procedure of the Russian Federation in 2002, therefore, for the most part, they do not reflect the essential features of the current procedural legislation.

Relatively recently (from 01.01.2012) the Court of the Eurasian Economic Community (hereinafter - EurAsEC Court) was created, later in accordance with the Treaty on the Eurasian Economic Union of May 29, 2014. [1] In accordance with paragraph 39 of the Statute of the Court of the EAEU, [2] it considers disputes arising on the implementation of the EAEU Treaty 2014, international treaties within the Union and (or) decisions of the Union bodies, including at the request of the business entity. An economic entity means a legal entity registered in accordance with the laws of a Member State or of a third State or an individual registered as an individual entrepreneur in accordance with the laws of a Member State or a third State.

It should be noted that according to the official site of the EAJC Court, the majority of judicial acts in 2015, 2016 and early 2017, Was made on the basis of the results of the declarations of the economic entities of the participating States.

The creation of such an international judicial authority specializing in economic disputes creates prerequisites for the development of a mechanism for supranational control over the compliance of the law-enforcement practice of arbitration courts of Russia with the general principles of international law and international treaties of the Russian Federation. The foregoing necessitates further study of the application of the norms of international treaties by the Russian Arbitration Courts.

2. Legal grounds of a general nature.

According to L.N. Galenskaya, part 4 of Art. 15 of the RF Constitution prescribed that "commercial courts are obliged to apply the rules of international law" [[13] , p. 3]. This legal duty is conditioned by a complex of international and national legal grounds. S.Yu. Marochkin calls this an indispensable prerequisite for the application of the norms of international law - "the establishment of legal conditions, in the presence of which their application is legitimate. In other words, not any agreement can be referenced "[[14] , p. 71-72].

At the international legal level, it is generally accepted that the state fulfills its obligations to the world community regardless of which body actually deals with the implementation of the international legal obligations of the state. According to Art. 118 of the RF Constitution [4] and Art. 1 of the Federal constitutional law "On the Judicial System of the Russian Federation" [5] judicial authority in the Russian Federation shall be exercised by means of constitutional, civil, administrative and criminal proceedings only the courts in the face of the judges involved and the established law order to the administration of justice by jury and arbitration assessors.

Arbitration procedure as a form of civil procedure one of the forms of exercising judicial power in the Russian Federation. Cases from administrative and other public legal relations, which, fall within the competence of arbitration courts, are considered in the civil procedure.

Carrying out an imperious function on behalf of the state, arbitration courts become eligible for the application of universally recognized and contractual norms of international law included in the established procedure in the legal system of Russia. At the same time the duty of implementing on behalf of the state government functions included arbitration courts to comply with the established procedure in the Russian legal system the provisions of international treaties due to the complex legal basis, includi: 1) the legal foundation of international character: the generally recognized principles of international law, international treaties, international custom; 2) the legal basis of domestic nature: constitutional provisions, the basic principles of the domestic (national) law, the norms of other sources of Russian law in their sequence (federal constitutional laws, codes and other federal laws, etc.) guidelines to clarify decisions higher courts of justice.

3. Publication of the texts of international treaties of the Russian Federation as a problematic segment of their applicability

I.I. Lukashuk noted that "the court directly applies the rules, incorporated into national law in the manner provided by the law of this state" [6, p. 103].

Let us turn the subject of this article: the ability to directly access the national enforcement bodies only to those provisions of international agreements that are entered into the system of the state of law.

"The requirement to publish, or promulgate treaties, asserts I.I. Lukashuk, - follows from one of the most important principles of law ... If the treaty is directly applicable, then it is subject to publication in the same way as the law. Otherwise, the court has no right to use it" [6, p. 133].

Let's note that the problems in the field of official publication of the international treaties of the Russian Federation are not new in science. However, they remain relevant in practice of applying the norms of international treaties by Russian arbitration courts.

For example, there is still uncertainty about what constitutes official publication, how it differs from communicating to the public; which source should be considered the date of official publication; unpublished international treaty is an integral part of the legal system of the Russian Federation, etc.

Before the changes in the legislation in the field of official publication in 2012 S.Yu. Marochkin drew attention to the significant contradictions, among which there were two theses: international treaties are published simultaneously with the law on ratification, and international treaties that have entered into force are subject to publication [16] , p.61].

The Constitution of the Russian Federation contains only an indirect requirement of the publication of international treaties: "any normative legal acts affecting the rights, freedoms and duties of a person and a citizen cannot be applied unless they are officially published for public information."

Russian Constitution is significantly complemented by Federal law "On international treaties of the Russian Federation" [6] , which directly connects the direct effect of international agreements with the necessity of official publication.

