SUPER-MANDATORY RULES IN PRIVATE INTERNATIONAL LAW

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INTRODUCTION

In the middle of the 20th century, the doctrine and jurisprudence of private international law in many European countries were complemented with a concept of "super-mandatory rules". Currently, the provisions on super-mandatory rules are contained in the legislative acts of such states as Argentina, Venezuela, Italy, Korea, Switzerland, Russia, etc. In recent years, prescriptions on super-mandatory rules have also been included in the acts of those countries that did not previously regulate this issue (for example, China, Paraguay, Poland, Serbia, Turkey, Croatia, Montenegro, Uruguay, etc.). Despite the seemingly identical nomination of such rules, states apply them in different ways. Although the concept of super-mandatory rules has existed for about a hundred years, the definition of their essence is still one of the most difficult issues in the doctrine of private international law. The complexity is conditioned by the fact that such prescriptions rarely contain indications of their specific nature. As a result, courts or international arbitration tribunals consider a particular dispute, interpret it, and decide whether the relevant provision is super-mandatory or not. This diversifies the jurisprudence of different countries.

METHODS

The methodological basis of this study was laid by general and special scientific methods, including system-structural, historical, technical-legal analysis, comparative jurisprudence, etc. Using these methods, we analyzed the above-mentioned subject in the interrelation and interdependence of its constituent elements, their integrity, comprehensiveness, and objectivity.

RESULTS

Depending on the scope of super-mandatory rules, there are countries whose laws allow them to apply such rules to any type of cross-border private law relations. In particular, these countries are as follows: Russia, Belgium, Serbia, Romania, Croatia, Switzerland, etc. According to Clause 1 of Article 1192 of the Civil Code of the Russian Federation, the rules of Section 4 of Part 3 of the Civil Code of the Russian Federation do not affect mandatory rules in the Russian legislation which regulate the relevant relations regardless of the applicable law (GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII, 2001). Thus, the possibility of applying super-mandatory rules in Russia is not limited to any sphere, extending their effect to all types of cross-border private law relations. This issue is similarly resolved in the Netherlands and Croatia.

There are countries whose legislation limits the possibility of applying super-mandatory rules only to the scope of contractual obligations. According to § 31 of the Private International Law Act of Estonia, Section 1 of Part Six does not affect the Estonian legislation governing a contract regardless of the applicable law (ZAKON ESTONII, 2002). A similar rule is contained in the Private International Law Act of the Dominican Republic of 2014 (Article 66). A special role in this classification is played by the 2007 Turkish Code on Private International Law and International Civil Procedure (ACT ON PRIVATE INTERNATIONAL AND PROCEDURAL LAW,

2007) which contradicts the application of super-mandatory rules. On the one hand, it is determined by the law of the country in which an action is brought (lex fori). On the other hand, it limits the possibility of their application in Turkey. In particular, Article 6 extends the effect of prescriptions adopted in the country of the court to all types of cross-border private law relations. On the contrary, Article 31 limits the possibility of considering the super-mandatory rules of other countries, which are closely related exclusively in the sphere of contractual obligations.

Depending on the type of potentially applicable super-mandatory rules, we can highlight countries whose legislation allows them to apply both super-mandatory norms of the country of the court (lex fori) and the provisions of other countries. These include Bulgaria, Switzerland, and some other countries.

There are also countries in which legislation does not regulate this issue at all (for example, Norway, Finland, Japan, etc.). Thus, the Japanese Act on General Rules for Application of Laws of 1986 (as amended in 2006) and the Austrian Law on Private International Law of 1978 (as amended in 2012) do not contain any prescriptions for super-mandatory norms. However, both the doctrine and judicial practice of these states recognize the need for their application[1]. In the absence of general provisions on super-mandatory rules, the relevant regulations are enshrined in separate laws. For example, according to § 5 of the Norwegian Insurance Contracts Act, the Norwegian courts apply the mandatory Norwegian law governing contracts regardless of the applicable law (ACT ON CHOICE OF LAW IN INSURANCE, 2007). Similarly, this issue is resolved in the legislations of other countries (for example, the Finnish Marriage Act, etc.).

