Politics and Society
Правильная ссылка на статью:
Guliev S.A., Rzaev R.G. — Refusal to Recognize and Enforce Decisions of international Commercial Arbitrations on the Basis of Contradiction to Public Policy // Политика и Общество. – 2023. – № 3. – С. 37 - 48. DOI: 10.7256/2454-0684.2023.3.43803 EDN: UWKKNC URL: https://nbpublish.com/library_read_article.php?id=43803

Refusal to Recognize and Enforce Decisions of international Commercial Arbitrations on the Basis of Contradiction to Public Policy / Отказ в признании и приведении в исполнение решений международных коммерческих арбитражей на основании противоречия публичному порядку

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Статья из рубрики "Судебная власть"

DOI:

10.7256/2454-0684.2023.3.43803

EDN:

UWKKNC

Дата направления статьи в редакцию:

30-08-2022

Дата публикации:

23-08-2023

Аннотация: Актуальность исследования подтверждается тем, что в условиях глобализации мировой экономики и развития международного коммерческого товарооборота значение международных коммерческих арбитражей стремительно

возрастает, а также тем, что наблюдается сложность и неоднозначность в понимании правовой категории «публичного порядка» ввиду того, что данный институт является не урегулированной окончательно областью правоприменения в современном правопорядке. Объектом исследования настоящей статьи являются общественные отношения, возникающие в результате деятельности третейских судов в международном коммерческом обороте. Целью работы является выявление процедур, механизма и особенностей применения оговорки о публичном порядке в сфере признания и приведения в исполнение решений международных коммерческих арбитражей. При написании данной статьи были использованы как общенаучные методы исследования, в том числе анализ, синтез, дедукция и индукция, так и специальные методы познания, такие как сравнительно-правовой и описательный методы. Одним из основных методов в данной работе выступает сравнительно-правовой, поскольку именно он помогает выявить сходства и различия рассматриваемых правовых систем, являющихся предметом исследования. Новизна заключается в рассмотрении соотношения вопросов касательно правовой природы «публичного порядка», а также анализа случаев, связанных с процедурой отказа в признании и приведении в исполнение решений международных коммерческих арбитражей на территории иностранного государства на основании противоречия публичному порядку. В процессе исследования были сделаны следующие выводы. Комплекс проблем, образовавшихся в данной сфере, практически невозможно разрешить одним лишь подписанием и введением в действие единого нормативно-правового акта международного уровня. Перечень случаев применения данной правовой категории в арбитражной деятельности носит неисчерпывающий характер. Оговорка о публичном порядке является одной из важнейших составляющих институтов международного частного права. Институт публичного порядка носит экстраординарный характер в решениях международных коммерческих арбитражей.

Ключевые слова:

коммерческое право, гражданский кодекс, Россия, третейский суд, арбитраж, публичное право, международное право, частное право, право, международное отношение

Today, arbitration courts play an important role both on a domestic and international level.

In the format of international commercial arbitration, they consider disputes of a private legal nature complicated by a foreign element. Of course, such disputes are of an international commercial nature, and they arise due to a violation of an agreement concluded between counterparties who are representatives of different states or complicated by another foreign element. And when the parties apply for arbitration to resolve such disputes, they may face certain obstacles, in particular, the problem of recognition and enforcement of the arbitration award in the territory of a foreign state. In this aspect, the "public order" category acts as an obstacle—in other words, grounds for refusal. Due to the existence of such a category, decisions of foreign arbitration courts on private law disputes sometimes cannot be enforced in the territory of another foreign state due to the contradiction to the fundamentals of the rule of law of that state.

It is important to note that each state has a clear scheme, a structure, based on which all state authorities, including the courts, operate in the country. The courts of Russia conduct their practical activities based on their rules and resolve complex legal issues and disputes. Disputes may affect not only the subjects of the Russian Federation, where the court considers and makes a decision that must be enforced in the territory of Russia. They may

also concern subjects of the law of a foreign state who conduct their commercial activities in different states. And when conducting commercial activities, a conflict of interest between the parties may arise. In this case, to effectively and quickly resolve disputes, the interested parties turn to the arbitration court, which decides which rules of foreign law will be applied to settle public relations and which rules will be much more appropriate to eliminate the parties' conflict of interests. The arbitration court where the parties have applied makes a decision that should, in fact, be enforced in the territory of another foreign state, as this directly concerns the subjects of this dispute. That is, the court implements the decision of a foreign court into the legal system of its country and guarantees its effectiveness. However, there may also be situations when the decisions of foreign arbitration courts cannot be enforced in the state, as the provisions spelled out in this decision contradict the foundations of the state structure of the country. In the legal field, such a phenomenon is commonly called a "public order" clause.

