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PROCEEDING ON CASES WITH THE PARTICIPATION OF FOREIGN PERSONS IN INTERNATIONAL PROCEDURE LAW OF RUSSIA AND BELARUS

© 2021 W. E. Butler[1, *], N. Yu. Erpyleva[2, **]

[1]Pennsylvania State University, USA
[2]National Research University Higher School of Economics, Moscow

**E-mail: web15@psu.edu*
***E-mail: nerpyleva@hse.ru*

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Abstract. This article is dedicated to one of the most interesting aspects of International Procedural Law – litigation with the participation of foreign persons. Authors focused on a comparative analysis of Russian and Belarus legislation concerning the regulation of international procedural relations. Article includes two parts: the first one considers international jurisdiction of Russian arbitrazh courts and Belarus economic courts on commercial matters; the second one examines the recognition and enforcement of foreign judgments in commercial matters on the territory of Russia and Belarus. Authors deeply scrutinized a wide range of legal documents including domestic legislation, bilateral and multilateral international treaties of regional character in order to show the convergences and divergences in Russian and Belarus procedural law concerning participation of foreign persons in international commercial litigation.

Key words: International Procedural Law, International Civil Procedure, international judicial jurisdiction, foreign persons, international commercial disputes.

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ПРОИЗВОДСТВО ПО ДЕЛАМ С УЧАСТИЕМ ИНОСТРАННЫХ ЛИЦ В МЕЖДУНАРОДНОМ ПРОЦЕССУАЛЬНОМ ПРАВЕ РОССИИ И БЕЛАРУСИ

© 2021 г. У. Э. Батлер[1, *], Н. Ю. Ерпылева[2, **]

[1]Пенсильванский государственный университет, США
[2]Национальный исследовательский университет «Высшая школа экономики», г. Москва

**E-mail: web15@psu.edu*
***E-mail: nerpyleva@hse.ru*

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Аннотация. Настоящая статья посвящена одному из наиболее интересных аспектов международного гражданского процесса – производству по делам с участием иностранных лиц. Авторы сконцентрировали свое внимание на сравнительном анализе российского и белорусского законодательства,

касающегося регулирования международных процессуальных отношений. Статья включает две части: в первой – рассматриваются вопросы международной юрисдикции российских арбитражных судов и белорусских экономических судов по разрешению международных коммерческих споров; во второй части исследуются вопросы признания и принудительного исполнения иностранных судебных решений по коммерческим спорам на территории России и Беларуси. Авторы детально изучили широкий круг правовых источников, включая национальное законодательство и международные договоры регионального характера, для того чтобы выявить сходные черты и различия в российском и белорусском процессуальном праве применительно к производству по делам с участием иностранных лиц.

Ключевые слова: международное процессуальное право, международный гражданский процесс, международная судебная юрисдикция, иностранные лица, международные коммерческие споры.

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Настоящая статья подготовлена при поддержке правовой информационно-справочной системы «КонсультантПлюс». Все международные договоры Российской Федерации, нормативные правовые акты и судебная практика приводятся по данным СПС «КонсультантПлюс».

With the dissolution of the former Soviet Union in December 1991 and transformation of the union republics into Independent States no longer bound by the Treaty of the Union of 30 December 1922, the Russian Federation operates as the "legal continuer" of the former Soviet Union and the other eleven sovereign States as each a "legal successor" of the Soviet Union. This policy of legal-continuer / legal successor avoided a legal vacuum with respect to treaty obligations of the former Soviet Union, and measures were taken to balance the domestic legislation of each former union republic with all-union legislation that was consistent with the new legal order, not repealed, and not contrary to old and new legislation whose existence and operation were necessary under post-Soviet conditions.

Other immediate responses included the negotiation of new treaties which would address the need for close harmonization of legal regimes that previously had been unified and the creation of regional organizations that pursued cooperation and, in some cases, elements of integration. Two leading organizations are the Commonwealth of Independent States (hereinafter: CIS)[1] and the Eurasian Economic Union (EAEU)[2], which has replaced the Eurasian Economic Community (EurAsEC)[3]. Economic integration is be-

[1] See: *Gadzhiev G.B.* Правовые аспекты создания Содружества Независимых Государств [Legal Aspects of the Creation of the Commonwealth of Independent States] // История государства и права [History of State and Law], No. 1 (2016), pp. 62–64; *Skryabina K.A.* Перспективы развития Содружества Независимых Государств [Perspectives of Development of the Commonwealth of Independent States] // Nauka.me, No. 3 (2020), p. 5; *Slizovsky D.E.* К вопросу об актуальных проблемах и перспективах развития Содружества Независимых Государств [On the Issue of the Topical Problems and Perspectives of Development of the Commonwealth of Independent States] // Региональное и муниципальное управление: вопросы политики, экономики и права [Regional and Municipal Governance: Political, Economic and Legal Issues], No. 4 (18) (2019), pp. 35–42.

[2] See: *Dikhtiar A.I.* Взаимодействие правовых систем государств – членов Евразийского экономического союза: теоретические аспекты [Interaction of Legal Systems of the States – Members of the Eurasian Economic Union: Theoretical Aspects] // Современное общество и право [Contemporary Society and Law], No. 1 (44) (2020), pp. 72–81; *Elistratova V.V.* Формирование правовой системы Евразийского экономического союза [Forming of the Legal System of the Eurasian Economic Union] // Вестник СГЮА [Herald of Saratov State Legal Academy], No. 1 (2017), pp. 46–51; *Kapustin A. Ya.* Право Евразийского экономического союза: подходы к концептуальному осмыслению [The Law of the Eurasian Economic Union: Approaches to Theoretical Conceptualization] // Современный юрист [Contemporary Lawyer], No. 1 (2015); *Volova L.I.* Совершенствование права Евразийского экономического союза в условиях новых вызовов и угроз [Improvement of the Law of the Eurasian Economic Union under New Challenges and Threats] // Северо-Кавказский юрид. вестник [Northern Caucasus Legal Herald], No. 1 (2017), pp. 24–31.