The possibility of applying super-mandatory rules in the territory of all EU member states is ensured by Regulation (EC) No. 593/2008 (June 17, 2008) on the law applicable to contractual obligations, as well as other regulations. Super-mandatory rules are also enshrined in international treaties covering various types of cross-border private law relations: the Hague Convention on the Law Applicable to Traffic Accidents (1971); the Hague Convention on the Law Applicable to Products Liability (1973); the Hague Convention on the Law Applicable to Agency of 1978 (Article 11); the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, etc. Almost all international treaties allow applying both the super-mandatory rules of the country of the court (lex fori) and the corresponding regulations of other countries related to the relations in question.

For instance, such sources of non-state regulation (lex mercatoria) are as follows: the UNIDROIT Principles for International Commercial Contracts (2010); the Principles of European Contract Law (Landau Principles) (2002); the Hague Principles on Choice of Law in International Commercial Contracts (2015); the Principles on International Commercial Contracts prepared by the Organization for the Harmonization of Business Law in the Caribbean (OHADAC Principles, 2015); Model Law relating to Private International Law prepared by the Organization for the Harmonization of Business Law in the Caribbean (OHADAC Model Law, 2014), etc.

Currently, there is almost universal recognition of the need to apply super-mandatory rules not only to contractual obligations but also to other types of cross-border private law relations. This includes non-contractual, marriage and family, inheritance, corporate, relations in the field of law intellectual property, protection of adults, etc.

However, the issue of super-mandatory rules and their essence remains unresolved. Attempts to solve this problem have been undertaken by scholars practically from the very moment the concept of super-mandatory rules emerged. All approaches to solving this issue can be divided into three groups.

According to the scientific ideas of the first group, their content is of key importance for the establishment of super-mandatory rules. Thus, the French scholar Ph. Francescakis highlighted such a feature of super-mandatoriness as the need to protect the fundamental interests of state and society (NORD, 2003). Realizing that this definition is "too broad", the scholar

[1]On the application of super-mandatory rules in Austria see: Verschraegen (2010); Walter (n.d.); in relation to Japan see: Basedow; Baum; Nishitani (2008).

supplemented it with an approximate list of interests, whose protection can justify the use of super-mandatory rules. They include the interests of ensuring the political, economic, and social organization of the state. In the doctrine, this definition was criticized due to its abstractness, which prevents its application (OPREA, 2015). However, this concept is still used by almost all authors who try to supplement it with clearer indications of the interests that need to be protected. According to N. Meyer (2010), super-mandatory rules are provisions that reflect the fundamental interests and values of the social system, as well as the political and social organization of the state, without which it cannot do. J. Fetsch (2002, p. 24) and J. Kröpholler (2006, p. 18) understood such rules as regulations that serve the overarching political and economic interests of the state. However, different additions to Francescakis' definition hardly solve this problem due to the lack of clear criteria for identifying such rules. While dwelling on their content, the supporters of this approach do not always consider one more important feature of such prescriptions, which is the mechanism of their action. In particular, most definitions do not state that such rules operate independently of the applicable law.

Super-mandatory rules are defined in the judicial practice of the Czech Republic, Canada (the province of Quebec) (JOVALCO GROUP CORPORATION V. INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL, n.d.), and other countries. The Federal Supreme Court of Switzerland indicated that such prescriptions are "rules that protect the most significant interests of the state, certain categories of persons, as well as society as a whole" (BÜCHLER, 2001, p. 45). Under one of the verdicts delivered by the Supreme Court of the Czech Republic, the provisions that are fundamental for state and enshrine fundamental rights and freedoms, as well as democratic values that constitute the foundations of the legal order of the Czech Republic, are regarded as super-mandatory (SADOWSKI, 2010). According to the judicial decision of the German court in the Piloten case (BAG, 1992), super-mandatory rules are aimed at the implementation of the social or economic policy of the state (whether they belong to private law or public law) and affecting cross-border private law relations by establishing prohibitions or permitting reservations (provided that such norms are adopted to protect not only private but also public interests).

