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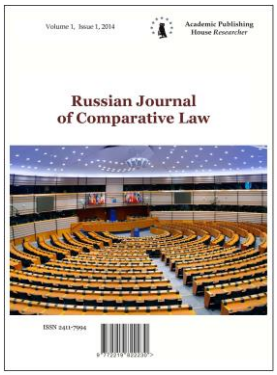

Articles and Statements

Audiovisual Work Format as an Object of Copyrights in Russian and Foreign Legal Practice

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Abstract

In the article the author describes audiovisual work format, discusses doctrinal points of view on the protection of the result of intellectual activity as an object of intellectual property rights. Then the author analyzes the judicial practice of the Russian Federation and foreign countries dealing with recognition audiovisual work format as object of copyrights. On the basis of the analysis, the author offers rightholders a number of recommendations for protecting their audiovisual work formats, as well as recommendations for characterizing audiovisual work format as a type of copyrighted work (dramatic work, script work, etc.). Finally, in view of the present judicial practice, the author concludes on potentiality for the audiovisual work format to gain legal protection as an independent type of work (object of copyrights).

Keywords: intellectual property, copyright law, nontraditional intellectual property, audiovisual work format, television program format, TV-format, intellectual rights protection, cross-border disputes, characterization of foreign legal concepts.

1. Introduction

Issues of legal protection of audiovisual work format (hereinafter also — TV-format, TV program format, format) are one of the tendencies of not only Russian (Sherstoboeva, 2011, Gorchakov, 2013, Gavrilov, 2017), but also the foreign (Meadow, 1970; Singh, 2010; Gottlieb, 2010) intellectual property law.

In west-european and north-american countries the “formatting” of television programs has been developing over the past 50 years; and in the early 90s of the last century it came to Russian television. It's no secret that a great deal of television programs — such as “The Last Hero” (Rus. “Последний герой”; originally named as “Survivor”), “Don’t Be Born Beautiful” (Rus. “Не родись красивой” which meaning is similar to the English proverb “Better be born lucky than rich”; originally named as “Yo soy Betty, la fea”), “The Voice” (Rus. “Голос”; originally named homonymous) etc. — which gained success at various times in Russia have been developed on the basis of foreign television formats.

Convenience related to minimization of financial, labor, information, etc. costs and production risks arising from the development of a new television program from scratch, is an obvious undeniable reason why popularity of audiovisual work format increase constantly in the

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global media industry. Concluding a license agreement on intellectual property rights to one's TV-format, a licensee acquires not a mere set of rights to some intellectual property which the format consists of (such as a script, characters, the most repetitive and/or original phrases, music, costume, make-up and scenery design, phonograms), but confidential information (business plans, guides on selection of participants and hosts, information on cameras and lighting equipment location, other technical and economic information necessary to create an audiovisual work), along with the licensor's end-to-end advice during the final television program production process within the licensee's territory (localization). Thus, provided that both parties make due efforts the success of the licensee's TV program is guaranteed.

Nevertheless, neither in doctrine, nor in judicial practice there is no unity in understanding the essence of format audiovisual work, as well as how and whether the result of intellectual activity must be legally recognized as an object of intellectual property. The issue also remains open at both national legislative and international legal acts levels (Kuznecov, 2016).

The article is an attempt to synthesise and analyse Russian and foreign judicial practice on granting legal protection to audiovisual work format as an independent object of copyrights. On the basis of the obtained results, the author proposes practical recommendations on some ways of protection of audiovisual work format as an object of copyrights, and on characterizing audiovisual work format as a type of copyrighted work.

2. Materials and methods

The study is based on the following materials: international treaties on intellectual property; acts of international organizations specializing at protecting audiovisual work format; acts of foreign legislation and acts of judicial practice of foreign countries (in particular of Australia, Belgium, Brazil, New Zealand, Canada, etc.) on cross-border intellectual property relations; Russian legislation and judicial practice on cross-border intellectual property relations.

Performing the research, the whole spectrum of general scientific methods usual for private law disciplines was used. Moreover, such private scientific methods as technical and comparative methods were used in the work.

3. Discussion

Up to date, in domestic and foreign legal community, there is no unity in understanding of nature and ways of legal protection of audiovisual work format.

For instance, par. 2 of Introduction to The Code of Conduct of the Format Recognition and Protection Association (FRAPA) (established in November 2014 and revised in March 2016) stated: "A format is a creative concept that finds itself on the dividing line of an idea and a tangible product… Every format is a unique creation in which its unique content and circumstances continually result in a new (legal) situation."

Professor Eh.P. Gavrilov defines the "program format" as a part of the form of its expression, which includes — using the popular Russian TV-program "The Field of Miracles" as an example — the form of the hall, the shape of the rotating table, the questions asked etc. (Gavrilov, 2016: 238), and the scriptual basis of the program consisting of a multiunit group of original elements that determine the creative solution of the program, including the original combination of these elements (Gavrilov, 2017).

In the author's opinion, the best doctrinal definition of audiovisual work format was suggested by A.V. Gorchakov: "Audiovisual work format is to be understood as a set of results of intellectual activity both protected and unprotected apart from the format as an intellectual property which are systematized as to be used to create an audiovisual work having a repeating (stable) feature and constitute a single complex object" (Gorchakov, 2013: 73).

For better understanding of the audiovisual work format phenomenon, it should be kept in mind that, as Neta-li E. Gottlieb notes, format can take various forms depending on the stage of TV-program developing.

At the first stage, format is completely equivalent to the idea (program idea) and presents an unexpressed general idea of an audiovisual work that is objectified on any medium.

At the second stage, the idea is presented in detail in writing, including a description of the visual elements of the show, rules, names, locations, casting recommendations, description of the plot, musical themes etc. Thus, it turns out "paper format" or the first version of the "production bible."

At the third stage, a set of technical, production elements (music, design of scenery, computer programs, characteristics of participants and hosts, etc.) and business knowledge is added to the "bible" — as a result a "program format" is created.

At the fourth, and final, stage, finished episodes of the program created on the basis of the "program format" are released (airing the episodes) (Gottlieb, 2010: 3-4). The similar classification of the stages is proposed by A.V. Gorchakov (Gorchakov, 2013: 65-73).

Thus, audiovisual work format can be defined as a unique set of sustainable TV show elements, on the basis of which enables one to produce separate series of audiovisual works in any country of the world with regard to national (local) features of a particular region. As such, the named elements can be both protected and unprotected as intellectual property.

As for the position which audiovisual work format could potentially take among objects of intellectual property rights (Biryukov, 2017), if recognized as such, logically, the answer to this question is rather equivocal. Up to date, two points of view can be distinguished. The adherers of the first — and the dominant — one propose to protect audiovisual work format as an object of copyrights (Meadow, 1970; Singh, 2010; Gottlieb, 2010). The adherers of the second point of view tend to believe that modern branches of intellectual property law (copyright, allied rights, and industrial property law) can't grant audiovisual work format adequate legal protection in view of its specifics. For audiovisual work format a special regime at the junction of copyright and industrial property rights is to be developed (Sherstoboeva, 2011; Gorchakov, 2013; Ananeva, 2017); consequently, format must be classified as an atypical intellectual property.

Sharing the second of the mentioned positions, but realizing lack of its influence on the practice, hereinafter the author proceeds on the assumption of audiovisual work format is an object of copyrights.

Recognizing format as an object of copyrights, is not a perfect decision. However, over the past thirty years, a wide range of judicial decisions supporting the idea has been formed. The court decisions analysis will undoubtedly enrich present knowledge on audiovisual work and will help in developing better regulation.

First of all, the reasons why the judicial practice has formed in such a way lie in that often in format disputes plaintiffs claim for their copyrights in format violation. Secondly, courts of some jurisdiction (Spain) support the plaintiffs position and hold for them and, if not, always accurately motivate the judgements in great detail. Thus, gradually a number of customary requirements have been developed meeting with which "promises" authors and other format rightholders obtaining a significant advantage when a dispute arises.

The first one of such requirements became the developing of the most detailed production "bible" in which the courts perceive a form of the television format expression. Recalling Gottlieb's four TV program production stages and taking reason as guide, one can state that a "bible" exists in every TV program in one form or another. A reasoned exposition of the concept and evaluation of its economic viability are vital for a format creators to justify for the project's profitability and to receive funding to put out the "paper format" (second stage) or "program format." However, for getting copyright the existence of a production "bible" only is not enough — its quality plays a leading role.

In the very first TV format case — "Green v. Broadcasting Corporation of New Zealand" (Green, 1989) — heard in New Zealand in 1989, the plaintiff failed to submit the production "bible" before the court. Instead, the producer and host of the popular at the time British show "Opportunity Knocks," Hugh Green, acting on plaintiff's the side, presented his script of the television program and referred to various similarities between his program and the defendant's homonymous one produced by the Broadcasting Corporation of New Zealand. Similarities encompass, among other things, the use of the same catch phrases and "clapometer" to determine the audience's reaction to the participants' performances. Nevertheless, the court did not find enough unity of the elements which Green indicated to grant legal protection to the "dramatic format" of. The court pointed out it is the difficult to separate certain sustainable and recurring features from other mutable elements and refused to protect it stating, that since copyright creates a rightholder's monopoly "there must be certainty in the subject matter of such monopoly in order

to avoid injustice to the rest of the world." In Green case there was no certainty in the subject of monopoly. Instead, ideas the defendant borrowed from the script, are not protected by copyright as widely recognized all over the world. Moreover, the court considered that a dramatic work must be of sufficient unity to be performed, but features constituting in the plaintiff's opinion the "format" do not meet the given condition.

Unlike the Green case in the New Zealand case "Wilson v. Broadcasting Corporation of New Zealand" (Wilson, 1989) presented before the court that same year, the children's audiovisual work "The Kiwi Kids" format created by the plaintiff under the auspices of the local children's charity fund about children with developmental features struggling against dark forces was written out. The court recognized nine and a half pages descripting the show's concept accompanied with images of characters and some scenes, as well as 57 pages of the project feasibility study a dramatic work which distinctiveness and original ideas remained in the defendant's animation program.

The need to disclose the TV-program concept in the production "bible" as complete, as it is possible was confirmed by the court "Cummings v. Canwest Global Broadcasting Inc." (Cummings, 2005). Refusing to protect a plaintiff's TV program "Dreams Come True" and stating the lack of violation in the defendant's actions, i.e. in creating and broadcasting television series "Popstars," the court of Quebec (Canada) pointed out the plaintiff's "bible" wasn't elaborated enough and so did not match with the originality criterion. Supporting the position of the lower court, the Quebec Court of Appeal added that the plaintiff's production "bible" looked more like a skeleton of an idea than the idea itself, and to obtain protection the plaintiff had had to add the skeleton with "flash," which would have been protected by copyright law (Singh, 2011: 24-25).

Then the courts moved to clarifying a production "bible" content and characteristics of audiovisual work format it must possess to obtain copyright protection. "Castaway Television Productions Ltd & Planet 24 Productions Ltd v. Endemol Entertainment & Jon De Mol Productions" (Castaway, Planet 24, 1999) dealt with the rights to the two most successful television formats of the early 21st century — "Survivor" produced by the British company Castaway Television Productions, and "Big Brother" produced by Endemol Entertainment. Rights to "Survivor" were successfully provided for localization around the world, including in Denmark, where the local version was named "Survive!" According to the plaintiffs, Endemol Entertainment copied the localized version and created the "Big Brother" program on its basis. Furthermore, to prove the format was copyrightable the plaintiffs claimed it was a unique combination of 12 specific elements had to be repeated in all local versions. The Netherlands court concluded the combination was indeed unique and specific enough to be considered original. Moreover, the format was described in the production "bible" in detail, so it could be recognized a work and gain copyright protection. Nevertheless, the court found no violations in the Endemol Entertainment actions.

Thus, the first time the essence of originality (or, according to Meadow, novelty) of copyrighted audiovisual work formats was established: the presence of a set of elements combined unique enough to the combination meet originality under the lex fori. In "Castaway Television Productions Ltd & Planet 24 Productions Ltd v. Endemol Entertainment & Jon De Mol Productions" the unprotected elements was discussed, but it seems doubtful the unprotected elements undermined copyrightability of the television format as a single object.

In the Spanish case "Maradentro Producciones S.L. v. Sogecable, S.A." (Maradentro, 2009), the plaintiff was denied copyright protection of his television format due to insufficient detailing of the latter. However, the value of this case lies in the court's position on audiovisual work format copyrightability. The court stated he formats are subject to copyright protection as far as:

1. copyright protects drawings, plans, models, mock-ups and sketches;
2. copyright protects scripts and storylines;
3. if the format can be compared to a script or a storyline then it must be protected as well;
4. in order for a format to be protected there must be a qualitative leap from a mere general concept, in a detailed and formally structured way, resulting in a creation of some complexity.

In a number of cases, courts denied to recognize TV formats copyrightable due to the lack of creative or intellectual contributions of their authors. For instance, in "K. Verbraeken v. VRT & BVBA De Filistijnen" (Verbraeken, 2008) the Belgian court refused to satisfy the claim because plaintiff's television format consisted of too generalized descriptions; the court qualified the lack of "intellectual effort of the author." The court stated: in order to obtain copyright protection, it must be apparent from the "bible" what exactly the actual episode of the program will look like.

In another Belgian case, due to non-compliance with the criterion of originality an audiovisual work format was even declared standard. Refusing to plaintiffs' claims, the court ruled that a mere description of some elements of a program or a television format put in writing is not a sufficient proof of the plaintiffs' intellectual efforts, and therefore, they have no copyrights in the format (BVBA T. & J.D.B., 2008). Consequently according to the Belgian courts, an audiovisual work format must, among other things, also meet the requirement of author's creative contribution.

The Australian District Court refers to the same requirement ruling that there was no infringement in "Nine Films & Television Pty Ltd v. Russia. Ninox Television Ltd:" [there is no copyright infringement, if. — AA] "someone independently creates a program without copying or where there is no substantial reproduction, or similarity to the material in which concepts are embodied" (Nine & Television, 2005).

In sum, the forequoted judgements demonstrate judicial attempts to interpret audiovisual work format falling under the universally received criteria for works of authorship: tangible form of expression, originality, author's personal creative contribution (Lutkova, 2017: 38-81; Biriukov, 2017: 34-36). However, the full-scale copyright protection is not exhausted with its mere declaration — it is also vital to define proper copyright infringement criteria to the very intellectual property. In a number of cases, having agreed that the format is a work courts refused to recognize the defendant as an infringer, and the defendant's format or program as a copy, because they were not sure that the similarities between the comparison objects were caused by copying, but by the single source of authors' inspiration. Let us consider the motives governing courts of various states, which make them refuse to establish one's format rights infringement.

In 1990 "Preston v. 20th Century Fox Canada Ltd" (Preston, 1990) dispute was solved in Canada. The Canadian court became first to apply the criterion of "substantial similarity" and established a list of conditions hereto. The case was initiated by an author of a literary work "Space Pet" who filed a lawsuit against 20th Century Fox Canada Ltd, believing that the ewoks from the movie "Star Wars. Return of the Jedi" are similar to the two kinds of creatures from his work (ewoks and olaks). The court found similarities in some details of the ewoks description, but a reasonable person would not notice a substantial similarity between the works of the parties. As explained by the court, a substantial similarity has to be proved, first of all, with the quality of the borrowed elements — not by their quantity — and it is necessary to take into account plots of comparison objects, themes, dialogues, moods, settings, temps, characters and sequences of events.

It was the "substantial similarity" criterion to be referred to by a court in the Canadian case "Hutton v. Canadian Broadcasting Corporation" (Hutton, 1992) dealt with comparing two nightly musical charts. The court decided that the programs in question have only genre similarities, as both teams of developers were inspired by charts of the fifties of the last century. However, the message and the structure of the programs differ, which affects the perception of their audience.

In the above dispute between rightholders in "Survive!" and "Big Brother" television formats, the Netherlands court, having recognized the plaintiff's format consisted of a unique combination of 12 elements as copyrightable one, nonetheless refused to recognize the defendant had infringed the plaintiff's rights. Later during the Danish proceedings justifying the same position, the appellate court concluded: "A format consists of a combination of unprotected elements... An infringement can only be involved if a similar selection of several of these elements have been copied in an identifiable way. If all the elements have been copied, there is no doubt that copyright infringement is involved. If only one (unprotected) element has been copied, the situation is also clear: in that case no infringement is involved" (Singh, 2011: 18).

The above opinion of the Danish Court can be illustrated by the Brazilian case "TV Globo & Endemol Entertainment v. TV SBT" (TV Globo & Endemol, 2004), where the "Big Brother" rightholders acted as plaintiffs. Initially, the plaintiffs and the defendants negotiated a license agreement, but the defendant refused to sign it, and after a while released a program called "Casa dos Artistas" ("Artist's House") copying some of the "Big Brother" television format elements. In this case, the court find out a rough and poorly disguised copycatting, which jumps out from the first minute of the defendant's TV program "with meticulous description, not only of the atmosphere in which the people will live for a certain period of time but also the places where cameras are positioned" (Singh, 2011: 23).

Another dispute over the localization of the "Survivor" took place in the United States. And again having satisfied the plaintiffs' action for declaration of copyrights in their audiovisual work format the court ruled there had been no violation, as it considered the results of the intellectual activities of the parties "substantially different in concept and feel" (Survivor Productions & CBS, 2003).

It is logical that in order decide the question on substantial similarity and on similarity in concept and feel a court should join art domain experts. However, it did not help Gestmusic Endemol S.A. to defend the rights in its television format "Your Face Sounds Familiar" during the trial against the Channel One took place under the Russian jurisdiction.

The background of the case "Gestmusic Endemol S.A. & VaitT Media v. Channel One" (Endemol, 2015) (hereinafter — "Endemol v. Channel One") is as follows. A license agreement was concluded between Gestmusic Endemol S.A. (Plaintiff 1) and Channel One (Defendant) under which Plaintiff 1 transferred to the Defendant an exclusive right to create one season of a series named "Exactly the same" (Rus. "Точь-в-точь") on the basis of the "Your Face Sounds Familiar" format. "Your Face Sounds Familiar" was created in 2011 in Spain and expressed in the production "bible." After Plaintiff 1 performed the agreement, nonetheless it set about producing the second season. At the time, exclusive rights to the TV format "Your Face Sounds Familiar" had been already transferred to VaitT Media (Plaintiff 2) via new licensing agreement on developing a series named "As like as two peas" (Rus. "Один в один"). Thus, in the opinion of both Plaintiffs, the exclusive rights of the Plaintiff 1 in the format and the exclusive rights of the Plaintiff 2 in the audiovisual work "As like as two peas" were infringed. The lowest court equated the format to ideas, concepts, principles, methods, processes that do not relate to creativity, but only describe the technology of production, and decided on lack of violation in the Defendant's conduct. The above was confirmed by higher courts, including the Supreme Court of the Russian Federation.

A detailed analysis of the "Endemol v. Channel One" was conducted by Eh.P. Gavrilov in the article "Audiovisual work 'format' and some matters of intellectual property law." The author proposes several valuable comments, however they need to be explained.

