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О статусе международных договоров в правовой системе Российской Федерации: от теории к практике

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В статье формулируется целесообразность определения правового статуса международного договора в составе источников права с позиции его базового единства. Предлагается анализ категорий нормативно-правового акта, нормативного договора, международного договора, выделяются их признаки, правовые характеристики. Исходя из базовых правовых характеристик категории нормативно-правового акта, обосновывается целесообразность отнесения международного договора к данной категории.

Ключевые слова: международный договор, нормативно-правовой акт, источник права, акт, договор, соглашение, правоприменение.

The status of international treaties in the legal system of the Russian Federation: from theory to practice

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The subject. The article s devoted to research the legal nature of international treaties.

The purpose of the article is to formulate the feasibility of determining the legal status of international treaties in the composition of the sources of law in terms of its unity.

The methodology. The author uses the systematic approach to research, methods of analysis and synthesis, including formal legal analysis of international treaties, Russian legislation and courts' decisions.

The main results and scope of their application. The analysis of the categories of legal act, the regulatory agreement, the international treaty, describing its characteristics, legal characteristics is performed. On the basis of the main legal characteristics of the category of normative legal acts, the expediency of inclusion of an international treaty to this category is proven. It is groundless to detach international treaties on normative legal acts, thereby reducing the extent of the need for their application. This, however, does not change the fact that the source of law in each legal system may have special characteristics depending on such system and complementing the basic characteristics. The international treaty is a legal act of international law. Such a conceptual approach to this issue allows making further conclusions.

Conclusions. The author highlights the circumstances of the need for reasonable use of international treaties to resolve disputes, that are significant for the process of enforcement. This position is based on the proposed definition of an international treaty including it to the normative legal acts.

Key words: international treaty, legal act, source of law, act, treaty, agreement, law enforcement.

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1. Introduction.

In the literature and in practice, international treaties are traditionally perceived on the basis of only their legal nature - as an agreement of the contracting parties, which does not disclose their legal status in the system of sources of the law applicable by the courts.

Legal literature offers the reader with some differences, but in general a similar list of types of sources of law: a normative legal act, a judicial precedent, a legal custom, a normative treaty.

A normative contract (a kind of which is usually called an international treaty) is singled out as an independent source of law and is separated from normative legal acts [1], p. 48; 3, p. 13-23; 11, p. 212-219; 22, p. 46-47; 23, p. 73; 24, p . 104-105; 25, p. 15; 26, p. 153-171].

Such a separation of international treaties from an array of normative legal acts can not be recognized as sufficient and proven from the standpoint of a general theory of law and established law enforcement practice.

Attention is drawn to the fact that the very rationale for distinguishing in the system of sources of law the normative legal act and the normative treaty by the authors of modern scientific literature is extremely rare. For example, the contractual variety of lawmaking [2] , p. 83] , it is indicated that it is carried out by agreement of two or more parties, in connection with which international treaties, "unlike normative and legal acts, do not directly express the state's will and are not an official legal act of the state" [5, p. 14].

Individual scientists, as an individualizing characteristic of a normative (hence, international) contract, as part of the sources of law, suggest that the fact that such a treaty is "a voluntary will of the parties", while a normative legal act "is an act of unilateral will" [3]. There is also a point of view according to which, "unlike normative acts adopted by state bodies, normative treaties are the result of an agreement between equitable actors on activities of common interest" [4], p. 160].

If we summarize these points of view, it turns out that the equality of subjects, the voluntary expression of each of them and the coordination of such wills are positioned as criteria for the allocation of an international treaty to an independent type of sources of law and, thereby, its isolation from such a type as normative-legal act. This approach to the species composition of sources of law is not objective.

2. System analysis of categories.

In order to determine whether a particular source of law refers to normative legal acts, it is first of all necessary to determine what is a "normative legal act" and using what criteria it can be qualified as such.

Legal science and practice universally operate with the concept of "normative legal act", while investing in it a different content.

In modern scientific doctrines can meet a variety of content definition of this category, "the act of lawmaking activities of the competent state bodies, which establishes, changes or cancels the rule of law" [5] , p. 11; 11, p. 213] or "an act containing rules of law and aimed at the settlement of certain social relations" [4, p . 161].