Such definitions do not reveal the essence of super-mandatory rules. Various judicial positions indicate only the reasons and purposes for their adoption. By their very nature, super-mandatory rules are no different from mandatory rules. Any mandatory prescription is important for ensuring and protecting the socio-economic interests of the state. However, not every provision can be called super-mandatory (TOLSTYKH, 2004). As a consequence, the difference between these types of rules is reduced to the "degree of their significance" for the protection of the interests they express. Neither the doctrine nor the judicial practice discloses the content of this criterion. Thus, the above-mentioned approach does not determine super-mandatory rules and requires the study of additional features.

The basis for identifying the second approach to the definition of super-mandatory rules is the action of such rules. Thus, P. Mayer (1986) considered super-mandatory rules as obligatory prescriptions to be applied to complex relations with foreign subjects, regardless of the appropriate legal order. A. Bonomi (1998, p. 140) adhered to the same approach and defined them as "provisions prevailing over bilateral conflict of laws rules and to be applied even to relations governed by foreign law". Attempts to define super-mandatory rules based on this criterion are also common to the Russian doctrine. For example, L.A. Lunts (1973) understood such rules as special substantive regulations, whose influence cannot be eliminated or limited by the choice of a foreign applicable law. However, this approach has its drawbacks. Considering the functioning of super-mandatory rules, its supporters do not name any other criteria that would distinguish them from common imperative prescriptions. Consequently, it is impossible to use this approach to establish super-mandatory rules, whose text does not contain a direct indication of their special nature.

According to the third approach, the super-mandatoriness of rules is determined through classifying the interests protected by such prescriptions and establishing the spheres in which they can be contained. F. Vischer (1993) identified the following types of rules: 1) provisions aimed at regulating and controlling the market and national economy as a whole (antimonopoly legislation, import and export restrictions); 2) rules adopted to protect the

national interests of the state in the field of land resources (the prohibition of acquiring land plots by foreign persons, the protection of agricultural land); 3) regulations protecting the foreign exchange reserves of the state; 4) rules adopted to control the securities market (the regulation of mergers and acquisitions, the obligation to disclose information); 5) provisions aimed at protecting the environment; 6) rules that protect the "weak" party of the contract (employees, consumers, etc.) (p. 157). M. Blessin (1999) tried to define super-mandatory rules similarly.

Such classifications hardly solve this problem due to the lack of clear criteria for identifying such rules that can be found in almost any sphere of social relations, where regulation is carried out through common mandatory prescriptions.

Thus, none of the above-mentioned approaches helps to determine super-mandatory provisions and requires the establishment of their additional features.

Attempts to develop additional criteria have been made by many authors. For instance, the Italian scholar T. Ballarino (1982; n.d.) proposed to solve this issue by using the following features: 1) a formal criterion (criterio formale), i.e. a rule is super-mandatory if it contains a direct indication of its impossible elimination by choosing a foreign applicable law; in the absence of such an indication, it is necessary to apply; 2) the criterion of legislative technique (criterio tecnico), according to which a rule can be recognized as super-mandatory based on its spatial and personal scope of action, indicating the legislator's intention to apply such a rule to cross-border private law relations, regardless of the appropriate legal order; 3) the goals to be protected by such rules (criterio finalistico).

However, even such criteria do not allow to establish super-mandatory rules, whose text does not contain indications of their special nature. The foreign doctrine also offers to "supplement super-mandatory prescriptions with special unilateral conflict of laws rules (Individualkollisionsnormen), indicating the spatial and personal sphere of their action" (ASOSKOV, 2011, p. 145; VISCHER, 1993, p. 126). However, this approach has not found universal approval among modern scholars and practitioners.