Eh.P. Gavrilov rightly notes that if one recognizes the production "bible" of "Your Face Sounds Familiar" as a literary work, then this work is copyrightable within Russia, since in 2011 both the Russian Federation and Spain were and still are participants of Berne Convention for the Protection of Literary and Artistic Works dated September 9, 1886 (hereinafter — the Berne Convention). In the case at issue, the "bible" is an unpromulgated literary work, as in sense of par. 1 Art. 1268 of the Civil Code of the Russian Federation it was not lawfully (by the author or due to the author's consent) opened to the public by means of publication, public show, public performance, broadcast or cable or in any other manner. Then, Eh.P. Gavrilov moves to the features of circumstance in proof inherent to unpromulgated works copyright infringement. While for promulgated works the presumption of the infringer's knowledge on its existence and of its copying by the infringer prevails, for unpromulgated ones there is an opposit presumption. Hence, the burden of proving that the alleged infringer had an access to the work lies with the rightholder. Only then will the presumption of copying take effect. At the same time, Eh.P. Gavrilov associates the Plaintiffs' loss of the case with the latter failed to prove the Defendant's access to the "bible" and his familiarization with it (Gavrilov, 2017).

In the author's opinion, it is necessary to object to the both Eh.P. Gavrilov's position and the court's one by clarifying them slightly. In accordance with the media custom, a license agreement on transfer of exclusive rights in an audiovisual work format characterizes by a number of features. Such an agreement is mixed: its significant part deals with scope and manner of consulting services the licensor is to render the licensee; a scope of the services varies from contract to contract. In particular, the basic and expanded provisions on the scope of the services are distinguished. It is assignation a production "bible" to the licensee which a basic, minimal scope of the services consists of — that means its inherent to any license agreement of such a type. Extended provisions may include, among other things, joint production of the pilot episode of the program by the parties, localizing, visiting by flying producers on schedule, participating a licensor' advisors in the production, master classes of the original television program producers etc. The extended, maximally developed provisions is an advantage for the both parties: as the licensee receives invaluable knowledge and skills, and guarantees a localized version of the TV program will be produced at least equal to the original one, the licensor excludes licensee's errors related to a lack of experience, proper technical equipment etc. that will not only lead to unpopularity of the

TV program in a single market, but also will bear a tangible blow to the licensor's reputation as an initial rightholder. Thus, Channel One was for sure familiarized about the existence of an unpromulgated literary work in the form of the production "bible" of the audiovisual work of the "Your Face Sounds Familiar" format. Assuming the converse is impossible, as the Defendant's acquaintance with the "bible" follows directly from the fact the licensing agreement between the parties was concluded. However, it should be agreed that the Plaintiff 1 should have additionally mentioned this in the claim or during a presentation of the case, and also submitted a relevant evidence.

E.P. Gavrilov agrees with the Plaintiffs' statement on the individualized sustainable elements of the television format repeated in each episode and which make the program recognizable should gain copyright protection, if they are original themselves, or if the set of them is original. Unauthorized use of such a protectable format constitutes a copyright infringement.

Thus, E.P. Gavrilov proposes a number of legal findings had to contain, amongst others, the fact at issue in "Endemol v. Channel One", and the burden of proof of which lay on the plaintiffs. The legal findings are:

- individualizing a certain set of elements, repeated in separate episodes of the TV program;
- use of the set of elements by the Defendant;
- originality of the elements themselves, or the set of the elements used by the Defendant (Gavrilov, 2017).

However, the Plaintiffs did not proved the above, so the courts found in favor of the Defendant.

The last thing to be clarified to gain the aims of the research is the possibility of protecting audiovisual work format as a dramatic work. Previously, four litigations were considered where the plaintiffs claimed for their television formats were a dramatic work in accordance with their national law or in accordance with the lex fori (Green, 1989, Hutton, 1992) — that is, in accordance with the Australian, New Zealand and Canadian jurisdictions. Analyzing the definitions given in the copyright laws of these states, we do not find any significant differences between understandings a dramatic work in Australia and New Zealand. Both laws include in the scope of the concept under consideration choreographic works, pantomimes, and film scripts (Australian Copyright Act, 1968; Copyright Act of New Zealand, 1994). It can be assumed that such a unity is rooted in close geographic location of the countries and in close relationship between them. The Canadian Copyright Act is one to stand out, as par. 2 Art. 2 of which fixes the following concept of a dramatic work:

«(a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise;

(b) any cinematographic work; and

(c) any compilation of dramatic works" (Canadian Copyright Act, 1985).

Consequently, under the Canadian Law, a dramatic work encompasses, in addition to a choreographic work and a pantomime, declamations, as well as compilations of several dramatic works. As to film scripts, in Canada they are not referred to as dramatic works, but films as a whole are.

Theoretically, if one provides the court with sufficient evidence that a television format or its "bible" are a script of series, the protection format as a dramatic work is possible in Australia and New Zealand, which is confirmed, in particular, by "Wilson v. Broadcasting Corporation of New Zealand." However, the opposite we see in Canada: although, in "Hutton v. Canadian Broadcasting Corporation," the plaintiff managed to register his format as a dramatic work, the court set the record straight and the plaintiff's television program was not recognized as a dramatic work.

Australia, New Zealand, and Canada, as well as other jurisdictions where the above disputes were resolved (including the Russian Federation), participate in the Berne Convention. In Article 2(1) of the Berne Convention of 1886, among other examples of "literary and artistic works," dramatic works are also named, but there is no definition hereto, hence, it is national legislators to interpret it.

The Russian Civil Code does not contain a definition of a dramatic work, too, as well as definitions of other results of intellectual activity listed in par. 1 Art. 1259. Nevertheless, in the Russian doctrine there is an opinion that dramatic works differ from, for example, literary works with the purpose of its creation — i.e. for theatrical production (Trahtengerc, 2009: 151-152).

That is, in accordance with the Russian legislation it is impossible to recognize an audiovisual work format as a dramatic work. Nonetheless, the Russian legislation contains a script work which is close to a dramatic one. The script work which can be used not only for creating theatrical productions, but also to create audiovisual works. G.B. Yumadilova defines a script work as "an object of copyrights created as a result of creative activity, which is a detailed description of actions, lines, sceneries and underlying the creation of a future theatrical or cinematographic work" (Yumadilova, 2016: 84-85). A.A. Klishina and V.L. Entin add that the script work is protected by copyright regardless of how fully it reflects the future work [theatrical or audiovisual. — AA], whether it is expressed in a brief form (synopsis), in a pre-stage form (literary scenario) or in an expanded form (director's script) (Abova, 2011: 264). Therefore, in proper accompanying conditions, an audiovisual work format can be judicially recognized as a scripted work, however, due to different qualitative value of the intellectual properties in issue, it will hardly satisfy the rightholders.

4. Results

The study illustrates legal protection of an audiovisual work format as an object of copyrights feasibility in Russia and foreign countries. The feasibility depends on meeting of a particular television format with the requirements of national legislation for works of authorship.

It is possible to propose to rightholders a number of recommendations for protecting their audiovisual work formats.

First and foremost, a television format must meet the criteria of a work protectability, that is: be expressed in any tangible medium (i.e. in a production "bible"), be original, be a result of personal creative efforts of an author or a collective of authors. A "bible" is to describe the essence of the future television program in as much detail as possible, to individualize the essential elements of the television format clearly, to demonstrate the elements' unity, as well as originality of each element itself, or a combination of them. Proving there is a format rights infringement, it is vitally to keep in mind that the production "bible" can be recognized as an unpromulgated work, and therefore, in case of a dispute it is necessary to prove the fact of an alleged violator's access to the "bible." To identify copying, it is better to call on an expert for evaluating similarity/difference between the following elements of the work's form recognized in the Russian doctrine: language, artistic images, sequence of events, characters features, "logical chains," etc. (Gavrilov, 2016: 228; Ionas, 1972) In courts of the United States, Canada and Brazil, one may refer to similarity/difference in themes and mood of an original work and an alleged copy, as well as in feel the comparison objects cause in the target audience.

Depending on form of the television format presentation and lex loci protectionis, courts qualify the intellectual property as a dramatic work (Australia, New Zealand), works of literature (Canada), a television program (Canada), a compillation (Netherlands, Denmark), a separate independent type of work (USA, Brazil, Russia). For each case and depending on the requirements of the particular legislation, it is advisable to decide on weather a television format is a promulgated or an unpromulgated work.

5. Conclusion

Thus, audiovisual work format is a new kind of intellectual property result underlying the global media market. Arguing on the ways of television formats legal protecting, legal science and practice agree with such protection necessity. Finding specific ways of protection that meet with TV format features is a task of subsequent researches.

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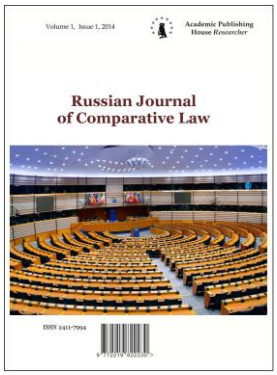

The Influence of the International Soft Law on the Internal Iegislator. The Big Leap in the Dark of the International Contract's Law in Paraguay

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Abstract

Paraguay opened himself to international exchanges with the creation of the MERCOSUR. After 20 years, it was necessary to Paraguay to modernize its legislation of private international law of contracts because it left no place for the autonomy of the will. To that purpose it took on board the Principles of The Hague relative to the international commercial contracts, a kind of soft law proposed to States wishing to reform their national law. These Principles authorize the parties to choose the applicable law of their contract, included a non-State law, solution rejected by numerous States. The paraguayan legislator also incorporated the liberal rules of the Inter-American Convention of Mexico City, which allows the judges, in the silence of the parties, to apply the law which presents the closest connections with the contract. It remains however to know how the judge will select the applicable law, knowing that the paraguayan legislator allows him to implement a non-State law.

Keywords: autonomy of the will, conflict of laws, Convention of mexico city, international contracts, mandatory rules, non-state law, Paraguay; principles of the Hague, private international law, proper law of the contract.

1. Introduction

For 20 years international business and investisments have been growing in Paraguay. So the authorities of this country were aware of the importance to have laws adapted to international exchanges to garantize security and rentability of the international transactions. They renovated the legislation about the law applicable to international contracts. Now Paraguay is the first country in the world to use the Principles on Choice of Law in International Commercial Contracts, approvided by the Conference of The Hague on 19th March, 2015. In this occasion, the paraguayan law was also put in accordance with the Inter-American Convention on the law applicable to the contractual obligations (signed in Mexico City on 17th March, 1994), known for its modernity.

This normative boil was beause the recent openness to trade in Paraguay, closed for a long time in the cross-border exchanges. After Declaration of Indépendance in 1813, Francia who led the country until 1840, had indeed set up a strong protectionism to favor the local economy. In this way, the country was isolated from the outside world. As historians note, «Francia led the foundations for a strong and interventionist State. Watching to protect itself against international flows of goods which could weaken its own production, Paraguay established a rigorous protectionism» (Le Monde diplomatique, 2014). When Francia died, Carlos Antonio Lopez who followed him, opened the borders to import expertise and modern equipment (telegraph lines,

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railroads, etc.); but the commercial balance of the country remained positive, that the other countrys of Latine America were jalous and supported by the Great Britain (which desapproved Paraguay to refuse the rules of the free exchange) they waged war to it. This war, said «riple Alliance War» because of the Treaty with the same name, signed on 1st May, 1865, between Brazil, Argentina and Uruguay, is having a devastating effect on the country's economy and that's why Paraguay had to join in the global economic system. But a second war («Chaco's war»: 1932-1935) against Bolivia stopped this movment. The coming to power of the Generals taken out glorious of this war changed it nothing, more than the coup d'etat of General Alfredo Stroessner in 1954. The country remained so closed to the outside world until 1989, date of the overthrowing this dictator (under the pressure of the United States). Free elections were then organized and it was at this moment that the new Constitution, adopted in 1992, asserted, in its Introduction, that Paraguay «is an integral part of the international community», encouraging by the development of the cross-border exchanges, since the creation of the MERCOSUR (Common Market of the South). Indeed, from 1991 Paraguay participated in its creation, as permanent member.

Despite the recent impact of the exchanges' globalisation on its economy, Paraguay reacted fastly on legislative plan, supported by the doctrine convainced by the crucial play of the principle of the autonomy of the will. Especially Dr. José Antonio Moreno Rodriguez, who participed to the development of The Hague Principles, was a decisive factor for the legislator of his country. Now, private international law is not any more considered as a « law for aristocrats, for elitist minorities, which could have real international life» (Di Martino, 2009), but as an instrument to impose Paraguay in the global trade. In fact, its legislation is now the most liberal and the most modern of the world for the international contract's law, because the adoption of the principle of the autonomy of the will, as designed by The Hague Principles and because the recognition of the proper law of the contract following the example of Mexico City's Convention.

2. Materials and methods

When it comes to the materials and sources, both Paraguayan domestic (Constitution, laws and sentences of the Supreme Court) and international regulations in force in Paraguay have been used, as well as the concluded international agreements and conventions and international soft law coming from the Conference of The Hague, together with relevant scientific papers and academic books, and databases. In this paper, the formal-legal method, the comparative method and the method of text analysis have been used.

3. Discussion – part. 1

The adoption of the principle of the autonomy of the will coming from the Principles of The Hague

Paraguay's will to adopt rules transposing The Hague Principles is clear in the preparatory debates of the Law № 5393, adopted in January 2015. Even if the motivations were various, all explain the opening to non-State law.

Two main reasons are at the origine of this ambitious reform: at first, the previous rules about international contracts' law were considered archaic; then, the participation of the paraguayan doctrine in the works of the Conference of The Hague and UNIDROIT allowed to introduce new ideas into this country, in correlation with the concern to attract new investors.

The terms are never rather strong to describe the law system which was up applicable until then : «dilapidated», «anachronistic», «antique», «archaic», etc. Indeed a big part of the rules of the paraguayan Civil Code, among which those concerning the international contracts, are inspired by old texts. Nevertheless this Code dates back only to 1987, substituting for the one which had been imported by Argentina hundred years earlier. In spite of, the main sources of the rules of conflict in contracts remained the Treaties of Montevideo of 1889 and 1940.

In 1888-1889, the conflict of law's rules between States of South America were standardized by the Congress which took place in Montevideo (Uruguay). 8 Treaties were adopted, all ratified by Paraguay (but also by Argentina, Bolivia, Peru and Uruguay).

The rule about the law applicable to cross-border contracts is in the Treaty on international civil law (1889), in the Title X (about legal acts); it designates the place of the execution of the contract for the main connexion (art. 32-39). Despite intensive discussions in the Civil law's Commission of the Congress, the Treaty didn't adopt the faculty for the contracting parties to

choose the applicable law because the majority of the congress participants were afraid that, by this way, the will is placed above the law. But this absence of consecration of the law of autonomy was quickly likened to a silence from which it was then easy to deduct, as the Argentine doctrine (Albornoz et al., 1986) made, as for lack of express ban, nothing prevented the parties from making a choice of law.

However, the question was not cut within States parties of this Treaty, no more than during the negotiation of the Treaty of Montevideo of 1940, which succeeded this of the 1889 in the relations between States today members of the MERCOSUR. Actually, although the latter proceeded to a dust removal from the original text, they did not leave the connexion of the contract to the place of its execution. But a new element, which seized the doctrine, came to confuse the issue: this version of the Treaty is endowed with an additional Protocol and the article 5 of this expresses that «the will of the parties can modify neither the jurisdiction nor the applicable law according to the respective Treaties, unless this law authorizes it». Certain authors saw an express reference in the national law of every State where the contract was executed. So, if the contract must be executed in Paraguay, it would have been up to the paraguayan law to say if the parties could opt for the law of another State.

With respect to the paraguayan law, in spite of the Preliminary Title of the Civil Code, which specifies that it can be broken the law only by another law (Art. 7), and in spite of the letter of its articles, which didn't leave place for the parties's autonomy according to the Montevideo's Treaties, it was the object of diverse interpretations. Two doctrinal currents were in confrontation: for some like R. Silva Alonso (Silva Alonso, 1995), member of the Commission for the codification in the origin of the Code of 1987, the principle of the autonomy of the will for international contracts would inevitably have been adopted through article 715 of the Civil Code which expresses that «the agreements made in contracts form the rule for the parties in which they have to submit themselves as to the law ». For this author, as long as the chosen law doesn't carry breach of the paraguayan public order and public morals, it would be absurd not to allow the parties to use their will to submit their contract to a foreign law. According to R. Ruiz Díaz Labrano (Ruiz Díaz Labrano, 2007, 2010), the principle of the autonomy of the will would also find a basis in article 669 of the Civil Code which specifies that the contractual freedom finds limit only in the imperative rules and in article 301 concerning the effects ot the contract.

But the opponents (Diaz Delgado, 2003; Pisano, 2009) of the conflicting autonomy (ie of the faculty for the parties to an international contract to choose the applicable law) answered that these texts were not conceived for the international contracts and that we could not give them a reach which they do not have : according to them they would dedicate only a material autonomy allowing the parties only to break the default rules of the paragayan law.

To get free of these currents, J.A. Moreno Rodriguez (Moreno Rodriguez, 2010) recommended, as for him, to draw the solution somewhere else that in the Civil Code; for him the conflicting autonomy could find its source directly in the Constitution, which accepts the existence of an international legal order (art. 145), as well as in the Law № 1879 of 2002, which resumed the model law UNCITRAL on *international arbitration*, which recognizes by the parties the faculty to say which law must be applied by the arbitrator.

The Supreme Court of Justice (civil and commercial division) finally adopted the principle of the autonomy of the will in an unique decision of March, 21st, 2013, resting on the most recent doctrine. But, in a civil law system such as that of Paraguay, an intervention of the legislator remained necessary. After the judge, it is the legislator, willing to offer a more liberal legislation to the investors, which was convinced.

The majority of the doctrine was in favor to the law of the autonomy pulling up to the extreme the interpretation of the existing texts. In the same purpose, it recommended the ratification of the Convention of Mexico City of 1994 (already signed by Paraguay), the article 7 of which recognizes to the contracting parties the faculty to choose the applicable law, just like the Convention of Rome concluded between the European States (19th June, 1980), which served as a model in its elaboration.

It is nevertheless another factor which is going to be decisive : the appointment, in March, 2010, by the Conference of The Hague, of Professor J. A. Moreno Rodriguez, among the experts asked to develop some «principles» about the law applicable to the international contracts. The Senator (Estigarriba Gutiérrez, Senate, Asuncion, 7th May, 2013) asked to present the bill to

the Senate so underlined that it «is important to recognize that the proposal was elaborated originally by a jurist of renamed, professor in our country, Doctor José Antonio Moreno Rodriguez, who based himself on the Principles of The Hague». This eminent jurist indeed drafted the first version of the bill and, allthough it underwent some modifications then, it was only to put the future paragayan law in accordance with the Convention of Mexico City when contracting parties emitted no choice of law.

Now, article 4 of the Paraguayan Law N 5393 of 2015 asserts expressly that «the contract is governed by the law chosen by the parties» (art. 4.1), that the parties can choose different laws to govern the various parts of their contracts as far as we can clearly distingish them (art. 4.2.b), that this choice can be done at any time and that it harms on no account the formal validity of the contract or the interests of third parties (art. 4.3), and finallly that no link is required between the chosen law and the parties or their contract (art. 4.4).