In paragraph 2 of the RF State Duma's Request to the Constitutional Court of the Russian Federation "On the Verification of the Constitutionality of Presidential Decree No. 1412 of 02.10.1996 "On Approving the Regulations on the Administration of the President of the Russian Federation, "the following official position is formulated: "In the current legislation definition of the concept of "normative legal act". At the same time, it is accepted in the legal doctrine that a normative legal act is a written official document adopted (issued) in a certain form by the law-making body within its competence and aimed at establishing, changing or repealing the legal norms" [1].

According to paragraph 2 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 27.04.1993 No. 5 "On certain issues arising in the examination of cases on applications of prosecutors on the recognition of legal acts as inconsistent with the law" (as amended by Resolution of the Plenum of 05.05.2000 No. 19) a normative legal act is an act of an

authorized body of a state authority, a local government body or an official, established in the established procedure, establishing legal norms (rules of conduct), mandatory for an indefinite circle of persons, calculated for neo nokratnoe application acting whether emerged or stopped specific relationship envisaged act [2] .

In the definition of the Supreme Arbitration Court of the Russian Federation No. VAS-5067/14 of July 14, 2014 it was stated that "a normative legal act is a written official document adopted (issued) in a certain form by the law-making body within its competence and aimed at establishing, or abolition of legal norms, under the legal norm - a compulsory state prescription of a permanent or temporary nature, calculated for multiple applications" [3] .

One can also cite the definition of a normative legal act proposed in the draft of the Federal Law "On Regulatory Legal Acts in the Russian Federation" prepared by the Ministry of Justice [4] . Article 1 of this draft indicates that a normative legal act is a written official document adopted in a certain form by a subject of law-making within its competence and aimed at establishing, amending, clarifying, enforcing, terminating or suspending the operation of legal norms, containing compulsory prescriptions of a permanent or temporary nature, extending to an indefinite circle of persons and designed for repeated use. At the same time, law-making is understood as the official activity of state bodies in developing and adopting normative legal acts.

These definitions differ in their desire to concentrate as much of the basic characteristics of the normative legal act as possible: creation (adoption) by the competent state bodies; written expression in a strictly defined form; content of the law; the existence of a procedure for its implementation, including, if necessary, the institution of compulsory enforcement of orders and non-violation of prohibitions. These characteristics in theory and practice are used as criteria for the qualification of a particular source of law as a normative legal act.

Meanwhile, such a formulation of the characteristics of the normative legal act leads to an unreasonably narrow understanding of this category.

These characteristics are described on the basis of only a national, intrastate approach to the categories of general theory of law. The basic unity of law and, consequently, its basic sources are not taken into account here. Of course, each legal system operates with a set of sources of law recognized by it as such, since they are most typical for its model of the device. But such differences do not exclude key from the position of the general theory of law characteristics of a particular concept.

There is a general legal set of properties (characteristics) for each of the types of sources of law - they can be conditionally called basic. In turn, the properties of different types of sources of law inherent in each particular legal system are superimposed on the basic ones, supplementing them. Thus, the basis for the classification of types of sources of law should be based on the basic fundamental characteristics of the relevant sources, rather than their specific features, due to the peculiarities of each particular legal system.

Normative legal act as a kind of source of law is primarily a general category of law in general. These or other specific sources of law can be attributed to this species both in the national legal system and in the international one.

We shall allocate the basic significant criteria for qualification of this or that source of law as the normative legal act:

- the content of the law in such an act;
- a written form of the statement of such norms, taking into account the requirements for the order of presentation;
- acceptance of the act by the subject (s) of law, to which such authority is granted within the framework of a specific right system;
- implementation of the authority to adopt the act in the established procedural order;
- the existence of a procedure for the implementation of such an act.

In support of their position, we give the following arguments.

It is generally accepted that the act - (from the Latin actum - document) is the name of various kinds of documents [6, p. 19].

The act is a generic concept, meaning in this case a formally expressed official document.