Thus, none of the approaches proposed in the doctrine can define super-mandatory rules and requires the establishment of additional criteria to distinguish them from common mandatory prescriptions. Some scholars claim that the best option would be to neglect the criterion of "public interest" and use only the criterion of "prescriptions to be applied to any circumstances falling within their scope, regardless of the appropriate legal order" (HELLNER, 2009, p. 460).

When deciding on the possibility of recognizing some rule as super-mandatory, it is necessary to consider the terms and expressions used in it, as well as other circumstances indicating that such a rule was adopted to protect the fundamental interests of the state. Super-mandatory rules are also only those provisions whose text contains an indication of their special nature.

Article 1192 of the Civil Code of the Russian Federation indicates two types of imperative norms[2]: 1) which are such as a result of a direct indication of their special nature and 2) attributed to the group of super-mandatory rules due to their "special significance, in particular, for safeguarding the rights and law-protected interests of participants in civil law relations". As a rule, there are no problems with the establishment of prescriptions belonging to the first category. When determining the rules belonging to the second category, numerous questions arise due to the lack of clear criteria for their definition. According to the current law, the only reason for separating such rules from common mandatory prescriptions is their special significance. Hence, the right interpretation of this term is crucial but the existing law does not provide it. The only indication of the term under consideration is given by the rule itself, providing as an example only one of the goals that such provisions aim at ensuring, i.e. "safeguarding the rights and law-protected interests of participants in civil law relations". This study proves that rules aimed at realizing other goals can also be classified as super-mandatory. However, it is not specified what kind of "other goals" fall into this category. The Russian doctrine also does not provide an answer to this question. V.L. Tolstykh (2002, p. 110;

[2]Dlya oboznacheniya sverkhimperativnykh norm v st. 1192 GK RF ispolzuetsya termin "normy neposredstvennogo primeneniya" [In Article 1192 of the Civil Code of the Russian Federation, super-mandatory rules are referred to as "imperative norms"].

2006, p. 354) understood super-mandatory rules as the key norms of substantive law, operating independently of the appropriate legal order. The scholar admitted the futility of attempts to develop an acceptable definition of such norms. Refusing to formulate the concept and clear features of super-mandatory rules, many scholars emphasized the need to address this issue at the level of law enforcement. On the contrary, the Russian scholars proceed from a narrower interpretation of this term. As a result, they excluded all the norms aimed at protecting certain categories of persons, for example, consumers, from the list of super-mandatory rules. In our opinion, it is necessary to consider the following features of super-mandatory rules:

1. Substantive and legal nature. Only substantive regulations can be regarded as super-mandatory. As a result, it is necessary to distinguish them from unilateral conflict of laws rules, as well as procedure law prescriptions;
2. The mandatory nature of a rule, i.e. the parties to some agreement cannot exclude its action or deviate from its provisions;
3. Special mandatoriness, i.e. a court that established the compliance of some rule with the two criteria mentioned above shall make sure that it is also applicable in the case when relations are complicated by a foreign subject and are regulated by foreign law;
4. The objective is to protect interests that are of particular importance for the state that adopted the rule in question, i.e. the interests and values expressed by such provisions are important for the state and under no circumstances should be violated or endangered;
5. Necessity, i.e. a rule can be recognized as super-mandatory only if the achievement of the goals expressed by it cannot be ensured by other means (for example, by using special conflict of laws rules that specify the applicable law);
6. The unconditional nature of an action, i.e. such a rule is subject to application under any circumstances falling within its scope, and derogation from it is inadmissible.

To recognize some rule as super-mandatory, it is required to comply with all of the above-mentioned criteria. Given the aforesaid, we can propose the following definition of super-mandatory rules. Super-mandatory rules of private international law (rules of direct application) are separate prescriptions of national legislation related to the category of mandatory rules to be applied to relations complicated by the presence of a foreign subject, regardless of the law chosen by the parties or determined by the court subject to the above-mentioned features.

Courts determine super-mandatory rules in accordance with the legislation, doctrine, and law enforcement practice of the state that adopted them. It is necessary to consider the official interpretation of rules, their application, as well as the materials prepared during the work on the act, whose text contains the corresponding prescription. This circumstance should be considered by courts when establishing foreign super-mandatory rules in accordance with Clause 2 of Article 1192 of the Civil Code of the Russian Federation.