If at first sight, this law more seems to be inspired by the article 7 of the Convention of Mexico City, it overtakes it by admitting without ambigüité (Juenger, 1994) the choice of a non-State law.

The paraguayan Legislator opened the principle ot the autonomy of the will extremely by offering to the parties the possibility of choosing a right which was not generated by a State. According to article 5 of the Law N 5393, « a reference to law includes rules of law that are generally accepted on a non-State origin, as a neutral and balanced set of rules ». So, a liberal solution, unequalled besides, was confirmed. The conviction that the authority of the paraguayan law is not questioned by the choice of a non-State law and the admission of the «juridicity» of the latter contributed together to this U-turn.

The Principles of The Hague give to the parties the possibility to choose «rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise» (art. 3). However they establish only an instrument of soft law proposed to the States which reform their legislation. Consequently they can be taken back in whole or in part, serving only a source of inspiration.

By implementing these Principles, Paraguay was not forced to recognize the faculty of the contracting parties to choose a non-State law. As the European States which are connected with the state positivism (EU Regulation N 593/2008), it would have been able to content with offering them the possibility of choosing a state law, which is not the one appointed by the rule of conflict in the absence of choice. According to this monistic approach (according to which only the State may generate the law), which is the most spread in the world, the choice by the parties of a body of non-State rules must be analyzed as a simple «incorporation» to the contract, ie which it does not prejudge the applicable (state) law. Consequently, non-State rules choosen by the contracting parties are a substitute for the suppletive rules of the state law which governs the contract, and find their limit in the imperative rules of this one. For instance, if the applicable law is the one of the contract's place of the execution, the choice of non-State rules, would be only a demonstration of «the material autonomy» by which the parties can rule out the suppletive rules of the competent law. The imperative rules come to impose upon the will because there is no contract above the law.

This fear of the «lawless contract», which still supports the solutions of the conflict of laws in Europe today (Landö, Nielsen, 2008; Hahn, 2006), was exactly one of the bastions fought successfully by the paraguayan doctrine. This one indeed dedicated numerous works to demonstrate that the authority of the law is not more questioned when the parties are authorized to choose a non-State law that when they can elect a national law. Actually, this will always and inevitably finds a limit in «the most imperative» rules of the paraguayan law.

Unlike the theory of the incorporation, the imperative rules in cause are the ones of the seized judge, whom he considers as internationally imperative in the point not to be able to give up their application (and not the imperative rules of the internal law of the law objectively applicable to the contract). Professor Moreno Rodriguez (Moreno Rodriguez, 2010), defender of the legal pluralism, so showed how, in paraguayan law, certain rules had an imperativity bigger than others, which will be maintained at all costs.

For instance, the article 9 of the Law N 194 of 1993, relative to the contracts of agency, representation and distribution plans that «the parties (...) cannot give up in no way the rights which are recognized by them in the present law». In 2001, the constitutional chamber of the Supreme Court of Justice of Paraguay so imposed the protective rules contained in this law on the

agreement of the parties. More exactly, the Supreme Court pronounced in favour of the character of «mandatory rule» or «loi de police» (ie internationally imperative rule) of its article 10 which requires the parties to submit their dispute to the paraguayan courts when the execution of the contract of agency, representation or distribution took place – or should have taken place – on the paraguayan territory. The Supreme Court underlined that for the paraguayan legislator «the fact that the litigious question can be discussed in the place of execution of the contract constitutes a guarantee for the parties. Indeed it is not illogical that after the enactment of a law, the State wants to intervene in the contractual relationship considered by putting precise rules to which the parties have to adapt themselves».

The same article, which allows the arbitration when it is an internal dispute, also raised the question if it is possible to envisage an arbitration abroad with the risk that the arbitrator does not apply the paraguayan law. In the same logic, the constitutional chamber of the Supreme Court (1996), which had been seized with this question a few years earlier, considered that to guarantee the paraguayan law's enforcement, an arbitration could take place only in Paraguay.

So these decisions give an evidence of the international imperative character of the Law № 194 of 1993, which a choice of law would not allow to escape. In other words, even though the parties would appoint a foreign law to govern their contract of agency, representation or distribution, the paragayan law will find to enforce when the contract runs in Paraguay because in this case the paragayan judge (or the arbitrator whose his head office is situated in Paraguay) is inevitably competent by application of its article 10. And in this respect, no matter that the parties appointed a foreign law or a non-State law.

Besides, the Law N 5393 took back for itself this decision by excluding expressly contracts of franchise, agency and distribution, from its scope of application (art. 1). In a more general way, it limits the choice of the parties when there are mandatory rules of paragayan law. Indeed its article 17, §1, resumes article 11, §1, Principles of The Hague according to which a court can «apply mandatory rules of the for, whatever is beside the law chosen by the parties».

As for non-State rules susceptible to by applied by the paragayan judge, they must be «generally accepted as a set of neutral and balanced rules» (art. 5 of the Law N 5393), ie as being enough complete to solve a contractual dispute, from a representative source of diverse economic, political and legal points of view, and not favoring systematically one of the parties to the detriment of the other one. So the paragayan legislator resumes the definition given by the Principles of The Hague, while amputating it of the requirement that this set of rules is «accepted at the regional, supranational or international level». The fact remains that in its spirit, these rules should result neither from the contract itself, nor the general conditions of a contracting party, nor even of a set of specific clauses in a given business sector.

The sets of rules are aimed from then on such as the Principles of European law of the contracts developed by the Commission Ole Landö, the Draft Common Frame of References stemming from the work of the Commission von Bar and from the Group EU Acquis managed by Schulte-Nöltke, the Convention of Vienna on the international sale of goods (1980) all the times when it is not applicable according to its own rules, or still the Principles relative to the right of the international trade developed by UNIDROIT. According to J. A. Moreno Rodriguez (Moreno Rodriguez, 2010), who contributed to the elaboration of Principles of The Hague and drafted the first version of the paraguayan law, the coherence of the transnational right would be assured, indeed, by systematizations realized by certain private bodies as UNIDROIT, of whom he is a member.

It is what also explains why the author estimates that its «juridicity» is acquired, in particular resting on the texts about the international arbitration, including the paraguayan law. In 2002, following the example of its South American counterparts (for insance, Mexico in 1993), Paraguay indeed adopted a modern Law (№ 1879 on the arbitration and the mediation), taking back the Convention of New York for the recognition and the execution of the foreign arbitration sentences which it ratified in 1998, and the model law of the UNCITRAL on the international commercial arbitration (in its version of 1985). Yet all impose on the arbitrator to respect the autonomy of the will. In this respect, the article 28, § 1, of the model law UNCITRAL refers to the «legal rules», understood as including the lex mercatoria and the transnational law, and its 4th § still specifies that «in every case, the arbitration court (...) takes into account commercial practices applicable to the transaction». This rule was adopted as before by the article 32 of the Paraguayan Law of 2002.

And, although the latter does not say expressly that the arbitrator can apply the practices of the international trade or the UNIDROIT Principles to the international commercial contracts without the support of a national law, the paraguayan authors nevertheless saw there the implicit assertion of this possibility. From then on, leaning on the French jurisprudence, and specially on the decision «Valenciana» (1991) where the Court of Cassation asserted that the arbitrator, who rules in accordance with custom and practices of the international trade, rules in law, they pull argument to assert the juridicity of certain sets of non-State rules.

4. Results – part. 1

Thus it is not surprising, in this context, that the Law N 5393 adopts not only the principle of the autonomy of the will, but also the possibility of choosing a non-State law (without going to arbitration). It will however remain to say, in time, if the contracting parties will use this faculty and how the judge will face the difficulties which can rise because of the choice of a non-state law (deficiency, interpretation, etc.). For the moment, it is still too early. But it is necessary to hope that the paraguayan judge will have the opportunity to establish judge-made rules, contrary to what takes place, it seems, in the other Latin American countries having ratified the Convention of Mexico City. This one, often considered as a model for its opening at the non-State law, is also a model of liberalism, which Paraguay has just resumed when the contract does not contain a clause of electio juris.

Discussion – part 2

The adoption of the proper law of the contract coming from the Convention of Mexico City

In spite of its global brilliance with the doctrine, the Inter-American Convention of Mexico City, adopted on 17th March, 1994, by the 5th Conference of Private International law of the Organization of American States (OAS), was applicable only in two States when Paraguay decided to adopt a part of its rules. But among these States, all do not consider it directly applicable in their legal order (self-executing), preferring to adopt a law to resume the main part, as Paraguay has just made. From now on, for lack of choice of law by the parties, thus the paraguayan judge applies the flexible principles contained in this Convention.

The integration of an international Convention in the legal order of a State depends on its constitutional rules. Whereas in certain States a ratification of the instrument is enough so that it becomes immediately and directly applicable, in others after promulgation it can produce effect only if its rules are resumed by a law. This one transposes then the rules of the Convention and makes them effective towards the people subject to the national jurisdictions.

Although it is classically asserted that the Convention of Mexico City is applicable in Venezuela and in Mexico, the first one resumed only the spirit. In the same way, Paraguay has just incorporated the Convention into its legal system, but without having ratified it.

According to articles 26 and 27 of the Convention of Mexico City, «the present Convention is opened to the ratification» and «to the membership of any State after its coming into force", planned 30 days after the deposit of the second instrument of ratification. Mexico was the first State to have ratified it, with a law of November 27th, 1995. Further to its approval by Venezuela, the Convention came into effect on December 15th, 1996.

However, Venezuela did not make a directly applicable instrument because, according to its constitutional rules, a law of transposition was necessary. It is a general law of private international law that was adopted more than one year later, on 6th, August, 1998 and which came into effect on 6th, February, 1999. So between December, 1996, and February, 1999, the Convention was only in force, without the support of a law of transposition. Accordingly, its rules were considered as of « principles of private international law generally accepted », in the sense of the former article 8 of the Code of civil procedure, today substituted by the 1th article of the law of 1998 (Hernández-Bretón, 2013).

Concerning the international contracts, its rules introduce in reality only a synthesis of the solutions of the Inter-American Convention. As explains it an author of this country, E. Hernández-Bretón (Hernández-Bretón, 2008), if the Convention of Mexico City is the main source of Venezuelan law regarding international contracts, it remains that the text of the law is much more moderated than the Convention, whose fundamental principles were only reproduced.

For instance, contrary to the Convention (art. 11), the law does not authorize the judge to take into account internationally imperative rules of another State (art. 10) (Parra-Aranguren, 1999).

In Paraguay, « the international Treaties validly celebrated, approved by a law of the Congress, and whose the instruments of ratification were exchanged or deposited, are a part of the internal legal order according to the hierarchy determined by the article 137 » (Art. 131, Constitution). Thus the Convention of Mexico City could be directly applicable, after approval of the Congress then the ratification. No act of ratification was however deposited with the Organization of the Inter-American States (OAS) (http://www.oas.org/juridico/english/sigs/b-56.html).

In spite of, it is possible to assert that the Law N 5393 of 2015 is a «law of incorporation» of this Convention in the paraguayan legal order, in the fact that it resumes the principle of the proper law of the contract, just like the Venezuelan law. Moreover, Senator H. E. Estigarribia Giutiérrez said, in his Speech to introduce the bill to the Senate, that «to tell the truth, the Convention of Mexico City can be incorporated by way of a ratification or an adoption of a law which collects the spirit of the text, as it often arrived in Latin America. This [paraguayan] bill incorporated the virtues of the Convention of Mexico City». Actually, the paraguayan law reproduces almost literally its rules in the absence of choice of law.

Before the adoption of the law, Paraguay subjected systematically the international contracts to the law of the place of their execution as regards the question of their validity and their effects. Today, on the contrary, the law invites the paraguayan judge, according to the Convention of Mexico City, to implement a flexible criterion : that of the narrowest links with the contract. According to its article 11, «1. If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the State law with which has the closest ties. 2. The Court will take into account all objective and subjective elements of the contract to determine the State law with which it has the closest ties».

Resuming partially the article 9 of the Convention of Mexico City, the legislator so requires the judge, who has to identify the «proper law» of the contract, to make an individual appreciation, by paying attention to «objective and subjective elements» such as the currency of exchange, the writing language of the contract, the place of conclusion or execution. On the other hand, no reference is made, at the stage of the identification of the applicable law, in the «general principles of the international trade recognized by the international organizations» which the national judges should be able to take into account according to the Convention of Mexico City (art. 9). Thus the article 11 of the paraguayan law is not a simple copy of the article 9 of the Convention, because of the differences of interpretation (Muir Watt and B. Ancel, 2006) arisen from its writing as for the role of the general principles of the international trade which it is made reference. Actually, the writers of the law considered that as far as its article 5 specifies that by «law» it is necessary to hear «legal rule», it was not useful to call back in the article 11 that the judge can apply directly non-State rules if he considers that they are more appropriate and closer to the contract (Moreno Rodrigez, 2016).

Concerning the article 12 of the law, it specifies that «in the addition to the provisions in the foregoing articles, the guidelines, customs and principles of the international commercial law as well as the commercial usage and practices generally accepted shall apply to discharge the requirements of justice and equity in the particular case». This text resumes word for word the article 10 of the Convention, authorizing the paraguayan judge to implement these non-State sources every time he considers that their application allows to satisfy the justice and the equity. Thus the judge has a unprecedented latitude in this country to apply the non-State law even though the parties didn't ask for it because, in the same circumstances, the arbitrator couldn't according to the letter of the article 32 of the law N 1879 of 2002. In spite of, the doctrine underlines that the parties which didn't appoint the law shouldn't be surprised and should be satisfied with the application of a rule generally accepted in comparative law.

4. Results – part. 2

The doubt as for the regime of this non-State law in front of the judge was not totally raised : if the objective of this formula is to give to the judge the necessary tools to look for an equitable solution, we don't know if he can evict the State law and substitute these non-State sources to meet

the requirements of justice and equity, or if he can only complete it with these sources. It will thus be up to the paraguayan judge to say it.

In any case, we could regret this legislative choice because it conflicts with the principle of legal security nevertheless advocated by the promoters of the law to defend the consecration of the autonomy of the will. Indeed, if the autonomy of the will offers a flexibility which «does not threaten the predictability, but (...) reinforces it» because «the parties can know the applicable law about their controversy, without having to ask for judicial interpretations» (Arroyo, 1995), on the other hand, the principle of the proper law allows no predictability because everything depends on the judge's appreciation. Therefore, as long as the latter didn't pronounce, the solution remains uncertain, uncertainty aggravated by the multiplication of the possibilities which are granted to him: enforcement of a state law or of a non-State law (on the condition of being generally accepted as a set of neutral and balanced rules, according to the article 5 of the law); enforcement of a State law with the possibility to correction this with a non-State law for equity's reasons, etc.

However some authors will answer that this lack of predictability is the ransom of the modernism. It remains to be seen how the judge will manage this new prerogative for which he does not benefit even from an assumption such as the one that knew formerly the European judges with the Convention of Rome (Art. 4, §2: «(...) it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration») which widely inspired the Convention of Mexico City.

5. Conclusion

Innovation calls up always one time of adaptation, what doesn't seem to slow down the paraguayan legislator, whose project to modernize its rules of judicial mutual aid forms gradually. Actually, except in the mercosurian frame (Protocol, Buenos Aires, 5th August, 1994), the paraguayan law (Art. 3, Code of civil procedure) refuses any efficiency to the clauses about jugdes'comptence, a real anachronism for a State which wishes to attract new investors (Moreno Rodriguez, 2006). Because, even if a country is capable of making business and wealth, theses latters come only if the judicial obstacles were erased and a predictable frame was set up. That is why, behind the scenes, it is about ratify the Convention of The Hague on Choice of Court Agreements, of 30th June, 2005. Undoubtedly, Paraguay is unwilling to remain simple spectator of this economic world phenomenon!

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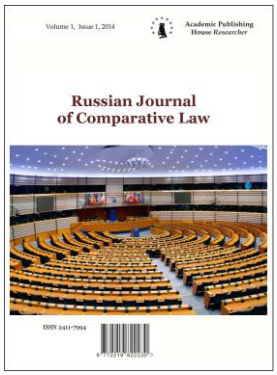

On Private International Law Regulation of Cross-Border Peripatetic Employment

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Abstract

The right to employment commonly considered as a privilege exclusive to individuals to dispose their capacity for work in the form they wish is the essential or fundamental unalienable individual right. In this quality this right is kept in all supreme laws of advanced states starting from the second half of the twentieth century making clear to all that the wage-earning labour is one of the most important phenomena produced by a social life to tie up members of different social groups. Thus it is enshrined in relevant legal forms (laws, codes, regulations etc.).

Being a product of legislation and forming logically complete bodies of rules to deal with labour as a particular social phenomenon, these forms evidence of a separate field of law (labour law) in national systems of law. With respect to this it can hardly be necessary to state that in line with other fields of law underlying modern systems of law much has been changed in labour law since the time when this right of employment was first introduced into national law forms in the nineteenth century as a fundamental individual right of those closely connected with a territory of a corresponding community. Now we may say that there is little or sometimes even no connection between domicile and place of employment, when individuals change locations for a better life by crossing borders of different sovereign states. This accordingly affects concepts underlying labour law in national systems of law with a corresponding effect to labour environment.

But what remains unchangeable is fundamental principles and rights at work to take appropriate measures in dealing with labour (nature, character and effect of this particular social phenomenon). These are universally accepted material law principles guiding and encouraging employees, employers and sovereign states around this increasingly interconnected world in accordance with a particular pattern. That is the balance of interests of capital and labour. The main idea is to prevent burdensome forms of work organisation in accordance with a general principle of our time advanced in most jurisdictions that the work should be adapted to the worker.

For this very reason, in this short article we would like to take an opportunity to address the issue as to whether in the age of sanctity of property and labour, nature and character of employment exert substantial influence on private international law regulation, on devices used by legislators in this particular sphere of regulation. These are directly applicable rules, conflict of law rules, uniform material law rules and international jurisdiction rules, which make up a separate field of law in national systems of law to deal with legal and jurisdictional conflicts of the time and place arising in a private law sphere. Here we would also like to uncover the employment status of an individual in private international law paying particular attention to expression, recognition and protection of labour rights exercised on a cross-border basis and make practicable proposals.

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This all in order to try to think of tomorrow as well as of today private international law and treat accordingly particular legal issues coming before it.

Keywords: cross-border peripatetic employment, mobile (transient) employees, public interest, legal and jurisdictional problems.

1. Introduction

It has always been held that the wage-earning labour makes a good deal for the most part of relevant communities encouraging national corporations, industries and economies to subsist, grow and prosper in the long run. In the private law sphere labour is viewed as origination of property, which right is reckoned to be of a particular value and importance for all nations around the world. For this very reason all states commonly maintain and protect such rights, which may be exercised by individuals in whichever socio-economic sphere they wish, ensuring maximum opportunities for employment.

Taking this into account the main end of this article is to throw some light on the nature, character and effect of peripatetic employment as a separate type of employment when considering it through the lenses of three-fold jurisprudence of private international law. That is the private law jurisprudence comprising the following substantial elements: public interest, governing law and procedural law. Being put in practice of regulation of private law relations closely connected with two or more sovereign states, this jurisprudence accordingly affects character and effect of this regulation. After the choice of appropriate court it rests on three main actions: finding (choosing); interpreting and applying proper law.