One of the first who began to consider this institute was the lawyer, doctor of law, and scientist F. K. Savigny, who, in his writings, outlined his views on this issue. One such work is *System*, where he expressed a very progressive idea for that time. Thus, he argued that all States form a single international system and that the admission of foreign law into the national system is inevitable and is the responsibility of the States [1]. But there was no provision for the automatic implementation of the norms of foreign laws into a State's legal system. Savigny stressed that certain restrictions prevent the enforcement of foreign law in the territory of a certain state to ensure the proper protection of national values and the jurisdiction of the state as a whole. This is how it developed, and the formation of the legal category of "public order" began, which is relevant to this day.

Savigny also argued that there are two types (classes) of norms of an absolutely imperative nature, otherwise referred to as *ius cogens* norms. So, in the first class, he indicated those norms that are imperative in nature and are inapplicable when there is a foreign element in private law relations, and in the second class, he attributed those norms that regulate not only the interests of individuals but also because of their special significance, they are based on the foundations of morality or on "public interest" [1].

But this is not the end of the Savigny classification of norms. He detailed his works and divided the norms of the second class into two subgroups: in the first subgroup, he included legislative provisions that were strictly coercive and could not be freely applied, regardless of the scope of the jurisdiction of States, and the second group included the category of "good morals," that is, such a concept that the norms of foreign law, which by their very legal nature contradict the national legislation of states, do not correspond [1]. In the future, this term was fixed in the FGC of 1804.

The jurist A.B. Levitin, having studied the applied cases of the reservation in the countries of Anglo-American law, instead sharply expressed his opinion that in the countries of this legal family, there is a chaotic and disparate application of this legal category—there is no unified legal line in this area. The scientist wrote: "The vague nature of this concept gives judges of bourgeois states the full opportunity to maneuver and reject foreign law in all cases when, for one reason or another, it is more profitable to apply their right" [2]. He pointed out that the theorists of Western legal doctrine were defeated in their attempts to formulate a single definition of public order. Moreover, as the researcher has established, in Western countries, it is considered, in its own way, a "shield" that completely excludes the application of foreign law, and in domestic law, this concept is used as an exclusive way of regulating private law relations complicated by a foreign element. According to Russian

legal experts, if there are other grounds to refuse to execute a foreign arbitration award, then they should be taken into account. The public policy clause applies in the most extreme case and at the last moment of the execution and administration of justice.

The legal category "public order" appeared as a mechanism that would restrain and protect the system of internal national law of those States in which the introduction of certain norms of foreign law would be reflected and for which, as a result, the application of certain foreign norms would have a negative impact. The use of this institution allows the state, in extreme cases, to prevent the operation of foreign law on its territory [3]. Otherwise, as A.S. Komarov correctly noted, such an order should be affected by the consequences of the application of foreign law so seriously that it will lead to undermining the foundations on which the order of public relations established in the state is based. That is why the public policy clause should be in demand only in exceptional circumstances [4].

To date, in the doctrine of the Ministry of Emergency Situations, the legislator knows two types of public order. Such are internal (*ordre publique interne*) and international (*ordre publique international*) reservations on public policy. As S. N. Lebedev correctly noted, it is necessary to clearly distinguish between the internal public order relating to relations that are governed by domestic law and the international public order that handles issues of international commercial turnover [5].

A subspecies of international public order is European public order, which is formed at the level of the European Union. Like the EU itself, it is supranational in nature, mandatory for all EU states. And as a rule, in legal force, it is above the internal public order of the States themselves but below the "actual international order," otherwise known as international public order. The practice of applying this type of public order is given in the decisions of the Court of the European Communities and the European Court of Human Rights. Thus, in the decision of the Court of Justice of the European Communities of June 1, 1999, No. 126/97 in the Eco Swiss Chine Time Ltd case, article 81 of the Treaty Establishing the European Union was specified, which clearly states that those agreements that in any way restrict EU competition in the market are invalid [6].