The analysis of the legislation, litigation practice, and doctrine common to Russia and foreign countries allows us to conclude that the interests protected by super-mandatory rules include: 1) the interests of the state, in particular, ensuring the sovereignty and security of the country, realizing important economic, social, and cultural interests, and protecting constitutional rights and freedoms of citizens; 2) the rights and interests of persons acting as the "weak" party to a civil contract comprising a foreign subject; 3) the rights and interests of other categories of persons, whose protection is of priority importance for the state that adopted such rules (children, the disabled, and low-income family members, etc.).

The application of super-mandatory rules has its specifics if compared to the use of conventional mandatory prescriptions (not related to super-mandatory rules). The most important feature is the fact that they eliminate the effect of other provisions regulating the relevant issue, without subordinating the whole relations to the legislation of the state that adopted such super-mandatory rules.

Despite the shortcomings inherent in the criterion of "close connection", both the legislation of most states (including Russia) and various international documents associate the possibility of applying super-mandatory rules of third countries precisely with this criterion. This is because the use of this criterion is the most expedient, allowing courts to apply super-mandatory rules that seem necessary with due regard to all the circumstances of the case.

The absence of legislative concepts and features of super-mandatory rules, combined with the ambiguous attitude of doctrine and judicial practice to such norms, harms law enforcement practice. To ensure uniformity and address other problems arising from the application of Article 1192 of the Civil Code of the Russian Federation, it is necessary to adopt the interpretation of the Supreme Court of the Russian Federation on the issue of determining and applying super-mandatory rules (rules of direct application). In particular, this clarification states that the recognition of some rule as super-mandatory cannot be denied only because there is no special clause in its text allowing the rule to extend to relations governed by foreign law and to establish that the provisions of Article 1192 of the Civil Code of the Russian Federation apply to relations regulated by the Family Code of the Russian Federation.

When considering consumer-related disputes with the participation of consumers and other persons regarded as the "weak" party to the contract, courts need to keep in mind that the rules aimed at protecting the rights and interests of these categories of persons might be considered super-mandatory in the accordance with Clause 1 of Article 1192 of the Civil Code of the Russian Federation.

The necessary conditions are as follows: 1) the absence or impossibility of applying special conflict of laws rules aimed at protecting this category of persons; 2) the focus of such a rule on the protection of not only private but also public interests; 3) the fundamental importance of such a rule for the protection of the interests expressed by it. Such should be recognized, in particular, the provisions of Article 8, Article 10, and Article 15, as well as Clause 2 and Clause 3 of Article 16 of the Law of the Russian Federation "On Consumer Rights Protection".

CONCLUSION

As a result of the study, we have drawn the following conclusions.

1. Super-mandatory rules of private international law (the norms of direct applicability) are separate substantive provisions of national legislation. They are of a private or mixed nature, belonging to the category of mandatory rules, but differing from the latter in the following features: 1) focus on protecting the most significant interests of the state or certain categories of persons; 2) having special significance for the protection of the specified interests; 3) having an unconditional action, i.e. such a rule is subject to application under any circumstances, and derogation from it is inadmissible; 4) having a special mandatory nature, i.e. such a rule cannot be neglected even in internal relations, it is subject to application even if such relations contain a foreign element and are governed by foreign law; 5) if it is impossible to achieve the objectives set in any other ways.
2. The study has revealed the main trends in the development of super-mandatory rules in Russia and foreign countries. Those are to expand the use of super-mandatory rules, i.e. to recognize the need to apply such rules not only to contractual but also to other types of cross-border private law relations (non-contractual, marriage and family, inheritance, relations in the field of intellectual property law, protection of adults who, due to the lack of their abilities, are not able to independently protect their rights and interests, as well as relations in the field of circulation of securities, trusts, etc.).
3. Super-mandatory rules of a supranational origin are formed based on the EU directives in the national legislation of the EU member states.
4. When resolving controversial issues of international private law, it is necessary to consider the super-mandatory rules of all countries whose persons and entities are involved in cross-border private law relations. Despite the ambiguous attitude of the doctrine and judicial practice to such rules, the relevant provisions are expressed in almost all international treaties, acts of the EU, sources of non-state regulation (lex mercatoria), as well as national legislation of most states.