The reason is evident: cross-border peripatetic employment relying on foreign labour and capital with closely connected rights and duties is a very useful instrument in the hands of corporations doing business in different socio-economic spheres on a broad cross-jurisdictional basis. It unblocks operation of instrumentalities of commerce and promotes its flow in a safe and efficient way. And states should handle it very carefully if modern national industries so request. But when this instrument gets into the hands of lawyers when dealing with real, significant and good faith controversies arising between employees and employers on a cross-border basis it becomes exceedingly complicated and raises many doubts as to its legal effect for the parties concerned as well as home and host states.

2. Materials and methods

After years of fight now labour is both voluntary and remunerative depending to a large extent on skills and experience of those able, willing and seeking to work. It is limited by the general prohibition to work more than 8 hours per day without having rest and ensured against temporary or permanent loss of wage-earning powers in case of disablement and sickness.

This cannot be considered otherwise than the fundamental premise of healthy national economies. Besides, in advanced states with governments of laws rather than men, working class is mostly represented by intelligent operatives living and working in very comfortable conditions. In the very same way labour legislation anticipated by factory legislation in most advanced states, is generally not imposed from above. It is rather administered by all those to whom it is applied. These are individuals, otherwise known as those who work.

In these circumstances cross-border peripatetic employment cannot but be a matter of review with all the necessary care and anxiety so far as it is an increasingly large component of modern national economies to be dealt with by proper legal means being in the hands of states. For this very reason in the present paper it will be considered, explained and guided by the use of the method of the broad comparative analysis of national and foreign labour and private international law rules.

3. Discussion

3.1. On labour relations in private international law

It should always be noted that the world rests on a great number of legal systems guiding different types of a private law activity carried out by individuals in their sole quality or jointly with others (corporations, organizations, states as participants of commercial deals and transactions). This activity, its nature and effect are marked by the sign of territoriality. It is inherent to private law itself, which is strictly territorial.

When we speak of labour (Browne, 1890), it is sufficiently recognized that in legal theory and practice it may be viewed from the following three fundamental standpoints relevant to material effect of this particular legal and social phenomenon to immediate participants of this particular type of private law relations exercised inside a particular community (employees and employers) and a state, with which jurisdiction this labour is closely connected. That is a classical model of labour relations, in which wage-earning labour is the essence whereas place is a necessary premise of particular private law relations, which main function is to make national economy subsist, grow and prosper in the long run. For this reason, there is only one state, these relations are closely connected with, to guide them. That is the state where individuals permanently stay and work.

Hence, it means that among essential elements of a classical model of labour relations to be properly weighed by judges at the settlement of conflict of law problems we may distinguish common place for work and residence. But with territorial borders of states left open for individuals in their quality of employees or employers (when they act jointly) from around the world, this labour becomes detached from the place of residence (home state) and turns to be closely connected with other (host) states. For this very reason when this labour has effect on two or more sovereign states having regulatory interests in it, in labour disputes it is viewed through the prism of a separate field of law in national systems of law termed "private international law" dealing with two main problems. These are conflicts of laws and conflicts of jurisdictions.

To resolve them means to converge conflicting legitimate regulatory interests of distinct sovereign states by means of devices found to be acceptable for them: 1) directly applicable rules (or overriding mandatory provisions of material law); 2) conflict of law rules; 3) uniform material law rules; 4) rules on international jurisdiction. These are particular mandatory and default legal rules being in service of sovereign states when addressing under the heads of relevant legal institutes of private international law particularly important issues of the social life of relevant communities by way of directing or coordinating private law relations burdened with a foreign or international element.

We are speaking of allocation of essential elements of cross-border labour and other relations closely connected with them in the appropriate system of law and system of courts by operation of the following legal institutes: 1) private international law of persons; 2) private international law of things and 3) private international law of obligations, each giving preference to appropriate criteria (subjective, objective or those, which do not fall under these two categories but being of a particular value and importance in this particular sphere of regulation). To deal with it means to find exclusive connection of these relations with one particular state with its system of law and courts.

It is plain that in theory and practice much may be asked of any other private law relations and their role in steady and harmonious growth of relevant communities. But it is apparent that labour relations including those exercised on a cross-border basis are generally felt to be of great value and importance for efficient working of national economies around the world. The ground for this observation may be found in the very idea of communities, which subsistence, growth and prosperity to a large part rest on labour and property, which this labour produces.

For the evidence please refer to Art. 170 of Brazil's Constitution, 1998, in which it is given that "the economic order, founded on the appreciation of the value of human labor and free enterprise, is intended to assure everyone a dignified existence, according to the dictates of social justice, observing the following principles... II. private property, ... VIII. pursuit of full employment...". Labour and property - these are two closely connected and practically important social phenomena, currently relying on highly professional intellectual labour and modern technologies to be used for the benefit of national economies and markets.

Peripatetic labour is a separate type of wage-earning labour. To study cross-border peripatetic labour relations in a private international law sphere means to show a particular non-commercial and voluntary nature of these relations burdened with a strong element of internationality underlying them. That is an element, which presence in the structure of private law relations resting on foreign capital and labour (Howell, 1890), may be characterized as real, firm and stable. It tends to a national legal order distinct from that other elements of private law relations tend to and as a result causes legal and jurisdictional problems.

When we advert to these relations first we need to inquire into the nature of separate rights and duties of the parties (Kant, 1887). That is the issue that really matters in this particular field of national law. With reference to this, it can hardly be necessary to state that labour relations are

voluntary, mutually beneficial relations of the parties relying on personal services to be performed in employers' interests and in accordance with their instructions for a money consideration. As it comes from this definition three main attributes should be present in service relations of individuals to be called labour. These are 1) free will; 2) expectation of remuneration and 3) employees' involvement.

This means that where there is no will and no need to work as necessary elements of the employment personality of individuals, which is dynamic, as well as no freedom of terms and conditions of employment or where employers conceal the real purpose of services to be rendered, there is no place for voluntary mutually beneficial relations. It is coercion, which is currently prohibited by all sovereign states advancing the idea that the only ruler is law rather than men. As a result all and any agreements, bargains or arrangements (Williston, 1893), written and express, which have been made by individuals and corporations for a particular kind of work to be rendered in the interests of corporations for a money or any other consideration are considered null and void when there is no consent from employees to be bound by their terms and conditions. Therefore they do not have any effect for employees rather for employers.

This voluntary nature of private law relations exercises much influence on fundamental legal principles of their ruling (Fletcher, 1985: 1263), which may neither be overlooked nor underestimated. The reason is evident: they express the main idea of labour law, which becomes effective in relevant national law rules. Constituting a particularly important part of national labour law, these principles 1) exclude all and any type of forced labour and discrimination or unequal treatment mainly dealt with by discrimination law; 2) encourage considerable latitude in drafting terms and conditions of labour relations and 3) provide for termination of these relations whenever employees please.

With respect to this we would like to remind that slavery is one of the most abominable legal institutes of the Roman law that survived in national systems of law until very recent times. And there is always a risk to return to the use of forced labour, especially now when criminal business in whichever socio-economic sector to a large part relies on forced labour taking different forms. This in disregard of all efforts made by states and other communities to prevent and combat forced labour as the issue coming within purview of their particular interests, which in legal theory and practice are known as interests of public policy, public security and public health.

Apart from the subjective will, which right to be freely exercised is ensured and protected by sovereign states on a cross-border basis, there are two other attributes (expectation of remuneration and employees' involvement) characterizing labour relations. With respect to expectation of remuneration it should always be reminded that labour may never be considered apart from the capital as a separate very important social phenomenon. It has always been taken for granted that labour is the only means to survival for the most part of humanity and one of such means for the well-being of the rest. Whether or not there is any money consideration in each particular case that is the matter of fact. And that is obviously not the issue we would like to enter into further detail rather the one relevant to legal nature of this expectation.

We are speaking of the right to be paid for the work done in accordance with instructions of employers and in their interests. This right is clearly given, ensured and protected in all and any national law forms, making national and foreign individuals enter into a separate social group called consumers. That is the group making money, goods, services and technologies circulate.

As to the final attribute it should be said that taking into view a particular nature, essence and function of labour relations concentrated on the work and its effect, labour is inextricably linked with employees ability, willingness and seeking to work using their experience, skills and knowledge connected with employment personality in an inextricable manner.

Taking into view a particularly sensitive for states nature of these voluntary and mutually beneficial relations held on a cross-border nature it is time to have a look at ideas underlying reconciliation of their conflicting regulatory interests.

3.2. Particulars of private international law regulation of labour relations

In the private international law sphere public interest is a specific sovereign idea through keeping away from what is not amenable to a nature of a particular community with its labour, commodity, capital and other markets, makes it grow and prosper under particular circumstances. To further the aim to ensure public law interests underlying private law rights and interests of a people constituting a relevant community and thus make this community composed of different

social groups grow and prosper in the long run it employs specific legal rules. These are directly applicable material law rules, which for the substantial or material regulatory interests in private law relations preclude the very problem of conflicting sovereign interests of distinct states and thus relieve judges from the necessity to choose law applicable to cross-border disputes of the parties. They are directed and resolved in conformity with material law rules of the state closely and substantially connected with private law relations in dispute.

In line with this there is another very strong private international law idea. That is the idea of legal paternalism in the sphere of conflicting regulatory interests in private law issues of two or more sovereign states facing with the problem of conflicts of capital and labour. It rests on interests of equity and equality and holds an individual (his rights and interests) in the center of all valuations in all the matters of the form, substance and effect of private law relations.

When clothed in the form of distinct private international law rules combining state and contractual regulation of labor and other relations closely connected with them, this idea insists on that a home state of the individual should not remain silent when an international labour contract is drafted in a way to discriminate (misconstruction of the contract in favour of employers) and benefit from this. That is the case when an employee is considered as a means to attain a specific end of business dealing unfairly, rather than a party on which this business relies. That is the party with a distinct number of rights, interests, benefits and privileges in the private law sphere, which should be properly maintained and encouraged on a cross-border basis by means of relevant legal rules, instructing, guiding and directing private law subjects in a particular way – to restore equilibrium of interests in employer-employee relations as a particular type of private international law relations.

Hence, it means that only states decide in which form to envelope employment as a particular social phenomenon and with which content to endow peculiar private law relations to further a specific goal allotted to them. That is form, submitted to the general theory of form memory, to encourage individuals, business, industries and the national economy as a whole as well as to ensure and secure a social order inside a separate community, in particular, by preventing individuals with unequal bargaining power from becoming slaves. Because unsupervised labour is both inefficient and dangerous for individuals acting solely or in different types of groups (smaller or larger). For this very reason, labour contracts may never be oral, rely on statements or be created by implications, without explicitly given terms and conditions of work acceptable for individuals.

In other words, the main idea of this theory is that labour relations should take a common written form to guard rights and interests of individuals (employees) as a weaker party of private law relations in whichever place, time and circumstances they are held. And in order to have predictable for the parties effect these relations should rely on particular terms and conditions. For instance, they should rest on the formal arrangement, which form and content should be governed by the law of the place where it is made (in Latin – *lex loci contractus*) if it is made where the usual work is placed.

This law provides for the consensual basis of this arrangement and mandatory provisions to be found in it to make certain a particular nature of private law rights and obligations. These are relevant to: 1) personal information on employee, 2) name of employer, 3) job description, date of employment commencement; 4) form and duration of a contract; 5) place and hours of work; 6) all issues relevant to remuneration; 7) employee's and employer's rights and obligations, responsibility. Whereas all these issues complement each other and for the purpose of peculiar private law relations with cross-border impact have no separate value, they should always be considered in unity.

It is presumed that under this employment contract employee is a party effecting characteristic or pecuniary performance marking the nature and essence of particular private law obligations. That is an individual performing a particular work function in compliance with applicable material law rules, regulations and standards, which require certain knowledge, skills and experience from this individual. Whereas employer is a natural or legal person, in whose interests individuals work. This person takes measures for proper organisation of working time to eliminate all risks inherent in the particular nature of work done by individuals (Hutchins, 1907) and makes payments for this work.

This reference to a party effecting characteristic or pecuniary performance under employment contract was not occasional. In the face of private international law the place of habitual residence of this party makes particular sense when elements of this contract are closely connected with two or more sovereign states. These are states claiming their regulatory rights is disputes arising between immediate parties of this contract with respect to its implementation closely connected with two or more states, when judges face legal and jurisdictional problems. To resolve them means to allocate elements of this contract in the system of law and submit them to a system of courts closely and substantially connected with this contract.

This criterion of the close or substantial connection of private international law relations with one particular state is found to be applicable in all civil and common law countries around the world for offering predictable results wherever these relations are held and disputes decided with respect to material effect of the contract for the parties concerned. For the evidence please refer to Polish Act on Private International Law, 2011; Turkish Act on Private International and Procedural Law, 2007, No. 5718; Spanish Civil Code, 2009 etc.

But it should always be noted that in disputes relevant to non-payment of remuneration as well as other forms of compensation for the work done, their duty to pay money may constitute and evidently constitutes a characteristic obligation for the purpose of private international law regulation. Hence, it means that the place of residence of the party effecting this characteristic performance (Lipstein, 1981) may be prevailing over any other place in the choice of governing law to any non-payment disputes affecting interests of two or more states.

3.3. Cross-border peripatetic employment. Particulars of private international law regulation

Peripatetic employment is a separate type of employment, which refuses to fit into established form of labour relations concentrated on the work as their essence and submitted to one particular place, which is close to home, for the following reasons. In the first place, that is a particular state of employment, having no fixed or habitual working place in response to modern technological and other challenges, which require transient works, services, technologies and capital as increasingly large components of modern national economies. In the second place, that is particular scope of employment rights. And in the third place, particular contents of working time, including also travelling time.

Here we would like to advert to the idea of working time underlying national legislation as well as international law acts with rules incorporated into a national law matrix. The main idea is to find out what falls under national and international concepts of working time when there is no clear-cut division between work and rest, with the former for the employers and the latter for employees for the ambiguous category of travelling time, which turns to be essential in this particular case.

Under original conception working is the time spent by employees, being under employers' disposal and acting in accordance with employers' instructions when pursuing their interests in one particular sphere of activity. In this definition we have three main criteria, being of a particular value and importance. When viewed through the prism of disputes resolution these are the following matters of fact to be decided by the court in each particular case: 1) place of rending services (employers' premises); 2) compliance with employers' instructions; 3) expression of willingness to pursue employers' interests.

With respect to this we would like to draw readers' attention to the following question we are concerned with - if these criteria undergo changes for a particular character of employment, which is mobile or transient, does this affect the definition of working time? In our opinion, yes, it affects and not without reason. As it may be seen, in this definition we have a reference to a classical form of employment. That is the one resting essentially on the category of the place of employment, which is fixed and permanent. In legal theory and practice this place is known as "usual place of employment".

But from the time when this form was incorporated into a national law matrix in the nineteenth century, much has been changed in private law regulation. We are speaking of several successive industrial and technological revolutions, largely affecting the structure of national economies and as a consequence the character of labour to make these economies subsist, grow and prosper in the long run. Thus, for example, all these "revolutions" placed men and women on the very same footing, which positive and negative sides we may observe now. Men and women no

longer have different tasks to fulfil to have their means to subsistence and prosperity. They "earn their bread" under common conditions.

With territorial borders of states left open for employees and employers from around the world, labour relations became burdened with a real, firm and stable element of internationality tending to conflicting regulatory interests of two or more sovereign states. As a result employment turned to be closely connected with different places where individuals are required or permitted to work. By thus arranging the facts (Schwartz, 1907) around modern employment we may see the cause of all and any legal and jurisdictional problems in the labour law sphere to be dealt with specific private international law rules (directly applicable material law rules, conflict of law rules, uniform material law rules and rules on international jurisdiction).

As a modern trend mobile or transient employment in whichever sector of activity affects the working time organisation traditionally submitted to the law of usual place of employment. For the evidence please refer to Art. 10 (6) of Spanish Civil Code, 2009, in which it is kept that "In the absence of express submission by the parties and without prejudice to the provisions of section 1 article 8, obligations resulting from a labour contract shall be governed by the law of the place where the services are provided".

This law decides on the issue of what falls under legal categories of "working time" and "rest time" to ensure rights of employees and employers (Salomon, 1907). Besides, this law determines conditions for entitlement to and granting of annual and other leaves, including arrangements for payments for temporary or permanent loss of wage-earning powers of peripatetic employees.

When dealing with these mutually exclusive legal categories of working and rest time, being of great practical consequence, first, it should be noted that the line of separation between them rests on the idea of the time of performance or non-performance of duties, which are said to be labour where they are rendered personally, in accordance with employers' instructions and in their interests for a money consideration.

Thus, for example, under Russian law "working time is a period of time during which an employee has to perform his labour duties according to internal rules of an organization and conditions of a labor agreement and other periods of time that are considered working time according to laws and other legislative standard acts" and "rest time is the time, when the employee is free from his or her labour duties and which can be used at the employee's discretion" (please refer to Art. 91 and 106 of Labour Code of the Russian Federation, 2001).

As it may be seen, this may be both actual performance of labour duties or preparation for such a performance, when employees cannot use their time in their interests rather interests of employers. In the above very capacious example we have the time of actual performance of labour duties and other time, which does not fall under the category of rest time. Hence, it means that under Russian legislation the time spent by peripatetic (mobile) employees travelling between home and customers when performing their labour duties, shall be considered as working time and shall be subject to effective guarantees (official state guarantees enshrined in national law acts to the benefit of employees).

Among these guarantees we may consider effective rest, which idea is expressed in the directly applicable labour law rule of Art. 108 of the Russian Labour Code, which provides that "during the working day (shift) the employee should be given a break for rest and meal, not more than two hours long, but not shorter than 30 minutes, which is not included into working hours". It is apparent from express words of this rule to be considered together with its purpose that employers are under an obligation not only to make sure that workers can take their rest but to make sure that they do take their rest, which is more important.

Nearly the same idea received its application in the definition of the secondary law act of the European Union. Thus based on Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time "working time means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice" (see Art. 2).

Though we cannot find it successful for a poor legislative technique employed by lawmakers in the present act to define this term, it implies travelling and other time necessary to be ready to perform labour duties. Therefore we may say that this definition accomplishes the main aim of lawmaking in the labour law sphere. This aim is to ensure rights of workers with no fixed work

place rather multiple locations in different states, and with no fixed work base rather multiple legal bases uncommonly affecting the legal status of peripatetic employees.

When we speak of legal status of peripatetic employees, it should be pointed out that it differs from that of employees with fixed work place and base. Assuming the fact that it is the issue of labour law to be dealt with by corresponding material law rules, it nevertheless cannot be avoided by us in the present paper. Because private international law deals with legal status of its subjects complicated by particular circumstances in which they rest with respect to specific labour relations until legal and jurisdictional problems receive solution by means of appropriate rules.

