

The influence of the principle of due procedure on the regulation of process involving foreign parties in the Russian law of civil procedure

1. General provisions.

The principle of due procedure is one of the element of the right to the fair hearing which is guaranteed by the article 6 of the European Convention on Human Rights (hereinafter the European Convention).

The realization of this principle is one of the main criteria both for reforming of procedural legislation and for interpretation of procedural rules by the courts in Russia. The ensuring of the right of every person to the fair hearing in the most various forms is of the utmost importance by reason of a great amount of complaints against Russia in European Court of Human Rights (hereinafter the ECHR) concerning the violation of this right.

The interpretation by the ECHR of the article 6 of the European Convention indicates that it contains the general “right to the fair hearing” and a number of special rights. The last ones could be divided in two groups: explicit rights and implicit rights. The first ones are follows:

- right to the independent and impartial tribunal established by law,
- right to a hearing within a reasonable time,
- right to a public hearing and to a judgment which is pronounced publicly.

The implicit ones are follows:

- right to access to justice,
- right to legal aid,
- equality of legal measures,
- right to an effective participation in an adversary trial,
- right to a fair representation of evidences,
- right to a reasoned judgment.

It seems that the principle of due procedure implies realization of listed rights and of the other ones.

The right to fair hearing is traditionally examined in Russia in the light of the article 6 of the European Convention.

The national legislation doesn't contain a definition of the right to fair hearing. The article 46 of the Constitution of Russia guarantees the right of everyone to judicial protection of his rights and freedoms but it doesn't refer to the justice of a hearing. Meanwhile, the judgments of the Constitutional Court of Russia contain a lot of references to this right.

As it follows from interpretation of the European Convention by the European Commission, the States members of the European Convention have a vast degree of discretion as regards the choice of measures and instruments which are destined for ensuring the correspondence of their legal systems with requirements of article 6 of the European Convention.

Therefore the national legal system should correspond to the principle of fair hearing. So we should pay attention to some aspects of Russian procedural law characterizing the realization of this principle as regards cases involving foreign parties.

The basic rules of procedure involving foreign parties contains in the Code of civil procedure of 2002 (hereinafter the CCP) and the Code of the state arbitral procedure (hereinafter the CSAP) of 2002. In the both codes there is the same model of regulation that is why they will be considered together in this report. Nevertheless it is the state arbitral courts who face with the questions of international procedure in the most cases. Therefore we take the CSAP which regulates the consideration of economic affairs as a basis. The difference in legal regulation between the CSAP and the CCP doesn't matter for this report.

There are some key aspects of process involving foreigners which are marked out traditionally because they permit to form a general conception of legal regulation of this institution in Russian law. They are the jurisdiction, status of foreigners, notifications in courts, probation, recognition and execution of foreign judgments.

We should note that these elements of international civil procedure are at the same time parts of the right to fair hearing.

Thereby we think that examination of the problem of influence of the due procedure's principle to regulation of process involving foreigners should be done in the light of some key aspects of process involving foreigners.

Due to this reason the following questions will be considered in the report: status of foreigners in Russian law, notification in courts, jurisdictional immunity, disclosure of evidence, recognition and execution of foreign judgments and the problem of parallel proceedings (*lis alibi pendes*).

The choice of these elements is conditioned by two reasons. On the one hand, they reflect certain aspects of the right to fair hearing in the interpretation done by the ECHR. On the other hand, they are those links of mechanism of juridical protection of foreigners that allow to comprehend how the principle of due procedure is realized in Russia.

2. Legal status of foreigners in process

Both the CSAP and the CCP contain the general rule that foreigners dispose the same procedural rights and bear the same obligations as Russians.

Therefore the principle of national legal treatment resulted from such principle of international and national civil process as the principle of procedural equity is fixed in Russian legislation. The similar principle is reflected in Principles and rules of transnational civil procedure elaborated by the American Law Institute (ALI) and the International institute for the unification of private law (UNIDROIT).

As this principle implies the application of general national rules in relation to procedural rights and obligations of foreigners, the legal regulation of this institution doesn't contain a lot of peculiarities.

