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A.Ye. Nurtan[1*], M.N. Abilova[2]

[1,2] *Academy of Justice under the High Judicial Council of the Republic of Kazakhstan, Astana, Kazakhstan*
(E-mail: nurtan_a@mail.ru, abilova_maya@mail.ru)

[1]*ORCID ID: 0009-0000-1971-1070*
[2]*ORCID ID: 0009-0005-5297-6181*

On the need to define the concept of "public order" in the context of recognition and enforcement of foreign judicial and arbitration decisions in the Republic of Kazakhstan

The article is devoted to the current problem of the lack of a clear definition of the concept of "public order" in the context of private law relations and the ensuing issues of recognition and enforcement of foreign judicial and arbitration decisions in the Republic of Kazakhstan. The aim of the research is to substantiate the need to define and clarify the concept of public order. As a result of the comparative legal analysis, it was revealed that the clause on public order is enshrined in the national legislation of different countries and in international documents, and is also applied by courts, but is absolutely vague and does not have clear criteria for application. In this regard, the authors came to the conclusion that the uncertainty of this term can negatively affect law enforcement practice, creating legal uncertainty and the possibility of arbitrary decisions. The article provides an analysis of existing points of view on the content of public order and considers two opposing approaches: on the need to clarify the concept of public order and the position that its definition should remain flexible and undetermined. Considering the importance of ensuring legal predictability in the area of recognition and enforcement of foreign court and arbitration decisions, the authors concluded that it is necessary to define the conditions for the application of public order by developing its concept, which will ensure uniform judicial practice in the Republic of Kazakhstan and its further improvement.

Keywords: public policy (public order), foreign decisions, recognition and enforcement of foreign court and arbitration decisions, refusal to recognize and enforce foreign court and arbitration decisions, enforcement proceedings.

Introduction

Globalization develops and encourages international cooperation for the purpose of economic development of states, and it has not lost its value even in such a turbulent period. One of the types of such international cooperation is foreign investment, as well as commodity and money turnover. In the course of such cooperation, civil and commercial disputes inevitably arise between entities, considered and resolved in courts and arbitrations of different countries. At the same time, the restoration of subjective rights is assumed under the condition that the decisions made by these courts and arbitrations are enforced. However, not all decisions can reach the execution stage, since legislation and a number of international documents establish a rule according to which recognition and enforcement of foreign decisions can be refused if it contradicts the public policy of the country where enforcement is sought. With the existence of such norm, the concept of public order itself does not have a clear content, is purely subjective in nature and has only general outlines.

Thus, the main scientific problem is the lack of a general understanding of public policy in theory, legislation and judicial practice; accordingly, this cannot but affect the activities of judges deciding the issue of recognition and enforcement of foreign decisions on the territory of the Republic of Kazakhstan, and has an impact to protect the subjective rights of individuals and legal entities.

If we specify the concept of public policy and identify the general characteristic conditions for the application of the public policy, this will make it possible to develop uniform rules for the application of public policy for judges of the Republic of Kazakhstan, which will improve law enforcement practice by eliminating the further possibility of an overly subjective approach to the concept of public policy, accordingly, will lay the foundation for the proper restoration of the subjective rights of participants in civil transactions.

* Corresponding author's e-mail: nurtan_a@mail.ru

Methods and materials

Research is based on general scientific and special methods as analysis, synthesis, historical method, analogy as the ground of comparative legal research, modeling and the formal legal method.

Comparative legal and formal legal methods was predominantly used which made it possible to present a comparative description of the concept of public policy across countries, based on the study of doctrine, legislation and judicial practice of different jurisdictions. Historical method mainly was used in terms of defining the concept of "public policy", which has a long history and is subject to change over time. Modeling method allowed to develop the conceptual framework of public policy and make a propose of a necessity in uniform approach to its application. The combination of these methods facilitated the identification of a need for well-defined criteria and conditions for the use of public policy as a basis for refusal to recognize and enforce foreign court and arbitration decisions.