As it has already been said, under particular circumstances affecting legal status of peripatetic (mobile) employees we mean specific working conditions (different places of work, which are distant from one another) requiring measures to be taken by employers to ensure adequate remuneration, compensatory rest and other guarantees to this category of employees. Certainly these are not measures introducing and maintaining inequalities of treatment between ordinary and peripatetic employees. These are rather measures to be taken to adapt work to the worker with respect to organisation of working time, preclude detrimental effect of these specific working conditions on safety and health of employees and thus reflect good practice of dealing with these complicated labour issues for all.

In particular cases they are ensured by means of directly applicable rules of law precluding the very problem of the choice of applicable law (Guzman, 2001: 883) to relations closely connected with two or more sovereign states (see in particular Art. 63 - 65, 76, 81, 96, 125, 126, 242 of Labour Code of the Russian Federation). No one may ever derogate from these rules and deprive individuals of their rights, privileges and benefits of the supervised labour. They give complete answers to legal problems in the private international law sphere and prevail over contractual rules in cross-border labour relations closely connected with Russia.

Here we would like to note that taking into view specific characteristics of the activity carried out by peripatetic (mobile) employees, the duration of working time cannot be either measured or predetermined by employees and employers. It is customary to handle this issue based on explicitly chosen law, when the parties jointly agree to deal with all and any labour disputes with cross-border effect in a prescribed manner.

But the point is – should in this case a specific conflict of law method be employed to deal with the issue of coordination of the court as to which law to use to resolve this issue? And do states need uniform or harmonized rules with respect to this issue? In answer to the first question, we are concerned with, it is worth mentioning that in such cases judges should be relieved from the necessity to choose law to guide private law subjects on a particular labour law issue or a group of issues for the voluntary choice of this law made by the parties. In many private international law codifications this right (freedom of law) is given as essential. As to uniform or harmonized rules, there is no need in them. Because lex voluntatis is commonly employed by sovereign states in whichever issue coming within purview of private international law, be it corporate, labour, investment or any other.

In the absence of explicitly made choice of governing law, where it is obviously impossible to detect an implied choice of governing law and when private law relations are closely connected with two or more sovereign states, this particular issue is dealt with by material law of the state having an overwhelmingly closer connection with private international law relations than any other state. This connection should be defined based on a number of factors. They should evidence of more enduring connection of cross-border labour relations with one particular state (with its system of law and courts) than with others, without which these relations would never be arranged, treated and executed in a way as it was done.

Finally, we would like to invite a reader's attention to the issue as to whether governments of sovereign states should be proposed to introduce new private international law rules to deal with this phenomenon of labour law (peripatetic employment) in a manner acceptable for employees, employers and states. If we rest our answer on the above reasoning, the answer will be negative. There is nothing to be dealt with by means of new directly applicable material law rules, conflict of law rules, uniform material law rules and rules on international jurisdiction. The question at issue is wholly within the purview of private international law rules of sovereign states kept in modern national codifications.

4. Results

4. 1. In labour law peripatetic employment is a separate type of employment, which refuses to fit into established form of labour relations for: a) particular state of employment, having no fixed or habitual working place in response to modern technological and other challenges, which require transient works, services, technologies and capital; b) particular scope of employment rights; c) particular contents of working time, including also travelling time.

4.2. In private international law cross-border peripatetic employment is a type of employment burdened with a real, firm and stable element of internationality tending to conflicting regulatory interests of two or more sovereign states to be dealt with by private international law rules (directly applicable material law rules, conflict of law rules, uniform material law rules and rules on international jurisdiction).

4.3. As a separate private international law phenomenon cross-border peripatetic employment in whichever sector of activity affects working time organisation traditionally submitted to the law of usual place of employment. This law decides on the issue of what falls under legal categories of "working time" and "rest time" and determines conditions for entitlement to and granting of annual and other leaves, including arrangements for payments for temporary or permanent loss of wage-earning powers of peripatetic employees.

5. Conclusion

We think that we have handled the issue to present answers to a group of questions raised in the present paper with respect to particulars of private international law regulation of cross-border peripatetic employment. Without overtly rejecting a classical form of employment, it makes all those charged with its ruling think how better to handle it. Because this employment has no fixed or permanent place of work. This accordingly affects organisation of working time as well as remuneration, compensatory rest and other labour law guarantees.

When dealing with this phenomenon of the social life the category of working time turns to be essential. The content of this legal category goes to the very heart of a regulatory problem. If it is treated by law of forum or some other law (governing law) as including travelling time, employees are entitled to relevant remuneration and other guarantees. Otherwise, employees are limited in their rights to remuneration and compensation, which accordingly affects their legal status.

Taking into view a cross-border nature of this phenomenon, these are issues to be dealt with by law closely and substantially related with these relations. That is law of the usual place of work. With respect to a particular scope of issues being within purview of a free subjective will of the parties of cross-border labour disputes that is law chosen by them in the relevant labour contract or some other formal arrangement. Otherwise, that is material law of the state having an overwhelmingly closer connection with private international law relations than any other state.

With respect to material effect of cross-border peripatetic employment contracts as contracts with characteristic or peculiar performance being only on one side (employees), it is governed by the law of the place, where the party effecting this performance resides. That is the party (weaker party), which in particular circumstances (misconstruction of the contract in favour of employers) requires special protection. These are cases of restoration of equilibrium of interests in employer-employee relations.

Thus we may conclude that peripatetic (mobile) employment does not need any specific private international law framework. This category of employees is afforded with appropriate protection under governing law. Hence, it means that in the age of sanctity of property and labour, nature and character of employment do not affect private international law regulation, in particular, devices used by national legislators in this sphere of regulation. They rather extend dimensions of private international law as a field of law in national systems of law compelled to deal with extremely difficult and important legal and jurisdictional problems of the time, which are conflicts of laws and conflicts of jurisdictions.

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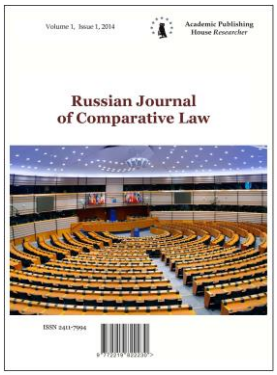

Between Freedom of Contract and Public Policy in France and in Russia

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Abstract

The purpose of this research is to perform a comparative analysis of the legal institution of unilateral termination of commercial relationship in two countries – Russia and France. The paper outlines that the French text refers to a «sudden break of commercial relationship», while the Russian language uses the term «unilateral refusal to execute the contract». The possibility of compensation for damage in the event of a sudddent break in commercial relationship is directly provided for by the French Commercial Code. Moreover, this provision is public policy, which makes it mandatory for a party wishing to terminate commercial relationship. In the Russian legislation, there is no general rule, however, an analysis of the legislation and case law conducted in this paper makes it possible to identify situations in which the legislator and the court protect the victim of a sudden refusal to execute the contract. The paper takes a new look at the analysis of Russian laws in the light of the public policy limits established in the French experience.

Keywords: France, Russia, freedom of contract, public policy, termination.

1. Introduction

In France and in Russia freedom of the contract is an essential and basic principle of contract law. New Article 1102 of the French Civil Code states that “everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract within the limits imposed by legislation”. Contractual freedom does not allow derogation from rules which are an expression of “public policy”. In addition, Article 6 of the French Civil Code establishes that “Statutes relating to public policy and morals may not be derogated from by private agreements”.

The freedom of contract was not recognized in Soviet law, since there was no market economy. Further, the political system has changed, and Russia has moved to new historical period and new regulations. In modern Russian law there is freedom of contract, however, it has limitations: the parties cannot violate the public interests, the rights of third parties, the principles of morality and good faith, etc.

2. Methods and materials

In order to examine and compare the unilateral motiveless termination of the commercial relations in France and Russia, we use different methods according to the goals of the research. In order to study the doctrine and opinions of the moders researchers we use text analysis. Formal

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legal method is used to study the legal regulations and case law. We use as well comparative method to present the different approaches established in two countries.

National sources and material from both countries are used. We study the legislation, as well as case law, which perfectly illustrates the particular problems. In addition, articles and opinion of famous lawyer are examined.

3. Discussion

France

3.1.1. Balance between freedom of contract and public policy in commercial contracts in France

The principle of freedom of contract provides to the parties free choice on the different stages of relations: from the choosing the subcontractor, freely determination of the content of agreement, the establishing and changing the governing provisions during execution of the contract, and to the termination of relations. However, according to the mentioned above articles of the French Civil Code, the parties have to respect the mandatory rules which named by French Civil Code "ordre public" – "public policy".

What is "Ordre public"? Public policy refers to all the principles, written or not, which are, at the time when we evoke them, considered in a legal order as fundamental principles and which, for this reason, require to derogate the effect of the private will (Cornu, 2018).

3.1.2. The rule of public order in the Article L. 442-6, I, 5° of the French Commercial code: the contractual agreement does not always create the law of the parties

Article L. 442-6, I, 5° of the French Commercial Code, the provisions of which are of a public policy nature, engages the responsibility of the author for the sudden even partial termination of a commercial relationship without written notice having regard to the duration of the business relationship and respecting the minimum period of notice determined by reference to usage of trade. The author is forced to repair the damage caused.

In the context of this article, the parties to a contract cannot derogate from the rules of public order in favor of their own provisions. Similarly, compliance with the notice provided for in the contract does not insure the author of the rupture against the penalty for the sudden termination of aforesaid relationship. Moreover, even when a notice period is agreed by the parties in the contract according to the provisions of Article L. 442-6, I, 5°, the judge may disregard for such notice period if it seems to him insufficient with respect to the length and to other circumstances. So, the public policy rule set forth in the French Commercial Code prevails over the "law of the parties". Examples:

A) Cour d'Appel de Paris , Pôle 5, Chambre 5, arrêt du 12 septembre 2013- 11/22934. In this affaire the Court of Appeal of Paris reminds that the judge cannot be bound by the stipulations of a termination clause in the contract when it comes to the evaluation of compliance with public policy.

B) *Cass. com., 22 oct. 2013, № 12-19.500, Bull. civ. IV, № 156.* In a judgment of 22 October 2013 the commercial chamber of the Court of Cassation reminds that «the existence of a contractual period of notice does not exempt from the judicial review whether this notice period takes into account the duration of the commercial relationship and other circumstances at the time of the notification of the break ". Here the Court of Cassation reduces the length of the contractual notice from twenty-four months to six months on the grounds that the initial period of notice was too long in view of the short period of commercial relations established between the parties (less than twenty months).

It is self-evident that the public policy nature of the aforementioned provisions authorizes the judge to increase the notice period provided for in the contract if it seems to him insufficient as well as to reduce it in the event that it seems excessive (Beaumont, 2015).

3.1.3. "Sudden termination of an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices." – what does it mean?

In order to understand what actions can be qualified and punished by the Article L. 442-6, I, 5° of the French Commercial Code, we will consider step by step the notion of each element.

3.2.1. "Established commercial relationship"

The notion of "commercial relationship" covers all types of relationships between two professionals, with the exception of consumer relations. The article applies regardless of the quality of the author of the break. The victim of sudden termination could have any legal status: for example, an association, a merchant, etc. It is important to note that the doctors are excluded from the application because their ethics prohibit practicing medicine as a business *(Cass. com., 23 octobre 2007)*. Advocates, notaries and industrial property agents are also excluded *(CA Aix 7 février 2013; Cass. com. 20 janvier 2009; Cass. com. 2 avril 2013)*.

The article applies to the purchase and sale of products as well as to the provision of services *(Cass. com. 16 décembre 2008; Cass. com. 18 mai 2010)*.

The legislator's goal is to punish any prejudicial termination of commercial relationship when one partner acts in bad faith, that is to say without legitimate reason, unilaterally and abruptly breaking the relationship awhile creating a confidence for the partner to continue the relationship or renew the contract. As a result any established relationship whether pre-contractual, contractual and even post-contractual is covered by the Article L. 442-6, I, 5° (Look examples here: *Lyon, 10 avr. 2003: BICC 2004, № 626; JCP E 2004, № 7, p. 254. Versailles, 14 oct. 2004: JCP E 2004, № 51, p. 2002; Paris, 14 déc. 2005: RDLC 2006, № 2, p. 101; Paris, 12 janv. 2005: RDLC 2005, № 3, p. 84; Paris, 29 nov. 2007: D. 2008. Pan. 2196)*

Moreover, it does not matter if the contract was concluded for the fixed period and was renewed. The notion of established commercial relationship exceeds the simple contractual commercial relationship (Grandmaire, 2017).

3.2.2. Sudden nature of the termination

In French we use the word "brutale" which can be translated in English as "sudden" or "abrupt". Regardless the different translations the sense of this notion reminds the same.

In order to be prejudicial and to be entitled to damages the breach must include two elements: firstly, according to the common law be "unpredictable, sudden and violent" (CA Rouen, May 30, 2002: JurisData № 2002-184180) and secondly, be made without prior written notice taking into account the previous commercial relation or the good practices recognized by the professional agreements.

How to determine the length of a prior notice? The legislator does not establish any method, however in several areas of business activities the professional agreements exist (for example, in transport, banking, etc). For example, transport relationship may be subject to a standard contract providing for a notice period of three months if the duration of the relationship is one year or more. If there is no applicable commercial practice acknowledged by multi-sector agreements, the lawyers propose to count the length as 1 month for each year of business relationship (D'Estais, 2014), however taking into account other important criteria:

- the investments made by the victim;
- the business involved (for example, seasonal fashion collections);
- a constant increase in turnover;
- the market recognition of the products sold by the victim and the difficulty of finding replacement products;
- the existence of a post-contractual non-compete undertaking ;
- the existence of exclusivity between the parties;
- the time period required for the victim to find other openings or refocus the business activity;
- the existence of any economic dependency for the victim.

Examples:

A. Cour de cassation, civile, Chambre commerciale, 6 septembre 2016, 14-25.891. The commercial chambre of the Court of Cassation states that the foreseeable nature of the breach of an established commercial relationship does not necessarily exclude its brutality within the meaning of Article L. 442-6, I, 5° of the French Commercial Code. In this case one company has stopped supplying his partner overnight without sending him a termination letter or written notice of termination. The Court bases his decision on the conclusion that this predictable nature can only result from an act of the author of the break, which manifested his intention not to pursue the commercial relationship. It is the only act that could give rise to a period of notice.

B. Cour de cassation, Chambre commercial, Rejet, 20 novembre 2012 № 11-22.660. Since the last contract concluded between the parties was not renewable by tacit agreement, the plaintiff company could not be unaware that this contract would likely to be the subject of a new negotiation or would not to be renewed at the end of the term. The plaintiff company could not reasonably hope for the continuity of the commercial relationship for the future.

C. CA Lyon, 3 juill. 2008 : JCP E 2008, № 51-52, p. 27. The notification of a call for tenders may constitute the manifesting intention not to continue the commercial relation on the previous conditions and thus it may cause the period of notice to run. However, it is still necessary for such intention be written and sufficiently clear to reflect the intent not to continue the relationship in the case of refusal of the new conditions.

3.3. Partially termination

Sudden termination of an established business relationship does not necessarily require a complete termination of relationship. The text of the French Commercial Code establishes as well a partial termination.

Cass. com., 18 October 2016, № 15-13.834. A sharp drop in turnover could be seen as a partially termination. Two companies of the group Carrefour had a long-term relationship with the service provider. The relationships lasted more than 17 years. In October 2005 Carrefour had announced the termination of the relationship giving 15 months' notice. However, the victim had brought the action before the judge of the Commercial Court of Paris on the basis of the Article L.442-6 I 5° of the French Commercial Code. The Court established that the real partial termination of relationships between two companies of Carrefour group and the service provider had started in January 2005. Thus, the Court ordered to compensate the damages to the service provider.

There is also a need to notice that a non-significant decrease in turnover, in the context of already fluctuating relations between two partners, does not characterize a sudden partial termination. In this case, the 15 % decrease in turnover is not sufficient to characterize the sudden break of commercial relationship *(Cass. com., 11 sept. 2012, № 11-14.620)*.

3.4. Sanctions and damage

3.4.1. Damage related to the sudden break of an established commercial relationship

The actions based on the Article L.442-6 I 5° allow to obtain the compensation for damage from the party who is the author of a sudden break. It is important to emphasize that the remedy could be seek for the damage caused by the sudden termination and not for the termination itself (Chevrier, 2015).

The principle of the damage reparation is based on the victim's loss of profit. Currently, it exists two ways to count the compensation for damage:

A. As an expected gross margin during the period of insufficient notice, which corresponds to the difference between selling price and cost price (Cass. Com., 3 dec 2002 № 99-19.822; CA Paris 4 mars 2011 № 09/22982);

B. As a contribution margin, which corresponds to the difference between turnover and variable costs (Schulte, Morhedec, 2011).

The compensation for loss of profit does not cover all the harm suffered by the victim. In order to be compensable, the losses and the harm must result from the "brutality" of the termination. In reality, it is very hard to prove. For example, the harm resulting from the reduction in the number of employees is not compensable, because the decision of the chef of the company to dismiss the employees results not for the sudden nature of the termination, but from the fact of the termination (Gauclère, Van Doorne-Isnel, 2013).

However, in some situations the victim succeeds in seeking the additional compensation, for example, if the investments specially made in the context of commercial relationship, or if the victim is suffered from the vexatious behavior of its partner. The judge sometimes can accept the demand for the compensation for moral damage (CA Bordeaux 30 avril 2009 № 09/4565).

Any action is time-bared after 5 years.

3.4.2. Types of sanctions

The first sanction which could be imposed is the compensation for the damage (loss of profit). The judge can also pronounce the nullity of the whole contract or the nullity of the clause in

question. Moreover, the judge may request the discontinuity of unlawful abusive practice and force to maintain the commercial relationship.

When the sudden break has potential or proven anti-competitive effects, another law can be applied as well. For example, the combination of two conditions –an economic dependence of the victim and the sudden break, which can influence the market competition or market functioning, – can lead to the sanctions pronounced by the Competition authority ("Autorité de la concurrence"). The amount of such sanctions can reach 10 per cent of the annual turnover (DG CCRF, 2017).

In addition, there is a possibility of the intervention of the Minister of Economy. The commercial chamber of the Court of Cassation established the power of the Minister of the Economy to enter in the affaire and to pronounce the civil fine for the sudden break of established commercial relationship. Before the entry into force the law « Sapin II » the maximum amount of the fine could be up to 2 million Euros or 3 times of amounts unduly paid. The law "Sapin II" increased the amount of civil fine from 2 million to 5 million Euros (Héry, 2017).

The most significant affaire illustrated the intervention of the Ministry of the Economy was in 2016 (Giovanni, Fèvre, 2017). We have already considered this case in the part "Partial termination" *(Cass. com., 18 October 2016, № 15-13.834)*. The main interest of this affaire lies in the fact that the Ministry of the Economy, Finance and Industry participated in this case and ordered the Carrefour to pay the civil fine of 100 000 Euros for the sudden break of established commercial relationship. Court of Cassation notes that the amount of the civil fine imposed on Carrefour had to take into account the size of Carrefour's turnover, as well as preventive effect to the companies of the same size and notoriety (Karapetov, Fetisova, 2015).

Russia

3.1.1. Unilateral motiveless termination of the contract in Russian practice

3.1.2. We would like to consider the Russian legislation and practice in the light of the French legal restrictions, as well as to make a comparison with French legal rules. It is important to highlight that a motiveless termination covers the cases where there is neither aggravated breach of the contractual obligations nor force majeure.