Both the law and the contract are acts, documents. For such an understanding, the internal qualitative characteristics of the act do not have priority: the procedural order of acceptance (imperative imperative order or conciliatory nature), forms (contract or law) and the accepting entity (the state alone or by agreement of wills with other states). From the point of view of the general theory of law, only their preliminary determination, certainty is important, since observance or non-observance of the order, form and authority of the subjects can in each concrete case influence the validity of the document, but not its expression outside.

Moreover, in each specific case, acts are adopted by expressing the will of the authorized entities - the legislative bodies, if this is the national legal system, and the subjects of public international law, if this is the relevant legal system. The order of expression of will and ways of its presentation are fixed in each legal system and must be observed by these subjects.

Such conclusions are consistent with the opinion of V.V. Ivanov that essentially legal acts (acts-documents) are "external expressions of legal activity of subjects of law" [7, p. 14-15]. When it comes to the legal (legal) act as a source of law, it means the final result of the will, the form into which it is poured out [8, p. 71].

Therefore, we believe that the formulation of the normative legal act in the definitions proposed above as one of its main characteristics, the adoption of this act by the authorized state authority unreasonably narrows this concept. This is only an additional, clarifying quality of such an act created in the framework of the national legal system. The authorized state authority is one of the subjects of the national legal system. With reference to the international legal system, the right to participate in the creation of norms is the main component of the legal capacity of the subjects of this system. In both cases, the rule of law is created by the subjects of each of the legal systems authorized for such legal activity.

Let us turn to the general concept of a normative treaty. It is basically defined as jointly accomplished in the appropriate form of the separate will of two or more authorized subjects of law-making, aimed at regulating the conduct of these subjects and (or) other entities, on the basis of agreement establishing legal norms. In other words, the normative treaty is "the agreement of two or more parties, as a result of which the rules of law are established, amended or abrogated" [9], p. 219].

Comparing this definition with the definitions of the international treaty, one can come to the conclusion that the basis of the definitions of the concept of an international treaty formulated by the Russian legal science is precisely such an understanding of the normative treaty.

In most general terms, an international treaty is defined as an international legal instrument that fixes the coordination of the will of two or more subjects of international law aimed at establishing the binding permissions, regulations and prohibitions provided by the coercive force of states. [See, for example: [10, p. 64]. Even more general is the definition of an international treaty as an agreement between subjects of international law, the conclusion, action and termination of which are regulated by international law [11, p. 77-78].

The definitions of the concept are formulated and normatively fixed.

So, according to para.1 Art. 2 of the Vienna Convention on the Law of Treaties of 1969 (hereinafter the Vienna Convention of 1969) and Cl. 2 of the Vienna Convention on Succession of States in respect of Treaties of 1978 [5] , a contract means an international agreement concluded between States in writing and governed by international law, regardless of whether such an agreement is contained in one document, in two or more interrelated documents, and also irrespective of its specific name. Moreover, despite the fact that the scope of the Vienna Convention of 1969 is limited by agreements between states, its norms can be applied to other international treaties, under which they would fall under international law (Article 3 of the 1969 Vienna Convention).

Vienna Convention on the Law of Treaties between States and International Organizations or International Organizations 1986 (hereinafter - the Vienna Convention of 1986) in cl. 2 proposes

a similar definition of international treaties with a peculiarity of the subject composition of agreements.

Federal Law of 15.07.1995 No. 101-FZ of the "On International Treaties of the Russian Federation" (hereinafter - the Federal Law "On International Treaties of the Russian Federation", the Law on International Treaties of the Russian Federation) in Art. 2 compiles the indicated definitions: "The international treaty of the Russian Federation means an international agreement concluded by the Russian Federation with a foreign state (or states), with an international organization or with another entity that has the right to conclude international treaties (hereinafter - another formation) in writing and regulated by an international right, irrespective of such an arrangement is contained in a document or in several related documents, and regardless of its concrete th name. "

Such definitions have a right and a basis for existence, but they only state the individual features of this source of law, emphasizing its international legal nature and essence, such as: conciliatory character, written form and international legal regulation of implementation processes. In this case, the starting category in the data definitions is the agreement underlying the international agreement.

