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Expansion of the Meaning of ‘Public Policy’: The Belarusian Approach

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This blog post examines the approaches of Belarusian law and judicial practice to the application of public policy rules. Considering specific cases, the author makes suggestions for mitigating the risks to challenge of arbitral awards on the grounds of non-compliance with Belarusian public policy.

Supreme Court Resolution on Public Policy

Under Belarusian law, Belarusian economic courts must refuse to recognize and enforce foreign arbitral awards in whole or in part if the recognition and enforcement of the arbitral award would be contrary to the public policy of Belarus ([Article 248\(1\)\(8\) of the Economic Procedure Code of Belarus](#)). In this regard, Belarusian law, in contrast to the approach in the New York Convention, requires refusal of recognition and enforcement.

The practice of Belarusian economic courts on analysing questions of public policy was summarized in the Methodological Recommendations approved by the [Resolution of the Presidium of the Supreme Economic Court of Belarus](#) (the Resolution).¹⁾ In the Resolution, public policy is defined as the fundamental principles of international law, the norms of the Constitution of Belarus, international treaties to which Belarus is party, and basic principles of the fundamental branches of law (e.g. constitutional law, civil law, etc.). If an arbitral award violates these principles and norms, it could violate public policy.

The Resolution also states that courts must justify applying public policy as a reason to refuse the recognition or enforcement of foreign arbitral awards. Courts must provide detailed reasoning concerning their findings on public policy in their decisions refusing enforcement. A detailed statement of reasons and grounds for refusing recognition or enforcement contributes to the development of a more consistent practice and consensus on the principles and rules that are part of Belarusian public policy.

However, the court practice on applying public policy in 2019-2020 indicates that Belarus’s economic courts do not always set out in detail the grounds for invoking public policy and tend to interpret the concept broadly.

Examples from the Economic Court Practice

In case No. 1-5??/2019, a Latvian joint-stock company (JSC) applied to the Economic Court of the Gomel Region for recognition and enforcement of an arbitral award made under the Arbitration Rules of the [Court of Arbitration of the Latvian Chamber of Commerce and Industry](#).

The court refused to recognize and enforce the award establishing several violations of Belarusian public policy:

1. **The debtor was not properly notified** of the arbitration proceedings since the notice of arbitration was sent in violation of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Cases 1965 (Hague Service Convention). The court recognized that the debtor participated in the proceedings and did not raise any arguments on this point. To my mind, the parties' participation, notwithstanding the lack of notice, demonstrates that the court should not have applied public policy.
2. **The arbitral tribunal denied the debtor's request for an interpreter** from Latvian into Russian. The court found that the principle of equality of citizens, organizations, and individual entrepreneurs before the law and the court was not ensured by the arbitral tribunal. The debtor's representatives who spoke Latvian were, however, present at the arbitral hearing. A translator was needed only to translate one of the debtor's representatives.
3. The ruling indicated that "the debtor's representative produced correspondence with a representative of the Estonian police on **the initiation of a criminal case** under the disputed agreement". According to the court, combating corruption is part of both domestic and international public policy. Thus, corruption, which could have occurred during the conclusion and execution of the contract, based on which the arbitral award was made, is a ground for applying public policy.

The conclusion that initiating a criminal case indicates a violation of Belarusian public policy does not correspond to the fundamental presumption of innocence enshrined in Article 26 of the Constitution of Belarus and cannot be evidence of a public policy violation. None of the above-mentioned circumstances should have been considered grounds for applying public policy.

In another case No. 13-1??/2020/507?, the Economic Court of Minsk considered an application of JSC K for recognition and enforcement of an arbitral award made under the Arbitration Rules of the [Arbitration Institute of the Stockholm Chamber of Commerce](#) to recover debts from JSC B. When considering the application, the court pointed out that the dispute arose from a construction contract concluded between JSC B (customer), JSC T (contractor) and JSC K (contractor), in which JSC T was an independent party to the contract. In the court's opinion, JSC T had rights and obligations towards other parties to the contract and had a material and legal interest that would be affected by the arbitral award.