As noted above, the concept of "public order" is one of the most important principles of private international law. It enshrines all the foundations and values that constitute the most important basis for building the rule of law, the system of action of state power within the jurisdiction of the state. This mechanism ensures the proper protection of the foundations of the state system, all those legal installations within which the legislation of countries functions and operates.

This category is universal and is effectively applied in almost all States for the simple reason that every State needs this mechanism. At the same time, fixing it in the legislation does not remain aloof from the legislator's attention. It is constantly being improved and updated, taking into account the developed national judicial practice, its national characteristics, and the adoption of international legal experience in this area.

The fundamental document regulating the activities of international commercial arbitrations is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 [7]. It is more often called the New York Convention because it was signed in the city of the same name. Structurally it consists of 16 articles. One of the reasons it was adopted is that in the modern world, in which there is globalization and convergence of modern legal systems, the role of international commercial arbitration in the

settlement of commercial disputes complicated by a foreign element is growing. Arbitration is not only able to resolve the dispute between the parties as efficiently and efficiently as possible in the shortest possible time but also the possibility of enforcement of arbitration decisions in the territory of the relevant State. And in this regard, this Convention was developed to harmonize and bring together the laws of the States that are parties to the Convention in the field of recognition and enforcement of foreign arbitral awards.

This Convention is an international multilateral treaty. It is universal in nature. Its universality lies in the fact that a record number of participating countries have signed and pledged to follow the provisions of this document. The New York Convention has facilitated the consideration of disputes arising from private law agreements while complicated by a foreign element and regulating the commercial activities of entities. Of course, due to the effectiveness and success of the document in the rapidly developing world, the level of appeals to arbitration in non-state courts is steadily growing and will continue to grow. It is important to note that with the adoption and adherence of States to the provisions of the New York Convention and other treaties of an international nature, a unified judicial practice of a universal nature will be formed, in which countless cases will be considered and resolved, which will facilitate the work of not only the arbitrations themselves but also the participating countries that have joined it.

The advantage of this document is that the countries participating in this Convention have the opportunity to allow for the unhindered enforcement of arbitration decisions in the territory of the State concerned. In fact, this gives this Convention flexibility and elasticity, and more than once, it has been referred to as very successful. But of course, if we talk about the fact that from the moment the State began to participate in this Convention, the unhindered enforcement of arbitration decisions is provided for, then, in fact, everything is different. There are certain restrictions, such as the provision of public order.

It is legally enshrined in paragraph "b" of part 2 of Article 5 of this Convention. It states that it is possible to refuse recognition and enforcement of an arbitration award if the competent authority of the country where this action is required considers that the arbitration award contradicts the country's public policy [7].

The Russian Civil Code understands the concept of "public order" as "norms of direct application" and fixes it in Article 1192 of the Civil Code of the Russian Federation. These are norms that, either as a result of the mandatory norms themselves or those norms that are of particular importance, are of considerable importance to the Russian legal system.

To understand even more deeply the issue of establishing regulation of public order in Russia, it is also necessary to refer to Article 1193 of the Civil Code of the Russian Federation. It states that the rule of foreign law does not apply when the consequences of its application would clearly contradict the foundations of law and order (public order) Of the Russian Federation [8]. In this case, the court will be obliged to apply the norm of domestic law.

Speaking in the language of legal doctrine, its negative concept dominates in the Russian Federation. It is fixed at a legislative level and applied in practical activities by the relevant authorities. As noted above, its essence lies in the analysis of the consequences of applying foreign law.

One of the problems put forward by Russian lawyers, and which prevails in the sphere of public order, is the impossibility of embracing all cases of its use to give a complete list of

the occurrence of such situations, as it is extremely difficult to establish in advance in which areas of trade and commercial relations in practice there will be a conflict of national and foreign law, which may lead to the use of the legal category. The reason for this is that now the world community is at the peak of its development and improvement, and it is often difficult to keep track, and even more so to embrace and clothe these actually arisen relations in a legal shell. But the legislator sees a way out of the current situation here and, instead of legal and technical techniques, applies methods essential to jurisprudence.