Certainly "the agreement or consent is a legal entity of any agreement, including the international" [12, p. 11]. Conciliatory ways to create a law allocates an agreement among the acts containing rules of law. But this criterion is inherent in him because of the specificity of the legal system in which it is created, the specificity of interaction within the framework of the subjects of the system. Rights of use of such a criterion is not justified for the separation of the contract as part of types of sources. Conciliation treaty-based norms do not change its legal nature - the rules of conduct that are binding for the participants because of the presence of the legal mechanism of implementation.

As a result of conceptual, lexical-semantic and soderzhatelno- legal analysis of the phrase "international treaty - an agreement" V.S. Ivanenko had come to reasonable conclusions about his unsuccessful , on making them confusion in the overall conceptual system, and that it is "very accurately reveals only one part of the concept of contracts - the legal entity as a result of harmonization of the wills of subjects of international law" [13, p. 26-51].

Thus, the doctrine is a substitution of concepts: the specific characteristics of international treaty agreements as a subject of international law is displayed on the forefront at the expense of the rest of its basic characteristics inherent in it as a source of international law .

It can be stated that the treaty meets the above formulated basic characteristics of normative legal acts: the act contains the rule of law, there is a written form of presentation of such standards, taking into account the requirements to this statement, made by the authorized bodies of subjects of international law, in accordance with established procedural order, as well as It is the implementation of the procedure.

Therefore, international treaties are normative legal acts with all ensuing legal consequences. This point of view has opponents. Thus, E.L. Potseluev, highlighting international treaties like a one in of the varieties of normative treaties, notes: "unsubstantiated looks regulatory understanding of individual lawyers as a legal contract legal act varieties". However, the author does not have any arguments in support of its critics [14, p. 17].

In support of this assertion, in addition to the above, one can cite the following arguments.

Characteristic of an international treaty as a source of law, having the rule of law, stresses MN Marchenko, when he says that all international treaties are "normative in content", despite the fact that "some of them form the general rules for the wide (just indefinite), the range of subjects and repeated use, while others contain a strictly individual norms that create rights and obligations only for the contracting parties" [15, p. 13].

We agree with this statement. Decision-making procedures of legal acts in its essence are very similar both in international and in national legal systems. This does not deny the existence of "fundamental differences between international and national way of norm" [17, p. 84-85].

The adoption of state obligations under international treaties (in all stages) requires the participation in this process is the competent state authorities, they in the name of each State shall

take the act (within the meaning of Article 9 - 17 of the Vienna Convention on the Law of Treaties, 1969). Further, at the national level to ensure compliance with international obligations can speak about a specific "authorization", i.e., the implementation of state actions that allow the legal system containing international treaty standards acts. It is this authorization (permission, software) subsequently gives rise to the application of such standards by the relevant national authorities.

In turn, in the national legal regulations are also accepted on behalf of the authorized bodies of the state - the subjects of the legal system. Entered into a legal mechanism for regulating social relations regulations and by observance of a certain mechanism (determination of the order of entry into force and scope, and the subsequent official publication, if necessary, the official interpretation).

It is important to note that the performance of international treaties as the normative-legal acts and finds confirmation in the legislation of the Russian Federation.

Thus, Art. 13 APC RF "Normative legal acts applied in cases" in Sect. 1 provides that the arbitration courts consider cases on the basis of the Constitution, international treaties of the RF, federal laws and normative legal acts of the Russian President, the Russian Government and federal executive power, constitutions (charters), laws and other normative legal acts of the RF subjects, acts of local self-government.

You should also specify the item. 7, Chapter 1, Section I of the Tax Code, "Legislation on taxes and fees, and other normative legal acts on taxes and duties" [7] , according to which if the international treaties of the RF, containing provisions relating to taxation and fees, establish other rules and regulations than those provided for in this Code and adopted in accordance with it normative legal acts on taxes and (or) fees, the rules apply the norms of international treaties of the Russian Federation. International agreements in this case also referred to the "other" normative legal acts on taxes and fees.

Therefore, it can be assumed that the legislature in formulating these rules of Russian law proceeded from the fact that international treaties are the legal acts.

Thus, considering the above, select the following signs international treaties as the normative legal acts:

- contain rules of law - the mandatory rules of conduct for members;
- are accepted by the authorized bodies of subjects of law;
- are based on the wills of subjects agreed upon in the course of their expression;
- are legally binding under international law;
- act as a legal force in national legal systems with the approval of such systems;
- taken always well-defined procedural order; why international law is formed by a conglomerate of special rules called "Rules of Procedure";
- have a written form, consistent with the international legal system the rules of documentary registration of legal acts.