So we could draw a conclusion that the equality of legal means and the right to adversary trial are guaranteed to the foreign parties of process in the same way as to Russians.

There is one example of attempt to avoid undesirable limits of legal capacity of foreigners. It is the rule of the CSAP according to which foreigner who takes part in the process should present to the court evidence of his legal status and the right to accomplish entrepreneurial or other economic activity. But if these documents haven't been represented state arbitral court could request it *ex officio*.

Therefore if the documents which attest legal capacity of foreigner are not presented to the court for some reason it doesn't involve the automatic denial of judicial protection.

The CCP contains other example. If foreigner haven't procedural capacity according to his national law he could be recognized in the territory of Russia as capable and ensured with access to justice provided that this person corresponds to the conditions of procedural capacity established in Russian law.

The only considerable ground to restrict or derogate the status of foreigners in Russian process is the principle of reciprocity universally recognized in international law. The possibility of application of this principle is provided by Russian law in the form of retorsion. But limitation of the rights of foreigners could be done only as a reciprocal measure and only by the Government of Russia.

At the same time the CSAP contains a rule concerning the procedural benefits for foreigners. They are granted to foreigners in the case when they are provided by international treaty of Russia. The benefits could include any rule provided more convenient legal treatment in arbitral process in comparison with general regulations such as benefits concerning juridical charge, legal aid etc.

For example in the article 2 of Minsk Convention of January 22 1993 On Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (hereinafter the Minsk Convention) it is said that citizens of each state – member of The Commonwealth of Independent States (CIS) and persons who lives in these countries are exempted from payment of judicial and notarial charge and enjoy the free legal aid under the same conditions that their proper citizens. These benefits are applied to all procedural actions on the case including the execution of judgment.

The same order is provided by the article 3 of the Kiev Convention of March 20 On the Procedure for Resolving Disputes concerning the economic activity (hereinafter the Kiev Convention). The Convention provides that business subject of each state – member of CIS are guaranteed in the territory of other state – member of CIS with legal and judicial protection of their rights and interests which are equal to the protection of their proper business subject. They have right to go to law in any court or other organ which are competent to resolve dispute, file a petition, take legal action and realize any other procedural action.

Therefore the Russian legislation ensures to the foreigners the same volume of legal protection as to the proper citizens.

3. Notification.

The other question which is inevitable when we analyze the right to fair hearing in process involving foreign party is due notification.

The question of due notification has considerable practical significance as the rate of procedure, efficiency of judicial protection and effectiveness of execution depends on elected way of notification of defendant about time and place of the hearing because one of the principal objections of the defendant during the examination of request of enforcement is the lack of notification or undue notification about hearing which has been held in other state.

The CSAP contains one general rule: if foreigners who take part in the process hold by Russian state arbitral court are situated or live outside Russia, these persons are notified about the hearing by means of sending letter rogatory in a competent organ of foreign state. In this case the period of hearing is prolonged by state arbitral court on term fixed by the treaty of legal aid for sending letter rogatory to competent organ of foreign state and in the absence of this term no more than six months. In the CCP there is a rule that judicial notification is done in accordance with the procedure established by international treaty or by federal law of Russia.

Any deviation from the established procedure of judicial notification and from term of hearing through court's fault may be qualified as violation of the article 6 of the European Convention because improper notification may lead to repeated adjournment of hearing and to reversal of judgment by the superior court that postpones pronouncement of legal sentence.

At the present time there are some possible situations concerning the judicial notification of foreigners.

Firstly, as regards citizens and companies of the states who concluded with Russia an international treaty of legal aid, judicial letters rogatory and summons are sent on the terms fixed by a treaty. For example in concordance with The Convention of legal aid of 1990 between Russia and Spain all the notifications are done through the Ministry of justice.

Secondly, the simplified procedure of notification is established by the Minsk Convention according to which notification should be done by sending documents between organs of justice. The Kiev Convention provides direct communication between courts and other competent organs.

