

RUSSIAN DESK

Dear readers,

On 9 July 2019 the Supreme Court issued Decree No. 24 of the Plenum which considered general and special issues that arise when establishing law applicable to civil matters with a cross-border impact.

The Decree cites a significant number of examples which are useful in contractual work when parties select the form of the transaction, and also when they choose the law applicable to the contractual obligations.

In addition, some provisions in the Decree are of practical significance for supply contracts, as they determine the scope of the United Nations Convention on Contracts for the International Sale of Goods of 1980 (hereinafter the "CISG").

A number of clarifications are also of key significance for dispute resolution, as they concern disputes involving consumers, corporate disputes and disputes arising from unjust enrichment.

This newsletter will be of interest to CEOs and the specialists of legal departments.

Sincerely,



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Clarifications of the Supreme Court of the Russian Federation on private international law

CHOICE OF APPLICABLE LAW

By virtue of the principle of party autonomy in private international law the parties to a contract may, when concluding a contract with a cross-border impact or subsequently, choose the national law

that will apply to their rights and obligations under the contract. The agreement may be drafted in the form of a provision on applicable law in the text of the contract (choice of law clause), or in the form of a separate agreement.

The Supreme Court clarified that:

- Such an agreement on the choice of law is autonomous in nature. Accordingly, the invalidity, non-existence or termination of the main agreement per se will not result in the invalidity or unenforceability of the clause on applicable law;
- The limits on the selection of applicable law in the agreements of parties (for example, the admissibility of the selection of applicable law after the conclusion of a contract) are determined on the basis of Russian law;
- Review of the validity, and also the conclusion of choice of law clause are determined on the basis of the law indicated by the parties in the choice of law clause;
- The parties are entitled to conclude an alternative choice of law agreement. In this agreement the selection of applicable law may depend on the selection of the party that will be the plaintiff in subsequent court proceedings.

When choosing the law the parties are also entitled, in addition to the express choice of applicable national law, to cite the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Principles, Definitions and Model Rules of European Private Law. The mentioned rules apply if the parties expressly state so.

If the parties use commercial terms contained in the International Commercial Terms (Incoterms), in the absence of evidence of any other intention of the parties, it is held that the parties approve the application of Incoterms to their relations in the version in effect on the date of the conclusion of the contract.

APPLICATION OF INTERNATIONAL TREATIES FOR ESTABLISHING OF APPLICABLE LAW

The Supreme Court clarified that if an international treaty of the Russian Federation already contains substantive legal norms applicable to the legal relations with a cross-border impact, there is no need to resort to conflicts-of-law rules to establish applicable law.

For example, the CISG does not regulate issues regarding the validity of a sale and purchase agreement or any of its provisions, and also the consequences that this agreement might have in respect of title to the sold product. Consequently, if a contract is covered by the scope of the CISG, some of the relations of the parties will be governed solely by the provisions of the convention (for example, provisions on the reimbursement of damages and their size), while other relations (for example, the invalidity of a contract) – will be governed by the applicable national law of the country which is determined in accordance with the conflicts-of-law rules.

CONCEPT OF CHARACTERISTIC PERFORMANCE FOR ESTABLISHING APPLICABLE LAW

In the absence of an agreement of the parties on applicable law, the contract is subject to the law of the country where the place of habitual residence or the main place of activity of the party responsible for performance that is of decisive significance for the substance of the contract is located at the time of the conclusion of the contract. For example, in a sale and purchase agreement, as a general rule the seller is recognized as the party engaged in characteristic performance.

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CONCEPT OF THE CLOSEST CONNECTION FOR ESTABLISHING APPLICABLE LAW

If applicable law cannot be determined on the basis of other norms, then the court applies the law of the state with which the transnational civil relation is most closely connected.

To establish the closest connection, the court is entitled to take account of:

- the place of habitual residence and citizenship of the parties – individuals;

- the main place of activity and place of incorporation of the parties – legal entities;
- the location of the division of the legal entity participating in the conclusion of the contract;
- the location of the subject of civil rights regarding which the legal relations have arisen;
- the place of enforcement of obligations.

When determining the closest connection, the court may also take into account the law of a country whose application would make it possible to implement in the best possible manner universally recognised principles of civil law, for example, such as:

- the protection of a bona fide party;
- the inadmissibility of deriving a benefit from its own bad-faith behaviour;
- a ban on the abuse of a right;
- the protection of the weaker party;
- preference for the retention of the validity of the transaction;
- a ban on the unjustified refusal to perform an obligation.

