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PUBLIC ORDER CONCEPT IN UZBEK LEGISLATION

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Annotation: In recent years, expansion of internal and international trade have become the most pressing issue for Uzbekistan and its Government. In transnational business transactions, often disputes are referred to foreign courts or international arbitrations for adjudication. At that moment, many states utilize the principle of ‘public order’ to reject enforcing or recognizing of foreign courts’ decisions. In this article, will be tried to explain how about that infamous rule in Uzbek Private International Law.

Key words: business, entrepreneurship, Strategy actions, public order (public policy), recognition and enforcement of foreign courts’ decisions.

Аннотация: в последние годы расширение внутренней и международной торговли стало наиболее актуальной проблемой для Узбекистана и его правительства. В транснациональных бизнес-операциях часто споры передаются иностранным судам или международным арбитражным судам для вынесения судебного решения. В этот момент многие государства используют принцип «пúblic order», чтобы отвергнуть применение или признание решений иностранных судов. В статье поставлена задача объяснить о правиле международного частного права в Узбекистане.

Ключевые слова: бизнес, предпринимательство, Стратегия действий, публичный порядок, признание и исполнение, решение иностранных судов.

Expansion of internal and international trade have become the most pressing issue for Uzbekistan and its Government. That is why, numerous normative acts have been adopted for protection and promotion entrepreneurship. For example, Law of The Republic of Uzbekistan on Guarantees and Measures of Protection of Foreign Investors’ Rights in 1998, Law of the Republic of Uzbekistan “On protection of investors’ rights in equity market” in 2001 and within the last few years more than 15 laws, including those “On Guarantees of the Freedom of Entrepreneurship”, “On the Protection of Private Property and Guarantees of Rights of Property Owners”, “On Licensing Procedures in Entrepreneurship”, in new edition have been adopted [7]. In addition, on the third part of Strategy actions in five priority areas of the Republic of Uzbekistan in 2017–2021 years was established that the expansion of foreign economic relations, introduction of modern technologies for the production of export-oriented products and so on. Obviously, these actions give rise to appearance of some disputes between Uzbek and foreign entrepreneurs, too. In transnational business transactions, often disputes are referred to foreign courts or international arbitrations for adjudication. At that moment, some states utilize the principle of ‘public order’ to reject enforcing or recognizing of foreign courts’ decisions. How about Uzbekistan regarding application of that infamous principle? Let me put some concrete questions:

Аннотация: сўнги йилларда ички ва ташки савдонинг кенгайиб бориши Ўзбекистон ва унинг ҳужумлар учун долар мавзуға айланиб бормокда. Халқаро садо муносабатлари азизий кўп аложалари ҳайр матқозлар ва бўйича матқозлар қўлдаш. Бундай ваёнатларда қўллаб давлатлар мазкур чет эл суллари ҳайр арбитражлар томонидан чикариланган қарорларни тан олиш учун қарорларини ошит самани қўйиш учун қарорларни ошит тўғрисида ҳуқуқий илмий ҳолат қўйилади. Унни мақолада мазкур мақола мазкур қўйиш учун ҳуқуқий илмий ҳолат қўйилади.

Қалит сўзлар: бизнис, тадбиркорлик, Ҳаракатлар стратегияси, оммавий тартиб, чет эл суд қарорларини тан олиш ва ижро этиш.