Thirdly, Russia is a party to the The Hague Convention of November 15 1965 On Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This means the possibility of judicial notification of foreigners according to the procedure established by the Convention.

The function of central competent organ established for realization of procedure of judicial notification is realized in Russia by Ministry of justice.

Therefore, the right of every interested person to be informed about judicial hearing is realized on the basis of international treaty by competent state organs according to the established procedure.

4. Jurisdictional immunity.

There is a rule in Russian law according to which foreign State as a sovereign has jurisdictional immunity as regards an action brought to him in state arbitral court, arrest of him property situated in Russia and application of interim relief.

Recovering of foreign State's property in the procedure of enforcement of sentence of state arbitral court is permitted only by consent of competent organ of the foreign State except as otherwise provided by international treaty or federal law. Jurisdictional immunity of international organizations is also determined by international treaty and federal law.

Renunciation of jurisdictional immunity should be done according to the procedure established by law of foreign State or rules of international organization. In this case state arbitral court tries a case according to general procedure.

There are three traditional kinds of immunity in Russia: immunity from suit, from interim relief and from judgment. All of them have the same legal and doctrinal basis. But it doesn't mean total lack of jurisdiction as regards foreign State. The rule of jurisdictional immunity doesn't apply to suit to State in its own national courts.

There are some peculiarities when we apply the rules of jurisdictional immunity. Firstly, this immunity is not unconditional and absolute. The exception could be provided by federal law or international treaty.

Secondly, jurisdictional immunity doesn't apply to counter-claim when foreign State brings a civil action in the other's state national court.

Thirdly, we should distinguish two functions of the State: as a sovereign and as an ordinary subject of private law.

Fourthly, renunciation of immunity should be clear, manifested in documents issued from competent organ and done according to the procedure established by foreign law.

Fifthly, the same rule of immunity applies to the immunity of foreign state's representatives.

These rules of juridical immunity apply also to international organizations (U.N.O., EBRR etc.).

We suppose that these rules testify that Russian legal system has apprehended the basic principles of international civil procedure and international law.

Some problems arising in this area concern sooner concrete cases than legal rules according to which there are resolved.

Thus, in case of Swiss company NOGA, which brought an action to Russia, one of the main questions was observance by Russia of the procedure of renunciation of juridical immunity.

We should keep in mind that the European Convention on State Immunity of 1972 was not ratified by Russia. However our country is in the process of accession to the United Nations Convention on Jurisdictional Immunities of States of 2004 which is based on the concept of limited immunity. Accession to this Convention will lead to expansion of application of jurisdictional immunity's rules

in some areas of civil circulation in Russia and change the legal practice in the courts of general jurisdiction.

5. Disclosure of evidence.

The right to fair hearing includes the right to fair presentation of evidence by the parties. One of the most important guarantees of this right is possibility for other parties to see these proofs.

The general rule of the both procedural codes about disclosure of evidence applies to foreign persons. The parties should beforehand, in the stage of preparation of the case to the hearing, represent evidence. However this procedure in Russian law very distinguishes from other national procedure, for example in USA.

The disclosure of evidence is not a separate procedure but it is realized during the hearing.

Disclose of evidence means that parties should represent their evidence to each other with the object of limiting of evidence in the hearing under the threat of ban to refer to evidence which was not presented beforehand to the other parties.

However in jurisprudence it was adopted a rule according to which evidence which was not disclosed before the beginning of hearing and presented only in the stage of examination of evidence during the hearing should be studied by state arbitral court of first instance regardless of reason of break of evidence disclosure's procedure.

Though, the reasons of lack of disclosure could be taken into account by state arbitral court during the cost allocation. Therefore break of disclosure's obligation could entail imposition of obligation to compensate all expenses of procedure.

Thus possibility to bear all expenses of procedure is the one real negative consequence for unfair party.

We should mention that some complication during presentation of documents in the case with foreign element could be provoked by the necessity to certify their translation by a notary. As regards documents produced by competent authorities of foreign state according to the foreign law rules they should be legalized with the exception of making apostille according to The Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents of 1961.