After the complex analysis of Russian civil and commercial legislations, the researcher can easily note that there is no common rule which could establish the obligation for the party to the contract to inform another party about the unilateral termination using a particular "reasonable" notice (the phrase "unilateral termination" could be also replaced with the phrase "unilateral refusal to execute the contract", which is closer to the Russian text). That is why we would like to search for the cases, where Russian legal practice can act in the "French way" protecting the victim to the sudden termination of a commercial relationship.

3.1.2. The unilateral refusal to execute the contract for the repayable rendering of services

According to the article 782 of the Russian Civil Code the party shall have the right to refuse to execute the contract for the repayable rendering of services, provided the executor's actually incurred expenses are paid out. At the same time, the executor also has the right to refuse to execute the obligations under the contract for the repayable rendering of services, provided the customer's losses are fully reimbursed.

The article does not mention the reason, so the party can refuse even motiveless, without the partner's breach, without the advance/early warning. The only obligation each party has is to provide to another party sums of money established by law.

It is reasonable to assume that such unilateral refuse without advance warning and without paying the forfeit entails financial and organizational risks for the parties to the contract. Therefore, the parties to the contract, understanding the limits of legal protection of their commercial relationships, decide sometimes to include either the obligation for advance/early notice or the compensation. Thus, the parties complement their rights to refuse to execute the contract with the contractual conditions. However, the courts for a long time recognized the conditions established by the parties invalid (Karapetov, Fetisova, 2015). Let us consider the examples.

A. Judgment of the Federal State Commercial Court of the North-West Area, 3 July 2009, case № A26-6447/2008. The parties have established a rule in the contract according to which any party unilaterally initiating the termination of the contract shall notify the other party in writing in not less than six months in advance, and also it shall pay to the other party compensation for loss in the amount of 80 percent of the six-month provision of the services.

The Russian Court of Cassation noted that, according the 1 paragraph of Article 782 of the Russian Civil Code, the contractor had the right to refuse to execute the contract for the repayable rendering of services, provided the executor's actually incurred expenses are paid out. The Article 782 does not contain any advance notification. Since unilateral termination of the contract is not a violation of the right, the only one consequence of the refusal must be the payment of incurred expenses, and not the compensation for the loss. Moreover, according to the text of the Article 782, the party has the right to unilaterally terminate the contract without any notice.

*B. Judgment of the Federal State Commercial Court of the Center Area, 8 November 2012, case № A35-13063/2011. T*he parties stipulated that the contract could be terminated ahead of schedule by written common agreement of the parties.Since Article 782 of the Russian Civil Code establishes the imperative right of a party to unilaterally terminate a contract, the Federal State Commercial Court considered that such right could not be limited by the parties. Therefore, the contractor has the right to terminate the contract unilaterally subject to payment of the executor's actually incurred expenses.

C. Judgment of the Federal State Commercial Court of Moscow District, November 2013, case № A41-48007/12. The parties to the contract provided that either party could refuse to execute the contract subject to notification not less than 30 calendar days before the date of termination. The Court concluded that the right to the unilaterally termination of a contract, established by Article 782 of the Russian Civil Code, could not be limited by party's agreement.

Coming back to the historical aspect, in 2014 the Supreme Commercial Court found this practice unacceptable. On March 14, 2014, the Court issued Resolution No. 14, in which he explained the application of the principle of contractual freedom for the provision of services. The Court concluded that Article 782 of the Russian Civil Code, provided for the right of each party to unmotivated unilateral refusal to execute the contract and for the unequal sharing of unfavorable consequences, did not exclude the possibility for parties to determine another way the consequences of termination. For example, the parties can set up full compensation for the loss. Also the commercial parties can provide in the contract the obligation to pay a certain sum of money from the party initiating the termination to another party.

However, such explanation OF the Supreme Commercial Courte can be implemented only for relation between commercial parties and between citizens; we shall exclude consumer relations, since the consumer is a week party *(The Court of Appeal of the Moscow City Court, 26 November 2015, case № 33-43296 / 2015).*

Resolution No. 14 established by the Supreme Commercial Court on March 14, 2014 has become the matter of dispute among the lower courts and researchers.

According to Bogdanov E.V., determination of the volume of contractual freedom is an exclusive competence of the lawmaker, and not of the Supreme Commercial Court. Thus, the Court has exceeded its competence when it invited the parties to set by themselves the conditions for full compensation for loss in case of unmotivated unilateral refuse to execute the contract. It turns out that the Court violated the very subjective right of the party to freely refuse to execute the contract, since the contract includes civil liability of the willing party in the form of full compensation for loss. Bogdanov's criticism of the above Resolution of based on the principle that the limits of contractual freedom must be established either by law or by contract (by contract – if the law allows parties to set up particular rules). Bogdanov E.V. suggests that the lower courts ignore the said Resolution of the Supreme Commercial Court, since they understand that the setting the limits of contractual freedom is a matter for the lawmaker and not for the Supreme Commercial Court (Bogdnov, 2016).

Examples of such contradictory decisions are: *Judgment of the Federal State Commercial Court of the Moscow District, 11 September 2014, case №A40-183017/13-173-1605; Judgment of the Commercial Court of the Moscow District, 7 November 2014, case № A40-186044/13-100-1617; etc.*

However, Karapetov A.G. takes a different view. He supposes that these lower courts seem to be unable to believe that the rules of interpretation of the Article 782 of the Russian Civil Code have changed, and they continue to follow the long-standing practice of qualifying the rule as imperative (Karapetov, Fetisova, 2015).

Moreover, some courts continue to evaluate negatively the clause about the early notification set up in the contract. They suppose that the law gives the possibility to terminate the contract

without early notification, and the parties cannot agree otherwise (See, for example: *Judgment of the Commercial Court of the North-Western District, 9 February 2015, case № A56-29241/2013* – the contract clause established the possibility of refusal only if the party provides 6-months advance notice and pays the compensation for the loss for this 6-months period is unacceptable, because such condition is a measure of responsibility. That is not allowed in the framework of such relationship.

However, there is also a positive jurisprudence.

The amount of compensation to be paid is determined by party's agreement." Several decisions support the idea that the parties can establish the rule about the compensation sum. In particular, this may be: the withholding of an advance *(Judgment of the Federal State Commercial Court of the Moscow District, 9 November 2015, № F05-11570/2015)*; the part of the agreed price for goods, works or services sold (for example, 50-60% of the total price under the contract) or the part of the total cost determined by calculation (for example, a fee for three months 'services in the event of early termination of the subscription contract); a non-refundable advance payment *(Judgment of the Federal State Commercial Court of the North-West District, 12 May 2014, № A56-1385/2013)*; payment for the complete month when the services were provided during limited period *(Judgment of the Commercial Court of the Pskov region, 30 January 2015, case № A52-3591/2014);* full payment for the particular phase of rendering services if the services were divided into phases and the refusal took place during the particular phase *(Judgment of the Moscow Commercial Court, 29 April 2015, case № A40-2765/15);* etc.

The court finds inadmissible to set up the compensation equal to the amount of the full price of the contract or to the greater amount of the full price of the contract *(Judgment of the Commercial Court of the Moscow District, 6 November 2014, № Ф05-12254/14)*.

3.2. The notice period in the case of the refusal to execute the contract

The notice should be sent in advance, since the executor cannot assume about the termination of the contractual relationship with the partner until he is informed (Byichkov, 2016). Therefore the contractual relations are considered to be terminated from the moment of delivery of the appropriate notice. Non-receipt of the notice if it is sent to the legal address is a responsibility of the executor *(Judgment of the Moscow Commercial Court, 22 October 2014, case № A40-173317/13-142-1572)*.

3.3. The principle of good faith and the notion of reasonableness

Lets us consider more examples, which are enough complex and illustrative.

A. Judgment of the Tenth Commercial Appeal Court, 12 April 2016, case № A41-37010/2015. Despite the existence of the principle of the contractual freedom in Russian law, the right to unilateral refusal to execute the contract should be limited to general principles of civil law – the principle of good faith and the notion of reasonableness. Bad faith and the party's unreasonable behavior in the event of unilateral termination of the contract are an abuse of its right.

In the judgment on 12 April 2016 the Appeal Court recognized that Auchan were acting in bad faith and unreasonable under the supply contract. Summarizing the facts of the case, it is necessary to pay attention to the time points of reference. The supply contract of unlimited duration was concluded on February 1, 2012. The contract established that an annual agreement should be concluded annually for the performance of the contract, and that the notice of termination should be sent not less than 30 calendar days before the effective date. The last annual agreement concluded by the parties ended on March 31, 2014.

However, in February 2014, Auchan unilaterally refused to fulfill contractual obligations, so stopped to send orders and on 5 May 2014 the counterparty received a notice of unilateral refusal from Auchan effective on 5 July. The supply contract implied the supply of pomegranate juice, the shelf life of which was limited to 18 months. In connection with the actual break of commercial relations in February 2014, the counterparty lawfully took measures to sell pomegranate juice to other buyers using substituting transactions. As follows from the explanation given in the Resolution of the Supreme Court of the Russian Federation of 24 March 2016 № 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations", if the party has concluded a substitute transaction because of the contract termination, he has the right to claim damages from the counterparty which is the difference between the price set in the broken contract and the price of goods, work or services under the substitute transaction (paragraph 1 of Article 393.1 of the Russian Civil Code).

Thus, the party applied to the court to recover damages. Since the goal of the compensation for losses consists is the creation of such material conditions of the injured party, as if the obligations were fulfilled, the Court of Appeal satisfied the party's demand on the compensation for loss. However, claims for the loss of profit were not met, as the calculation of the loss of profit was not documented and proven.

To sum up, this example describes the situation of a partial break of the commercial relationship and as a consequence, the recovery from loss. Thus, the restoring the balance of commercial relationship is implied in Russian law. It is set up in certain articles, in the contrary to the French law, where we see the basic rule. However, the question of adequacy of 30-days notice is discussed neither by the parties nor by the court.

B. Judgment of the Moscow Commercial Court, 11 July 2013, № A40-148325/2012. The automobile dealer applied to the court in order d to recognize as invalid the refusal of the distributor to execute the contract. Despite the fact, that the contract included the clause stipulated that the party had a right for the unilateral refusal to execute the contract, the court granted the automobile dealer's claim. He considered that the distributor did not have the real economic reason and moreover, during the same period of time, the distributor was expanding his distribution network. The refusal to execute the contract announced by the distributor meant for the dealer the no-win situation: to start his business from zero and to re-equip the dealer center for a new car brand.

To sup up, one can say that the principle of good faith, as defined in paragraph 3 of Article 307 of the Russian Civil Code (and later explained by the Supreme Court in 2016), extends to a unilateral refusal, when formally the refusal does not contradict any rule of law, but turns out to be unfair.

4. Results

The parties to commercial relations must demonstrate fairness not only during the partnership but also in how they terminate their commercial relationships.

Since for more than 20 years there a public order embodied in the form of an article of the French Commercial Code, establishing liability in tort if the party suddenly terminates, even partially, a commercial relationship without adequate prior written notice. The public policy rule was initially designed to prevent sudden so-called 'de-referencing' by large retailers. However, the courts extended the scope of this article. The regime now represents one of the major sources of litigation before the French commercial courts (David, Gaucher, 2014).

Dispite the fact, that the main goal of this rule is to anticipate changes to business activity and give to the parties sufficient time to prepare for those changes, the professionals claims that the implementation of this legal instutute provide a strong economic inefficiency and legal insecurity (Vogel, Vogel, 2016). Moreover, no one can argue that the French judicial practice immediately and without errors determined the scope of the rule, avoiding mistakes and inconsistencies in the decisions of courts of different levels. Even today the courts determine on a case-by-case basis whether a victim party could legitimately expect a longer notice of termination than the agreement had envisaged.

In the Russian legislation, however, there is no direct prohibition on a sudden break of commercial relations in the absence of sufficient notice. Russian courts are still deciding on the possibility of the parties to agree on another regulation of their relation than indicated by law. Therefore, the Russian case law is at the stage of developing a concept that corresponds to the notions of justice, public interests and the protection of the weak party of the contract. Despite various legislative approaches, in Russia as well as in France, a party to a contract can protect its interests by using the rules established by the Russian Civil Code (for example, articles 10, 307,168 and so on, depending on the context of the case).

5. Conclusion

To break or not to break? This is the question that professionals can ask themselves during their commercial relations. If the possibility to terminate the contract is the consequence of the freedom of contract, we know that certain breaks can engage the responsibility of their author, as "freedom" and "responsibility" are closely linked.

The possibilities to terminate current or even future commercial relationships (in the case of negotiations) are now more limited than several years before because of the creation of new torts such as the "sudden termination of commercial relationship" in French law, as well as because of development the new means of protection of the victim in Russian case law.

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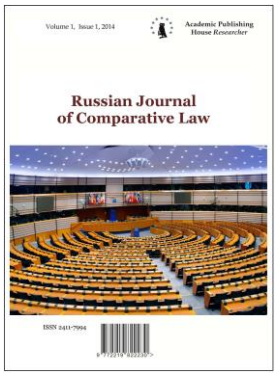

The Legal Nature of Land Use Rights in Vietnam

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Abstract

This paper focuses on analyzing and clarifying the emergence of land use rights in Vietnam as a legal creation for the implementation of land ownership by the entire people. The authors address such issues as the limitations of existing perspectives on the current legal nature of land use rights in Vietnam and on proving land use rights as a kind of rights in rems. At the same time, the article also specifies the components of land use rights as a kind of right in rems.

Keywords: land use rights, property rights, land ownership by the entire people, right in rems.

1. Introduction

Since the ownership of land by the entire people was established and maintained in Vietnam, individuals, households and organizations in Vietnam has not been entitled to own land but are rather legally recognized with "Land use rights". The legal nature of land use rights has been a research issue which attracts great interest of various legal scientists in Vietnam in recent years. This problem, however, has not been properly or adequately researched when land use right was not considered a type of right in rems. Therefore, this article will clarify the creation of land use rights as a result of the existence of land ownership by the entire people in Vietnam, proving land use rights as a kind of right in rems and analyzing it components as a kind of right in rems.

2. Material and methods

This paper is conducted based on previous research results of some legal scientists such as: "The Role of the State in the Implementation of the Land Ownership by the entire people" (Nghi Huu Pham, 2005); "Provision of rights and the issue of modifying the" Property and Ownership Rights in the 2005 Civil Code of Vietnam" (Hang Thi Thuy Pham, 2013); "The concept of right in rems should be used in the Civil Code" (Hue Dang Duong, 2015). This paper is written with the concurrent use of various methods such as analysis, synthesis, dialectical materialism, methods of interpretation and comparative method.

3. Discussion

Before the establishment of the 1980 Constitution, the term "Land use rights" had not been used in the Vietnamese legal system to refer to the rights of individuals, households and organizations to land, instead the term "Ownership" is used, such as: "... to implement the land

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ownership regime of farmers" (Land Reform Act, 1953, Art. 1); "The State, under the law, protects the land ownership and other production materials of the farmers" (Vietnamese Constitution, 1959, Art.14). In terms of content, the term "ownership" is also understood as including: "These three rights of possession, use and determination are closely interdependent and interrelated" (Phong Khanh Trinh, 1975).

On December 18, 1980, at the Seventh session, the VI National Assembly adopted the 1980 Constitution. A sole land ownership regime in Vietnam was established, which is the public ownership regime under the name "ownership by the entire people" (Vietnamese Constitution, 1980, Art. 19). On that basis, the 1987 Law on land was enacted and the concept of "land use rights" was formally adopted. Since then, through several times of substitution in the Constitution and in the Law on Land, the regime of land ownership by the entire people has continued to be maintained and the concept of "land use rights" has still been used. Having been established in such a context, "land use rights" is a legal creation to realize all-people ownership of land in Vietnam which is also a legal instrument to help the state implement its authority (power) of ownership. This can be analyzed as follows:

First, as the representative of the entire people's land ownership, the state has all the three powers of the owner, namely possession, use and determination on land. In practice, the state has been implementing these powers but in an indirect and macroscopic way (Nghi Huu Pham, 2005). The state with the basic function: "On behalf of the society to manage the different aspects of life, to ensure the stability, social order and the interests of the entire social community" (Doan Minh Nguyen, 2014), can not stand to directly exploit and use each land plot to generate profits. Meanwhile, in order to carry out production and business activities, many the subjects in society is daily and hourly in need of land as an indispensable asset. In order to obtain land, the subjects should be allocated land by the state. However, given the allocated land without any power to that land, the subjects can not have any impact on the land to satisfy their needs. As a consequence, subjects must have certain powers over the land that the law must recognize to ensure the rights and interests of the subjects who directly use the land, so that they are ensured with long-term use and exploitation to invest their capital and effort to improve land. In addition, recognizing the powers of land users will directly creates the basis for effective land management, desertification and land waste avoidance, and regulations of land benefits for socio-economic development of the country. The powers that the state grants to the subjects are different but all are generalized under the general concept of "land use rights". The term "land use rights" here is not one of the three powers of the owner but a general concept used to refer to a set of powers that the state grants to the land owner. Thus, the "land use rights" of land is an independent right arising from the ownership of the entire people of land and exists independently of the land ownership by the entire people, represented by the state as the owner of the land.

Second, legally, each property has only one ownership by an established owner, which is the exclusive and absolute characteristics of property rights (Dien Ngoc Nguyen, 2009). If the simultaneous recognizing the ownership of different entities on an asset, it will result in a severe conflict of rights and interests between the entities, which will be the root of socio-economic instability. As a result, the law stipulates the land ownership by the entire people cannot at the same time regulates that the certain subjects in the society also have the ownership of land. There is a need for a new legal concept to recognize the rights of direct land users and to differ it from the notion of ownership. Of the three powers of property rights, the right to use is the most economically meaningful and practical right, thus the use of the term "land use rights" is also a reasonable choice for Vietnamese lawmakers.

At present, there still exist many inaccurate and inadequate perceptions of the legal nature of land use rights.

The first point of view is that land use rights are the content seperated from the land ownership by the entire people. Many Vietnamese scholars view land use rights as a right to be separated from the entire people's ownership of land (Hanh Hong Le, 2017, Thai Quoc Luu, 2016, Nam Hong Sy, 2016). This is a simple view of land use rights based on the concept of "use right" as defined in the Civil Code. According to Article 189 of the Civil Code 2015: "The use right is the right to exploit the utility of, enjoy the interests and profits from the property. The right to use may be transferred to another person by agreement or in accordance with the law." Basically, this concept is one-sided, less scientific because when the state grants land use rights to the subject, not only the

use rights are granted but also the right to possession of land, because without possession, it is impossible to exploit and use land. In addition, entities are allowed to dispose of their land use rights through transactions (transfer, inheritance, capital contribution, donation of land use rights) or through relinquishment of land use rights (return land to the state). Entities are always in an unequal position because they only have one of the three powers of the entire people's land ownership, thus the state can easily interferes by administrative decisions on the land use rights of subjects.

