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# Disclaimer of public policy in transboundary bankruptcy

## Descargo de responsabilidad de las políticas públicas en bancarrota transfronteriza

Yury A. SVIRIN 1; Alexandr A. MOKHOV 2; Vladimir A. GUREEV 3; Irina G. ANDROSOVA 4; Elena V. SHIROKOVA 5

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**ABSTRACT:**
The studies carried out within the framework of this article allow us to conclude that legal relations arising in the sphere of transboundary bankruptcy are elements of the state public policy and clause on public policy is applied to them. Therefore, the clause on public policy in case of transboundary bankruptcy can be used in exceptional circumstances concerning the fundamental values of society, taking into account legal principles in force in the field of bankruptcy. It is proved that while considering the issue of public policy clause application, the result of the possible public policy violation, but not the reasons underlying it, is subject to assessment.
**Keywords** transboundary bankruptcy (insolvency), public policy clause, public policy, "positive" public policy theory, "negative" public policy theory, international public policy, internal public policy.

**RESUMEN:**
Los estudios realizados en el marco de este artículo nos permiten concluir que las relaciones jurídicas que surgen en el ámbito de la quiebra transfronteriza son un elemento del orden público del estado y se aplican una reserva en un procedimiento público. En este caso, la reserva de un procedimiento público en caso de quiebra transfronteriza puede utilizarse en circunstancias excepcionales relativas a los valores fundamentales de una sociedad, teniendo en cuenta los principios jurídicos vigentes en el ámbito de la quiebra. Está comprobado que cuando se considera la aplicación de la evaluación de la política pública está sujeta al resultado de una posible violación del orden público, y no las razones subyacentes.
**Palabras clave** bancarrota transfronteriza, cláusula de orden público, orden público, teoría de política pública "positiva", teoría de política pública "negativa", orden público internacional, orden público interno

# 1. Introduction

The growth of financial globalization and markets globalization inevitably contributes to the emergence and development of transnational economic and, within them, legal relations complicated by a foreign element. The crises that have become more frequent in the last decade in the economy of different countries negatively affect the payment balance of enterprises and determine the procedure for transboundary bankruptcy of the debtor (Grebennikov, Marchuk & Galushkin, 2013; Grudtsina & Galushkin, 2013). A fair and cost-effective legal regulation of transboundary bankruptcy is designed to balance the potentially conflicting interests of the debtors and creditors and provide confidence in international trade and investment. Given that the legislation on transboundary insolvency is not subjected to the process of compulsory international reconciliation, states differently solve this problem: some, following the doctrine of universalism, unite all the property of the debtor and the claims of creditors, regardless of their location; others extend exclusive jurisdiction over property located within their territory, thereby adhering to the doctrine of territoriality. However, in either case, the question of the applicable law in case of transboundary bankruptcy is still not resolved in Russia as neither special bankruptcy law, nor Section 6 of Part III of the Civil Code give an answer to this question.

In law enforcement practice, a dichotomy arises about the definition of the applicable law, whether the right should be - lex causae (the law applicable to the transaction) or lex concursus (the law of the state where insolvency proceedings are opened). The Presidium of the Supreme Arbitration Court of the Russian Federation in its Decision on a specific case No. 10508/13 of 12.11.2013 thus formulated its legal position, that in determining the applicable law, lex concursus should be used - the application of the state law to the place of debtor’s bankruptcy.

Also the issue of recognizing foreign judgments in transboundary bankruptcy is not resolved at the legislative level, taking into account the observance of Russia's national interests.

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# 2. Research Methodology

## 2.1 Research Methods

The following methods are used in the process of research: comparative, theoretical (analysis, synthesis, concretization, generalization, method of analogies); empirical (study of the existing and current judicial practice of applying civil liability, observation); comparative-historical (comparative analysis of Russian and foreign experience in the application of state responsibility), as well as methods of systemic, structural-functional and statistical analysis.