Expansion of internal and international trade have become the most pressing issue for Uzbekistan and its Government. That is why, numerous normative acts have been adopted for protection and promotion entrepreneurship. For example, Law of The Republic of Uzbekistan on Guarantees and Measures of Protection of Foreign Investors’ Rights in 1998, Law of the Republic of Uzbekistan “On protection of investors’ rights in equity market” in 2001 and within the last few years more than 15 laws, including those “On Guarantees of the Freedom of Entrepreneurship”, “On the Protection of Private Property and Guarantees of Rights of Property Owners”, “On Licensing Procedures in Entrepreneurship”, in new edition have been adopted [7]. In addition, on the third part of Strategy actions in five priority areas of the Republic of Uzbekistan in 2017–2021 years was established that the expansion of foreign economic relations, introduction of modern technologies for the production of export-oriented products and so on. Obviously, these actions give rise to appearance of some disputes between Uzbek and foreign entrepreneurs, too. In transnational business transactions, often disputes are referred to foreign courts or international arbitrations for adjudication. At that moment, some states utilize the principle of ‘public order’ to reject enforcing or recognizing of foreign courts’ decisions. How about Uzbekistan regarding application of that infamous principle? Let me put some concrete questions:
1. Is public order rule available in Uzbek legislation?
2. How is current situation public order rule in Uzbek legislation?
3. How is system and practice of application of public order exemption in civil law countries?

These questions may be interested by some foreign companies that have interests to do business in Uzbekistan. In this article the author will try to find answers to those questions.

1. Is public order rule available in Uzbek legislation?

The notion of “contrary to the public order” in Uzbek legislation roots into former Soviet Union. However, there was less interest to research the public order because of USSR legal system. According to Soviet private international law, if there was no any treaty between USSR and foreign state, that state courts’ decisions were not recognized or enforced in territory of the USSR. The USSR concluded treaties with other socialistic states and those treaties established rules of recognition, enforcement and public order. That is why, those treaties made it unnecessary to determine rules of recognition, enforcement and public order on procedural laws. Despite the fact that public order rule was not so necessary in procedure, some Soviet scholars point out their ideas regarding public order. For example L. Lunts and I.Pereterskiy says The public order rule is a rule that infringes Private International Law, and when judging whether or not a foreign courts’ decisions are contrary to the public order, judging shall rely on the Constitution [1, page 216]. By contrast, G. Matveev points out that the public order rule shall not be considered as infringing rule of Private International Law. On the contrary, this rule shall be considered as a tool used by judges in order to prevent threat from foreign law and foreign judgment [2, page 76].

Nevertheless, Fundamentals of the Civil Legislation of the U.S.S.R. and the Union Republics in 1961 restricted only application of foreign law. Looking in details that 128th article, it establishes that

“Foreign law is not applied, when its application would contradict the basis of soviet law and order (public order). In these cases soviet law is applied. The refusal to apply foreign law cannot be based only on difference between political or economic system of corresponding foreign state and political or economic system of the USSR” [3, page 429].

After that, the same article was utilized on Civil Code of Uzbek SSR and the Principles of Legislation on Marriage and the Family of the USSR and the Union Republics in 1968.

The first part of that article has been applied during the choice of applicable law, not to recognition or enforcement of foreign courts’ decisions in practice. However, A.Muranov argues that the second part of that article can be used in recognition or enforcement [3, page 429].

Furthermore, there should be noted that a Decree of Presidium of the Supreme Soviet of the USSR of 21st of June of 1988 No.9131-XI “On acknowledgement and execution in the USSR of decisions of foreign courts and arbitrations”, advice

“The refusal to allow a forced execution of a decision of a foreign court is allowed only if: ...6) execution of a decision would contradict the sovereignty of the USSR or would threat the security of the USSR or would contradict basic principles of soviet legislation”.

After the collapse of USSR new independent post-soviet countries appeared and they commenced to adopt their new codes and legislations. It should be noted that, despite the collapse of Soviet Union, many rules of Soviet Union remained without changing in their legislations. For example, the Civil code of Uzbekistan of 1996 establishes identical norms in article 1164. According to this article

Foreign law shall not be applied in cases when its application would contradict the bases of the legal order (public policy) of the Republic of Uzbekistan. In these cases the law of the republic of Uzbekistan shall be applied.

A refusal to apply a foreign law may not be based merely on the difference in the legal, political, or economical system of the respective foreign state from the legal, political, or economic system of the Republic of Uzbekistan.