In 2012 the decision of the Constitutional Court of the Russian Federation on case of verification of constitutionality clause 1 of Art. 23 of the Federal Law "On International Treaties of the Russian Federation" in connection with the complaint of a citizen I.D. Ushakov was adopted [7] . Among other things, this decision noted that international treaties of the Russian Federation, which entered into force are subject to mandatory official publication in accordance with the established procedure (on the basis of Part 3 of Article 15 of the Constitution of the Russian Federation), without which they cannot be considered as satisfying the principles of the rule of law, legal equality and legal certainty as a necessary constitutional criteria for the protection of human and civil rights and freedoms on the territory of the Russian Federation. However, opposite points of view were expressed [18, p. 30].

Perhaps this solution (influenced on the adoption of changes in the legislation of Russia on official publication.

Analysis of Article 30 of the Federal law "On international treaties of the Russian Federation" which regulates the procedure of the official publication of the international treaties of the Russian Federation, shows, in particular, duplication of classification of international treaties (interstate, intergovernmental and interdepartmental ones), and the corresponding legal consequences in the form of publication.

International treaties ratified by the Federal Assembly, are published in conjunction with the federal law on ratification [8] .

The official publication of federal constitutional law, federal law, an act of the Federal Assembly is considered to be the first publication of its full text in the "Parliamentary newspaper", "Rossiyskaya Gazeta", "Assembly of the Russian Federation" or the first placement (publication) on official internet-portal of legal information (www.pravo.gov.ru).

Reference and legal system on the issue of official sources of publication of international treaties still refer to the Presidential Decree "On the order of publication of international treaties the Russian Federation" in 1993 [9] , in accordance with paragraph 1 of which international agreements (except for interdepartmental contracts) entered into force for the Russian Federation shall be officially published in the monthly Bulletin of International Treaties" and, where appropriate, also in the newspaper "Russian News". Furthermore, international treaties of the Russian Federation may be made available to the public in other media and publishing houses.

The second paragraph of the Decree comes to the authorized bodies for the implementation of the submission of the official publication of international agreements - it is the Ministry of Foreign Affairs, where necessary - in conjunction with the Ministry of Foreign Economic Relations, the State Committee for Economic Cooperation with the States - CIS members or other interested central bodies of federal executive power.

This document does not state a clear procedure for the publication and communication to the public of international treaties of the Russian Federation determined by the terms of this procedure.

In addition, there is no clear distinction between the concepts of "official publication" and "communication to the public".

Publication of texts of agreements on the official website of the network the Internet can be considered as recognition [10]: such publications are obviously intended to be operational.

The portal acts since 2005, the certificate of registration of mass media was issued 10.11.2011. The earliest publication of the international treaty on the portal is dated 13.07.2012, in total there are 826 publications (30.06.2017). Converging of these dates and numbers, there are two logical questions: does the official publication before making changes to the Federal Law on 25.12.2012 provide for the recognition of such publication of official status; whether published on this site other international agreements already entered into force for the Russian Federation on the date of the official recognition of such publication. And if the second question is less relevant for the law enforcer, the first one is extremely important .

Partially in response to the second question, let us illustrate one of the publications on the website. Agreement on the determination of the customs value of goods transported across the customs border of the Customs Union on 25.01.2008 - Publication number: 0001201207130036, publication date: 13.07.2012. At the same time, it is noted that it entered into force on 06.07.2010 and has not been previously published. In other words, a commercial Court of the Russian Federation may apply this Agreement only for the settlement of the dispute in case if the relationship arose after 13.07.2012. In the meantime the agreement has already entered into force has to be officially published .

A section on the State party to an international treaty to indicate it on the date of entry for each of them by virtue of this agreement could be relevant.

The decision of the Federal commercial Court of the Northwest District of 02.03.2009 in case number A42-3138/2008 may be relevant. The plot is that the JSC "Russian Railways" (the plaintiff) appealed to the Arbitration Court of Murmansk region with a claim to the JSC "Siberian Aluminum Company" (defendant) for the recovery of a fine for exceeding the carrying capacity of the car. The decision of the arbitration court of the first instance of 31.10.2008 denied the claims.

During the cassation appeal of the decision the complainant did not agree with the conclusion of the trial court that the Agreement between the Russian Federation and the Government of the Republic of Finland on the Finnish-Russian railway traffic, concluded 16.04.1996 city, and not published in the manner prescribed by law [11] . He believed that the court "wrongly recognized the priority of the national legislation before the Agreement" [12].