## 2.2. Literature Review

A traditional defence mechanism that allows states to ensure internal interests is the legal institution of the clause on public policy (ord. republic - French, public policy – Eng.). The essence of the clause on public policy is expressed in the possibility of refusing to apply a foreign rule of law or recognizing and enforcing a decision of a foreign court in the event of threat to fundamental social, legal, economic and political foundations of the state.

The need to protect domestic state policy in transboundary bankruptcy is recognized both at the international and national levels. In particular, the UNCITRAL Model Law on Transboundary Bankruptcy of 1997 (the legislation which 43 states have so far adopted [2]) indicates that "nothing prevents the court from refusing to take measures to protect the violated right if the measure in question is clearly contrary to the public policy of the State" (UNCITRAL Model Law Cross-Border Insolvency (1997) with the Guide to Enactment and Interpretation (2013) UNCITRAL Texts and Status

URL: www.http://uncitral.org/uncitral/ru/uncitral_texts/insolvency.html.

It should be noted that the Russian Federation has not yet incorporated the UNCITRAL Model Law on Transboundary Bankruptcy.

The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which the Russian Federation is a party, contains a rule that recognition and enforcement of an arbitral award may be refused if the competent authority of the country finds that recognition and enforcement in fulfilment of this decision are contrary to the public policy of this country (Convention on the Recognition and Enforcement of the Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). URL: www.http: //uncitral.org/uncitral/en /uncitral_texts/insolvency.html

However, this convention does not apply to relations in the field of bankruptcy. Letter No. OM-37 of the Supreme Arbitration Court of the Russian Federation of March 1, 1996 clarifies that the New York Convention regulates the issues of mutual recognition and enforcement on the territory of the states parties to the convention, not judicial decisions taken by state courts (courts of general jurisdiction and arbitration courts) but decisions of arbitration courts. While the examination of bankruptcy cases is subordinated to arbitration courts (Clause 1, Part 6, Article 27 of the Arbitration Procedural Code of the Russian Federation).

The legislation of the Russian Federation does not contain any special legal norm regulating the application of the clause on public policy in insolvency (bankruptcy) cases. At the same time, a general rule has been established that "the arbitral tribunal refuses to recognize and enforce the decision of the foreign court in full or in part if the execution of the foreign court's decision contradicts the public policy of the Russian Federation" [4].

Despite the wide recognition in various international and national legal documents of the need for the "protective clause" (Schutzklausel - German), the universal criterion indicating when to apply it has not been documented because of the ambiguity of the nature of the clause itself and the absence of any coherent generalized study. In this connection, the doctrine notes that the uncertainty of the category of public policy is being built into one of the principles of private international law (Luntz 1973). The search for any criterion for the application of the public policy clause in the field of transboundary bankruptcy is complicated not only by the existing differences between insolvency procedures between states, but also by the fact that the content of public policy within the state borders also varies via changing values as a result of accumulating historical experience. The public policy clause is based on national law, thus giving States potentially greater latitude in order to avoid recognition of foreign insolvency proceedings.

To date, all attempts to disclose the inner content of the notion of public policy have not been crowned with success. In the Virgos-Schmitt Report to the European Convention on Insolvency Proceedings of 1995, which has doctrinal significance, it is noted that public policy is based on the fundamental principles of the recognizing state law and includes, in particular, constitutionally protected rights and freedoms, as well as all fundamentals of the policy of the requested state (Virgos-Schmit report on the Convention on Insolvency Proceedings, Brussels, 08.07.1996 URL: http://eur-lex.europa.eu.

The absence of a clear definition of public policy in the legislation and in legal doctrine allows us to conclude that the public policy clause is a legal fiction - a conditional form serving as a kind of filter that prevents the negative consequences of the application of foreign law.

It seems that the interpretation of the clause on public policy in the context of transboundary bankruptcy is possible on the basis of some hypothetical design of potential effects resulting from the recognition of any foreign judicial act in the insolvency case. In the context of modern legal paradigm, based, inter alia, on the general legal presumption that a foreign judgment is valid, the public policy clause serves as an important protective mechanism for the domestic priority values.