The second view is that land use rights are property rights. From the viewpoint of many Vietnamese scholars today, land use rights are considered as property rights (Trang Thuy Nguyen, 2017, Huy Quang Ho, 2017). Basically, this view is right because the land use rights have all the elements and characteristics of a property right, namely:

(i) Land use right is also the right of the subject to be executed on a specified parcel of land that is clearly demarcated (satisfying the property right as the right to a property);

(ii) Subjects of land use right are allowed to exploit the natural properties of land to create material possessions or to carry out transactions such as transfer, lease, capital contribution, mortgage, sublease ... to recover a certain benefits (satisfying the property right is a right can be valued in money).

However, if only the recognition of land use rights as a single property right is incomplete, inaccurate and inevitably leading to some of the following unwanted consequences:

First, recognizing land use rights as a mere type of property right does not permit the specification of the relationship between land use rights and land ownership by the entire people. Land use rights are a type of derivative right, which is formed on the basis of the land ownership by the entire people. Without land ownership by the entire people, there will be no land use right. Land use rights are a legal tool created by the state so that the actual ownership of the entire people in which the state acts as owner representatives can be realized. Therefore, it will be impossible to demonstrate the derivative nature of land use rights in relation to land ownership by the entire people. In addition, the independence of land use rights in relation to the land ownership by the entire people is not reflected, because although it is derived from the land ownership by the entire people, after it has been allocated to the subjects, the land use right is relatively independent from the land ownership by the entire people.

Second, the restrictions on the protection of the legitimate rights and interests of the subjects include land use rights. For example, in case when an individual is granted a land use right by the state and the individual has rented the land to another person for a period of 20 years. During this period, the third party has commited land acquisition. In this case, the individual who is granted the land use right by the state is entitled to the property right and concurrently the land tenant also has the property rights with the land he has rented. When the land is occupied, who has the right to the property is the person who has the right to file a case for land? Obviously, the land use rights as property rights in this case has not clarified the legal status of the subjects, showing a restriction in protecting the legitimate rights and interests of the right holders.

Third, the perception of land use rights as a mere property right causes a lot of problems in the legislation and law enforcement. The current law on land of Vietnam contains many provisions relating to land use rights in Clause 20, Article 3 of the Law on land 2013 such as: "transfer of land use rights"; "lease of land use rights"; "land price is the value of the land use right per unit of land area". These concepts are unscientific, incomprehensible and self-contradictory. For example: In point b, Clause 1, Article 3 of the Ministry of Natural Resources and Environment's Circular No. 36/2014/TT-BTNMT of June 30, 2014 detailing the methods of land valuation; building and adjusting the land price index; specifying land prices and land valuation consultancy, when discussing the valuation of land use rights, in reality, we value each specific parcel of land for the purpose of land use, location, profitability, conditions of technical and social infrastructure, area, size .... That is, though the regulation is "transfer of land use rights" but in fact, it is the purchase and sale of each parcel of land.

To be able to assert that land use rights are indeed a limited right in rems, it is necessary first to clarify the content of limited right in rems.

Right in rems or right of things (droit reél) is a legal concept derived from ancient Roman law. Throughout the long-term development process, rights in rems have proved its particularly important role in the legal system of many developed countries, mainly in ones with the civil law

traditions such as France, Germany, Japan.

Right in rems in narrow sense is the civil right of a subject, allowing the subject to perform acts directly and immediately on things. Rights in rems are operated without having to depend on other subjects, thus the right includes two factors, namely subject of rights (individuals, organizations) and the objects of rights (Dien Ngoc Nguyen, 2011). To a larger extent, right in rems is a statutory body which encompasses all the legal norms of the object of the right, the content of the rights, its derivatives and abolishments, principles of implementation, protection of rights and limitations that right-holders have to abide by when exercising their powers ... (Hue Dang Duong, 2015).

Contrary to the right in rems is the personal right or right in persona (droits personnels), which is the civil right of a subject (a creditor) to request another subject having responsibility (credit receiver) to perform certain acts to achieve their own interests. Rights in rems and rights in persona differ from each other but all are the rights valued in money or in other words property rights. Compared with the right in persona, the right in rems has the following characteristics:

First, the right in rems is of absolute characteristic. The absolute nature of the right in rems is manifested by the fact that the rightful subject is permitted to perform all acts (including physical and legal acts) directly and immediately upon his or her own property without depending on the will of other subjects, so long as such acts are not contrary to the prohibitions of the law or cause harm to the public interest (Dien Ngoc Nguyen, 2010). At the same time, the right in rems is binding on all people, so that everyone has to respect and is not be allowed to infringe upon the rights of others.

Second, the subject has the right to recourse (also known as the right to follow the property (Mau Van Vu, 1961), or the right to pursue (Dien Ngoc Nguyen, 2013) and the right of priority with the property. The right to recourse allows the right holder to exercise his rights over an object at any time even if the object is held by another subject. For example, the subject of the right in rems can file a lawsuit to recover his property; An adjoining property may use the passage even though the adjacent property has a change in ownership (Hang Thi Thuy Hoang, 2013). Priority right is that the right in rems holder has the right to be paid more preferentially than the right in persona owner and even to the other right holder without the registration of that right in rems in the exercise of rights on the property. The priority right of the right in rems subject is manifested in case right in rems is a method to ensure the implementation of an obligation, such as: The creditor who accepts one's loan or property mortgage shall be entitled to priority payment by the proceeds from the sale of the pledged or mortgaged assets when the obligation is not more fulfilled with the unsecured creditors.

Third, the right in rems has the characteristic of being public which is derived from the absolute nature of the rights. Therefore, they must be made public so that people know the existence of and the legal status of the rights in rems to eliminate the acts of infringing upon the rights of others or being harmed due to the lack of knowledge of the legal status of the rights. Unlike the rights in rems, when the right in persona is established between the creditors and the credit receivers, the law is not obliged to disclose to all people and the parties have the right to agree to keep secrecy about the right in persona.

Fourth, the right in rems is stipulated by law. Since the right in rems is of special importance, the specific types and content of the right in rems are provided for by the the law. Article 175 of the Japanese Civil Code states: "No other right shall be established other than those provided for in this Code and other laws." Entities do not have the right to create new objects outside of the rights provided for by the law.

There are many different criteria for the classification of rights in rems. If basing on the criterion of the relationship between the object and the subject, and the adequate and complete nature of right in rems, it can be divided into two types: the principal and the limited right in rems.

First, the principal right in rems (full right in rems)

Right in rems or real right is the basis for the creation of other rights in the right in rems system. The principal right in rems has all the characteristics of right in rems in general, apart from one distinction which is the feature of permanence. The principal right in rems only disappear when the object is no longer in existence or is transferred to another subject. Ownership is the principal right in rems, which includes the right to possess, use, and determine, allowing the subjects to do all acts that are not legally prohibited to the property in order to achieve his or her

own interests. Ownership is strictly and absolutely protected by law. All other subjects must respect ownership right. All infringements of ownership, depending on the nature and extent are liable to legal responsibility.

Second, the limited right in rems

Limited right in rems is the right of the subject who is not the owner of the property. Limited right in rems is derived from the ownership rights of the owner or in accordance with the law. There are different reasons for the formation of various limited rights in rems. For some limited rights in rems such as tenure rights and surface rights, the primary reason for the emergence of these rights is: "The human need is very diverse and is growing, while not everyone has their own property to use that for satisfying their needs. Therefore, they can only satisfy their needs through the use of other people's property. On the contrary people with property do not always have the need to use and exploit their property directly. Consequently, there is a "convergence" in terms of aspirations as well as in terms of benefits between property owners and non-owners in exploiting the utility of property" (Hue Dang Duong, 2015). For the limited rights in rems such as rights of easement (the right to adjacent real estate), the birth of this kind of right in rems is primarily to ensure the interests of other subjects in the normal exploitation of their property in some special cases such as adjacent real estate, surrounded by each other .

On a property can exist many different limited rights in rems, while there is only one principal right in rems existing on the property. That principle has existed since Roman times, accordingly there can be only one form of ownership right on a subject. For example, on a parcel of land, apart from the ownership of that parcel of land which is the principal right in rems, other types of limited rights in rems can also co-exist, such as easement; entitlement; surface rights, etc. It can be noticeable that a plot of land cannot have both ownership by the entire people and public or private ownership (ownership of the individual, ownership of the legal entity). The limited right in rems also carry all the characteristics of the right in rems but in comparison with the principal one, it is not permanent but depends on the time limit prescribed by the law or within the time agreed upon with the owner (Yen Thi Hong Vu, 2015). Some limited rights in rems include easement right, rights to pledge, mortgage, surface rights.

From thanalysis of limited rights in rems, it is noticeable that the land use rights in Vietnam have full characteristics of a limited right in rems. This is manifested as analysed below:

First, the object of land use right is "thing" - a specific land plot which is clearly demarcated.

Rights in rems are the right imposed over things. Therefore, the first requirement of the right in rems is that its object must be considered as "things". So can the land (a specific parcel of land) be considered a thing (an object)? Land is an object because it satisfies the following requirements that an object must possess.

Land is a part of the material world. A “thing” as commonly understood is "the cubic, existing in space, perceivable". (Instutite of Linguistics, 2003). Thus, anything that is to be regarded as an object must exist in reality with certain shapes, sizes that anyone can perceive via normal senses without having to experience the complex thinking and abstractions.

"Land as a natural entity with its own origins and development history, is the entity with the complex and diverse processes that take place in it" (Krasil'nikov, 1958). With such characteristics, land is an object. However, if the land is isolated and separated from other elements of nature, the land is merely subject to research in the fields of geology, chemistry, environment ... but is not yet the object that the subjects targets because it does not satisfy their need. Land is also the concept of "land" to a large extent, not only that of land but also of many other elements of nature: "Land is a limited vertical area of space, including: climate of the atmosphere, soil cover, vegetation, animals, water surface" (Hinh Van Luong, 2003). Thus, the land exists in an objective and tangible way, which is a body that can be perceived by normal senses, thus it is possible to assert that the land is an object. Thus, the land exists in an objective and tangible way, which is a body that can be perceived by normal senses, thus it is possible to assert that the land is an object.

In addition, land is useful and al human activities are conducted on land and exert impacts on land. The usefulness of land can satisfy certain needs of human. Firstly, it is the need for shelters then come the others such as the needs for production-business, culture, social of mankind. Land is a material element which is indispensible and cannot be substituted. Because this, the right to access and use land is considered as the human right in the socio-economic area (Wickeri and Kalhan, 2010). Though land is useful, it is by no means that land naturally yields

benefits for different subjects. Instead the subjects have to use their acts to affect land in different ways depended on their purposes or law provisions for that land, such as planting trees, digging ponds, building works, grazing livestock, residence ... on the land. Without impacts on the land, human cannot receive the desired interests. The impact on the land may be indirect with this subject, but with the other subject there must be a direct impact on the land, as in the case where a subject gains rental benefits from the landleasing or subleasing of the land, the recipient of this benefit does not directly affect the land mechanically, but to yields profits, the tenant or the subleader must still have an impact on the land to obtain benefits for themselves since then to fulfill the obligation to pay land rent. As a result, all living and human production and business activities are attached to land and carried out on land, so the right in persona nature of the land use rights is undeniable. In addition, valuable land, any particular parcel of land can be priced into a certain money amount, depending on factors such as land use purposes, area, shape, location, legal status of the parcel of land ... The fact that it can be valued in money allowing land to enter into civil and commercial transactions which increases its value. Land becomes the object that subjects in the society target and wants to legally establish its rights on the land, thereby gaining protection from the state for this valuable asset.

Second, land use rights are stipulated by laws

One of the right in rems is its statutory characteristics, which means that the right in rems cannot be laid down by the parties, but must be governed by law (which is usually the law - normative legal document promulgated by the highest state power agency). The study of legal regulations in Vietnam shows that land use rights are fully statutory. In particular, although the content of land use rights for different types of land is different, in general, all land use rights have specific content (the specific powers that the law provides for the land user. use that land); the basis for arising and terminating; legal consequences of the violation; methods of protection of land use rights. For example, for annual agricultural land, the land user has rights such as conversion, transfer, sublease, inheritance, donation, mortgage, contribution of land use rights (Law on land, 2013, Art. 179).

Third, land use rights are limited.

As with all other types of limited rights in rems, land use rights are of limited nature. This attribute is manifested in the following points:

Land use rights are the derivative right from the land ownership by the entire people. The land ownership by the entire people comes before the land use rights. From the land ownership by the entire people as stipulated by law, the state is the representative owner of the entire people who allocates land use rights to subjects in the form of land allocation, land lease and recognition of land use rights. Land use rights for subjects only arise at this point. If the state does not provide the land use rights to a certain subject, then the land owner has no right to use the land. Therefore, the land use right is the right which derives from the land ownership by the entire people.

The land ownership by the entire people is independent, while land use right is dependent, thus it is full and complete. The state has full authority to manage, use and dispose of all land within its territory by regulating the content of land use rights, deciding to provide land use rights to the subject, the right to revoke land use rights... Meanwhile, the content of land use rights represented by the state is based on the type of land and the forms of land use rights that emerge. The land use rights are limited in terms of various contents, such as not all land use right holders having full rights to transfer, convert, lease, sublease, inherit, mortgage, contribute capital by land use rights; When being granted the land use rights by the state, these rights must not be used with the right purpose of the land. At the same time, the land ownership by the entire people is only represented by the state without any other subjects being allowed.

Moreover, the land ownership by the entire people is permanent, while the land use right is not. The permanent nature of land use right by the entire people is that it is not limited in time, yet the land use right is restricted to the duration of land use for each specific land type, such as the expiry date of land for the construction of the headquarters of a foreign organization with diplomatic functions is no more than 99 years or the period of use of agricultural land leased by the State is no more than 50 years ... at the end of the land use term, if not being extended by the state, the land use rights of the subjects are terminated.

Thus, it is possible to assert that the land use right in Vietnamese law is a limited right in

rems and that the concept of land use rights can be defined as follows: "Land use rights are a type of limited rights in rems derived from the principal right in rems of land ownership by the entire people, with the state as the representative of the entire people allocating land in different forms, such as land distributing, land lease and recognition of land use rights. Subjects possessing land use rights shall have the right to possess, use and dispose of land within the prescribed scope of law and must comply with certain legal obligations in the course of exercising their powers. "

Land use rights are made up of three elements: subject, object and content.

Regarding the subjects, land use rights are granted as stipulated by law. In order to be the subjects of land use rights, individuals, households and organizations must have the right to use the land in the following forms:

(i) Directly granted land use rights by the state through land allocation, land lease and recognition of land use rights;

(ii) Receive land use rights through transactions such as conversion, transfer, inheritance, donation, mortgage or capital contribution using land use rights.

The land use right certificate is a legal document to certify the land use rights of the subjects. A certificate of land use rights shall only be issued to subjects having land use rights in accordance with the law. Meanwhile other subjects without certificate, although legitimately using land through land lease transactions, borrowing or using land in practice, are not the subjects of land use rights.

The subjects of land use rights now include: Households, individuals; Domestic organizations such as state agencies, the People's Armed Forces units, political organizations, socio-political organizations, economic organizations, socio-political professional organizations, professional organizations, social organizations. , socio-professional organizations, public non-business organizations and other organizations according to the civil law; Vietnamese communities such as those communities living in the same village, hamlet, residential quarter, residential quarter and similar residential area with the same customs, practices or common family; Foreign-invested enterprises including enterprises with 100% foreign investment capital, joint-venture enterprises and Vietnamese enterprises where foreign investors purchase shares, merge or buy back according to law provisions on investment.

Concerning the object of land use rights, if the subject of the entire people's ownership of land is all land within the national territory, including land, islands and territorial waters (Hanoi Law University, 2016), the object of land use rights is narrower, that is, the land which has been allocated with land use rights by the state to the subjects. For unused land, it is not subject to the land use rights. The subjects of current land use rights as defined in Article 10 of the 2010 Law on Land include two basic land categories: (i) agricultural land; (ii) non-agricultural land.

With respect to the content of land use rights, the content of the land use right shall be the powers to use land provided and protected by the law, accordingly the subjects of the right can acts on the parcel of land under his management. In general, the content of land use rights includes the following basic powers: Possession of land, land use, and land disposition.

Land use rights allow the subject to legitimately hold or control the land against the infringement of other subjects. This power is the most prerequisite for the subjects to exploit and use the inherent properties of land for their own benefit as well as to exploit the benefits of land related transactions. Land use rights give land owners the ability to take possession of the land in a comprehensive manner, in both legal and practical terms. On the practical side, the subjects carry out land occupatation by holding and managing a defined land area with clear boundaries. With this land area, the subjects can certainly build the fence to manage and prevent the intrusion of other subjects. Legitimate land possession is the land owner's right to use the land with the recognition of the state which in the legal documents, the name of the land owner is registered for that land. Likewike, information on the current status and legal status of the management and use of the land plots and assets attached to the land, the legal possession of the land by the land user entitled to use the land is more clearly expressed in the land register document.

Entities with land use rights can use land on their own preferences but must comply with the legal regime of the type of land as prescribed by law. The land use refers to the direct impact on land such as cultivation, aquaculture, construction, etc., but can also be implemented through transactions permitted by law such as rents, lease, mortgage, assurance with land use rights ... to recover the profits as desired. In practice, many land owners still have land use rights but are limited

to direct use of land and the implementation of land-related transactions is not possible, particularly with respect to land use rights whose procedure is strictly stipulated by law such as mortgage, capital contribution, transfer ...

The land owner has the right to dispose of his land if he does not want to continue using the land or wants to obtain benefits by terminating the land use right. The decisions about land are made by the following ways: (i) Transfer of land use rights to other entities through transactions such as transfer, conversion, inheritance, capital contribution, donation of land use rights. However, not all land owners who have the land use right can dispose of agricultural land in this way; (ii) Voluntarily return land to the state when there is no demand for land. This is a way of disposing of land which any subject who has land use rights can do so.

4. Results

From the contents presented above, this paper has obtained some following results: Clarifying that the birth of land use rights is the creation of lawmakers in Vietnam to implement the regime of land ownership by the entire people; Specifying the scientific shortcomings of existing concepts in Vietnam regarding the legal nature of land use rights; Proving in a scientific way that land use rights are a kind of limited right in rems and clarifying the components of land use rights as a limited rights in rems.

5. Conclusion

Land use rights are a legal creation and, at the same time, a legal instrument for the realization of the entire people's ownership in Vietnam. Land use rights by legal nature are limited right in rems and have the full characters of a limited right in rems Perceiving that land use rights is a content that is separated from the land ownership by the entire people is inaccurate and considering land use rights as property rights is not adequate, leading to many restrictions in the construction and perfection of the laws related to land use rights. Therefore, it is necessary to recognize land use rights as a right in rems.

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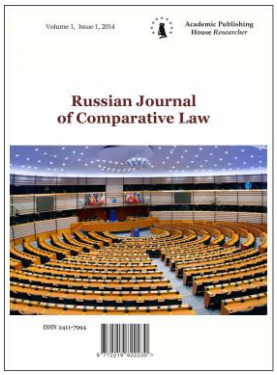

From the Rights to the Duties of Business Entities under the European Convention on Human Rights

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Abstract

The aim of this paper is to analyse the rights and obligations of business entities under the European Convention on Human Rights ('the Convention') with the purpose of determining the correlation of business and human rights in this instrument. The key focus of this study is to identify whether business entities under this treaty should only be perceived as human rights holders or may well be recognised as being responsible for violation of these rights (obligors).