[3] See: *Boklan D.S.* Евразийский экономический союз и Всемирная торговая организация: соотношение правовых режимов [Eurasian Economic Union and World Trade Organization: Correlation of Legal Regimes] // Право. Журнал ВШЭ [Law. Journal of the Higher School of Economics], No. 2 (2017), pp. 223–236; *Kakitelashvili M.M.* Три года ЕАЭС: перспективы дальнейшей интеграции [Three Years of the EAES: Prospects of Further Integration] // Законы России: опыт, анализ, практика [Laws of Russia: Experience, Analysis, Practice], No. 5 (2018); *Mikaelian I.A.* Некоторые вопросы членства государств в Евразийском экономическом союзе и право Всемирной торговой организации [Some Questions of Membership of States in the Eurasian Economic Union and Law of the World Trade Organization] // Междунар. журнал гуманитарных и естественных наук [International Journal of the Humanities and Natural Sciences], II, No. 3 (2017), pp. 202–206; *Moiseev E.G. (ed.)* Международно-правовые основы создания и функционирования Евразийского экономического союза [International-Legal Foundations of the Creation and Functioning of the Eurasian Economic Union]. M., 2017; *Sokolova N.A.* Евразийский экономический союз: правовая природа и природа права [Eurasian Economic Union: Legal Nature and Nature of Law] // Lex russica, No. 11 (2017), pp. 47–57.

ing pursued within the EAEU by the Customs Union and the Single Economic Space[4]. The EAEU is developing its own community law more assertively and positively than did its predecessor incarnation[5].

None of the regional organizations contain all the post-Soviet republics (the Baltic republics being outside the region for these purposes in any event). Nonetheless, all the Independent States are in close geographical proximity to one another, share a common Russian and Soviet legal heritage in addition to their local histories and experiences, use a common legal language, if not exclusively at least in part (Russian), and in many respects a common legal mentality. In addition to local community formation, these States confront the challenge of adapting their structures and harmonizing their legal regulation and legal concepts with larger communities – the World Trade Organization, European Union, Council of Europe, Organization for Economic Cooperation and Development, among others. There is, moreover, advanced integration project: the Union State of Russia and Belarus was founded in 1999. It is the case, in our view, that post-Soviet legal space remains a "laboratory of comparative law", but that laboratory has become more sophisticated, more complex, more refined, and, in its own way, more challenging for the parties involved[6].

In this article we examine certain aspects of international civil procedure of Russia and Belarus: proceedings with the participation of foreign natural and juridical persons or stateless persons with particular reference to international commercial disputes. The countries concerned have experienced mutual repatriations and migrations from one another during the past nearly three decades, foreign investment from within and outside the post-Soviet countries, expanded tourism, and the development in general of international civil procedure law as the important branch of private international law influenced by a variety of sources[7]. At present both Russia and Belarus participate in two interstate associations: the CIS and the EAEU.

Jurisdiction of Russian Arbitrazh Courts and Belarus Economic Courts in cases with Participation of Foreign Persons

The jurisdiction of Russian arbitrazh courts in cases with the participation of foreign juridical persons and individual entrepreneurs is determined by Russian procedural legislation: the Code of Arbitrazh Procedure of the Russian Federation (hereinafter: Code of Arbitrazh Procedure) adopted in 2002, as amended to date[8]. The Russian arbitrazh courts are an integral part of the Russian judicial system and operate side by side with federal courts of general jurisdiction.

[4] See: *Drozdova S.A.* Таможенный союз и Единое экономическое пространство – основа формирования Евразийского экономического союза [The Customs Union and the Common Economic Space are the basis for the formation of the Eurasian Economic Union] // Таможенное дело [Customs Affairs], No. 4 (2014), pp. 12–15; *Khalipov S.V.* Система таможенного права и структура Таможенного кодекса Евразийского экономического союза [The System of Customs Law and the Structure of the Customs Code of the Eurasian Economic Union] // Росс. экономический вестник [Russian Economic Bulletin], No. 1 (2018), pp. 91–98; *Kulikova N.I., Plotnikov A. Yu.* Таможенный союз как форма экономической интеграции: юридические аспекты практики ЕАЭС [The Customs Union as a Form of Economic Integration: Legal Aspect of the EAEU Practices] // Страховое право [Insurance Law], No. 1 (82) (2019), pp. 27–31; *Mokrov G.G.* Евразийский экономический союз. Единое таможенное регулирование [The Eurasian Economic Union. The Uniform Customs Regulation]. M., 2020; *Salmin'sh R. Yu.* Таможенно-правовое регулирование в Таможенном союзе Евразийского экономического союза [Customs Law Regulation in the Customs Union of the Eurasian Economic Union] // Отечественная юриспруденция [Fatherland Jurisprudence], No. 3 (2017), pp. 11–13.

[5] See: *Boklan D.S., Lifshits I.M.* Действие принципа верховенства права в Евразийском экономическом союзе [Operation of the Principle of Supremacy of Law in the Eurasian Economic Union] // Междунар. право [International Law], No. 2 (2016), pp. 1–13; *Branovitskii K.L.* Тенденции развития европейского процесса на современном этапе и перспективы сближения на евразийском пространстве [Developmental Trends of the European Process at the Contemporary Stage and Prospects for Coming Together in European Space] // Вестник гражданского процесса [Herald of Civil Procedure], No. 3 (2017), pp. 204–220; *Bublik V.A., Semyakin M.N., Gubareva A.V.* Модернизация правового пространства стран Евразийского экономического союза [Modernization of the Legal Space of the States of the Eurasian Economic Union] // Междунар. публичное и частное право [International Public and Private Law], No. 4 (2020), pp. 36–39; *Fedortsov A.A.* Интеграционное и национальное правосудие в Евразийском экономическом союзе [Integration and National Justice in the Eurasian Economic Union] // Журнал зарубежного законодательства и сравнительного правоведения [Journal of Foreign Legislation and Comparative Jurisprudence], No. 1 (2017), pp. 36–39.

[6] See: *Butler W.E.* "Law Reform in the CIS", Sudebnik, I (1996), pp. 9–32. These observations were expanded in: *Butler W.E.* Евразийское юридическое пространство – лаборатория сравнительного правоведения [Eurasian Legal Space – Laboratory of Comparative Law] // Евразийский юрид. журнал [Eurasian Legal Journal], No. 7 (2011), pp. 6–9.