The Decree of the Federal Arbitration Court of the Northwest District of 02.03.2009 set out sufficiently detailed motivation in support of the need for international agreement and its annexes. The Court makes the following findings. This Agreement has an intergovernmental character. In accordance with the recommendations set out in the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 11.06.1999, № 8 "On the action of the international treaties of the Russian Federation with regard to questions of the arbitration process", the arbitration courts is recommended to take into account that Russian international treaties concluded by the ministries and departments, shall be published in the official publications of these bodies. Furthermore, para. 2 of the mentioned resolution states that international treaties of the Russian Federation may be made available to the public in other media and publishing houses (Presidential Decree of 11.01.1993, № 11" On the order of publication of the international treaties of the Russian Federation"). According to the Ministry of Transport of the Russian Federation (which is the legal successor of the abolished Presidential Decree of 09.03.2004, № 314 of the Ministry of Communications of Russia) on 02.11.2004, the number 28, the official source of the Ministry of acts found not to be in need of the state registration, a newspaper "Transport of Russia" published a report of the Ministry of Transport of the Russian Federation to join the force from 10.03.2007, the conditions of transport.

When the court concludes that such a procedure for the placement of information about international treaties and agreements, in the implementation of which federal executive body is involved, adopted in order to ensure the realization of the rights of citizens and organizations to access information on the activities of the Government of the Russian Federation and the federal executive bodies. And in accordance with the provisions of the Federal Law of 27.07.2006 № 149-FZ " On information, information technologies and information protection" Internet, being the kind of information and telecommunication networks, is a means of transmission and access to information resources and thereby becomes a mass medium.

As a result, the Court concludes that the company is a professional participant of the transportation process and regularly receives the goods transported under the Finnish-Russian railway traffic, was to obtain information on the entry into effect of the conditions of transport and therefore could read them.

However, in our opinion, the situation would not arise at all in the absence unreasonable gradation of international treaties, depending on the level of signatory authority. But subject to the availability of such provisions . The Court turned to the clarifications set out in the Resolution of the Plenum of the RF from 11.06.1999, № 8 "On the action of the international treaties of the Russian Federation with regard to questions of the arbitration process" [14] , according to which international

agreements concluded at the level of ministries and departments, shall be officially published in the official publications of these bodies.

However, in the newspaper "Russian Transport" published only a message about joining the action with a specific date of the conditions of transport. The publication of such a message could not be the basis for the beginning of these Terms, because the text is not officially published in this edition. This message is a repetition of the mistakes of the laws of ratification, when after their publication makes the message that the text of the international treaty will be published separately later.

In this case, the institute of official publication of regulations is unreasonably spoofed by the institution providing access to information. Communication to the public can be carried along with the publication in the official publications, but not instead of it. Communication to the public does not create any legal consequences either for the very act, either for implementing the provisions of its subjects.

This position is supported by the Supreme Court of the Russian Federation set out in the decision of 20.04.2011, the number GKPI11-383, according to which of n. 1 of the Presidential Decree "On the order of publication of the international treaties of the Russian Federation" is seen that first and second paragraphs determine the order the official publication of the international treaties of the Russian Federation and the publications in which such publication made. Therefore, the publication of the international treaty of the Russian Federation in any other publication, is not named in any of the paragraphs in Art. 30 of the Federal Law "On international treaties of the Russian Federation", expands the list of official publications. The third paragraph Art.1 of the said Decree does not regulate issues related to the official publication of international treaties, and provides only the possibility of bringing them to the public in other media and publishing houses. The wording of this paragraph does not allow to consider such publication of international agreements official, entailing the corresponding legal consequences, and does not negate the requirement of their official publication in some of these publications purposes [15].

V.Yu. Suvorova notes that the arbitration courts "do not always pay attention to the failure to publish the contract", suggesting that "it happens ... because they do not consider it an obstacle to its application" [21].

It should be understood that the awareness of the judiciary about the current sources of the law is very significant. However, the awareness of private persons on the law enshrines the rights, freedoms and legal interests. Presumption of such awareness is dependent on compliance by the State of its obligations according to the official publication of regulations. But it must be clearly understood that the information and the official publication are different phenomena and only the latter gives rise to legal consequences.

The current situation of uncertainty in the procedures for the official publication of normative legal acts on the territory of Russia gives rise to serious legal consequences in the field of law enforcement. Commercial courts made completely opposite conclusions about the applicability / non-applicability of the same treaty.

We believe that the rights and freedoms of individuals may be affected by the provisions of international treaties indirectly through regulation of their relations with the participation of legal entities. Consequently, the national legal system allows the arbitration courts Russia immediately to apply only officially published international treaties of the Russian Federation.