Public policy from a historical point of view is justified in the substantive law. Provisions governing the "material" public policy, as a rule, are established by national legislation in the field of private international law. For example, article 193 of the Civil Code of the Russian Federation establishes that the norm of foreign law subject to application in accordance with the

rules of this section is not applied in exceptional cases when the consequences of its application would clearly contradict the foundations of the rule of law (public policy) of the Russian Federation.

At the same time, it is necessary to distinguish between the material and procedural aspects of legal relations on transboundary bankruptcy. The documents of UNCITRAL Working Group V dealing with insolvency law note that not all States provide a procedural component as part of public policy. In this connection, the draft of the UNCITRAL Model Law on the Recognition and Enforcement of Judgments in Respect of Insolvency Proceedings includes fundamental principles relating to fair procedural requirements (A / CN.9 / WG.V / WP.145) - Recognition and enforcement of judgments in connection with insolvency proceedings: draft model law URL: www.http: //uncitral.org/uncitral /ru/uncitral_texts/insolvency.html.

The differentiation between the material and procedural component of the clause on public policy is of great practical importance in cases of transboundary bankruptcy. The consequences of the "procedural" public policy are wider than those of the "material" public policy. This conclusion can be justified by the fact that when applying the clause on "material" public policy, the consequences of the foreign law application are hypothetically assumed, whereas when applying the clause on "procedural" public policy, a concrete consequence is assessed because of the procedural action.

In addition, the "procedural" public policy is applied not only to the recognition and application of final foreign decisions, but also to bankruptcy proceedings in general (for example, if cooperation or provision of information requested in the bankruptcy case in another state clearly contradicts the public policy). This is due to the recognition and execution of various foreign judicial acts within the framework of insolvency procedure and giving them any "effect" provided by the foreign law in the states, adhering to the universalist approach to regulating transboundary bankruptcy.

An example of this position from the international law enforcement practice is the case of bankruptcy against Dr. Jürgen Toft, (Inre Dr Juergen Toft, whose accounts payable was more than 5.6 million euros), during which on 22.07.2011 the bankruptcy court of the southern judicial district of the State of New York refused on the basis of the clause on public policy, to recognise and enforce the order of the German court, which would allow the foreign representative to access the electronic mailboxes of the debtor created on the servers of Internet providers located in the USA. The basic procedure for the debtor was initiated in Germany, and the court of Munich ordered that it intercept mail and e-mail. After repeatedly refusing to cooperate with the court, the debtor escaped justice and the German manager applied to the American court in order to obtain the debtor's accounts. The justification for the position of the American court was the impossibility of unimpeded access to e-mails stored on the servers of Internet service providers in the United States, since, according to US law, the disclosure of the debtor's e-mails is not allowed and is considered to violate the confidentiality of correspondence and may lead to criminal liability. At a time the German law does not have this restriction and allows the interception of the debtor's mail with the aim of preventing the commission of unfavourable transactions for creditors.

The Arbitration Procedural Code of the Russian Federation No.95-FZ of July 24, 2002, according to which the bankruptcy cases are reviewed, establishes the rule of law that the assignment of any foreign court or competent body of any foreign state is not enforceable if the execution of the assignment violates the fundamental principles of Russian law or otherwise contradicts the public policy of the Russian Federation. At the same time, a systematic interpretation of the norms of the Russian legislation on insolvency (bankruptcy) suggests that recognition and enforcement in the Russian Federation are subject only to final foreign judgments. This approach is reflected, in particular, in the definition of the Supreme Arbitration Court of the Russian Federation of 23.06.2008 No. 11934/04 on the application of the National Atomic Energy Generating Company Energoatom with a request to provide legal assistance by recognizing the definition of the Economic Court of the City of Kiev regarding the extension of

the moratorium on meeting the requirements of its creditors. The Supreme Arbitration Court of the Russian Federation indicated that "judicial acts of foreign courts on the application of interim measures are not subject to application on the territory of the Russian Federation, since they are not the final judicial act on the merits of the dispute" (Definition of the Supreme Arbitration Court of the Russian Federation No. 11934 / 04URL of 23.06.2008: http://www.arbitr.ru/).