Given article seemingly means that whether applicable law contradicts to public order of Uzbekistan, that law is not applied by court. Based on this article we can claim that the notion of public order is available in Uzbek legislation. In authors consideration this article almost the same with 128th article of Fundamentals of the Civil Legislation of the U.S.S.R. and the Union Republics in 1961 and article of Civil Code of the Uzbekistan SSR in 1963. However, K.Rakhmonkulov says that article 1164 is totally different from article of Civil Code of the Uzbekistan SSR in 1963. Since, this article restricts of foreign law when it contradicts to legal system and this means that the restriction of the application of foreign law shall base on fundamentals of law, but not ideological and not political principles of state[4, page 640].

2. How is current situation public order rule in Uzbek legislation?
As mentioned above, the notion of public order is available in Civil Code of Uzbekistan. However, there is not precise explanations regarding to the usage of article 1164 in cases of recognition or enforcement of foreign court’s decisions. Whether we analyze the article 1164 word by word there can be seen that the first part says foreign law is not applied when it contradicts to Uzbekistan law or order. The second part indicates that applying foreign law cannot be based only on difference between political or economic system. For example, if corresponding state is communistic, but its law does not contradict to public order of Uzbekistan, that communistic state’s law shall be applied.

By contrast, Russian scholar A.Muranov indicates that the second part of the article 158 th of the Basis of Civil legislation of the USSR and the republics (1991) (The refusal to apply foreign law cannot be based only on difference between political or economic system of corresponding foreign state and political or economic system of the USSR) was interpreted to apply against foreign law and to recognition and enforcement of foreign courts’ judgments[3, page 430]. In addition, he points out that Russian legislators once took account of foreign experience concerning the notion “public order”: the idea of the 2 nd part of the 158 th article of the Basis of civil legislation of the USSR and the republics of 1991 was borrowed from paragraph 7 of the Decree of Presidium of Hungarian People’s Republic of 31 of May of 1979 No13. Therefore, the second part of that article can be used in recognition or enforcement. Russia also bases on that analogy [1, page 430]. But, A.Muranov didn’t give evidences that USSR applied that article against recognition and enforcement based on analogy. Another noticeable point is that, famous scholars of Private International Law (PIL) of USSR B.Boguslavskiy and L.Lunts or A.Garfemskiy never failed to argue that article of public order can be applied other nuances than applicable law. Furthermore, Russian scholar N.Viktorova points out that Russian law does not give explanation of public order and it is interpreted by judges too broadly [5, 101-115 pages].

In case of Uzbekistan, neither Uzbek scholars argued, nor Decree of Presidium of the Supreme Court of Uzbekistan guided that the second part of article 1164 can be used in recognition or enforcement procedure [4, page 643]. Hence, we can’t claim that understanding and analogy of article 1164 of Civil code is the same with understanding and analogy of Russian approach. Obviously, there would be complexity provided that there are no any rules respecting to public order which court can apply in procedure of recognition and enforcement. That is why, that situation criticized by scholars of Uzbekistan K.Rakhmonkulov and O.Okyulov. They say “non-determination of public order in procedural codes and diversity of application of public order in practice may give rise to interpret it too broadly by judges of Uzbekistan” [4, page 643]. After the two decades adoption of Civil procedural code and Economic procedural code of Uzbekistan and many criticisms, legislator decided to adopt public order rule into them. In January of 2018, those codes were amended and public order rule was established in article 370 of Civil procedural code and in articles 255 and 256 of Economic procedural code. According to article 370, “decisions of foreign courts or foreign arbitrations shall not be recognized and enforced providing that recognition and enforcement of decisions of foreign courts or foreign arbitrations are contrary to the sovereignty, security and fundamental principles of law of the Republic of Uzbekistan”. If we look at, however, Economic procedural code, there can be seen some differences. Firstly, public order rule is divided into two types which applicable against decisions of foreign courts in article 255 and against decisions of foreign arbitrations in article 256. Secondly, article 255 determines that “decisions of foreign courts shall not be recognized and enforced providing that recognition and enforcement of decisions of foreign courts are contrary to the sovereignty, security and fundamental principles of law of the Republic of Uzbekistan”. In this article noticeable point is that there mentioned only enforcement of decisions but, not recognition. By contrast, due to article 256, “decisions of foreign arbitrations shall not be recognized and enforced providing that recognition and enforcement of decisions of foreign arbitrations contradicts or threats public policy of the Republic of Uzbekistan”.