There are some exceptions provided by international treaties of Russia. For example article 13 of the Minsk Convention according to which documents which was produced or testified on the territory of one of Participant state by a competent organ and according to the established procedure with attached seal are accepted on the territory of other Participant state without any special certification. Documents which are considered on the territory of one participant state as official have, on the territory of other participant state have probative force of official documents.

Therefore international treaty of Russia could grant more favorable conditions of representation of evidence but it evidentially doesn't limit the right to fair hearing.

But we couldn't say the same about institution of evidence's disclosure which doesn't practically work in Russian law. It could complicate realization of the right to fair hearing.

6. Parallel proceedings (*lis alibi pendens*)

The important problem in jurisdiction's area is parallel proceedings and parallel judgments.

In practice some cases could be examined at the same time or at different times in different states. It could be possible that two judgments, one of which has been pronounced in Russia, contradict to each other.

To avoid possible collision Russian law has fixed a principle of priority of process which was brought earlier according to which judgment pronounced earlier should be executed. This principle is fixed in many conventions and treaties on legal aid.

Thus, according to the Minsk Convention in the case of institution of proceedings concerning the dispute involving the same object, grounds and parties in courts of two Participants the court who brought the procedure later should dismiss the case.

The same principle is fixed as general rule in national law and it applies if:

- Foreign court instituted legal proceedings or pronounced a judgment as regards the same dispute (same parties, object and grounds);
- Arbitral court of Russia hasn't exceptional jurisdiction to try a dispute;
- Foreign judgment should be recognized and executed according to international treaty of Russia or according to federal law.

If foreign judgment hasn't been successfully recognized in Russia plaintiff has a right to bring the same action into a Russian state arbitral court.

The other aspect of the principle *lis alibi pendens* is situation when foreign judgment doesn't come to effect but process on the same civil case goes simultaneously in different states.

In this case there is some difference between the CCP and the CSAP that could lead to considerable violence of participant's rights. According to the CCP court of general jurisdiction has to give back the statement of claim or leave the statement without examination if the proceedings as regards the matter involving same parties, object and grounds was previously instituted by foreign court.

But the CSAP contains other rule according to which state arbitral court leaves a statement of claim without examination if foreign court is in the process of examination of the dispute involving the same parties, object and grounds.

7. Recognition and execution of foreign judgment

Superior courts of Russia (Constitutional court, Supreme Court, Supreme State Arbitral court) consider execution of judgment as an integral part of the right to fair hearing in accordance with article 6 of the European Convention and jurisprudence of the ECHR.

According to the article 6 of Federal constitutional law On judicial system in Russia obligatoriness on the territory of Russia of foreign judgments, judgments of international court and arbitral awards is determined by international treaty of Russia. There are some special federal laws in the forced execution's area: On bailiffs of 1997 and On forced execution's procedure of 2007.

In the area of international circulation of judicial decisions Russia take part in follow international treaties: three multilateral conventions (Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and two conventions concluded between states of former USSR) and 29 bilateral conventions the most of which was concluded at soviet period (for example with Rumania in 1958). Russia has concluded bilateral conventions on legal aid included certain aspects of international circulation of judicial and non-judicial acts with some members of European Union: Bulgaria, Cyprus, Greece, Italy, Spain, Finland, Poland, Hungary, Czech Republic and Slovakia. However we haven't got any convention with some major partners of Russia in Europe as France, Germany and Great Britain.

Russia also takes part in three Hague conventions concerning circulation of documents:

- The Convention Abolishing the Requirement of Legalization for Foreign Public Documents of 1961.
- The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965
- The Convention On The Taking Of Evidence Abroad In Civil or Commercial Matters of 1970.

General rules of recognition of foreign judgments in Russia:

1. It is necessary to have an international treaty, which provides the possibility of recognition and execution of foreign judgment and arbitral award (article 6.3 of Federal constitutional law On judicial system, article 241 of the CSAP and article 409 of the CCP). In the absence of international treaty, execution of judgment of foreign state court is practically impossible. For example, there is a treaty on legal aid on civil matters between Russia and Poland of 1996 that allows assuring mutual recognition and execution of foreign judgments.