It should be emphasized that the existence of differences between the procedural domestic and foreign orders for conducting bankruptcy procedures in themselves cannot be grounds for the application of the clause on public policy. Not every rule of foreign law, the result of which is different from the national one, is a violation of public policy. Thus, in the case of Hartford Computer Hardware Inc. the High Court of Ontario (Canada) granted the request of representatives of the debtor company (the main proceedings for which were opened in the United States) to recognize the decision of the US court that approved the provision of a new loan to the debtor, part of which was to refinance the old debt. US legislation established a mechanism for granting a new loan to a creditor of a bankrupt debtor after the commencement of insolvency proceedings in order to finance its current operations, the proceeds of which are used to repay the debt that the creditor created before the commencement of the proceedings on the basis of the previously granted loan. Although the implementation of such a mechanism is unacceptable in Canada, in case of bankruptcy proceedings under Canadian law, the court, on the basis of the circumstances of the case, considered that the public policy clause was not applicable (UNCITRAL, Case Law (CLOUT), URL: www.http: //uncitral.org/uncitral/ru/uncitral_texts/insolvency.html.

Thus, the protective function of the clause on public policy should be used only in case of material breach threat to the legal status of participants in the bankruptcy case and is applied regardless of the interests of the individual creditor, since the fundamental interests of the state play a key role in this case. The flexibility of the concept of public policy presupposes leaving the question of the sufficient basis for the application of a clause on public policy to a court.

According to the recommendations developed by the Presidium of the Supreme Arbitration Court of the Russian Federation on the basis of the review practice by the arbitration courts of the cases on the application of public policy clause as a ground for refusing recognition and enforcement of foreign judicial and arbitral awards, the arbitral tribunal denies recognition and enforcement of foreign judicial or arbitration decisions on its own initiative, if it establishes that such recognition and enforcement is contrary to public policy of the Russian Federation. The ground provided for by subparagraph "b" of paragraph 2 of Article V of the New York Convention and paragraph 7 of part 1 of Article 244 of the Arbitration Code of the Russian Federation refers to the ones established by the court independently, ex officio, irrespective of the application of the relevant arguments by the parties to the case.

A similar situation is fixed in the sub. "B" par. 2 of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dtd. 1958, which consists in the fact that recognition and enforcement of any arbitral award may be stopped if the competent authority of the country in which this recognition and enforcement is requested, will find that the recognition and enforcement of this decision are contrary to the public policy of that country.

At the same time, the powers of the court for the protection of public policy do not exclude the rights of the parties of the dispute, and of third parties to invoke a violation of public policy and provide evidence in support of their argument. In addition, the party challenging the decision on the basis of public policy violation is interested in choosing the proper evidence in support of its rightness.

The conceptual basis for the application of the public policy clause in judicial practice and fixing it in legislation is a "positive" and "negative" theory of public policy. The "positive" theory of public policy is based on the inviolability of a number of positive legislative prescriptions, which form the basis of the legal system of the state. The "negative" theory of public policy is based

on the consequences assessment from the application of the norms of any foreign law in relation to public policy, regardless of their fixing in the legislation of the recognizing state.

In accordance with the Civil Code of the Russian Federation, a clause on public policy can be disclosed both from the point of view of a negative approach through the foundations of the rule of law of the Russian Federation (Part 3 of Art.1193 of the Civil Code of the Russian Federation) and from the point of view of a positive approach through over-mandatory norms of law part 3 of article 1192 of the Civil Code of the Russian Federation). This position of the legislator is confirmed by law enforcement practice. In particular, a review of the practice of arbitration courts cases considering on the application of public policy clause as a ground for refusing to recognize and enforce foreign judgments and arbitral awards indicates that public policy means fundamental legal principles (rules) that have the highest imperative, universality, special public and social significance, constitute the basis for building the economic, political, legal system of the state. Such principles include, in particular, the prohibition of committing acts that are expressly banned in excess of the peremptory norms of the legislation of the Russian Federation (Article 1192 of the Civil Code of the Russian Federation), if these actions damage the sovereignty or security of the state, affect the interests of large social groups, violate constitutional rights and freedom of individuals.