In Western legal doctrine, public order is understood as the basic institution of private international law and international civil procedure, the necessary "backup security mechanism" used in cases where the state's fundamental interests are affected [9]. That is, as in Russian law, this concept means such legal techniques, institutions, and principles that are able to provide full protection of the legal framework, the "core" of the rule of law of the state, from adverse consequences, results in the case of the application of foreign law.

To date, many countries, such as Austria, Greece, Liechtenstein, Mongolia, Turkey, and the USSR, have fixed the negative concept of a reservation in their legislations, where, as is known, the legislator is interested in the consequences of applying the norms of foreign law, the correlation of the implementation of foreign norms with the basic foundations, principles, and foundations of the state.

It is interesting that the concept of "public order" was first introduced by a French legislator. This term has found its legislative reflection and legal consolidation in Article 6 of the FGC of 1804. The article emphasized that "it is impossible to deviate from laws that affect public order and good morals by private agreements" [10].

As a result, the most important provision was fixed, according to which it is prohibited to change the norms of essential nature for the State by agreements of individuals. Otherwise, those agreements that purposefully ignore this norm are null and void. Another confirmation of the above is Article 1133 of the Federal Tax Code, which states that the purpose of the obligation is illegal if it contradicts good morals and public order [6].

The German legislator is not far from the French experience of perceiving such a concept. As for Germany, lawyers have not accepted this concept for long, considering it alien in relation to their legal regulations and regulations. But unlike other states, the "good morals" concept has taken root quite well in Germany. It was clearly enshrined in the legislation in 138 of the State University and Article 30 of the Introductory Law to the State University [6]. But in the future, this concept was used in the same sense as the concept of "public order." Therefore, it was subsequently replaced by the term "public order" and is still valid in modern German legislation.

Article 17 of the Swiss Law "On Private International Law" states: "Foreign law does not apply if the consequences of its application are incompatible with Swiss public policy" [6]. It should be noted that this legal category is interpreted in Switzerland too narrowly and restrictively, as a result of which this institution is very rarely used. In practice, it can be observed that arbitration decisions are not often canceled based on contradiction to public policy.

As practice shows, many foreign decisions are often not enforced in the territory of the state. The reason for this is that the state, represented by its competent authorities, wants to avoid bringing into its legal system everything that is alien to it and not profitable.

Therefore, to preserve the harmony of the functioning of their internal legal relations, many States may refuse to execute arbitration decisions, referring to the public order of their country, thereby emphasizing that some decision contradicts the foundations of the state structure.

It is important to note that such a mechanism has been and still is an effective tool in the hands of judges. Due to the fact that a clear definition has not yet been established in the legislation because the main points of this legal category have not been fully developed, judges have a great desire to apply an expansive interpretation to this institution of the most important nature, that they successfully and succeed in implementing this scheme. Judges, when conducting their practical activities and analyzing cases of private law complicated by a foreign element, can easily cancel a foreign decision, indicating that the provisions of the established case do not correspond to the state's public order. Therefore, applying the legal category of public order is relevant in judicial practice today. At the same time, L. Raape said: "The more precise the reservation about public order, the easier it is for the judge" [11]. Indeed, despite the practical "arbitrariness" on the part of judges concerning cases where this legal category is present, it will be much easier for the judicial corps if a clear provision is developed and established that will consolidate the activities of the public order clause. Having set this task and achieved it. As a result, efficiency and quality will increase significantly, and transparency of decisions will be ensured. However, to reach such a level, both deep and time-consuming intellectual and theoretical work must be done, as well as an analysis of all cases that have been rendered due to the relationship of foreign arbitral awards with the public order of the Russian Federation.

Due to the fact that this institution is a novelty in Russian law, in practice, there is such a thing that judges often mistakenly apply the legal category "public order" to it when qualifying decisions of international commercial arbitration. Again, the judges of domestic law have yet to adapt their practice to this category. There are also examples of the incorrect application of this institution in the practice of the judiciary.

For example, as A. I. Muranov notes, there was a case when a foreign arbitration award was made by the ICAC at the CCI of the Russian Federation based on substantive law. In this case, the courts granted the petition, which requested the cancellation of this decision, also noting that the decision does not comply with the legislation of the Russian Federation, nor does it comply with the public policy of this state. It is easily concluded from the above that the court could have overturned such a decision, provided that the ICAC would not have taken into account the foundations of law and order, and as a result, the public order of the country would have been violated, which is not acceptable and not permissible.