Results

Enforcement of foreign decisions is an indicator not only of the level of the state in the international arena, but also of the effectiveness of legal regulation of the issue of protection and restoration of violated rights of subjects in a particular country. After all, the mechanism for protecting violated rights and legitimate interests lies not only in the issuance of a judicial act and its entry into force, but also in its timely execution. Only after the execution of judicial acts the violated or contested rights, freedoms and legally protected interests of citizens, legal entities and the state are restored. Thus, the property rights and interests of subjects are restored not as a result of a decision, but rather as a result of the execution of foreign decisions.

At the same time, it is not always possible to enforce decisions of foreign courts and arbitrations. Decisions of foreign courts and arbitrations must undergo a recognition procedure in the territory where enforcement is sought. One of the grounds for refusal to recognize and enforce foreign decisions is the public policy.

The concept of public policy, although enshrined in the legislation of different countries and international documents, is considered in theory and has taken place in judicial practice for a long time. Nowadays there has not been a clear understanding of when cases should be classified as contradicting to public policy and when the courts apply the public policy too broadly. Accordingly, the party that seeks recognition of a foreign decision may, in such cases, lose this instrument of protection and restoration of its subjective rights. If we take into account that foreign investor companies can also apply for the execution of decisions, accordingly, the unreasonable application or broad interpretation of public policy can lead to an outflow of investment, because a state that does not have a clear legal framework and practice on restrictions (in this case, regarding the possibility of enforcing decisions) and which cannot fully ensure the restoration of subjective rights will not be attractive in terms of investment. Additionally, in general, if a foreign counterparty does not feel confident that he can find legal protection in a particular territory, it will not contract with the entities of this territory, and accordingly, this will affect the commodity and monetary turnover of the state. At the same time, in paragraph 2 of Article 1 of the Constitution of the Republic of Kazakhstan, one of the fundamental principles of the Republic's activity is outlined as economic development for the benefit of the entire people [1]. Economic development, among other things, involves attracting foreign investment and developing civil turnover through interaction between the constituent entities of the Republic of Kazakhstan and the constituent entities of other states. Consequently, in order to ensure the restoration of the subjective rights of participants in civil transactions, it seems important to determine the criteria of public policy and the conditions for its application in order to avoid an overly subjective approach or broad interpretation of its content by each individual judge who is considering a foreign decision for its recognition for the possibility of its further execution on the territory of the Republic of Kazakhstan.

Also, public policy has another side — it is a mechanism for protection of the state where the execution of a foreign decision is sought from the influence and introduction into its legal system of foreign norms or decisions that can cause significant damage to its public policy. Accordingly, the institute of public policy must be enshrined and applied, but the current practice of too broad an interpretation and a subjective approach plays a negative role. Therefore, it seems extremely important, leaving the concept of public policy itself, to determine its criteria and conditions for application in practice. In the Republic of Kazakhstan, such uniform conditions do not exist; there is no regulatory resolution or other act that would provide instructions for judges who are considering the issue of applying public policy.

Since this concept directly affects the restoration of the subjective rights of participants in civil transactions, as well as the investment attractiveness of Kazakhstan, and, accordingly, further economic develop-

ment and, in general, the country's reputation in the international arena, the expanded application of the clause on public order is unjustified.

This problem can be solved by developing the concept of public policy and uniform rules on the conditions for applying the public policy, embodied in the form of a Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan. In Concept of legal policy of the Republic of Kazakhstan until 2030, approved Decree of the President of the Republic of Kazakhstan dated October 15, 2021 No. 674 states that regulatory resolutions are designed to ensure uniform and correct application of laws and by-laws by courts. They eliminate discrepancies and problematic issues, while at the same time giving the correct direction for application of the law. It is also noted that State regulation of business activities should be limited to the need to eliminate risks that affect national security, human life and health, ecology, law and order, morality [2], which suggests that in private legal relations there are key points that should be taken into account (including in relation to the category of public order).

