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SOME ISSUES OF BORROWING THE ESTOPPEL DOCTRINE IN CIVIL PROCEEDINGS OF THE RUSSIAN FEDERATION

ALGUMAS QUESTÕES DE EMPRÉSTIMO DA DOUTRINA DO ESTOPPEL EM PROCESSOS CIVIS DA FEDERAÇÃO RUSSA

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Abstract: The article is devoted to the actual problem of applying the doctrine of common law countries in Russian legal practice. The relevance of the topic is due to the fact that in recent years, in order to optimize the judicial procedure, there has been a tendency for law enforcement officers to turn to the estoppel doctrine used in common law countries. The research goal is to consider the possibilities and difficulties of applying the estoppel doctrine in Russian judicial practice. The author also considers the feasibility of implementing this institution in the Russian legal field. The research methodology is based on legal analysis and includes methods of the general scientific group (generalization, systematization, comparison), as well as a number of special methods: content analysis of scientific literature on the research topic, as well as doctrinal analysis, critical analysis of judicial practice. As a result of the study, the author concluded: the reception of the doctrine by Russian law should be exclusively systemic and deliberate, and the principles of Russian civil legal proceedings are of decisive importance for clarifying the reception scope of the estoppel doctrine. The borrowing of this institution of common law in the legal system of a country belonging to the continental legal type should not be mechanical.

Keywords: Legal system. Common law countries. Russian judicial practice. Estoppel. Civil proceedings.

Resumo: O artigo é dedicado ao problema real da aplicação da doutrina dos países de direito comum na prática jurídica russa. A relevância do tema deve-se ao facto de nos últimos anos, a fim de optimizar o procedimento judicial, ter havido uma tendência para os agentes da aplicação da lei recorrerem à doutrina de estoppel utilizada nos países de common law. O objectivo da investigação é considerar as possibilidades e dificuldades de aplicação da doutrina de estoppel na prática judicial russa. O autor também considera a viabilidade da implementação desta instituição no campo jurídico russo. A metodologia de investigação baseia-se na análise jurídica e inclui métodos do grupo científico geral (generalização, sistematização, comparação), bem como uma série de métodos especiais: análise de conteúdo da literatura científica sobre o tema de investigação, bem como análise doutrinal, análise crítica da prática judicial. Como resultado do estudo, o autor concluiu: a recepção da doutrina pela lei russa deve ser exclusivamente sistémica e deliberada, e os princípios dos procedimentos legais civis russos são de importância decisiva para clarificar o alcance da recepção da doutrina de estoppel. O empréstimo desta instituição de direito comum no sistema jurídico de um país pertencente ao tipo jurídico continental não deve ser mecânico.

Palavras-chave: Sistema jurídico. Países de common law. Prática judicial russa. Estoppel. Processo civil.

1. Introduction

Today, with the growing number of socio-political conflicts resolved by the courts, the legislators in many states have to develop constructive approaches to improving procedural legislation and law enforcement practice in order to reduce the number of judicial disputes and increase the quality and speed of the justice administration. In modern conditions, the achievement of these goals is possible only in conditions of high standards for the conscientious participants' behavior in the process.

Russian legislative and law enforcement agencies are also actively involved in solving this problem. At the end of 2021, the Supreme Court Plenum of the Russian Federation in a fundamental decision on the rules for the consideration of cases in first instance arbitration courts, listing the arbitration process principles, separately noted that in addition to the traditional and long-known principles of Russian justice (adversarial, public, immediacy, procedural economy, etc.), the courts should also take into account the case *«good faith of the persons involved in the case and procedural savings»* (18).

In recent years, in connection with the fight intensification against various malversations in the procedural sphere and the desire of the judicial procedure optimization, there is a tendency for law enforcement officers to turn to the common law countries' doctrine – estoppel, considered as a consequence of the «good faith principle» manifestations (8, 9; 21, p. 98).

2. Results and Discussion

Sources of borrowing the estoppel doctrine in Russian procedural law

This borrowed from English common law concept is based on the idea of stimulation the consistent behavior of legal relations subjects: a party who acts contrary to the position it previously held should not benefit from its inconsistent behavior, which in practice is expressed in prohibiting a party from raising appropriate objections.

As rightly noted in recent Russian studies of the doctrine under discussion, in English law the term «estoppel» is considered as a collective concept that combines three main types:

1. Classical estoppel (estoppel by representation) is a procedural rule of proof aimed at limiting the proof of the factual case circumstances by excluding from the subject of judicial research and assessing the circumstance that is important for the consideration and resolution of the case.