[7] See: *Yablochkov T.M.* Курс международного гражданского процессуального права [Course of International Civil Procedure Law]. Yaroslavl, 1909; *Get'man-Pavlova I.V., Kasatkina A.S., Filatova M.A.* Международный гражданский процесс: учеб. [International Civil Procedure: textbook]. M., 2020 (Сер. «Высшее образование») [The Higher Education Series]; *Beaumont P., Danov N., Trimmings K., Yuksel B. (eds.)* Cross-Border Litigation in Europe (Studies in Private International Law Series). Hart Publishing, 2017; *Born G.B., Routledge P.B.* International Civil Litigation in the United States Courts (Aspen Casebook Series). Wolters Kluwer, 2018; *Calster G. van* European Private International Law: Commercial Litigation in the EU. Hart Publishing, 2021; *Fentiman R.* International Commercial Litigation. Oxford, 2015; *Hartley T.* International Commercial Litigation: Text, Cases and Materials on Private International Law. Cambridge, 2020; *Lazic V., Stuij S. (eds.)* International Dispute Resolution: Selected Issues in International Litigation and Arbitration (Short Studies in Private International Law Series). T.M.C. Asser Press, 2018; *Steinitz M.* The Case for an International Court of Civil Justice. Cambridge, 2018.

[8] See: Comp. (2002), No. 30, item 3012, as of 8 December 2020.

The jurisdiction of Belarus courts which consider economic cases with the participation of foreign juridical persons and entrepreneurs has been determined in the Code of Economic Procedure of the Republic Belarus[9] (hereinafter: Code of Economic Procedure), a wholly renewed version of which was adopted on 6 August 2004 and entered into force from 1 January 2005, as amended to date[10]. Belarus courts of general jurisdiction administering justice in civil, criminal, and administrative proceedings and proceedings in economic cases are an integral part of the judicial system of Belarus together with the Constitutional Court of the Republic Belarus, Supreme Court of the Republic Belarus, regional (Minsk City Court) court, and economic court of the region (City of Minsk)[11]. The system of courts of general jurisdiction is structured on the principle of territoriality and specialization. The formation of extraordinary courts is prohibited. Thus, international commercial disputes with the participation of foreign persons are considered by courts of general jurisdiction in Belarus by way of a court proceeding for economic cases. In the Code of Economic Procedure, they are named as courts considering economic cases, which in the interests of brevity herein are called economic courts.

Section V "Proceeding with Regard to Cases with Participation of Foreign Persons", Code of Arbitrazh Procedure and Chapter 27 "Proceedings with Regard the Consideration of Economic Disputes and Other Cases with the Participation of Foreign Persons", Code of Economic Procedure determine the jurisdiction of Russian arbitrazh courts and Belarus economic courts with regard to international commercial disputes[12].

Pursuant to Article 254, Code of Arbitrazh Procedure and Article 242, Code of Economic Procedure, foreign persons enjoy procedural rights and bear procedural duties equally with Russian and Belarus organizations and citizens[13]. Foreign persons have the right to apply to arbitrazh courts of the Russian Federation and economic courts of the Republic of Belarus in order to defend their violated or contested rights and legal interests in the sphere of entrepreneurial or other economic activity. Foreign persons participating in a case must submit to an arbitrazh court or to an economic court evidence confirming their legal status and their right to undertake entrepreneurial and other economic activity. In the event of the failure to submit such evidence, the arbitrazh court or economic court has the right to demand and obtain such evidence at its own initiative.

The Government of the Russian Federation or the Government of the Republic of Belarus may establish retaliatory limitations (retorsions) with respect to juridical persons of those foreign States in which special limitations have been introduced in respect of juridical persons and citizens of Russia or Belarus (Article 254(4), Code of Arbitrazh Procedure and Article 242(4), Code of Economic Procedure[14]. Apparently the positions of Russian and Belarus legislation on these issues are identical, with one exception: the Code of Arbitrazh Procedure in Article 254(1) provides for a possibility of procedural privileges for foreign persons if so provided by an international treaty. In Belarus foreign persons may not be granted procedural privileges more favorable than those granted to organizations and citizens of Belarus.

General Jurisdiction. The basic principles for establishing the general jurisdiction of Russian arbitrazh courts and Belarus economic courts with regard to international commercial disputes have been laid down in a similar way in both codes. Arbitrazh courts or

[9] See: National Register of Legal Acts of the Republic Belarus (2004), No. 138, 139.

[10] As of 6 January 2021.

[11] See: Article 5, Code of the Republic Belarus "On Court Organization and the Status of Judges" of 29 June 2006, as of 10 December 2020. National Register of Legal Acts of the Republic Belarus (2006), No. 107, item 2/1236.

[12] There is no generally-accepted terminology in private international legal doctrine for determining procedural jurisdiction in civil cases with the participation of foreign persons. In the view of A.A. Mamaev, the most appropriate term is "international procedural jurisdiction". In turn, the unified complex institution of international procedural jurisdiction would be subdivided into: (a) international judicial jurisdiction; (b) international administrative jurisdiction; (c) international arbitral jurisdiction", and so on. A.A. Mamaev understands international judicial jurisdiction to be the determination of the competence of the judicial agencies of a particular State for the settlement of a concrete civil case; in other words, that institution which is at present called "international subject-matter jurisdiction" (see: *Mamaev A.A.* Международная судебная юрисдикция по трансграничным гражданским делам [International Judicial Jurisdiction in Cross-border Civil Cases]. M., 2008, pp. 36–44). The terms "international jurisdiction" and "international subject-matter jurisdiction" are used as synonyms in the present work.

[13] Russian and Belarus legislations understand "foreign persons" to be foreign organizations, international organizations, foreign citizens, and stateless persons effectuating entrepreneurial and other economic activity (Article 247, Code of Arbitrazh Procedure; Article 1, Code of Economic Procedure).