3. What about rule of public order in Civil law countries?

As long as, we address to Japanese Private International Law, there can be witnessed that public order rule was distinguished into two types. First one is article 42 of Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsōkuhō], Law No. 10 of 1898 (as newly titled and amended 21 June 2006). According to this article “Where a case should be governed by a foreign law but application of those provisions would contravene public policy (ordre public), those provisions shall not apply” [6, page 160]. This article is addressed during the process of application of foreign law.

Another type of public policy (public order) can be seen in the Code of Civil process. According to the article 118 “A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements .... the content of the judgment and the court proceedings are not contrary to public policy in Japan....”. This article is utilized as defense instrument against threat from
foreign judgment and authority of determining which point of foreign law contradicts to public order of Japan is given to judges.

As well as, in German Private International Law, public order is divided into two types as Japanese PIL. According to article 328 Code of Civil Procedure “Recognition of a judgment handed down by a foreign court shall be ruled out if… the recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights”. This provision is interpreted as public order by German scholars and this is an example usage of public order in recognition of foreign decisions.

However, section 6 EGBGB establishes the German reservation relating to public order. Foreign law must not be applied when their application would contradict to fundamental principles of German law. In accordance of interpretation, that rule means when there are serious violations against fundamental rights which guaranteed by German constitution foreign law shall not be applied.

Conclusion

Comparing to two leading civil law countries, we may understand that public order was established in Civil code of Japan and Germany for using when court applies foreign law. In contrast to this, Code of Civil Procedure of Japan and Germany establishes public order for using when court recognizes or enforces of foreign decisions. As we have seen Soviet approach and Russian approach were different than these two countries and as a successor of Soviet law Uzbekistan’s legislation did not determine public order in neither Code of Civil procedure and Code of Economic procedure, too. However, Uzbekistan did not base on analogy in usage of public order as Russia and by determining public order rule in Code of Civil procedure and Code of Economic procedure indicated that Uzbekistan chose better way. This means that Uzbek legislation and Russian legislation on public order have differentiated in spite of they are successors of Soviet Union.

To sum up this article we can give some comments and suggestions to develop public order in procedural law of Uzbekistan.

Firstly, choosing way of German or Japanese legislation to establish public order seem to be better than Russian approach. One reason is that Russian approach is uncertain and it would be intangible for foreigners. Therefore, Uzbekistan have chosen better way by establishing public order on procedural codes like in Japan and Germany.

Secondly, determination rule of public order sometimes leads to interpreting it broadly by judges. As a result, decisions of foreign courts could be rejected by domestic courts. In this case, a Decree of Presidium of the Supreme Soviet of the USSR of 21st of June of 1988 N 9131-XI would be helpful to utilization of public order in practice. Since, it restricts judges from interpret public order broadly.

Thirdly, article 256 of Code of Economic procedure should be interpreted clearly in decisions of the plenum of the Supreme Court. Since, uncertainty of that article could lead judges reject recognition of foreign arbitrations even though they do not contradict to public order.

Finally, Uzbek scholars K.Rakhmonkulov and O.Okyulov point out that “non-determination of public order in procedural codes and diversity of application of public order in practice require from the Supreme Court to take a responsibility for explaining its legal meaning” [4, page 643]. Obviously, non-determination of public order in procedural codes is not problem, presently. Although, this does not give guarantee that public order rule will not be interpreted broadly by judges in practice. Therefore, authors also support position of scholars K.Rakhmonkulov and O.Okyulov. In fact, whether Supreme court of Uzbekistan take a responsibility on interpretation of notion of public order it would help to widespread notion of public order among all judges of Uzbekistan.

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