There is also the opinion among lawyers that in reviewing and analyzing international commercial arbitration cases, it is impossible to apply a public order clause to refuse to enforce this decision. Moreover, they express the opinion that such a procedure is not feasible when Russian law is also present. Confirmation of the above-stated is the ruling of the Judicial Board of the Supreme Court of Russia dated September 25, 1998. But, in fact, this is far from the case. The Russian Law "On International Commercial Arbitration" explicitly stipulates that this institution can be implemented in absolutely all cases of arbitration decisions.

Muranov notes: "In the Russian Federation, the principle of a favorable attitude to decisions of international commercial arbitration (favor recognitions) applies" [12]. This means that the Russian Federation as a whole respects and recognizes the validity of the decisions of international commercial arbitration on its territory. However, the main obstacle to this is

the public order itself and the contradictions of its provisions. And often, in practice, there is such a thing that I do not use this category correctly or even legitimately. Basically, such situations occur in bankruptcy proceedings when debtors cancel the arbitration decisions made against them in the territory of Russia.

The state courts of Russia may refuse to recognize and enforce arbitration decisions due to a contradiction to public order. But there is a question that it is impossible not to ask: what is meant by the violation of public order in practice? Thus, such an action is understood as a case when, for example, there is non-compliance with the principle of equality of the parties to the dispute [13]. This principle is fundamental in any legal system of States of the modern era, and its violation may lead to the invalidity of decisions made by competent authorities. Another example is the violation of the exclusive jurisdiction of the courts of Russia [14]. This action also falls into the category of "contradiction to public order," that only those courts that are authorized to consider specific cases can make a decision, and an important factor here is that other courts are not competent to consider such disputes, as the exclusivity of this proceeding belongs to other courts. There is also another pattern of violation of public order. This contradicts the imperative norms of an international treaty [15]. It is known that international treaties to which the Russian Federation has acceded and ratified are part of the national legal system. This is also stated in the state's main law —the Constitution. In international treaties of the Russian Federation, mandatory norms are often fixed, which cannot be changed by a separate agreement between the parties. As a result, making decisions that do not comply with the provisions of an international treaty, where mandatory norms are enshrined, is unthinkable and unacceptable. These mandatory norms are part of the public order, and any deviation from such a mechanism will lead to the complete insignificance of the legally significant decisions taken.

As noted above, an expansive interpretation by judges is often applied to the category of "public order." And such an action cannot but lead to arbitrariness on their part. In this connection, in practice, there are resonant cases, the basis of the contradiction of which lies in the inconsistency of a certain decision with the public order of the country. This situation was observed when the Swedish company "Stena RoRo AB" sued the Russian company "Baltic Plant." The Arbitration Institute of the Chamber of Commerce, located in Stockholm, considered this case. The parties were suing because the Russian side undertook to build ships for the Swedish side but did not meet the deadline, so a lawsuit was filed. The Swedish company, filing a lawsuit with the Institute, referred to the fact that they had been harmed on a particularly large scale while asking to apply the institute of "estimated damages" to the defendant. However, if this institution is known to European law, then there is no such analog in Russian. As a result, the state courts of the first and appellate instance of Russia refused to execute the decision made by the Arbitration Institute of the Chamber of Commerce, as it did not comply with the public policy of the state. But the most interesting thing is that the Supreme Arbitration Court, having evaluated the decisions of the courts, did not give them legal force, ruling that the damage suffered by the plaintiff is equal in content to the concept of "penalty" in domestic law, and as a result, it found that this decision must be enforced [16].

Nevertheless, there are other difficulties in enforcing the decisions of foreign arbitrations. This applies to cases where it is necessary for the court to execute this decision, but it cannot be done, as the provisions of this decision contradict the super-mandatory norms of the State. For example, such is the decision of a foreign arbitration court, which obliges the Russian defendant to keep foreign currency proceeds from export activities in a foreign

currency account abroad [17]. Thus, the decision cannot be executed in Russia, as it violates the mandatory norms of the Budget Code on the repatriation of foreign currency earnings, and such an action contradicts the public order of Russia.

Thus, this institution is a novelty in modern Russian law. Having rebuilt its economic and state system and considering the foreign experience of advanced states, the Russian Federation has implemented the norms on public order in its national law, fixing it in sectoral regulatory legal acts. But because this concept is new to domestic law, there is not much-accumulated practice in this area, especially considering that cases of this nature are extremely rare, as the reference to public order is not often used during arbitration proceedings.