[14] On retorsions, see: *Agalarova M.A.* Ограничительные меры (реторсии) [Restrictive Measures (Retorsions)] // Вестник Сибирского института бизнеса и информационных технологий [Herald of the Siberian Institute of Business and Information Technologies], No. 1 (2017), pp. 52–56; *Garmash V.A., Pelipenko D.S.* Взаимность и реторсии в международном частном праве [Reciprocity and Retortions in Private International Law] // Аллея науки [Alley of Science], vol. 1, No. 10 (2018), pp. 738–741; *Luchkinskaia T.A., Berdegulova L.A.* Частноправовая реторсия в международном частном праве [Private-Law Retorsion in Private International Law] // Наука и общество в эпоху перемен [Science and Society in an Era of Changes], No. 1 (2015), pp. 104–106; *Pogozheva M.I., Bataeva O.V.* Взаимность и реторсия в международном частном праве [Reciprocity and Retorsion in Private International Law] // Актуальные проблемы конституционного и международного права: материалы Второй ежегодной конф., 2018 [Topical Problems of Constitutional and International Law: Materials of the Second Yearly Conference, 2018], pp. 13–16.

economic courts consider cases relating to economic disputes and other cases connected with undertaking entrepreneurial and other economic activity with the participation of foreign persons if:

(1) the defendant is situated or resides on the territory of the Russian Federation or the Republic Belarus or property of the defendant is located on the territory of the Russian Federation or the Republic Belarus;

(2) the management organ, branch, or representation of a foreign person is situated on the territory of the Russian Federation or the Republic Belarus;

(3) the dispute arose from a contract under which performance should have occurred or did occur on the territory of the Russian Federation or the Republic Belarus;

(4) the demand arose from the causing of harm to property by the action or other circumstances which occurred on the territory of the Russian Federation or the Republic Belarus or the harm ensued on the territory of Russia or Belarus;

(5) the dispute arose from unjust enrichment which occurred on the territory of the Russian Federation or the Republic Belarus;

(6) the plaintiff in the case concerning the defense of business reputation is situated in the Russian Federation or the Republic Belarus;

(7) the dispute arose from relations connected with the circulation of securities, the issuance of which occurred on the territory of the Russian Federation or the Republic Belarus;

(8) the application with regard to a case concerning the establishment of a fact having legal significance indicates the existence of this fact on the territory of the Russian Federation or the Republic Belarus;

(9) the dispute arose from relations connected with the State registration of names and other objects or rendering of services on Internet networks on the territory of the Russian Federation or the Republic Belarus;

(10) in other instances when there is a close link of a contested legal relation with the territory of the Russian Federation or the Republic Belarus (Article 247(1), Code of Arbitrazh Procedure; Article 235(1), Code of Economic Procedure)[15].

A case accepted by an arbitrazh court or an economic court for consideration in compliance with the rules of international jurisdiction must be considered by it in substance even if in the course of the proceeding in connection with a change of location or place of residence of persons participating in the case or other circumstances the case become relegated to the jurisdiction of a foreign court (Article 247(4), Code of Arbitrazh Procedure; Article 235(5), Code of Economic Procedure)[16].

By Decree of the Plenum of the Supreme Court of the Russian Federation No. 23 "On the Consideration by Arbitrazh Courts of Cases Relating to Economic Disputes Which Arise from Relations Complicated by a Foreign Element" of 27 June 2017 (hereinafter: Plenum Decree No. 23)[17], cases with the participation of foreign persons are relegated to such a generalized category as cases relating to economic disputes arising from relations complicated by a foreign element. This generalized category includes also cases relating to: disputes whose subject-matter is rights to property or another object situated on the territory of a foreign State (for example, rights to property in a foreign State possessed by a Russian organization, rights to intellectual activity or means of individualization situated in or registered in a foreign State); disputes connected with a legal fact which occurred on the territory of a foreign State, in particular a dispute arising from obligations arising from the causing of harm which occurred in a foreign State (point 1). All the aforesaid disputes are considered by an arbitrazh court according to the rules and within the powers established by the Code of Arbitrazh Procedure, subject to the peculiarities provided by Section V of the said Code, unless provided otherwise by an international treaty of the Russian Federation (Articles 3(3), 253(1), and 256[1], Code of Arbitrazh Procedure).

Along with the rules on general jurisdiction of the Russian arbitrazh courts and Belarus economic courts with regard to international commercial disputes, which are almost identical in both States, the codes also contain principles and definitions of *exclusive jurisdiction* of the said courts and they have significant differences. The similar rules for determination

[15] Cases relating to economic disputes and other cases connected with the effectuation of entrepreneurial and other economic activity are within the jurisdiction of arbitrazh courts in Russia and economic courts in Belarus. Arbitrazh and economic courts settle economic disputes and consider other cases with the participation of organizations which are juridical persons, citizens effectuating entrepreneurial activity without the formation of a juridical person and having the status of an individual entrepreneur acquired in the procedure established by a law, and in instances provided by the Code of Arbitrazh Procedure or the Code of Economic Procedure and other legislation of both states (Article 27(1)-(3), Code of Arbitrazh Procedure; Article 39, Code of Economic Procedure).

[16] See: *Fedorenko Yu. V., Balyan V.V.* Участие иностранных лиц в российском арбитражном процессе [Participation of Foreign Person in Russian Arbitrazh Procedure] // Наука и образование: хозяйство и экономика; предпринимательство; право и управление [Science and Education: Economy and Economics; Entrepreneurship; Law and Management], No. 8 (2019), pp. 110–112; *Vardikian A.E., Degtiareva L.A.* Производство по делам с участием иностранных лиц [Proceedings in Cases with the Participation of Foreign Persons] // Молодежный научный форум: общественные и экономические науки [Youth Scientific Forum: Social and Economic Sciences], No. 11 (2016), pp. 730–735.

[17] See: Bulletin of the Supreme Court of the Russian Federation, No. 8 (August 2017).

of exclusive jurisdiction are as follows. Both arbitrazh courts in Russia and economic courts in Belarus have exclusive jurisdiction in cases with the participation of foreign persons which relate to:

(1) disputes with respect to property in the State ownership of the Russian Federation and the Republic Belarus, including disputes connected with the privatization of State property and compulsory alienation of property for State needs;

(2) disputes whose subject-matter is immoveable property if such property is situated on the territory of the Russian Federation or the Republic Belarus or the rights thereto;

(3) disputes relating to the deeming invalid entries in the State registers or cadastres made by a competent agency of the Russian Federation or the Republic Belarus keeping such register or cadastres;

(4) disputes connected with the founding, liquidation, or registration on the territory of the Russian Federation or the Republic Belarus of juridical persons or individual entrepreneurs, and also with contesting the decisions of organs of these juridical persons (Article 248(1), Code of Arbitrazh Procedure; Article 236(1), Code of Economic Procedure).