In the absence of any legal definition of the notion of public policy clause, modern legal doctrine has developed two approaches to its interpretation: in a narrow and a broad sense. The interpretation of the clause when it applies to legal relations with a foreign element, which also includes relations in the field of transboundary bankruptcy, is generally narrower than when it applies to legal relations without any participation of a foreign element. In this regard, in legal doctrine, there is a distinction between international public policy (Ordrepublicinternational-Germ.) and internal public policy (Ordrepublicinterne-Germ.). The idea of such a distinction was substantiated in the works of the German lawyer Friedrich Karl von Savigny, who proposed to allocate imperative norms, not only established in the interests of individuals, but resting on moral grounds or on public interest and superseding the application of foreign law.

Russian legislation does not directly fix the terms of "international public policy" and "internal public policy", but at the same time, conducts such differentiation. This is evidenced by the provision of Article 1193 of the Civil Code of the Russian Federation, according to which the rule of foreign law, in exceptional cases, is not applied when the consequences of its application would clearly contradict the foundations of the rule of law (public policy) of the Russian Federation, taking into account the nature of relations complicated by a foreign element.

The UN Commission on International Trade Law, the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Transboundary Insolvency of 2003, noted that a growing number of legal systems recognize the dichotomy between the notion of public policy, how it applies to internal affairs, and the notion of public policy as it is used in connection with international cooperation issues and questions of consequences recognition of foreign laws (UNCITRAL Model Law on Transboundary Insolvency (1997) with Guide to Enactment and Interpretation (2013), paragraph 103, URL: www.http: // uncitral. org / uncitral / en / uncitral_tex ts / insolvency.html.

It seems that in the second case the public policy is understood more restrictively than the internal public policy.

This position is a reflection of the universalist approach to regulating transboundary bankruptcy, which involves the shifting of national legislation towards foreign law and a narrow interpretation of the clause on public policy. Public policy in this case is based on the fundamental principles of law and "includes, in particular, constitutionally protected rights and freedoms, as well as the policy framework of the requested state" (Virgos-Schmit Report on the Convention on Insolvency Proceedings, Brussels, 08.07.1996, p.205, URL: http://eur-lex.europa.eu.

Supporters of the territorial approach to regulating transboundary bankruptcy recognize

exclusive jurisdiction over the assets and creditors of the debtor within the state border and consider it reasonable to broadly interpret a clause on a public policy that applies to any peremptory norm of national law.

The empirical reality is that, despite the UNCITRAL's call for narrow interpretation of the public policy clause, the world's law practice knows cases of using this mechanism to ensure the interests of individual creditors and stakeholders, "stretching" the limits of public policy. Examples include the bankruptcy cases of In re Qimonda, In Vitro SAB de SV, In Re Toft, In re Gold & Honey (UNCITRAL, Case Law (CLOUT), URL: www.http: //uncitral.org/uncitral/ru/ uncitral_texts / insolvency.html). In the insolvency case of the corporation Qimonda AG Bankr. Lit. (whose assets included about 10,000 patents, the most valuable of which were the dynamic memory of random access, flash memory and semiconductor technology), the court for bankruptcy cases in the eastern judicial district of Virginia on October 28, 2011. came to the conclusion that the recognition and application of German bankruptcy legislation will have a negative impact on the US economy, will entail a risk of investment for companies such as IBM, Micron, Intel, Samsung and will undermine the fundamental state policy in stimulating technological innovation. Both the US and Germany have incorporated the UNCITRAL Model Law on Transboundary Bankruptcy, but this example shows that, despite the desire of states to unify the regulation of transboundary bankruptcy, the conflict of various jurisdictional interests is inevitable. The clause on public policy, in this case, stands guard over the national policy, being part of the concept of state sovereignty and is capable of turning into fiction any scheme of cooperation in case of bankruptcy.