Foreign countries have accumulated considerable practical experience in applying the public policy clause. It is necessary to consider that public order as an institution and the most important legal category of private international law has been formed in Western countries. Of course, there is no doubt that these states have succeeded to the greatest extent in realizing the operation of this mechanism, in formulating its main criteria and features of its application. Many prominent minds devoted their professional activities to the analysis of public order, tried to define it and establish the content of the institute.

Western European judicial practice is generally successful in this direction, and the judges considered interesting situations in the refusal to recognize and enforce arbitration decisions based on a contradiction to public order.

In Western countries, judicial practice in the field of refusal to recognize and enforce decisions of international commercial arbitration is structured so that such situations are observed in rare cases. The whole point is that in Western European judicial activity, the category of "international public order" is a special case, and it is interpreted as the basic principles of morality and justice [18]. Thus, a well-known specialist in the field of international commercial arbitration A.-Ya. Van den Berg was able to count eight cases of refusal to recognize and enforce decisions of international commercial arbitrations based on contradiction to the public policy during the 45 years of the New York Convention of 1958, and he revealed the fact that such cases were applied either outdated or subsequently abolished rules of law [19].

In the case of MGM Productions Group, Inc. vs. Aeroflot Russian Airlines, which was considered by a US court in 2004, the Russian company, citing a contradiction to public policy, applied much effort to prevent the enforcement of an arbitration award made in Sweden in favor of an American company. The American company, in turn, cooperated with Aeroflot and provided various services to the Russian company. And the defendant believed that the decision of the Swedish arbitration affected the public order of the United States because the services that the American company provided to the Russian side concerned Aeroflot's business in Iran, which violated the embargo that the United States imposed on Iran [20]. But the US court, which considered this case, explained that even if there were some facts confirming the violation of the Embargo imposed on Iran, referring to the contradiction of American public order, it was almost impossible to prove that the Swedish arbitration award contradicts what is meant by public order in the United States—its norms of morality and justice. Moreover, the court stressed that the choice of the direction of foreign policy can in no way negatively affect public order, as stated in Article V of the 1958 Convention.

Another interesting case should be considered. It also provides for the possibility of sending

a violation of public order if it has been established that the defendant's fundamental rights have been violated [21]. It is important to add that the violation of rights was so pronounced that this circumstance did not allow the person to protect their basic procedural rights during the proceedings. The German court was guided by such motives when it refused to enforce in its territory the decision of the American court that was issued against the German company. The German court justified its position by the fact that the arbitrator of the American court did not allow the defendant (a German company) to familiarize themselves with the provisions of the document that was directly related to the proceedings. The German Court pointed out that this circumstance is a gross violation of the fundamental principles of the conduct of the process, and it contradicts the public order of the state [22]. Consequently, the decision was not enforced.

As it has already been clarified in this paper, it is possible to refer to public order when the very existence of an already rendered arbitration award contradicts the public order of this State. Guided by this, the court in the United States did not enforce the decision of the arbitration court issued in Ukraine, as it did not comply with the fundamentals of the country's law and order [23]. The court considered the decision unlawful and therefore did not satisfy the request for recognition and enforcement of the arbitration award in the United States.

Excessive and unlawful obligations of the parties under the contract are also unacceptable. Thus, in its decision No. 176/2015, the Supreme Court of Greece established that it is prohibited to establish excessive obligations against one party under the contract. Otherwise, the contract is not enforceable, as such a situation is a clear violation of public order because there is no principle of fairness in the distribution of the burden of the parties [24].

As a result of the conducted research, it was revealed that the "public order" legal category is one of the basic institutions of private international law, is an effective mechanism for protecting the foundations of the rule of law of States, and occupies an important place in regulating the activities of international commercial arbitration in relation to the institution of refusal to recognize and enforce foreign arbitral awards.

In the future, serious work is to be done to implement the tasks set within the framework of international cooperation in arbitration. To this end, it is necessary to hold conferences on jurisprudence at the highest level to resolve issues of applying not only the rules of public order in relation to the activities of international commercial arbitration but also other important institutions of private international law.

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Результаты процедуры рецензирования статьи

Рецензия скрыта по просьбе автора