The problem of improving the quality of judicial decisions and uniformity in them was raised in the Message of the Head of State Kassym-Jomart Tokayev to the people of Kazakhstan dated September 2, 2019, "Constructive public dialogue is the basis of stability and prosperity of Kazakhstan", in which it was noted the significance in ensuring uniformity of judicial practice [3]. Thus, a consistent judicial approach to such a crucial concept for ensuring a state's attractiveness on the international stage undeniably plays a key role.

Discussion

The doctrine of public order is considered one of the oldest and most important. It expresses the desire of theorists to determine the boundaries of the competence of foreign legislative jurisdiction. At the same time, it is noted that the main purpose of the doctrine of Ordre Public is to develop such a necessary amendment to the principles of determining competent laws, which protects against damage to the legal system of the court when applying foreign law [4; 90-91] or enforcing foreign judgements. Over the years since the introduction of the clause on public order into theory and practice, its content has been interpreted in different ways. It should be noted that of all the issues studied, the issue of public order is most often considered in the literature. In the theory of private international law, the combination of words "public policy" has not yet found a single definition that reflects its meaning [5; 116, 6; 54] and scientists from different countries still continue to attempt to consider various aspects of the concept of public order, including as grounds for refusal to recognize and enforce foreign court and arbitration decisions, largely from the standpoint of determining the content of this concept [7, 8, 9]. Thus, Yu.G. Morozova associates the emergence of the public order clause with the state's ensuring its public interests both at the international level and in the domestic sphere [10]. According to R.Sh. Khasyanov, the term-concept "public order" began to enter into active legal circulation as one of the political and legal instruments for protecting particularly significant, general "public" interests of society and the state within the country by public authorities [11; 9–14]. It was also spoken of as: "the rights of sovereignty and political independence", as well as the highest principles of individual and social morality, respect for natural human rights, and the principles of economic order, a set of legal norms that a given state considers to be related to its "essential interests" [5; 116]; "public law"; "social law", i.e. laws concerning the rights of society; "laws designed to preserve the state"; "a set of laws that ensure social equilibrium", which included the norms of criminal and administrative law, laws on property rights, on monetary circulation and rules of morality [6; 54] and etc.

When enshrining a public policy clause in its legislation, almost no state specifies its content [12]. The clause on public order is contained in the laws of all countries, the difference is only in how states define its public order. In legislation, public order is equated with the basic principles, good morals, moral rules, fundamental principles, the foundations of Sharia, etc. According to the results of comparative analysis we have conducted, the legislative approach does not differ, as well as the doctrinal one, in specification in establishing the scope of public order.

This concept is also included in the legislation of the Republic of Kazakhstan. Thus, Article 1090 of the Civil Code mentions public order as a case of limitation in the application of foreign law, without providing a definition, but equating public order to the foundations of legal order [13]. Saying about public order as one of the grounds for refusing to recognize and (or) enforce an arbitration award in subparagraph 2) of paragraph 1 of Article 57, the Law of the Republic of Kazakhstan "On Arbitration" defines it as the foundations of legal order in subparagraph 1) of Article 2 [14]. A reference to public order without disclosing its definition is also contained in the Civil Procedure Code of the Republic of Kazakhstan, which in subparagraph 2)

of paragraph 1 of Article 255 lists the grounds for issuing a ruling on the refusal to issue a writ of execution for the compulsory execution of an arbitration award [15]. Subparagraph b) of paragraph 2 of Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the Republic of Kazakhstan acceded by Decree of the President of the Republic of Kazakhstan No. 2485 of October 4, 1995, states that recognition and enforcement of an arbitral award may be refused if the competent authority of the country in which recognition and enforcement is sought finds that recognition and enforcement of this award are contrary to public policy of that country [16]. It should be noted that the legislation of Kazakhstan emphasizes the exclusivity of the public order clause and the rules of law stipulate that the court's determination that an arbitral award is contrary to the public order of the Republic of Kazakhstan is an unconditional basis for the annulment of the arbitral award. And the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated November 2, 2023 No. 3 "On Certain Issues of the Application of Arbitration Legislation by Courts" in paragraph 34 emphasizes that when annulling an arbitral award on this basis, the court should justify which fundamental rules that form the basis of the legal order were violated, how the arbitral award and its further execution will be contrary to public order [17]. Despite the inclusion of such rules in the legislation of Kazakhstan, it can be stated that the concept of public order is contained as one of the key ones in matters of refusal to apply foreign law or refusal to recognize and enforce foreign decisions, but it is not specified and the mechanism for determining its content is not disclosed.