In addition to the above principles the Code of Arbitrazh Procedure provides for extending exclusive jurisdiction to cases arising from disputes connected with the registration or issuance of patents, registration and issuance of certificates for trademarks, industrial designs, utility models, or the registration of other rights to the results of intellectual activity which require registration or the issuance of a patent or certificate in the Russian Federation (Article 248(1(3)), Code of Arbitrazh Procedure). The legislation of Republic Belarus for its part contains three other grounds unknown to the Russian legislation apart from the shared principles given above:

(1) cases concerning the economic insolvency (or bankruptcy) of juridical persons and individual entrepreneurs whose location or place of residence is Belarus;

(2) disputes concerning the exclusion of property from an inventory or release from arrest, if the arrest of property was carried out by a respective State agency of Belarus;

(3) disputes connected with deeming invalid nonnormative legal acts of State agencies and agencies of local government and self-government of Belarus;

In addition to the above principles both codes provide for extending exclusive jurisdiction to cases with the participation of foreign persons arising from administrative law relations, however the wordings of this ground differ significantly. The Code of Arbitrazh Procedure extends exclusive jurisdiction to cases with the participation of foreign persons arising from administrative and other public law relations (Article 248(2)). And pursuant to the Code of Economic Procedure the exclusive jurisdiction is extended to the cases with the participation of foreign persons one way or another connected with administrative legal relations. In this last instance, the emphasis is placed on economic disputes closely connected with administrative legal relations (Article 236(9), Code of Economic Procedure). The Code of Arbitrazh Procedure gives comparatively wider interpretation of exclusive competence of Russian arbitrazh courts in the said sphere.

In 2020 the Code of Arbitrazh Procedure was amended and two more articles which have no analogues in the Code of Economic Procedure were added[18]. In accordance with these amendments the exclusive jurisdiction of Russian arbitrazh courts is also extended to disputes with the participation of persons subjected to restrictive measures introduced by a foreign State, State association, union or a State / interstate institution of a foreign State or a State association/union, and disputes in which such restrictive measures serve as a ground, if not provided otherwise by international agreements of the Russian Federation or agreement between the parties to the dispute[19].

The exclusive jurisdiction of Russian arbitrazh courts and Belarus economic courts on consideration of international commercial disputes of certain category shall be distinguished from the exclusive competence of an arbirazh court or an economic court with regard to consideration of a certain dispute arising as a result of conclusion of prorogation agreements between the parties. The rules of *contractual jurisdiction* are consolidated in Article 249 of the Code of Arbitrazh Procedure and Article 237 of the Code of Economic Procedure[20]. Prorogation agreements are an arrangement between parties or potential parties in dispute concerning the referral of a dispute for settlement of the court of a particular State[21].

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[18] See: Articles 248.1 and 248.2 were added by Federal Law of 8 June 2020, No. 171-FL.

[19] See: *Naumova E.A.* Новый механизм защиты прав в российском арбитражном процессуальном законодательстве при ограничении доступа к правосудию в иностранных судебных системах [New Mechanism of Protection of Rights in Russian Arbitrazh Procedure Legislation in the Situation of Restricted Access to Justice in Foreign Judicial Systems] // Нотариальный вестник [Notary Herald], No. 11 (2020), pp. 59–64.

[20] See: *Bogdanova N.A.* Виды соглашений о международной подсудности [Types of Agreements on International Jurisdiction] // Администратор суда [Court Administrator], No. 1 (2019), pp. 42–46; *Rozhkova M.* О некоторых аспектах соглашения о международной подсудности [On Certain Aspects of an Agreement of International Jurisdiction] // Хозяйство и право [Economy and Law], No. 3 (2018), pp. 3–13.

[21] According to Plenum Decree No. 23 (point 6), the participants of international economic relations and other relations connected with the effectuation of economic activity have the right to conclude a

A prorogation agreement acts as a legal form of implementing the norms on contractual jurisdiction contained in Municipal Law. A prorogation agreement must be concluded in written form. According to Plenum Decree No. 23 (point 6), the mandatory written form of a prorogation agreement is considered to be satisfied if it was drawn up in the form of a separate agreement, clause in a contract, or such agreement is reached by an exchange of letters, telegrams, telexes, faxes, or other documents, including electronic documents transmitted by channels of communication enabling it to be reliably ascertained that the document emanates from the other party. Taking into account the Code of Arbitrazh Procedure (Article 9), a prorogation agreement is also considered to be concluded in written form if it was concluded by an exchange of procedural documents (petition to sue and reply to a petition to sue) in which one party declares the presence of a prorogation agreement and the other party does not object. Reference in the contract to a document containing a prorogation agreement represents a prorogation agreement concluded in written form on condition that the said reference enables such an agreement to be considered part of the contract[22].

The formulation of the heading of Article 249 in the Code of Arbitrazh Procedure and Article 237 in the Code of Economic Procedure is, in some respects, unfortunate: "Agreement on Determining Competence of Arbitrazh Courts of the Russian Federation (Courts Considering Economic Cases in the Republic Belarus)". Reference in both cases actually is being made to a prorogation agreement, whereas the reference should be made to contractual jurisdiction, the prorogation agreement merely serving as the legal form expressing contractual jurisdiction. A more appropriate formulation would be: "Contractual Jurisdiction of Cases with Participation of Foreign Persons". This formulation would enable a more precise distinction to be drawn among, first, the types of jurisdiction (general, exclusive, and contractual) and, second, the concept of a prorogation agreement as a mean of determining jurisdiction in the form of the realization of contractual jurisdiction from the concept of jurisdiction itself as a package of rules for ascertaining the competence of a particular State court. We draw attention once more to the fact that a prorogation agreement may change only the rules for determining general jurisdiction, but never exclusive jurisdiction – which would risk the prorogation agreement being deemed to be invalid. In this sense contractual jurisdiction may be regarded as the parties in dispute changing general jurisdiction by agreement between themselves[23].