The legislation of Belarus (for example, Article 13 of the Constitution of Belarus) enshrines the principle of equality before the law and the court and also guarantees the right to judicial protection of one's rights and legitimate interests.

The court found that **JSC T did not participate in the arbitration**. The court stated that JSC T had a substantive interest that could be affected by the enforcement of the arbitral award since the subject of the dispute was the assessment by the arbitral tribunal of the legal consequences of

termination of the contract as a result of which JSC T was deprived of the right guaranteed by the legislation of Belarus to protect its interests. The court concluded that enforcement of the arbitral award would be contrary to Belarusian public policy.

The court's decision is rather controversial. Based on the content of the decision, JSC T, whose rights could be affected by the arbitral award, did not file complaints against this award. JSC T did not participate in the court proceedings, where violation of public policy was argued. Thus, the court applied public policy without actually clarifying the particular circumstances that may arise as a result of the recognition and enforcement of the arbitral award. A violation of public policy could be established only if there was evidence of violation of the party's rights as a result of the enforcement of the arbitral award in Belarus.

Conclusions

Based on the above examples from Belarusian judicial practice, the following conclusions can be drawn:

1. Belarusian economic courts should be following the Resolution which is applicable and binding on them. However, in practice, the courts do not always consider the Resolution and:
 - interpret the concept of public order too broadly, for example, ignoring the constitutional principle of the presumption of innocence, decide based on the mere fact of notifying the police about a possible crime, without waiting for a final decision, or
 - ignore the requirements of the Resolution on the need for a detailed statement of grounds for applying public policy, for example, in the case with an alleged infringement of the rights of a third party by an arbitral award.
2. When considering relevant cases, the parties, in support of their position, need to refer more to the specific norms of the Resolution, which have to be assessed by the court when making a decision.
3. When drafting arbitration clauses in contracts with Belarusian parties, if enforcement is expected to take place in Belarus, the parties should more actively entrust the resolution of disputes to Belarusian arbitral institutions and / or appoint Belarusian specialists as arbitrators.

The procedural aspects of the arbitration rules of Belarusian arbitral institutions are in line with the approaches of the state courts and, therefore, minimize the possibility of violation of public order due to non-compliance with procedural aspects of public policy. The secretariat of the arbitral institutions also, as a rule, informs an arbitral tribunal consisting of foreign arbitrators about the practice of application of public policy rules by national courts.

Belarusian arbitrators know better than foreign arbitrators the approaches of Belarusian courts to issues of proper notification, translation, etc. Consequently, Belarusian arbitrators can anticipate and prevent possible violations of Belarusian public policy during the proceedings. For example, by taking additional measures to comply with the notice requirements in the national procedural legislation, although not provided for by the arbitration rules, but ensuring compliance with the public policy of the place of recognition and enforcement of the arbitral award.

Belarusian courts typically carry out an in-depth review of arbitral awards for compliance with legal grounds for refusal of recognition and enforcement. Incomplete indication of the circumstances of the case in the arbitral award may lead to a misunderstanding during its

subsequent assessment by a court and to a refusal to recognize and enforce the arbitral award on public policy grounds. It is important to ensure that arbitral awards contain a detailed description of circumstances that could be considered grounds for applying public policy rules in Belarussian courts. Belarussian arbitrators will be able to, considering the peculiarities of Belarussian legislation, practice, and courts' decision-making logic, draw up a more motivated arbitral award, considering possible future objections about violation of Belarussian public policy.


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References

- ¹ Note that from 1 January 2014, the Supreme Economic Court of Belarus was attached to the Supreme Court of Belarus.

This entry was posted on Saturday, June 26th, 2021 at 8:41 am and is filed under [Belarus](#), [Public Policy](#), [Recognition and enforcement of arbitral award](#)

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