An obligatory condition for considering the application of the clause on public policy is the existence of a conflict of norms between foreign and national legislation. Therefore, the result of any possible violation of the public policy, and not the reasons underlying it, is subject to assessment. Proceeding from this, the legal doctrine knows attempts to determine the methodology for applying the public policy clause. In particular, French scientists proposed a method that includes two stages of assessment of clause on public policy effects. The first stage involves primafacie evaluation, in other words - whether the foreign decision violates the public policy of the state explicitly. If the primafacie assessment leads to finding a possible violation, it becomes necessary to confirm the negative consequences "by taking a deeper look at the facts". At the second stage, the court, analyses the factual circumstances on an exceptional basis, without subjecting them to review (Christhope Seraglini & Ortscheidt Jerome. 2013).

Discussion in the legal doctrine is also the question of the application of the clause on public policy, if the debtor's bankruptcy arises as a result of the execution of any foreign judicial decision. Is there any reason to refer to the public policy, and will the debtor's recognition of bankruptcy, as a result of the execution of a foreign judgment, lead to consequences that contradict the foundations of law and order and morality? Interpretation of the norms of Russian legislation allows us to say that a clause on public policy in this case is not applicable. Entrepreneurs carry out their activities independently, aimed at making profit, at their own risk and are equal participants in legal relations. The use of public policy clause in the situation in question could lead to possible abuse of law, for example, the conclusion by the debtor of obviously unenforceable contracts. In addition, the law on bankruptcy of Russia provides for special mechanisms to protect the insolvent debtor, including those aimed at restoring his solvency. Since the arbitration court has made a decision on the introduction of a supervisory procedure in respect of the debtor, all claims of creditors are subject to review only within the framework of the bankruptcy case. Law enforcement practice shows that applications for recognizing and enforcing a foreign judgment against a person for whom an application for bankruptcy has been filed and a decision to introduce a supervisory procedure has been made is considered within a bankruptcy case. In this case, they will be included in the register of creditors' claims and when the debtor is declared bankrupt, they will be satisfied in accordance with the procedure established by law. The register of creditors' claims also includes foreign court decisions legalized in separate proceedings (Information letter of the Supreme Arbitration

Court of the Russian Federation of December 22, 2005 No. 96. Email: URL: www.arbitr.ru.

The next aspect of the application of the public policy clause in transboundary bankruptcy is the delimitation of the fundamental grounds of public policy from special grounds for refusing to recognize and enforce foreign judgments provided for by international treaties and domestic laws. For example, a violation of the procedure for notifying the parties or failure to comply with the procedure for the approval of major transactions is a special ground for refusing to recognize and enforce a foreign judicial decision. While a violation of the fundamental principle of independence and impartiality of the arbitrator is the general basis for the application of public policy clause. This conclusion is confirmed by the legal position of the Supreme Arbitration Court of the Russian Federation, set out in the Information Letter of the Russian Supreme Arbitration Court No. 156 of February 26, 2013, which states, inter alia, that "the arbitral tribunal shall apply a public policy clause as a ground for refusal to recognize and enforce foreign judicial and arbitral awards in exceptional cases, without substituting special grounds for refusing such recognition and enforcement as provided for by international treaties of the Russian Federation and norms of the Arbitration Procedure Code of the Russian Federation" (Newsletter of the Supreme Arbitration Court of the Russian Federation from 26.02.2013 No. 156 URL: www.arbitr.ru.