However, the problem with public order is not so much the lack of specification, but rather the fact that the issues of clarifying this category in each specific case remain at the discretion of the court. By subsuming various legal, political and moral categories under "public order", the judge can expand his powers to limit the application of foreign law or refuse to recognize and enforce foreign decisions.

This problem, according to some authors [18], entails the unjustifiably frequent issuance by courts of decisions to refuse to enforce arbitration awards of foreign states precisely with reference to public policy. When the law provides a sufficiently broad field for judicial discretion, there is a danger of arbitrariness, where a significant role is played by the subjective inclination towards a particular interest. Such legal risk is reduced if there is a generally accepted definition of the concept, i.e., the most accurate clarification of the meaning [19; 99]. In the event of a clash of public and private interests, the negative role of the legal certainty of the rule of law regulating controversial social relations increases significantly. Unfortunately, as practice shows, any opportunity to expand discretion in the process of law enforcement, laid down in the law, becomes the right of the strong and creates additional problems for the protection of the rights of the weaker party in the legal relationship [20].

A unique and paradoxical situation is emerging, when conventions, legislators and courts refer to a legal norm — public order — on publicly important issues and disputes, without defining its concept, composition, features and other necessary characteristics, leaving all this to the subjective perception and discretion of judges or other authorized law enforcement officers. A way out of this could be legislative consolidation or judicial interpretation of the content of this legal category [11; 10]. On the other hand, referring the clause on public order to the categories of public law and types of imperative norms, it is also not entirely correct to talk about providing courts with the opportunity to evaluate and interpret the category of "public order", since such categories should be as predictable as possible so that through them it would be possible to regulate public relations unambiguously.

As noted, "the judicial system cannot but contradict itself when decisions are made by a large number of individuals, in no way connected or communicated with each other, on the basis of their subjective understanding of "good faith", "morality", "reasonableness", "proportionality", etc. And the inevitable contradiction of such decisions, made under similar circumstances, subjectively assessed differently, cannot have a positive effect on the formation of the legal consciousness of the citizens of the state" [21]. Thus, if the content of this concept were to be specified, judges could have guidance and reference points in the application of the public order clause. It is rightly noted that "it must seem a serious breach of international comity to assume, in relation to a state recognized as sovereign and independent, that its legislation is contrary to the essential principles of justice and morality; such an assertion can easily offend this state and it must come from the sovereign, acting through ministers, and not from a judge" [22; 198].

There is also an opposite point of view, according to which it is not possible to specify the content of public order. Opponents of specifying this category believe that the institution of public order has never been one of those that can be regulated in detail by law [18], therefore it is impossible to define public order or a list of such norms. It is considered that it is impossible to foresee cases of public order, since it is a category that changes over time and dependents on changes in behavior, morality and economic conditions [23;.85].

The range of potentially unfair actions is so wide that it can hardly be described in legislative acts at all [24; 25], in addition, the same actions can be both conscientious and unfair depending on the motive for their implementation. M.K. Suleimenov and A.E. Duisenova believe that the actual content of this evaluative concept depends on the circumstances of a particular case and, in accordance with the generally accepted world practice of developed countries, is subject to establishment exclusively by the court, and not by the legislator [25]. F.S. Karagussov also makes conclusion that an attempt to "more clearly define" the concept of "public order" in the law is not only inappropriate, but can be dangerous [26]. Of course, legal relations are acquiring a new character, and in connection with this, the idea of public order may also change. Due to the fact that it is impossible to foresee all cases in advance, this definition should be formulated in general. At the same time, it should not be so general as to allow an unjustifiably broad application of the clause, i.e., it should also contain clarifying, concretizing features of public order.