PUBLIC POLICY OF THE FORUM AND THE CONCEPT OF OVERRIDING MANDATORY PROVISIONS

Regardless of the foreign law chosen by the parties, in exceptional circumstances the Russian court applies Russian legal provisions to the relations of the parties.

Such norms are referred to as overriding mandatory provisions. In view of their special significance, in order to protect the rights and legally protected interests of participants in civil matters, they are applicable to any situation falling within their scope, irrespective of the applicable foreign law.

The following norms are classified as overriding mandatory provisions, for example:

- the provisions of Russian legislation which establish limitations on the transferability of specific objects of civil rights;
- the provisions of Russian legislation which prevent in certain instances the conclusion of a marriage by a foreign citizen in the Russian Federation;
- the provisions of Article 114 of the Merchant Shipping Code of the Russian Federation¹ which stipulate that an agreement of the parties on the choice of applicable law may not result in the elimination or reduction of the liability that the carrier should incur for harm caused to the lives or health of passengers, loss or damage to cargo and luggage or their late delivery.

The Supreme Court also stated that the absence of norms or legal doctrines in Russian law similar to the norms or legal doctrines of applicable foreign law do not constitute per se grounds for the application of a clause on public order (*ordre public*)².

¹The Merchant Shipping Code of the Russian Federation, No. 81-FZ dated 30 April 1999.

²A similar clarification is contained in Clause 5 of Information Letter No. 156 of the Presidium of the RF Supreme Commercial Court dated 26 February 2013 "Overview of the Practice of the Consideration by Commercial Courts of Cases on the Application of a Clause on Public Order as the Grounds for Recognizing and Enforcing Foreign Court Judgments and Arbitral Awards".

APPLICABLE LAW FOR QUESTIONS INVOLVING THE STATUS OR LEGAL CAPACITY OF PERSONS

In some foreign countries certain types of entities do not have the legal status of legal entities, even though they have civil legal capacity (for example, a general partnership in Germany).

The Supreme Court clarified that the law for questions involving the status of such foreign entities is deemed to be the law of the country where the entity is incorporated. Such foreign entities are entitled to acquire and exercise civil rights and assume civil obligations, act as the plaintiff and respondent in a Russian court.

LAW APPLICABLE TO CONSUMER CONTRACTS

According to the general rules, if a contract is concluded between a professional party and the consumer, the parties may make a choice of law in accordance with the general rules.

In addition, the Supreme Court clarified the following:

- If a professional party operates in the country of the place of residence of the consumer, and the contract is related to such activity of the professional party; or
- If a professional party is targeting its activity on the country of the consumer's residence or the territory of several countries, including the country of the consumer's residence, and the contract is related to said activity of the professional party,

then the **court is entitled on its initiative** to apply the consumer protection rules provided by the mandatory provisions of the law of the country of the place of consumer's residence.

Such compulsory rules in Russian law are contained above all in the Law "On the Protection of Consumer Rights"³, and also in the Civil Code.

A professional party is deemed to have aimed its activity on the country of the consumer's residence, in particular in instances when it maintains a website whose contents attest to its focus on consumers from a corresponding country.

A website may be considered to be targeting Russian consumers if one of the languages of the website is Russian, prices are set in Russian roubles, contact telephone numbers are indicated with Russian codes or there is other similar evidence (for example, the owner of the website ordered services aimed at increasing the citation rate of its website by Russian users).

LAW APPLICABLE TO SECURITIES

The Supreme Court clarified that the conflicts-of-law rules relating to rights *in rem* in immovable property also apply to certified and uncertified securities. In the case of uncertified securities, the country where the asset is located is deemed to be the country where the rights to such securities are registered.

Consequently, when resolving disputes related to uncertified securities registered and maintained in a shareholder register in the Russian Federation or custodian account, the courts should apply Russian law.

LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS

Obligations arising as a result of unjust enrichment are subject to the law of the country in which the unjust enrichment took place.

The Supreme Court clarified that if the unjust enrichment occurred in the form of a cashless banking money transfer, then the country where the enrichment took place should be considered to be the location of the bank (its branch, division) servicing the acquirer to whose account the funds were credited.



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³ Law No. 2300-1 of the Russian Federation dated 7 February 1992 "On the Protection of Consumer Rights".

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