Not begging the importance of these previously existing definitions in the literature of the source of law, for the purposes of this study we believe it necessary to propose the following definition, which characterizes the concept of the test as a legal act.

The international treaty is an international legal act, adopted by the authorized subjects of international law on the basis of conciliation, containing the rules of conduct binding on the contracting parties to regulate social relations of mutual interest.

Accordingly, in the case of an international agreement of the Russian Federation, the latter is a party to such a contract, he is authorized to implement it within the state's jurisdiction.

3. Conclusions.

According to V.S. Ivanenko, the qualification of an international treaty as a legal act "allows already at the stage of definition taken and continue to be considered an international agreement is not a treaty-deal between the subjects of international law, as well as a basic rule-proclaiming source of contemporary international law." This understanding of the essence of the contract makes it

possible "to establish the precise place of Russia's international treaties in the Russian legal system" [14, p. 45-46].

The proposed definition gives us a starting point for the study of processes of implementation contained in international treaties Russian legal norms through enforcement activities of arbitration courts of the Russian Federation.

As the legal consequences of the qualification of international treaties as the normative-legal acts are the following.

1. The international treaty is an international legal act, which is to be applied by the courts of the Russian Federation. It should not be understood as the act of a "power of the legal position" judicial authority or a person involved in the case. The fact is that as a result of much exaggerated in the value of units of international law on the public and private [18, p. 93-94] formed the view that the international treaties of the Russian Federation are of a public law character and application in this regard shall be exclusively international in international relations.

For example, a dualistic theory suggests that international law and domestic law designed to regulate different groups of public relations: international law - intergovernmental relations, and domestic law - relations involving individuals and entities subordinate to the supreme power of the state. The interaction of legal systems within the framework of this theory suggests that the "rules of international law have an impact on domestic law-making and law enforcement, and vice versa. Each of interacting legal systems has a rule acting in their environment" [19, p. 208].

But practice shows that this concept has not always withstand objective criticism. Thus, I.V. Fedorov proves the possibility of courts of international law, not only in matters with a foreign element (as it deals with private international law), but also in matters of purely domestic nature but related to international law. This category of cases cannot be limited by interpretations of private international law. Applied in such cases, treaties are aimed at resolving the first inter-state public relations, but in its structure are norms of direct action against national law subjects. Thus, I.V. Fedorov concludes it is possible to use international law to regulate the court action in the resolution of the dispute, which lacks any foreign involvement, use it exclusively for the "mono-national" dispute [20, 32].

Even though these findings that are relevant to the theory and practice of the contract, the analysis of arbitration practice shows that the judiciary for a long time (even after the adoption of the 1993 Constitution of the Russian Federation) refers to the norms of international treaties of the Russian Federation as a category is certainly legal, but "alien" and therefore not subject to the application. In this regard, a reference to the norms of international treaties in judicial acts are still in some cases, are formal, not meaningful, non-regulatory. This has largely contributed to the selection of international treaties is a separate type of sources of law, the separation of their normative and legal acts.

That is the qualification of the international treaty as the legal act allows the court to concentrate on the basic nuances of law enforcement with regard to this source of law, which are required for the correct conclusions. As part of the legal consequences particularly evident close relationship of these components of the legal system, as the right and of justice. A kind of indicator of this is the order of the legal position of the court on the merits, which is reflected in the judicial act.

2. In the case of admission to arbitration a dispute relating to international law, the arbitral tribunal must implement a specific sequence of actions. He is essentially similar to the algorithm of application of legal acts of the national law. Certain features are the result of the international origin of the contract.

Here we note only the following. Given the competitive nature of the arbitration process, a link to the international agreement of the persons participating in the case, requests a court enforcement action in respect of that act. But the absence of such links involved in a case does not preclude the obligation of the arbitral tribunal in the search for and application of international agreements in the process of legal classification of the dispute.

3. The current Russian legislation permits the use of only the officially published international treaties of the Russian Federation, regardless of whether it has come into force or be applied provisionally.

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