2. Promissory estoppel is the main type of estoppel in equity, which is a substantive institution of the law of obligations.

3. Formal estoppel, the main type of which is «estoppel per rem judicatem» – an analogue of the domestic procedural institution of a court decision legal force (26).

The application of procedural «estoppel res judicata» («estoppel per rem judicatem», «malversation of process estoppel») in Russia was laid by the Supreme Arbitration Court Presidium of the Russian Federation in a decision of March 22, 2011 No. 13903/10 (19). The highest instance, referring to Part 2 of Article 9 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the AIC of the Russian Federation), indicated that «the parties are deprived of the right to put forward new claims, arising from both the principal and the additional obligations in respect of which the settlement agreement was concluded, on the basis that, by entering into a settlement agreement, the persons sought to terminate the dispute in its entirety» (1). Despite the ensuing criticism, this position became the starting point for the use of this type of estoppel in the argument and for ordinary courts, and gradually the mention of the doctrine in judicial acts turned into an ordinary phenomenon in justifying the preclusive effect of the settlement agreement concluded by the parties for additional claims not stated in the initial process (19).

So, in his dissenting opinion Judge of the SAC of the Russian Federation S.V. Sarbash pointed out that such Presidium approach was contrary to the substantive law and the will of the parties themselves. «Settlement agreement is a civil law contract subject to approval by a court», and therefore, in addition to the norms of procedural law, the civil law rules on contracts, including the freedom of contract rules and on the contract interpretation, are subject to application. Taking into account the rule on the literal interpretation of the contract terms meaning, formulated in Part 1 of Article 431 of the Civil Code of the Russian Federation as general, the author sees no reason to «derive from the recognition by the debtor of one debt the implied intention of the creditor to cancel another debt, which was also not the subject of the claim» (19). Also, S.N. Egorkin calls «not very successful» the first attempt to use a reference to the doctrine in the argument

estoppel (9). So, the principle of the highest court is not a certain way of interpreting a settlement agreement, but that the very fact of its conclusion should be regarded as a certain conduct of the party, which it is obliged to adhere to henceforth.

However, in accordance with the principle Estoppel, a party must henceforth adhere to, must be expressed clearly and unambiguously, and the logic of the Presidium leads to the fact that «the parties to the process will think twice before going to reconciliation» in view of its consequences uncertainty, since «it is not known whether the court will not consider the conclusion of a settlement agreement without the inclusion of any condition delineating the limits of this agreement to be a certain position of the party on a particular issue» (8,9). In their work Zh.I. Sedova and N.V. Zaitseva (22, p. 55-56) show the relevant case examples in which the courts have reproduced the stated position.

When referring to the procedural legislation of its homeland, common law countries, we can note that the doctrine of estoppel was used in this case by the SAC of the Russian Federation to justify the prohibition of putting forward new claims related to a dispute terminated by a settlement agreement. That is, to implement the function of claim preclusion, which in common law countries is fulfilled by «res judicata» – the rule on the inadmissibility of resolved case reconsideration, the analogue of which in the domestic process are the provisions on the claim external identity.

However, the fundamental difference between the American model of claim individualization is that, for the purposes of res judicata, a dispute is individualized by a group of facts relating to a single «event or transaction», regardless of how many of them may arise from claims or subjective rights.

The action of res judicata is the flip side of the plaintiff's right to freely combine the various claims in the original claim. For a claim to be made by filing a new claim, it is not necessary that the claim actually be the subject of the first case. It is sufficient that this claim could potentially *be made* by the plaintiff (3;14, p. 39; 4, p. 1155). In the American process res judicata determines the impact of the final judgement on any subsequent trial on the same subject (3). The difficulty of distinguishing «facts» from «legal conclusions» in court practice has led the framers of the Federal Regulations to carefully avoid the word «facts» in denoting what should be stated by the plaintiff in the claim statement (7, p. 149). In Russian civil procedure, this function is performed by the rules on the external identity of claims. In American law, the rule of inadmissibility of reconsideration of a once resolved

case provides that the plaintiff has only one opportunity to sue the defendant in respect of «a specific transaction or event» (11, p. 452).

If the plaintiff «can» combine all claims in one, in fact it means that he «must» do so due to the action of res judicata. Behind this model of legal regulation, not least of all is the rather austerity of procedural economy inherent in common law countries, where going to court is traditionally associated with significant financial and time costs (11, pp. 242, 461).