In our opinion, the most accurate assessment of this problem was given by A. Pilenko, who insisted that "the science can be systematized only if an exact definition (and not a description) of the idea of public order is given" [27; 57]. According to I.A. Pokrovsky, if the concept of "good morals" only covers up a whole series of unconscious purely legal problems, then we have the right to demand from the legislator that he, and not the judge, makes every effort to resolve them [28; 258]. And the definition of the scope and content of the concept of "public order" must be expressed in writing and must contain as exhaustive a list of cases of application of the reservation, or a list of norms of public order, or precise features of public order. And in our opinion the point of view of Yu.G. Morozova is correct that the mechanism protecting public order is subject to legislative consolidation, otherwise the solution to the issue of violation of the public interest will be illogical, subjective [10; 15]. S.V. Scriabin also comes to the conclusion that there are no obstacles to proposing a unified normative explanation of the concept of "public order" [29].

As for judicial practice, international experience shows that the concept of public order is interpreted differently in each country [30, 31]. Kazakhstani practice indicates about an already emerging unfavorable trend of misunderstanding and application of the public policy clause in the Republic of Kazakhstan [32, 33, 34]. In connection with such a difference of opinion in practice, it is considered most correct to determine uniform criteria and conditions for the application of public policy for a specific territory. After all, by subsuming various legal, political and moral concepts under "public policy," a judge can expand his powers to limit the recognition of foreign decisions, which can negatively affect the subjective rights of participants in private law relations. The need for this is confirmed by the Regulatory Resolution of the Constitutional Court of the Republic of Kazakhstan dated September 13, 2024 No. 51-NP On the consideration of paragraph 3 of Article 52 of the Law of the Republic of Kazakhstan dated April 8, 2016 "On Arbitration" for compliance with the Constitution of the Republic of Kazakhstan [35], which notes that the terminology used identifies public order and the foundations of legal order, in which a violation of the former may manifest itself in an encroachment on any elements of the foundations of legal order recognized as such in the legislative acts of the Republic of Kazakhstan, and it is proposed to adjust the category of public order to ensure its formal certainty and clarity.

Conclusions

Kazakhstan can improve its legislation and practice of the application of the public policy, which in turn will have a positive impact on the level of security and restoration of the rights and legitimate interests of subjects of civil turnover.

As a result of developing the conceptual basis of public policy a Regulatory Resolution "On the uniform application of the public policy in the case of refusal to recognize and enforce foreign court and arbitration decisions on the territory of the Republic of Kazakhstan" should be drawn up which will be submitted by the Supreme Court of the Republic of Kazakhstan and according to which it will be possible to ensure uniformity in interpretation and the application by judges of the Republic of Kazakhstan of the rule on public order when considering foreign decisions with a view to refusing their recognition and enforcement.

If these results are obtained, the level of judicial practice will improve and the courts will learn to find a "golden mean" in such matters, being able to protect national interests, and at the same time not be too radical. Such a harmonious approach will undoubtedly increase investor confidence and can turn Kazakhstan into one of the centers of international cooperation, which is also an important factor in the development of our country.

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А.Е. Нұртан, М.Н. Абилова

Қазақстан Республикасында шетелдік сот және төрелік шешімдерін тану мен орындау контексінде «жария тәртіп» ұғымын анықтаудың қажеттілігі туралы