Location of Defendant. The location of a natural or juridical person who is the defendant is the principal norm regulating jurisdiction with a foreign element (Article 247(1(1)), Code of Arbitrazh Procedure; Article 235(2), Code of Economic Procedure). Both codes contain an unusual innovation as the criteria for establishing the jurisdiction of an arbitrazh court or an economic court: the presence of a close link between the legal relation in dispute and the territory of the Russian Federation or the Republic Belarus (Article 247(1(10)), Code of Arbitrazh Procedure; (Article 235(11), Code of Economic Procedure).

The Information Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of 9 July 2013 (hereinafter: Information Letter No. 158)[24] explained that when applying Article 247 an arbitrazh court should establish the existence of a close link of the legal relation in dispute with the territory of the Russian Federation in each concrete instance, taking into account the entire aggregate of circumstances of the case, the forms of such link being different, and the presence thereof must be identified by the court (point 10, Information Letter No. 158)[25].

prorogation agreement for the consideration of disputes in an arbitrazh court of the Russian Federation (contractual competence). A prorogation agreement is an agreement of the parties to refer to an arbitrazh court of the Russian Federation all or certain disputes which arose or might arise between them in connection with a concrete legal relation, irrespective of whether this legal relation is of a contractual nature or not. In this event the arbitrazh court of the Russian Federation will have exclusive jurisdiction to consider the particular dispute provided that such agreement does not change the exclusive jurisdiction of the foreign court (Article 249, Code of Arbitrazh Procedure).

[22] See: *Bogdanova N.A.* Право, применимое к форме соглашений о международной подсудности [Law Applicable to the Form of Agreements on International Jurisdiction] // Междунар. публичное и частное право [International Public and Private Law], No. 5 (2017), pp. 8–11.

[23] For an analysis of the categories of general and exclusive jurisdiction, see: *Datsko R.A., Kudriavtseva L.V.* Проблемы рассмотрения дел с участием иностранных юридических лиц в российском арбитражном процессе [Problems of the Consideration of Cases with the Participation of Foreign Juridical Persons in Russian Arbitrazh Procedure] // Полиматис [Polymatis], No. 4 (2017), pp. 14–20; *Mokhova E.V.* Компетенция российских арбитражных судов по рассмотрению дел с участием иностранных лиц [Competence of Russian Arbitrazh Courts with Regard to Consideration of Cases with Participation of Foreign Persons] // Вестник Арбитражного суда Московского округа [Herald of the Arbitration Court of the Moscow District], No. 4 (2014), pp. 17–38.

[24] The Letter is entitled: "Survey of Judicial Practice with Regard to Certain Questions Connected with the Consideration by Arbitrazh Courts of Cases with the Participation of Foreign Persons" (see: Вестник Высшего Арбитражного Суда РФ [Herald of the Supreme Arbitrazh Court of the Russian Federation] (2013), No. 9).

[25] As forms of a close link, Information Letter No. 158 pointed to the place of undertaking work under a contract; the location of an object with respect to which work is performed; the location of evidence relating to a case; and the law applicable to the contract. It should be noted that the first two criteria are of a "strict" character and mentioned in Article 247 of the Code of Arbitrazh Procedure, but applicable law as a criterion for establishing court jurisdiction seems rather unequivocal (first we should choose the jurisdiction, and then the applicable law, for the choice of applicable law by the parties may be deemed by a court to be invalid).

The Supreme Court of the Russian Federation on this question said that the principle of the existence of a close link between the legal relation in dispute and the territory of the Russian Federation underlies the general rules of determining the competence of Russian arbitrazh courts, because Article 247 must be interpreted by taking this principle into account. Pursuant to Article 247, an arbitrazh court establishes the existence of a close link of a legal relation in dispute with the territory of the Russian Federation in each concrete instance by taking into account the entire aggregate of the circumstances of the case. Confirmation of the existence of a close link between a legal relation in dispute and the territory of Russia may be evidence that the territory of the Russian Federation is the place where a significant part of the obligations should be performed arising from the relations of the parties; the subject-matter of the dispute is most closely linked with the territory of Russia; the basic evidence with regard to the case is situated on the territory of the Russian Federation; the law applicable to the contract is the law of the Russian Federation; the natural person performing the functions of a management organ of the foreign company was registered at a place of residence on the territory of Russia; the domain name site with respect to which a dispute arose (except for domain names in the Russian domain zone) is oriented primarily towards a Russian audience, or commercial activity is oriented towards persons within the jurisdiction of the Russian Federation (points 12 and 15, Plenum Decree No. 23).

In our view, the category of "close link" serving as a conflicts link with respect to the choice of the applicable material law cannot serve as such when choosing a jurisdictional agency. This is because underlying the norms enabling the last to be chosen are factual circumstances making it possible to link the Russian arbitrazh court and the dispute which it is proposed to transfer for consideration (for example, management organ, branch, or representation of a foreign person on the territory of the Russian Federation – Article 247). The category "close link" does not allow one to choose a specific court as a jurisdictional agency for the settlement of a dispute because the link of a legal relation in dispute with the territory of a court itself needs special determination. We turn to the next explanation of the Supreme Court of the Russian Federation: the choice by the parties to a contract of an arbitrazh court of the Russian Federation as the place for the consideration of disputes does not automatically subordinate the contractual relations of the parties to Russian material law. The absence of the expression of the will of the parties with respect to applicable law means that the court competent to consider the particular dispute determines this, being guided by applicable conflicts norms of international treaties and/or federal laws (point 43, Plenum Decree No. 23).

In our view, this position of the Supreme Court of the Russian Federation should be understood in reverse: because the choice of jurisdiction of a Russian arbitrazh court does not mean the automatic subordination of contractual relations of the parties to Russian material law, the choice of Russian law as applicable should not automatically entail the establishment of the jurisdiction of a Russian arbitrazh court. It should be regarded in aggregate with other circumstances of a concrete case. Thus, the innovation introduced in the Code of Arbitrazh Procedure of the Russian Federation concerning a "flexible" link into a "strict" procedural right should be approached with care.

Neither Russian nor Belarus procedural legislation contains any conflicts norms with regard to determining the law applicable to the procedural legal or dispositive legal capacity of foreign persons[26]. In this event undoubtedly the general conflicts norms concerning the personal law of natural and juridical persons contained in Part Three, Section VI, of the Russian Civil Code would be used, as amended[27].