In England, estoppel against *claims and issues* in a new process that may have been (though not, by omission of a party) the subject of proceedings between the parties in a judgement case is known as *the Henderson vs Henderson: «... if a matter becomes the subject of proceedings before a competent court, the court requires the parties to the proceedings to present the case in its entirety and does not allow (except in special circumstances) the same parties to initiate proceedings on the same subject matter on matters which may have been submitted as part of the relevant dispute, which, however, was not done due to negligence, ignorance or even accidental omission»* (27, p. 1241). The malversation against, which the estoppel is directed, is expressed mainly in the frivolous attitude of the party to the process of justice administration, in ignoring the fact that the resources of the court are limited, and any proceedings are implicitly characterized by opportunity costs: the time devoted to the consideration of one case could be successfully used to resolve another dispute, the parties to which are «waiting for their turn» (27, p. 1241; 2, p.480-482).

The foregoing gives some reason to believe that behind the appeal of the Supreme Arbitration Court (SAC) of the Russian Federation to the institution of estoppel, in fact, there may be a radically different approach to the rules of external identity of claims (than provided for in the current procedural law). But at the same time limited to cases of termination of the dispute by conciliation of the parties and aimed at achieving procedural economy, on the one hand, and on the other – combating the unscrupulous behavior of the parties to the conflict.

General criticism of borrowing procedural estoppel

In some publications devoted to procedural estoppel, a more general question is raised. In particular, it is the question about the advisability of introducing the term «estoppel» into domestic jurisprudence, taking into account the fact that the participants in the process can be citizens who do not have even minimal legal knowledge, on the basis of

which it is concluded that if the using term is justified in the doctrine, then in legislation and judicial practice it should be avoided or explained as much as possible, in what sense it is used in a particular situation (16, p. 111-112).

In addition, the researchers note that estoppel is used by Russian courts arbitrarily, at their own discretion and based on legally uncertain categories (for example, «consistency», «coherence», «advantage (benefit)»)). To a certain extent, this approach makes the application of the procedural law unpredictable due to deviation from the principles of legality, adversarial and equality of the parties, that poses a threat to the availability of justice in civil cases. And in fact, there is the court's refusal to apply it literally when depriving the participant of the process of the opportunity to exercise the procedural right formally belonging to him with reference to estoppel. As a result of procedural estoppel, the court restricts the procedural rights of the parties, which can be expressed in a prohibition on the commission of a procedural act, if the court for one reason or another considers the behavior of the party contradictory. Foreign doctrine («procedural estoppel»), without enshrining it in the procedural law, contradicts the constitutional and legal meaning of a fair trial, revealed through compliance with the procedure established by law for the consideration and resolution of a particular civil case (26, p. 9-10).

On the one hand, without appropriate legislative regulation, such a «creative» approach of the courts, expressed in the injunction on the commission of a number of procedural actions due to the previous behavior inconsistency of the process participant, makes the process largely unpredictable.

On the other hand, it is impossible to deny the obvious aspect: the number of appeals of law enforcement officers in the texts of judicial acts to the institution of estoppel has avalanche-like increasing. At the same time, the doctrine does not deny the positive and effective properties of the institution of procedural estoppel; on the contrary, it is argued that it is necessary to make appropriate changes to the procedural law in order to bring a formal basis for its application by the courts. At the same time, to implement relevant legal regulation, including in the reform of procedural legislation, it is necessary to understand whether law enforcement practice has really developed consistent and proven procedural rules for this institution application (12, p. 355; 23, p. 352).

The potential of borrowing procedural estoppel for the procedural form development and the procedural legislation reform

Nevertheless, in response to the above critical arguments regarding the reception of the institution in question, we like to draw attention to the heuristic potential that it possesses for the development of national procedural law. Being a manifestation of the principle of procedural good faith, estoppel becomes a reflex, a reaction on the part of the court to various malversations by the parties of their procedural capabilities.

Thus, estoppel *highlights* those situations in which procedural rights turn from a means of ensuring the effective operation of the justice mechanism into their opposite, *and testifies to the shortcomings* of the legal regulation existing in the field of civil proceedings. In those situations where these shortcomings are of a one-time, random nature (for example, due to the unique specifics of a particular case), procedural estoppel, as a tool Judicial activism, is a suitable tool for overcoming them. But when the practice of applying procedural estoppel acquires the features of the same type and is repeated in cases with a similar plot, this becomes a signal that the problem is systemic in nature and needs to be resolved at the legislative level. In this case, it is appropriate to talk about the legislative reception of estoppel, which means *the approaches conversion of courts applying estoppel in similar circumstances into a set of procedural laws*, which eliminates the legal regulation lack and, as a result, makes it unnecessary to further appeal to estoppel as a discretionary court instrument.