The decision made by the Judicial Collegium on Economic Disputes of the Supreme Court of the Russian Federation on April 28, 2012, in case No. A40-147645 / 2015 confirms the possibility of implementing public policy clause in bankruptcy disputes. Thus, the public corporation Bank FK Otkrytie, as a competitive creditor of Closed Joint-Stock Company Negotsiant, appealed to the Supreme Court of the Russian Federation with a cassation appeal in which it requested, by reason of the contradiction in the execution of the arbitration award with the public policy of the Russian Federation, to discharge the court of the city of Moscow order and the resolution of the Arbitration Court of the Moscow District, which satisfied the requirements of LLC NORDSTROY for the issue of enforcement the order for compulsory execution by the Closed Joint Stock Company Negotsiant of the decision of the arbitration court. As grounds for the complaint, the Bank FK Otkrytie pointed out that the arbitration proceedings were initiated by CJSC Negotsiant and LLC NORDSTROY, which are in direct relationship with each other and are affiliated entities, for the purpose of legalizing an unjustified claim based on artificially created debts, for its use in the future as the basis for initiating an insolvency procedure. In its decision in this case, the Supreme Court of the Russian Federation indicated that the protection of the interests of third parties protected by law, including in relation to the insolvent debtor, is an important function of justice, which is an element of the public policy of the state. At the same time, courts exercise such control proceeding from general principles of law, legal principles operating in a particular sphere of legal relations (for example, in the field of insolvency (bankruptcy)), and taking into account the norms of legislation regulating the specific sphere of legal relations (Determination by the Judicial Collegium on Economic Disputes of the Supreme Court of the Russian Federation of 28 April 2017 in case No. A40-147645 / 2015 URL: www.arbitr.ru). For the issue of proving public policy violations in the applications of third parties, competitive creditors in cases of compulsory enforcement of decisions of arbitration courts, the Presidium of the Supreme Arbitration Court of the Russian Federation formulated the legal position in Decree of May 13, 2014 No. 1446/14 that it is sufficient for the competitive creditor to present to the court his evidence prima facie, confirming the materiality of doubts about the existence of his debt. At the same time, the other party, insisting on the existence of the debt awarded by the arbitration court, should not be embarrassed to refute these doubts, since it is this party who must have all the evidence of the legal relationship with the insolvent debtor. This is due to the fact that the ability of bankruptcy creditors to prove the groundlessness of another creditor's claim, confirmed by the decision of the arbitration court, is usually limited in a bankruptcy case, thus presenting them with a high standard of proof would lead to an inequality of such creditors.

This position of the Russian court can also be taken into account when solving problems of

transboundary bankruptcy, as the participation of a foreign entity as a creditor is enshrined in the Federal Law "On Insolvency (Bankruptcy)" of October 26, 2002. No. 127-FZ. The decision of the Judicial Board on economic disputes of the Supreme Court of the Russian Federation of 09.10.2015. in case No. 305-KG15-5805, which annulled the judicial acts that satisfied the demand for recognition and enforcement of the decision of the adhoc arbitration court (Republic of Latvia, Riga) at the request of Hartik Limited (Hong Kong) to the open joint-stock company "Murmansk multiservice networks», declared insolvent (bankrupt), was the confirmation of it. (Decision of the Judicial Board of Economic Disputes of the Supreme Court of the Russian Federation of 09.10.2015 in case No. 305-KG15-5805 URL: www.arbitr.ru).

The company Eltekhmontazh, being a bankruptcy creditor and referring to a material breach of the law, the rights and legal interests of the applicant and his public interest protected by law, appealed to the Supreme Court of the Russian Federation with a request to reconsider the decision of the Arbitration Court of the Moscow Region and the decision of the Arbitration Court of the Moscow District in cassation order. Expressing disagreement with the challenged judicial acts, the applicant referred to the fact that during the new examination of the case the courts were obliged to leave the company's application without consideration, since by that time the bankruptcy proceedings had already been opened in relation to the Murmansk Multiservice Network, or to refuse the company's satisfaction since from the introduction of the bankruptcy procedure against the debtor, the reasonableness of the claim of each creditor to the debtor concerns not only the private interest of the creditor but also affects public interests – interests of other creditors, therefore, such creditors have the right to object to the execution of the arbitral award, which in this case is allegedly counterfeit and is based on the collusion of the debtor and the company, and is presented in order to reduce the bankruptcy of the debtor.