Under Article 1196 the civil legal capacity of a natural person is determined by his personal law. According to Article 1195, the personal law of a natural person is the law of the country of which this person is a citizen. If a person in addition to Russian citizenship also has a foreign citizenship, Russian law is his personal law. If a foreign citizen has a place of residence in the Russian Federation, Russian law is his personal law. When a person has several foreign citizenships, the personal law is considered to be the law of the country in which this person has a place of residence. The personal law of a stateless person is the law of the country in which this person has a place of residence. The law of the country which granted a person asylum is considered to be the personal law of a refugee. According to Article 1202(1) of the Russian Civil Code, the personal law of a juridical person is considered to be the law of the country where the juridical person was founded, unless provided otherwise by provisions of the Civil Code.

The principles underlying the establishment of international jurisdiction are also embodied in the 1993 Minsk Convention on Legal Assistance and Legal Relations with Regard to Civil, Family, and Criminal Cases (hereinafter: Minsk Convention) as amended by the Moscow Protocol of 28 March 1997[28]. The Minsk

[26] See: *Makhniboroda I.M.* Характеристика международной процессуальной правоспособности [Characteristics of International-Procedure Legal Capacity] // Современное право [Contemporary Law], No. 11 (2010), pp. 130–133.

[27] See: Comp. (2001), No. 49, item 4552. As of 1 October 2019.

[28] The Minsk Convention entered into force on 19 March 1994 and, for the Russian Federation on 10 December 1994; for Belarus on 19 May 1994; The Moscow Protocol entered into force on 17 September 1999 and, for Russia on 9 January 2001, for Belarus on 17 September 1999.

Convention is thus a multilateral regional international treaty which sets out the basic principles for the citizens and juridical persons of one Contracting State to have recourse to the courts on the territory of another Contracting State. The most important Minsk Convention principles for determining international jurisdiction are: (1) the principle of national regime (Article 1); and (2) the principle of the delimitation of territorial jurisdiction on the basis of the place of residence of the defendant (Article 20).

Principle of National Regime. Under the Minsk Convention (Article 1), the citizens of each Contrac-ting State, as well as persons residing on the territory thereof, enjoy on the territories of all other Contracting States with respect to their personal and property rights the same legal defense as do citizens of the particular Contracting State. This means citizens and other persons have the right to freely and without obstruction to apply to the courts of other Contracting States which enjoy competence in civil and family matters, may appear in such cases, file petitions or suits, and exercise other procedural actions on the same conditions as citizens of the particular Contracting State. The provisions also extend to juridical persons created in accordance with legislation of the Contracting States.

The Minsk Convention (Article 20) provides that suit against persons having a place of residence in one of the Contracting States are to be filed irrespective of their citizenship in the courts of this Contracting State, and suits against juridical persons are filed in courts of the Contracting State on whose territory the management organ, representation, or branch is situated. If there are several defendants having a place of residence or location on the territories of different Contracting States, the dispute is considered at the place of residence or location of any defendant at the choice of the plaintiff. The courts of the Contracting States are competent also in instances when on the territory thereof:

(a) trade, industrial, or other economic activity of an enterprise or branch of the defendant is undertaken;

(b) an obligation from a contract which is the subject-matter of a dispute is performed or should be performed wholly or in part;

(c) the plaintiff with regard to a suit concerning the defense of honor, dignity, and business reputation has a permanent place of residence or location.

With regard to suits concerning the right of ownership or other rights to a thing to immoveable property, the courts at the location of the property are solely competent. Suits against carriers arising from contracts for the carriage of goods, passengers, and baggage are filed at the local of the management of the transport organization against which a claim was filed in the established procedure. The two last grounds are examples of the exclusive jurisdiction of the court of a particular Contracting State and cannot be changed by the counter-parties and consequently may not be the subject-matter of a prorogation agreement.

The Minsk Convention also regulates contractual jurisdiction. Under Article 21 of the Minsk Convention, the courts of the Contracting States may consi-der cases also in those instances when there is a written agreement of the parties concerning the referral of a dispute to these courts. The exclusive jurisdiction arising from Article 20 of the Minsk Convention and other norms, and also from the domestic legislation of the respective Contracting State, cannot be changed by agreement of the parties to the contract. The court terminates the proceedings in the case upon the application of the defendant when there is an agreement concerning the transfer of the dispute.

The 1992 Kiev Agreement on the Procedure for the Settlement of Disputes Connected with the Effectuation of Economic Activity[29] (hereinafter: Kiev Agreement) is, together with the Minsk Agreement, a major instrument establishing jurisdiction in cases with the participation of foreign persons. The Kiev Agreement regulates, *inter alia*, the settlement of cases arising from contractual and other civil-law relations between economic subjects (Article 1). To this end, Kiev Agreement contains norms concerning general, exclusive, and contractual jurisdiction. A court from a State-Party to the Kiev Agreement is competent to consider a dispute with the participation of foreign persons where:

(a) the defendant had a permanent place of residence or location on the day of filing a suit;

(b) trade, industrial, or other economic activity of an enterprise or branch of the defendant is effectuated;

(c) an obligation from a contract which is the subject-matter of dispute was performed or should have been performed in whole or in part[30];

(d) an action or other circumstances which served as grounds for a demand concerning the compensation of harm occurred;

(e) the plaintiff in a suit concerning the defense of business reputation has a permanent place of residence or location;

[29] The Kiev Agreement entered into force on 19 December 1992; for Belarus and the Russian Federation also on that date (see: Информационный вестник Совета глав государств и Совета глав правительств СНГ «Содружество» [Information Herald of the Council of Heads of the States and the Council of Heads of Governments of the CIS "Commonwealth"]).

[30] The Supreme Court of the Russian Federation in its Ruling of 21 January 2020 No. 305-ЭС19-12690, Re: case No. A40-227636/2018, especially pointed out that the possibility of considering the dispute in the court of the relevant CIS member State depends on the place of performance of the obligation under the foreign economic transaction. Available on "ConsultantPlus".

(f) the supplier, independent-work contractor, or provider of services or performer of work who is a counter-party is located there, and the dispute concerns the conclusion, change, or dissolution of contracts (Article 4(1)).