Attempt to apply estoppel in the absence of a compulsory counterclaim rule

Here's an example to illustrate our last point. In the Russian civil process, as in many other foreign legal orders, there is no construction of the so-called «mandatory» counterclaim at the legislative level, i.e., the prohibition on the defendant to case in the future such an independent claim that could (but was not) previously in the initial process be (but was not) declared as a counter due to its connection with the original claim of the plaintiff against the defendant.

At the same time, some (so far) examples from judicial practice indicate that there is a need on the part of the judicial system to expand the range of claims, the presentation of which is suppressed by the entry into force of a court decision. In particular, this is an

attempt by the courts, through procedural estoppel, to include in this circle those claims that could have been, but were not made during the trial by the defendant. These are situations in which passive conduct is the result of the defendant's omissions (intentional or reckless) in the first case, followed by the initiation of a new process for claims that could have been made initially through the presentation of a counterclaim. Blocking for the defendant of such an opportunity would exclude common situations where the consideration of counter-related claims is carried out sequentially in different processes.

Thus, in one of the cases, the plaintiff (the employer under the contract) filed a claim with the arbitration court to recover from the defendant (contractor) amounts of unjust enrichment and interest for the use of other people's funds in connection with the unlawful retention by the contractor of the raw materials transferred for processing. The court's decision, upheld by the appellate instance, dismissed the claim.

The court found that the contractor had previously filed a lawsuit to recover the debt and penalty under the disputed contract from the employer. But at the time of consideration of this dispute, the customer was also aware of the improper performance by the contractor of its obligations under the contract. Within the framework of the previously considered case, the court approved a settlement agreement on the payment by the customer in favor of the contractor of funds (principal debt, penalties).

In the new case, based on the provisions on the essence of the settlement agreement, which found their expression in the above-mentioned legal position of the SAC Presidium of the Russian Federation (Decision No. 13903/10 of 22.03.2011) (19), the courts concluded that it was necessary to apply the principle of estoppel to the claims.

However, the Cassation Court did not agree with this approach, stating that it follows from the literal content of the settlement agreement that it is aimed at terminating all of *the customer's* obligations under the contract (24). The termination by the settlement agreement of a dispute from one obligation, arising from the contract, cannot automatically mean the termination of disputes between the parties on other independent obligations arising from this contract. In the second case, there is a different subject composition: the debtor is not the customer, who is obliged to pay for the work performed, but the contractor, whom the customer, as a creditor, considers obliged to return the transferred materials.

The very right of claim of the creditor against the debtor is also different in content. The Cassation Court found no basis for concluding that, in bringing the claims,

the employer had engaged in inconsistent or contradictory behaviour expressed in a change in the position underlying the previously approved settlement agreement.

As can be seen from the above judicial act, the court of cassation approached the possibility of an expansive interpretation of the approach of the SAC Presidium of the Russian Federation regarding the consequences of concluding a settlement agreement. Nevertheless, this case shows that there is a certain request from judicial practice for a more effective organization of the procedural form in terms of the inadmissibility of the process's multiplication, and this request cannot be satisfied through the literal application of the current provisions of the procedural law.

If we turn to foreign experience, then, for example, in the United States of America, the rule on the *necessary counterclaim* (*compulsory counterclaim*) does not apply in all jurisdictions. But such a rule is contained in federal law, which specifies what the defendant *must* include in its response (*pleading*) (10) as a counter-claim any claim which, at the time of the original action, he has against his procedural opponent and which arises from the same circumstances (*transaction or occurrence*) as the original claim brought against the defendant. Otherwise, the relevant claim will be lost by him. The duty to bring a counterclaim exists only if the original and counterclaim arise from the same grounds. In practice this is understood in the sense that the claims are united by evidence commonality or, more broadly, that there is a logical link between the claims (25). The relevant criterion is discretionary: the court decides whether such a connection exists pragmatically, from the point of the convenience of considering claims in one process.

The preclusive effect in the case where the necessary counterclaim has not been filed arises not from the claim exhaustion by the judgement (*bar*), but from the action of a special estoppel – *estoppel by rule*. Its application is a sanction for the defendant's failure to fulfill his duty imposed on him by procedural rules, and not as a consequence of the substantive (and therefore objective) impact of the judicial act on the totality arising from one ground disputed rights and obligations of the parties. *Estoppel by rule* – estoppel by virtue of law (rules): this is rule 13(1)(a), the failure to comply with which is grounds for application preclusive sanctions.