Мақала жеке құқықтық қатынастар контексінде «жария тәртіп» түсінігінің нақты анықтамасының жоқтығының өзекті мәселесіне және одан туындайтын Қазақстан Республикасындағы шетелдік сот және төрелік шешімдерді тану және орындау мәселелеріне арналған. Зерттеудің мақсаты — жария тәртіп ұғымын анықтау және нақтылау қажеттілігін негіздеу. Жүргізілген салыстырмалы-құқықтық талдау нәтижесінде жария тәртіп туралы ескертпе әртүрлі елдердің ұлттық заңнамасында және халықаралық құжаттарда бекітілгені, сонымен қатар соттар тарапынан да қолданылатыны, бірақ табиғаты бойынша мүлдем анық емес және қолданудың нақты критерийлері жоқ екендігі анықталды. Осыған байланысты авторлар бұл терминнің белгісіздігі құқық қолдану тәжірибесіне теріс әсер етіп, құқықтық белгісіздік пен ерікті шешімдердің қабылдану мүмкіндігін тудыруы ықтимал деген қорытындыға келді. Мақалада жария тәртіптің мазмұнына қатысты қалыптасқан көзқарастар талданған, сонымен қатар жария тәртіп түсінігін нақтылау қажеттігі және оның анықтамасы икемді әрі анықталмаған болып қалуы керек деген екі қарама-қарсы көзқарас қарастырылған. Шетелдік соттар мен төрелік шешімдерді тану және орындау саласында құқықтық болжамдылықты қамтамасыз етудің маңыздылығын ескере отырып, авторлар Қазақстан Республикасында біркелкі сот тәжірибесін және оны одан әрі жетілдіруді қамтамасыз ететін жария тәртіп тұжырымдамасын әзірлеу арқылы оны қолдану шарттарын айқындау қажет деген қорытындыға келген.

Кілт сөздер: жария тәртіп, шетелдік шешімдер, сот және төрелік шешімдерін тану мен орындау, сот және төрелік шешімдерін тану мен орындаудан бас тарту, атқарушылық іс жүргізу.

А.Е. Нуртан, М.Н. Абилова

О необходимости определения понятия «публичный порядок» в контексте признания и приведения в исполнение иностранных судебных и арбитражных решений в Республике Казахстан

Статья посвящена актуальной проблеме отсутствия четкого определения понятия «публичный порядок» в контексте частноправовых отношений и вытекающих из них вопросов признания и приведения в исполнение иностранных судебных и арбитражных решений в Республике Казахстан. Целью исследования является обоснование необходимости определения и уточнения понятия публичного порядка. В результате проведенного сравнительно-правового анализа, было выявлено, что оговорка о публичном порядке закрепляется в национальном законодательстве разных стран и в международных документах, а также применяется судами, однако носит абсолютно неопределенный характер и не имеет четких критериев применения. В связи с этим, авторы пришли к выводу, что неопределенность этого термина может негативно отразиться на правоприменительной практике, создавая правовую неопределенность и возможность произвольных решений. В статье приводится анализ существующих точек зрения на содержание публичного порядка, а также рассматриваются две противоположных позиции: о необходимости уточнения понятия публичного порядка и позиция о том, что его определение должно оставаться гибким и недетерминированным. Учитывая важность обеспечения правовой предсказуемости в сфере признания и исполнения иностранных судебных и арбитражных решений, авторами сделан вывод о необходимости определения условий применения понятия публичного порядка путем разработки его концепции, которая обеспечит единообразную судебную практику в Республике Казахстан и дальнейшее ее совершенствование.

Ключевые слова: публичный порядок, иностранные решения, признание и приведение в исполнение иностранных судебных и арбитражных решений, отказ в признании и приведении в исполнение иностранных судебных и арбитражных решений, исполнительное производство.

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Information about the authors

Nurtan Azamat Yerlanuly — Master of Law, PhD Candidate, Leading Researcher, Academy of Justice under the High Judicial Council of the Republic of Kazakhstan, Astana, Kazakhstan; e-mail: nurtan_a@mail.ru

Abilova Maigul Nestayevna — PhD, Director of the Center for Academic Programs and Projects, Professor of the Scientific and Educational Center for Civil Law Disciplines, Academy of Justice under the High Judicial Council of the Republic of Kazakhstan, Astana, Kazakhstan; e-mail: abilova_maya@mail.ru