The Arbitration Court of the Udmurt Republic in its judgment of 21.04.2014 in case number A71-2758 / 2014 on the application of the limited liability company "Udmurt commercial company" to the Office of the State Traffic Safety Inspectorate of the Department of the Russian Ministry of Internal Affairs for the city of Izhevsk invalidate and the cancellation of the administrative liability, the reasoning of which is based on analysis of the provisions of the Russian legislation and taking into account that the information on official publication of the ADR is absent, and Annexes A and B to that agreement is not only not published, but not placed in the reference and legal systems, concluded that "the involvement of the society responsible for the violation of the requirements of the ADR, it should be recognized unlawful" [20] . This decision upheld the decision of the Seventeenth Arbitration Court of Appeal of 09/07/2014 [21].

Meanwhile, directly opposite conclusions are made in the arbitration case number A65-5254 / 2013 on the application of the limited liability company "Management of technical transport Bugulminskoye" to the Office of the State Traffic Safety Inspectorate of the Department of the Russian Ministry of Internal Affairs of Bugulma region the Republic of Tatarstan on challenging decisions on bringing to administrative responsibility. The circumstances of the presence / absence of the actions of the plaintiff in the case of an administrative offense composition were evaluated by the Arbitration Court of the Republic of Tatarstan on the basis of the provisions of the ADR [22] . These conclusions were supported by the Eleventh Arbitration Court of Appeal and the Federal Arbitration Court of the Volga district [23]. In particular, in the reasoning of a third instance court stated that "the courts applied to the present case the relevant provisions of ADR." This conclusion is based on the following ratings: "Article 1 Federal Law of 15.07.1995 № 101-FZ "On international treaties of the Russian Federation " an international treaty of the Russian Federation is an international, intergovernmental agreement and the treaty of the interdepartmental character regardless of its type and the name (contract, agreement, convention, protocol, exchange of letters or notes, other forms and names of international agreements). Clause "a" Part 1 of Article 21 of the same Act provides that the Russian Federation's accession to international agreements on behalf of the Russian Federation made by the Russian Government.

In accordance with the decision of the Russian Government dated 3.2.1994 number 76 Russian Federation has officially joined the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) from 28.04.1994.

European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) by virtue of paragraph 4 of Article 15 of the Constitution to 28.04.1994 is an integral part of the legal system of the Russian Federation " [24] .

Fines imputed to the Company for the administrative offense are significant (400 000 rub.),. But any action on the part of senior government officials to legalize the applicability of the international treaty of the Russian Federation have not been taken (the official publication is not implemented), and the full text (including annexes) is still missing even just in the public domain. One site has been found, which gives a real opportunity to get acquainted with the provisions of the full text (including annexes) ADR [25]. We believe that the execution of protocols on administrative offenses, with reference to this normative legal act of international law and the adoption of judicial decisions on the basis of its provisions are unjustified.

4. Conclusions.

The need for legislative regulation of the issues of the official publication of normative legal acts of the Russian Federation is relevant. [22, p. 95].

Thus, on the one hand . failure of domestic procedures to ensure the possibility of the proper application of the international treaty, which entered into force for the State, is the basis for liability of the state as a participant of international relations, violating the principle of the obligation of good faith and performing the obligations under the treaty. In turn, law enforcement agencies and individuals (whether legal or natural persons) must be guided by the fact that only officially published acts can be applied. From this point of view, the state can not make excessive demands on their bodies and individuals with regard to the application of provisions of international treaties.

But on the other hand, there is a collisional situation: current international law does not provide official publication of normative acts as one of the grounds for the application of its rules , but the Russian legislation does.

The first version seems to be more appropriate. However, a states, independently determining the manner and means of implementation of international treaties within the framework of its legal system, may encumber a need to comply with additional procedures to ensure the most effective protection of the rights and freedoms of man and citizen, as well as for ordering enforcement.

Wherein the requirement of official publication has completely legitimate purposes and must be fulfilled.

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<p>Библиографическое описание статьи Киселева О.А. Применение международных договоров Российской Федерации в арбитражном судопроизводстве России / О.А. Киселева // Правоприменение. – 2017. – Т. 1, № 3. – С. 174–189. – DOI : 10.24147/2542- 1514.2017.1(3).174-189.</p>	<p>Bibliographic description Kiseleva O.A. The application of international treaties of the Russian Federation in the legal proceed-ings in arbitration courts of Russia. <i>Pravoprimerenie = Law Enforcement</i> <i>Review</i>, 2017, vol. 1, no. 3, pp. 174–189. DOI: 10.24147/2542-1514.2017.1(3).174- 189. (In Russ.).</p>