2. Reciprocity as a condition for recognition of foreign judgments is provided only for bankruptcy's matters (article 1 of federal law On bankruptcy). Reciprocity as a general condition of recognition of foreign judgments was provided in the projects of the both procedural code but it hasn't been included in the final version of the codes.

From 2002 it appears judgments where reciprocity is recognized as a ground for recognition of foreign judgments in the lack of international treaty. In particular in decision of Supreme Court of Russia of July 7 2002 it was said that request for recognition and execution of foreign judgment may be satisfied by competent Russian court in the absence of international treaty on the basis of reciprocity if the courts of the foreign State recognize Russian judgments. That is why it is necessary to check whether there are cases of recognition of Russian judgments by

courts of Great Britain and Northern Ireland or these possibilities are excepted by the legislation of this State.

After that there were some decisions of State arbitral Courts. Thus, Federal state arbitral court of Moscow region (court of cassation) in decision of March 2 2006 noted that decision of High court of justice of England and Wales should be recognized on the bases of reciprocity as according to the article 98 of the Agreement on Partnership and Cooperation between the European Communities and their members, free access exempt from discrimination of citizens and legal persons to competent courts is established and in accordance with precedents of the ECHR execution of judgment is considered as integral part of the right to court. The court referred also to the article 6 of the European Convention and articles 17, 18, 46 and 118 of Constitution of Russia and article 14 of The International Covenant on Civil and Political Rights based on the fact that the right to execution issues from respect of human rights.

But this attitude is not common for all the courts. Information letter of Supreme State Arbitral Court of Russia number 96 of December 22 2005 on the questions of international civil process didn't prohibit reciprocity but at the same time didn't provide it directly.

The approach based on reciprocity became obsolete and the best mode is free circulation of judgments but, as compared with condition of international treaty, application of reciprocity as a condition for recognition and execution of foreign judgments is breakthrough for Russia.

National legal regime is provided only for judgments mentioned on the Convention between Russia and Belorussia.

Problem of mutual execution almost doesn't appear in disputes between entrepreneurs as they prefer arbitration for settlement of the conflicts and Russia takes part on the Convention of 1958.

However there are some areas where bilateral treaty could ease considerably commercial circulation:

- when it is necessary to settle a dispute in state court as arbitration agreement is absent or invalid,
- for simplified modes of settlement of conflicts: simplified procedure, writ, execution of notarial act,
- in the case of transnational bankruptcy when property of debtor is situated on the territory of Russia or other state.

In December 2 2004 VI Russian congress of judges has adopted a resolution On the state of justice in Russia and perspectives of its improvement, where it is noted the necessity of effective mechanism of recognition and execution of foreign judgments and rendering of mutual legal aid. The congress suggested to join to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters or elaborate on its model a separate treaty.

At present time Council Regulations of EU (for example COUNCIL REGULATION No 44/2001 of December 22 2000 on jurisdiction and the

recognition and enforcement of judgments in civil and commercial matters) could serve a basis for this treaty.

8. Conclusion.

The question of practical realization of the principle of due procedure in the cases with foreign element is still open. On the whole, regulations which regulate procedure with foreign element don't differ from general procedural institutions. That is why the right to fair hearing is realized through the whole system of procedural norms.

It allows to mark out some problems limiting principle of due procedure which are common for the Russian judicial system. They include for example the problem of disclosure of evidence, institution which doesn't really work at present time.

Complicacies which could impede realization of the right to fair hearing could be also stipulated by specificity of participation of foreign citizens in trial. These complicacies are traditional for international civil procedure and include, for example, problem of recognition and execution of foreign judgment.

We could draw a conclusion that the most important factor in this area is the application of international treaty in Russia which determines possibility of due notification and execution of judgment.

It is positive fact that Russia tries to fixe in its procedural legislation general criterias of the right to fair hearing and seek to unify legal regulation of participation of foreigners with general procedural institutions,

However there are a lot of tradition problems which have an impact to realization of principle of due legal procedure . They should be resolved in the future.