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Super-mandatory rules in private international law

Regras super-obrigatórias no direito internacional privado

Reglas súper-obligatorias en derecho internacional privado

Resumo

O artigo estuda o conceito e a necessidade de aplicar regras super obrigatórias nas relações privadas internacionais. O conceito de regras super-obrigatórias surgiu no direito internacional no século XX. No entanto, diferentes países fornecem várias definições dessas regras e desenvolvem diferentes práticas de sua aplicação. A diversificação desse conceito dificulta a efetiva proteção dos direitos e obrigações violados das partes às relações internacionais. Analisando diferentes atos do direito internacional, os autores do artigo oferecem sua visão de regras super obrigatórias. Métodos: O tema foi estudado por meio de métodos científicos gerais e métodos científicos especiais, incluindo análises sistemas-estruturais, históricas, técnico-legais, jurisprudência comparativa, etc. O objetivo é examinar a aplicação de regras super-obrigatórias (em particular, sua possível aplicação nas relações privadas internacionais), bem como determinar e formular sua essência. Resultados: Os autores estudaram a aplicação de regras super obrigatórias em vários países, incluindo a Rússia. Eles também formaram a definição de regras super-obrigatórias e consideraram a possibilidade de sua aplicação na Rússia.

Palavras-chave: Direito internacional privado. Regras super obrigatórias. Mecanismo de aplicação de regras super obrigatórias.

Abstract

The article studies the concept and the need to apply super-mandatory rules in international private relations. The concept of super-mandatory rules emerged in international law in the 20th century. However, different countries provide various definitions of such rules and develop different practices of their application. The diversification of this concept hinders the effective protection of violated rights and obligations of parties to international relations. Analyzing different acts of international law, the authors of the article offer their vision of super-mandatory rules. Methods: The topic was studied through general scientific methods and special scientific methods, including system-structural, historical, technical-legal analysis, comparative jurisprudence, etc. The objective is to examine the application of super-mandatory rules (in particular, their possible application in international private relations), as well as determine and formulate their essence. Results: The authors have studied the application of super-mandatory rules in various countries, including Russia. They have also formed the definition of super-mandatory rules and considered the possibility of their application in Russia.

Keywords: Private international law. Super-mandatory rules. Mechanism of applying super-mandatory rules.

Resumen

El artículo estudia el concepto y la necesidad de aplicar reglas super-obligatorias en las relaciones privadas internacionales. El concepto de reglas super-obligatorias surgió en el derecho internacional en el siglo 20. Sin embargo, los diferentes países proporcionan diversas definiciones de esas normas y desarrollan diferentes prácticas de su aplicación. La diversificación de este concepto obstaculiza la protección efectiva de los derechos y obligaciones violados de las partes en las relaciones internacionales. Analizando diferentes actos de derecho internacional, los autores del artículo ofrecen su visión de reglas super-imperativas. Métodos: El tema fue estudiado a través de métodos científicos generales y métodos científicos especiales, incluyendo análisis sistema-estructural, histórico, técnico-legal, jurisprudencia comparada, etc. El objetivo es examinar la aplicación de las normas supero obligatorias (en particular, su posible aplicación en las relaciones internacionales privadas), así como determinar y formular su esencia. Resultados: Los autores han estudiado la aplicación de normas supero obligatorias en varios países, entre ellos Rusia. También han formado la definición de normas supero obligatorias y han considerado la posibilidad de su aplicación en Rusia.

Palabras-clave: Derecho internacional privado. Reglas super-obligatorias. Mecanismo de aplicación de normas super-obligatorias.