In its decision of the case, the judicial board pointed out that bankruptcy cases were aimed, among other things, to protect the public policy, as well as the interests of creditors of the debtor, in connection with which, the latter have the right to challenge the judicial acts on which the bankruptcy claim declared in the case is based. When passing the disputed judicial acts, the courts avoided verifying whether the decision of the arbitral tribunal outside the bankruptcy process entails unreasonable satisfaction of the claims of one creditor and the detriment of the rights and legitimate interests of other creditors to receive satisfaction at the expense of the bankruptcy of the debtor, thus, violating the balance of public and private interests.

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# 3. Results and Discussions

**3.1** On the basis of theoretical analysis and generalization of judicial practice, the authors concluded that the application of public policy clause in the field of transboundary bankruptcy is possible only in exceptional cases. This is evidenced by the use of the phrase "clearly contradicts" in determining the notion of the clause on public policy, with a view to emphasizing the limited nature of its interpretation and the exceptional circumstances in which its application is possible. It is proved that the very fact of norms conflict of foreign legislation in the absence of other additional circumstances is insufficient for the application of the clause on public policy.

**3.2** The need to differentiate the material and procedural aspects of public policy clause is substantiated. This is of great practical importance in cases of transboundary bankruptcy, since the consequences of "procedural" public policy are broader than the consequences of "material" public policy.

**3.3** The extrapolation of provisions on the admissibility of public policy clause use in private international law, Russian law and law enforcement practice allows us to approve the following:

- the public policy clause is considered as an internal protective mechanism, but not as a set of priority legal norms that clearly outline the scope of its application.

- a foreign court decision cannot be considered on the merits if it is recognized in another state. Otherwise, the principle of general legal presumption will be violated, according to which the

foreign judgment is valid. In a state in which the recognition or execution of a foreign judgment is sought, the court can only decide whether the foreign decision will have negative effects on the public policy of the requested state.

**3.4** It is postulated that, despite the absence of regulatory norms, judicial practice in Russia confirms the possibility of public policy clause use in disputes over transboundary bankruptcy.

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# 4. Conclusions

The authors have come to the following conclusions as a result of the research:

The application of public policy clause in the field of transboundary bankruptcy is possible based on the fundamental principles of law and legal principles in the field of transboundary bankruptcy, such as: equal rights to participate in a bankruptcy case, a principle of equality of creditors and inadmissibility of obtaining illegal and unreasonable advantages by one of the creditors, protection of the debtor's property, economically beneficial and fair management of the debtor's property.

In accordance with the Civil Code of the Russian Federation, the clause on public policy can be disclosed both from the point of view of a negative approach through the foundations of the rule of law of the Russian Federation (Part 3 of Art.1193 of the Civil Code of the Russian Federation) and from the point of view of a positive approach through over-mandatory norms of law Part 3 of Article 1192 of the Civil Code of the Russian Federation). Such a controversy in the normative interpretation of the public policy clause determines the issuance of controversial judgments.

The Russian legislator should also concretize the notion of the "national interests of Russia" when resolving the issue of recognizing foreign judgments in transboundary bankruptcy..

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# 5. Recommendations

When recognizing a foreign judicial decision to declare a debtor bankrupt, Russian courts must take into account the balance of public and private interests.

It is necessary to consolidate the possibility of applying a clause on public policy in transboundary bankruptcy, as well as the criteria for its application at the legislative level.

In order to exclude different interpretations in judicial practice, the state should give a normative interpretation of the clause on public policy, and also define the content of such a legal category as public policy.

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1. Department of Civil Procedural Law and Bailiff Organization, All-Russian State University of Justice, Moscow, Russia. Contact e-mail: usvirin@mail.ru

2. Department of Business and Corporative Law, Kutafin Moscow State Law University (MSAL), Moscow, Russia

3. Department of Civil Procedural Law and Bailiff Organization, All-Russian State University of Justice, Moscow, Russia

4. Department of Foreign Languages №2, Plekhanov Russian University of Economics, Moscow, Russia

5. Chair of Civil law and Process Ows, Academy of Labour and Social Relations, Moscow, Russia

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