The absence of such provisions in Russian procedural legislation does not mean that the need for timely filing of counterclaim is not recognized in judicial practice and doctrine. Thus, the preamble of the Plenum Resolution of the Supreme Commercial Court of the Russian Federation № 57 of 23.07.2009 (17) emphasizes that by virtue of the

provisions of parts 2 and 3 of Article 41 of the AIC of the Russian Federation, «persons participating in the case *must faithfully use all procedural rights belonging to them, including timely filing counterclaim (*Article 132 Code), to raise objections. Malversation of procedural rights or failure to perform procedural duties by persons participating in the case entails for these persons the adverse consequences provided for by the Code». However, there is no indication of specific adverse consequences for the defendant in the explanations of the highest instance.

In the Russian procedural doctrine, the question of the possible borrowing of the institution of compulsory (necessary) counterclaim (compulsory counterclaim) has not been sufficiently studied. It is possible to note the work by A.Y. Kleymenov, who proposes to distinguish counterclaim by the nature of their relationship with the original to those that, being declared separately as independent, will not be able to endanger the decision stability to satisfy the original claim, and those whose resolution will entail the decision cancellation in the first case. The author rightly notes that the defendant's failure to bring a second type of counterclaim raises the question of the need to reassess the legislator's approach to the unconditional, indisputable and unrestricted defendant's right to bring a counterclaim or to establish for the defendant the adverse consequences of such a refusal (15, p. 111-112).

In their research Zh.I. Sedova and N.V. Zaitseva also note that, for example, claims for the recognition of a contract as invalid or not concluded in the presence of a decision on recovery under the contract that has entered into force constitute an malversation on the part of the defendant, since they violate the principle of legal certainty in material legal relations and complicate the judicial process in terms of the timing and number of processes (22, p.127-128).

In view of the foregoing, it is possible to support the thesis by A.Y. Kleymenov to introduce an injunction on the subsequent filing of an independent claim for the defendant who, before the adoption of the judicial act that ends the consideration of the case on the merits, did not submit a counterclaim against the plaintiff for consideration in conjunction with the original claim – in the case when the counterclaim satisfaction excludes in whole or in part the original claim satisfaction (15, p.120).

The above example of an attempt by the courts to apply estoppel in the form of a prohibition on the future of a separate claim by the defendant, which could be freely brought in the initial proceedings as a counter, clearly demonstrates the potential of estoppel referred to above. The court's appeal to procedural estoppel serves as a signal to

the legislator, that «litmus test» that makes it possible to identify the existence of a certain problem in the legal regulation field of the relevant procedural relations.

3. Conclusion

The question of how the procedural form should develop in the future in terms of borrowing the doctrine of estoppel remains open. However, the examples given in this article show that this is an effective tool for preventing the multiplication of processes by «splitting» individual claims in different litigation. The discussion of the existence of prerequisites for the legislative reception of such a kind of estoppel doctrine as res judicata touches upon the fundamental problems of procedural law - the relevance of domestic doctrines on the legal force of a judicial act and on the individualization of claims, as well as mechanisms for the implementation of the constitutional right to judicial protection (the right of access to a court) in respect of undeclared claims. In this regard, we repeat that new approaches cannot be implemented by the judicial system. Otherwise, the right to judicial protection would be limited by the courts only with reference to the principle of good faith, which was inconsistent with the basic constitutional provisions.

In conclusion, we note that our ideas about the boundaries and conditions for borrowing estoppel are still being formed, including through a critical analysis of references to this principle in law enforcement practice. In particular, E. Cook, who has devoted extensive research to this common law institution, rightly notes that «any attempt to study the principle of estoppel raises more questions than it answers» (5). Nevertheless, at this stage, the research task is not only to get an idea of the development of procedural estoppel and its current state, but also to identify the rational grain of this institution, its heuristic potential. Often, the problem identified through estoppel requires the study and additional adjustment of the current procedural law, which we tried to demonstrate in this article (5).

At the same time, it cannot be denied that the doctrine reception on the part of Russian law should be exclusively systemic and deliberate, and the principles of Russian civil proceedings are crucial for clarifying the question of this reception scope for the estoppel doctrine. This common law institution adoption in the legal system of a country belonging to the continental legal type should not be of a mechanical nature.

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