Alongside with the rules of determination of general jurisdiction (Article 4(1)), the Kiev Agreement also regulates exclusive jurisdiction. Suits filed by subjects of economic activity concerning the right of ownership to immoveable property are considered solely by a court of a Contracting State on whose territory the property is situated (Article 4(3)). Cases concerning the deeming invalid wholly or in part acts of State and other agencies not having a normative character, and also compensation of losses caused to economic subjects by such acts or which arose as a consequence of the improper performance by such agencies of their duties with regard to economic subjects, are considered solely by a court at the location of the said agency (Article 4(4)). A counter-suit and demand for a set-off arising from the same legal relation as the basic suit is subject to being considered in the court which considers the basic suit (Article 4(5)) – also being the grounds for exclusive jurisdiction together with the two mentioned previously.

The contractual jurisdiction defined by the Kiev Agreement assumes that the court of the Contracting State considers cases also if there is a written agreement of the parties to transfer a dispute to this court. When there is such an agreement, the court of the other Contracting State terminates the proceedings in the case upon the application of the defendant if such an application was made before the adoption of a decision in the case (Article 4(2)). The prorogation agreement cannot change the exclusive jurisdiction of a court competent to consider the case in accordance with Article 4(3)–(4) of the Kiev Agreement.

Thus, for courts of Contracting States to the Kiev Agreement, that Agreement is the principal specialized international treaty regulating jurisdiction with regard to economic disputes. Because, however, Georgia and Moldova are not parties, the rules of the Minsk Convention apply to determine jurisdiction in economic disputes in which citizens or juridical persons from those States are involved because the Minsk Convention has more Contracting States than does the Kiev Agreement.

Alongside with participation in the Minsk Convention and the Kiev Agreement both Russia and Belarus have a large number of bilateral legal assistance treaties relating to civil, family, and criminal cases; these treaties also address jurisdiction over economic disputes. As a rule, the place of residence on the territory of a State by a natural person or the location of a management organ of a juridical person, representation, or branch of a juridical person is the basis on which the court of a Contracting State to a bilateral treaty is competent to consider the dispute. The question then arises of the priority or correlation of the multilateral and bilateral treaties concluded by Russia and Belarus and the relevant norms of national legislation laid in the Code of Arbitrazh Procedure and the Code of Economic Procedure.

Pursuant to general principles of Public International Law and Private International Law, and also taking into consideration the explanations of higher judicial organs of Russia and Belarus, set out in a number of documents (see: Decree of the Plenum of the Supreme Court of the Russian Federation No. 23 "On Conside-ration by Arbitrazh courts of the Cases on Economic Disputes Arising from the Relations Complicated by a Foreign Element" of 27 June 2017 and also Decree of the Plenum of the Supreme Economic Court of the Republic Belarus No. 21 "On Certain Issues of Consideration by Economic Courts of the Republic of Belarus of Case with Participation of Foreign Persons" of 31 October 2011[31] one may conclude the following.

In order to determine the jurisdiction of disputes with respect to foreign persons of those States with which Russia and Belarus have bilateral treaties on legal assistance, those treaties are applied[32]. In the absence of bilateral treaties to which post-Soviet States are parties, with regard to jurisdiction over economic disputes between citizens of post-Soviet States or between natural and juridical persons of those States, the provisions of the Kiev Agreement apply, and if citizens or juridical persons of Georgia or Moldova

[31] See: National Register of Legal Acts of the Republic Belarus (2011), No. 130, item 6/1092. According to point 4 of the Plenum Decree, international treaties of the Republic Belarus on questions of International Civil Procedure are subject to application by economic courts as follows: when considering cases with the participation of foreign persons from CIS countries which are parties to the Kiev Agreement, the economic court should be guided by the Kiev Agreement because of the *lex specialis* character of its norms. The Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases concluded at Kishinev on 7 October 2002 (hereinafter: Kishinev Convention) is applied unless these legal relations have been regulated by the Kiev Agreement. With respect to CIS countries which are not parties thereto, the Minsk Convention applies. When considering cases with the participation of foreign persons from States with which Belarus has concluded bilateral legal assistance treaties, the provisions of the bilateral treaties apply. When considering cases with the participation of foreign persons from other States, the universal multilateral treaties apply to which Belarus is a party: the 1954 Hague Convention on Civil Procedure; the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the 1968 European Convention on Information on Foreign Law; and 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

[32] However, it should be taken into consideration that according to Decree of the Plenum of the Supreme Court of the RF No. 23 the special international treaty is subject to priority application irrespective of its participants and the time of adoption unless provided otherwise by the norms of international treaties.

are involved, the Minsk Convention applies. The rules of the Code of Arbitrazh Procedure of Russia and the Code of Economic Procedure of Belarus are applicable when determining jurisdiction if a party to a foreign economic transaction emanates from a State with which Russia or Belarus has neither a bilateral nor multilateral treaty containing provisions on establishing the jurisdiction of courts with regard to international commercial disputes.

(Ending in the next issue)

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Authors' information

BUTLER William Elliott –
B.A. (The American University); M.A. (John Hopkins University); J.D. (Harvard University); LL.M. (Academy University of Law, Russian Academy of Sciences); Ph.D. (Johns Hopkins University); LL.D. (London University); LL.D. honoris causa (Kiev University of Law); Foreign Member, National Academy of Sciences of Ukraine and National Academy of Legal Sciences of Ukraine; Corresponding Member, International Academy of Comparative Law; John Edward Fowler Distinguished Professor of Law and International Affairs, Dickinson Law School, Pennsylvania State University; 201 Old Main, University Park, PA 16802 USA

ERPYLEVA Natalia Yu. –
Doctor of Law, Professor, LL.M. (University of London), S.J.D. (Russian Academy of Civil Service), Head of the Department of Legal Regulation of Business, Faculty of Law, the National Research University Higher School of Economics; 20 Myasnitskaya str., 101000 Moscow, Russia

Сведения об авторах

БАТЛЕР Уильям Эллиот –
доктор права, академик РАЕН, действительный иностранный член Национальной академии наук Украины, профессор Пенсильванского государственного университета (США); 201 Old Main, University Park, PA 16802 USA

ЕРПЫЛЕВА Наталия Юрьевна –
доктор юридических наук, профессор, руководитель Департамента правового регулирования бизнеса факультета права Национального исследовательского университета «Высшая школа экономики»; 101000 г. Москва, ул. Мясницкая, д. 20