This paper addresses the following three points. First, this manuscript focuses on the concept of a 'business entity' in the meaning of the Convention. Second, the author concentrates on the rights of these entities as elaborated in the practice of the European Court of Human Rights ('the Court'). Third, an analysis of the possible obligations of businesses under this international treaty is accomplished. Based upon the Convention, the author concludes that business entities may perform the roles of both human rights holders and human rights obligors.

Keywords: business entity, human rights, duties, positive obligations, state-owned company, responsibility, European Convention on Human Rights, European Court of Human Rights.

"no silver bullet can resolve the business and human rights challenge"
Nicola Jägers
(Jägers, 2013: 295)

1. Introduction

Interrelationships between business and human rights have been intensely discussed by scholars (e.g. De La Vega, 2017: 431; Černič, 2010: 210; Deva, Bilchitz, 2013; Kamminga, 2004; Bhandary, 2011; Verdonck, 2016: 112; Karavias, 2013; Augenstein, 2011; Vázquez, 2005: 927-959) and practitioners (Business and Human Rights Research Centre) at both the United Nations and regional levels. Current developments in international law indicate that the role of business entities gradually changes. In May 2011 the Organisation for Economic Co-operation and Development (OECD) introduced its new Guidelines for Multinational Enterprises.

A significant step forward in this direction was made through the endorsement of UN Guiding Principles on Business and Human Rights (UNGP) in 2011 (HRC). These became the standard of corporate responsibility for governments, intergovernmental organisations and non-

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governmental organisations. This standard was reflected in documents of many intergovernmental organisations all over the world.

For example, in November 2016 the **ASEAN** Intergovernmental Commission on Human Rights held the AICHR Seminar on Promoting Corporate Social Responsibility (CSR) and Human Rights in ASEAN. This seminar explored the role of governments and businesses in promoting CSR, as well as possible elements of a regional strategy on the issue.

In March 2017, the **OAS** Inter-American Juridical Committee adopted a resolution titled "Conscious and effective regulation for companies in the sphere of human rights". This document called upon the OAS to examine the "Corporate social responsibility in the area of human rights and the environment in the Americas" of 2014 with the goal of strengthening progress in the region and proposes that states and companies respect concrete obligations in order to protect human rights and the environment.

The **African Commission on Human and Peoples' Rights** established the Working Group on Extractive Industries, Environment and Human Rights Violations, which highlighted the need for direct accountability of corporations for human and peoples' rights violations (Dersso: 2016). One of the newest document on the subject matter is the Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights introduced by the open-ended intergovernmental working group (OEIGWG) on 29 September 2017.

In Europe, three main human rights organisations, namely the Council of Europe (CoE), the European Union (EU) and the Organization for Security and Cooperation in Europe (OSCE) follow the UNGP as well.

In 2015, the **European Commission** issued the "Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play".

The **OSCE** published a report titled "Ending Exploitation. Ensuring that Businesses do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector".

The **Council of Europe** adopted Resolution 1757 and Recommendation 1936 on "Human Rights and Business" in 2010. In these documents, the CoE Parliamentary Assembly recommended that the CoE Committee of Ministers explore ways and means of enhancing the role of businesses in respecting and promoting human rights. As a result, the Steering Committee for Human Rights (CDDH) published two drafts in 2012: the "Draft preliminary study on corporate social responsibility in the field of human rights: existing standards and outstanding issues" and the "Draft feasibility study on corporate social responsibility in the field of human rights". Following these drafts, in March 2016, the Committee of Ministers adopted Recommendation CM/Rec (2016)3 on Human Rights and Business.

All of the aforementioned documents involving the obligations of business entities are of a soft law nature. In our research, we wish to take it a step further and also prove that a binding human rights treaty, specifically the Convention, may be seen as defining obligations on businesses. The preliminary study demonstrates that there are disagreements on the subject-matter in different CoE documents. The CDDH in its reports observed that "while businesses enjoy certain rights under the Convention, they do not have obligations under this instrument" (CDDH, 2012). On the other hand, the Court as the body responsible for the interpretation of the Convention developed a factsheet titled "Companies: victims or culprits" (Companies: victims or culprits, 2013), which shows that business subjects may be seen as both the victims of human rights violations and the violators of these rights. In view of these ambiguities, the author intends to study the case-law of the Court in order to clarify whether business entities should be recognized under the Convention as being responsible for the respect of and compliance with human rights and, if so, under which basis.

Given this, the manuscript will address the following three points: first, what is covered by the concept 'business entity' in the meaning of the Convention; second, what are the rights of business entities under the Convention as elaborated in the practices of the Court and third, an analysis of the possible duties or obligations of these subjects based on the Convention in the light of the existing case-law of the Court. In the conclusions, the answer to the main research question on possible responsibility of business entities for violations of human rights will be provided. The further division of the paper corresponds to the three above-mentioned points. In order to be

able to examine the rights and duties of corporate subjects under the Convention, first of all it is necessary to explain the concept 'business entity' for the purposes of this CoE instrument.

2. Materials and methods

The main sources for writing this article became the case-law of the European Court of Human Rights, monographs on the subject-matter, journal publications and Internet archives. The study used the basic scientific methods such as the historical method, analysis, synthesis and the method of comparative law. The use of historical method allowed to describe the practice of the Court regarding the human embryo status in a chronological order. Analysis and synthesis always complement one another. Every synthesis is built upon the results of a preceding analysis, and every analysis requires a subsequent synthesis to verify the results. The author applied these two methods throughout the paper. The method of comparative law served as a tool for defining the difference in views on the subject from the sides of the states and intergovernmental organisations.

3. Discussion

3.1. The definition of the term 'business entity' in the sense of the Convention

The way we define a concept influences the comprehensive understanding of it. Correspondingly, the content of the rights and duties of business entities will depend on the chosen approach. The theory of human rights law distinguishes between two groups of subjects: 1) human rights holders and 2) human rights obligors. If we apply this division to the Convention, the concept of ***human rights holders*** will correspond to the notion of a victim of human right violations who are often the applicants before the Court.

Regarding the position of ***human rights obligors*** in the meaning of the Convention, according to Article 1 of the Convention the primary obligation to secure human rights set forth in this treaty is imposed on the states. Taking into consideration the changing place of corporations in international law (Pahuja, 2016) particularly in regards to human rights, the next part will elaborate on the possibility of business entities to act in the capacity of human rights obligors based on the Convention and the Court's case-law.

A) "Governmental" v. "non-governmental" organisations

The distinction between human rights holders and human rights obligors can be explained best with a reference to the difference between 'non-governmental' and 'governmental' organisations. To be able to obtain the standing of the applicant (victim), in other words the human rights holder, a business entity should possess the features of a 'non-governmental organisation' in the sense of the Convention. An illumination of the subject-matter was produced by the Court in the case of *Transpetrol, a.s., v. Slovakia* (Transpetrol, a.s., v. Slovakia, 2011) In this case, the Court highlighted that "…a company is "a non-governmental organisation" if it is governed essentially by company law, does not enjoy any governmental or other powers beyond those conferred by ordinary private law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts…" (Transpetrol, a.s., v. Slovakia, 2011: 61).

Based on this, we may conclude that **a business entity is a 'non-governmental organisation', if** it is: 1) completely independent of the state; 2) governed essentially by company law; 3) subject to the jurisdiction of the ordinary rather than the administrative courts.

By contrast, **a business entity** should be seen as so called **'governmental organisation' if** it: 1) exercises governmental powers; 2) enjoys any other powers beyond those conferred by ordinary private law in the exercise of its activities; 3) is established for public-administration purposes. Additionally, the unity of interests of the business entity and the state in the form of the participation in the same proceedings, following the same purpose or being represented in those proceedings by the same lawyer attests the position of 'governmental' organisations.

In case of companies acting as 'non-governmental organisations', it is clear that they are not prohibited from lodging their complaints with the Court and may act as human rights holders. Regarding the position of the business entities having the features of 'governmental organisations' because of strong ties with the states, they may not act as human rights holders, but only as the human rights obligors. However, this does not signify that the terms 'governmental organisation' and human rights obligor should always be seen as the synonymous. The concept of human rights

obligors is much wider and may comprise also 'non-governmental' business entities. The detailed explanation will be provided further in this paper.

B) Business entities as human rights holders

The text of the Convention (Convention for the Protection..., 1950) does not contain the term 'business entity'. However, this expression can be found in the Court's case-law (Megadat.com SRL v. Moldova, 2011: 12; Gotthárd-Gáz Kft v. Hungary, 2007: 19; Léval and Nagy v. Hungary, 2003: 17; Arshinchikova v. Russia, 2007: 24; Felix Blau SP. Z O.O. v. Poland, 2010: 36; Elcomp sp. z o.o. v. Poland, 2011: 41, and others). For example, in the first paragraph of the judgment in the case of *Hélioplán Kft v. Hungary*, it was noted that "[t]he case originated in an application (no. 30077/03) against the Republic of Hungary lodged with the Court ... by a Hungarian *business entity*, Hélioplán Kft ("the applicant") ..." (Hélioplán Kft v. Hungary, 2007: 1). This excerpt clearly shows that business entities may be regarded as applicants in proceedings before the Court and consequently human rights holders.

The list of the permissible individual (not inter-state) applicants under the Convention may be found in Article 34 of this treaty: "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals..." (ECHR). Given that a direct reference to the phrase 'business entity' is absent, it may be unclear whether the Court regards a 'business entity' to be considered a 'person', a 'non-governmental organisation' or as a 'group of individuals'. The analysis of the *Travaux Préparatoires* (The Preparatory Works to Article 25 of the Convention, 1964), the case-law of the Court (Ukraine-Tyumen v. Ukraine, 2007: 28) and the legal doctrine (Emberland, 2006: 35; van den Muijsenbergh, Rezai, 2012: 47) attests that a profit-making business entity should be seen as a non-governmental organisation (NGO) for the purposes of the Convention.

One may provide hundreds of examples of the Court's judgments and decisions where applicants appear as business entities of different types, such as joint stock companies (Kirovogradoblenergo, PAT v. Ukraine, 2013; Askon AD v. Bulgaria, 2012; OAO Neftyanaya Kompaniya Yukos v. Russia, 2011; OAO Plodovaya Kompaniya v. Russia, 2007), public limited companies (S.A. Sitram v. Belgium , 2002; S.A.GE.MA S.N.C. v. Italy, 2000; N.T. Giannousis and Kliafas Brothers S.A. v. Greece, 2006; Sociedade Agrícola do Ameixial, S.A v. Portugal, 2011) or limited liability companies (British-American Tobacco Company Ltd v. the Netherlands, 1995; 3A.CZ s.r.o. v. the Czech Republic, 2011; Alithia Publishing Company Ltd and Constantinides v. Cyprus, 2008; OOO Rusatommet v. Russia, 2005; Rosenzweig and Bonded Warehouses Ltd v. Poland, 2005). Moreover, given that the Convention does not impose a nationality requirement for submission of the application, we may find cases relating to the business entities set up outside of the CoE member states (Anheuser-Busch Inc. v. Portugal, 2007: 1; Regent Company v. Ukraine, 2008: 1). Although the Court does not require an official registration of a legal person for lodging an application with it (Association of Victims of Romanian Judges and Others v. Romania, 2014; The United Macedonian Organisation Ilinden and Others v. Bulgaria, 2006), given the nature of business entities a majority of the applications involve officially registered subjects.

According to the Convention, a business entity is a non-governmental organisation. However, not necessarily every NGO in the meaning of this treaty is a business subject. An analysis of existing definitions of this term allows us to conclude that *the term 'business entity' refers to any type of legal person carrying out its activities for the purposes of producing a profit*. It could possess different names, such as company, corporation, partnership, joint venture and so on. In the current manuscript we will use these titles interchangeably. What is of importance is that all these entities were established with the aim of generating profit. Accordingly, in this paper we will not deal with case-law concerning NGOs established in the form of non-profit organisations, political parties, movements (*e.g.* LGBT), religious groups, *etc.*

C) Business entities as human rights obligors

The ideas expressed above regarding the definition of business entities under Article 34 of the Convention relate to their capacity as the applicants, the human rights holders. Given the fact that in accordance with the Convention only the states are directly responsible for violations of human rights, the definition of business entities in the capacity of human rights obligors is quite

problematic. Nonetheless, the case-law of the Court may well provide us with an explanation on the subject-matter.

Under the well-established case-law, the application submitted to the Court against a private business entity "...would be inadmissible as being incompatible *ratione personae* with the Convention provisions" (CDDH, 2012). On the other hand, in the case of *Trocellier v. France* the Court observed: "...the Contracting States are required to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, *whether in the public or the private sector*, can be determined..." (Trocellier v. France, 2006). This may lead us to the conclusion, that under some circumstances the Convention also requires compliance with its norms in the private business sphere.

Article 1 of the Convention sets forth that the right envisaged by the Convention shall be secured on the territory within the jurisdiction of the state parities. It means that the business entity responsible for the violation of human rights under the Convention has to be set up in the territory of the one of the 47 states, which have ratified the Convention. Exceptionally, the case-law of the Court envisages extra-territorial jurisdiction of state parties to the Convention (Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights). This could be relevant for a debate on the possible liability of multinational corporations.

The question arises as to what is the position of the state-owned companies under the Convention. In its commentary to Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the International Law Commission (ILC) observes: "The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority..." (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, 2001: 48). The practice shows that the Court in its case-law follows the approach taken by the ILC. Before deciding on attribution of the conduct of an entity to the state, it put the subject to the test on the compatibility of the application *ratione personae*.

In this test, the Court evaluates the *e.g.* the degree of governmental control over a business entity, the management, the position on the market, national legislation regulating the conduct of an entity, *etc.* (The details of the test see in the following cases: Mykhaylenky and Others v. Ukraine, 2004: 41-45; Khachatryan v. Armenia, 2009: 51-53; Lisyanskiy v. Ukraine, 2006: 17-20; Shlepkin v. Russia, 2007: 21-24; R. Kačapor and Others v. Serbia, 2008: 92-99; Grigoryev and Kakaurova v. Russia, 2007: 32-36). For instance, in the judgment in the case of *Mykhaylenky and Others v. Ukraine,* the Ukrainian government argued that although the debtor company was state-owned, it was a separate legal entity and the state could not be held responsible for its debts (Mykhaylenky and Others v. Ukraine, 2004: 41). The Court agreed that a valid question has been raised. On the basis of the above-mentioned test, it came to the conclusions that the state was liable for the company's debts to the applicants. In the same way, in the case of *Khachatryan v. Armenia* regarding the debts of joint-stock company 'Hrazdanmash' whose majority shareholder was the state, the Court concluded that the debtor company, in spite of the fact that it was formally a separate legal entity, did not enjoy sufficient institutional and operational independence from the state to absolve the latter from its responsibility under the Convention (Khachatryan v. Armenia, 2009: 51-53).

In general, the Court admits that the state is responsible for the conduct of business entities established in the form of state-owned companies (Cooperativa Agricola Slobozia-Hanesei v. Moldova, 2007: 8; Gusinskiy v. Russia, 2004: 70), private prisons (Dickson v. the United Kingdom, 2006: 5), state-funded schools (O'Keeffe v. Ireland, 2014: 14; Dogru v. France, 2008: 6) and public hospitals (Avilkina and Others v. Russia, 2013: 15). These examples confirm that the Court follows the rules of public international law regarding the responsibility of the state set forth by the ARWISA.

To see the difference between human rights holder and obligors, it is of interest to look at the reverse side of the coin, which is when the state-owned company acts as an applicant. An excellent example is the case of *Transpetrol, a.s., v. Slovakia* (Transpetrol, a.s., v. Slovakia, 2011). In this

case, the applicant joint-stock company complained about the fairness of proceedings before the Slovakian Constitutional Court regarding the ownership of shares. At different periods of time, the state had majority share holdings in the company. The Court observed, *inter alia,* that due to its strategic importance to the national economy, the applicant company used was excluded by law from privatisation as it was recognised as having the character of a "natural monopoly" (Transpetrol, a.s., v. Slovakia, 2011: 66). Moreover, in the proceedings before the Court the government had been represented by the same lawyer as the applicant company. These circumstances reflected the unity of interests of the applicant company and the state. Therefore, the application of this state-owned business entity was declared incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a).

However, this does not mean that in general state-owned companies are prohibited from lodging their applications with the Court. In the case of *Islamic Republic of Iran Shipping Lines v. Turkey* (Islamic Republic of Iran Shipping Lines v. Turkey, 2007), the Turkish government contested that the applicant company was a state-owned corporation, which could not be considered to be distinct *de jure* or *de facto* from the government of the Islamic Republic of Iran (Islamic Republic of Iran Shipping Lines v. Turkey, 2007: 68) and therefore the application should be declared inadmissible. The Court conducted its *ratione personae* test and decided that there is nothing to suggest that the present application was effectively brought by the Islamic Republic of Iran and the applicant company is entitled to bring an application (Islamic Republic of Iran Shipping Lines v. Turkey, 2007: 82). This case reaffirms the rule that the state-owned companies may also be seen as the human rights holders. Nonetheless, habitually, the business entities governed and controlled by the state act rather as human rights obligors.

Having defined the main features of business entities for the purposes of the Convention, it is now important to analyse the practical impact of their legal standing as framed in this international treaty. Legal standing relates to the possibility to possess certain rights or bear identified duties. Initially, the study will focus on the rights of business entities under the Convention.

I. Rights of business entities under the Convention

The fact that business entities may possess certain rights under the Convention is generally recognised. Consequently, there is no need to prove that they may be regarded as human rights holders. Therefore, this section of the paper will only provide a brief summary on the rights applicable to companies in the proceedings before the Court. What is new in this paper is the division of these rights into categories. The special value of this contribution is that it provides an exhaustive list of the provisions under which business entities may complain of. Furthermore, this list is illustrated by examples from the Court's case-law in the footnotes.

When discussing rights established in the Convention, the author suggests dividing them into two separate groups. **The first group** is composed of ***human rights***, commonly understood as inalienable and inherent in all human beings (OHCHR, What are Human Rights?). Examples of such rights are the right to a fair trial, freedom of expression, or the prohibition of discrimination. **The second group** is represented by so called '***procedural rights'***, those related to admissibility of the application and the other stages of the examination of the case by the Court. For instance, in accordance with Article 43 of the Convention an applicant company has the right to request a case be referred to the Grand Chamber of the Court. Rule 100 of the Rules of Court provides for the possibility of asking for free legal aid (ECtHR, Rules of Court, 2016: 44). According to Rule 34 of the Rules of Court, a person may ask the President of the Court's Chamber to grant authorization for the interpretation and translation into English or French of the submissions. It also includes the possibility to use the language of the CoE contracting party other than the official language in the course of the oral hearings before the Court (ECtHR, Rules of Court, 2016: 17-18).

Upon return to the first group (human rights), the study on the Convention conducted by the author (Tymofeyeva, Non-Governmental Organisations, 2015: 99-102) demonstrates that ***business entities may enjoy all or certain human rights envisaged in the following provisions*** of this CoE treaty: Article 6 (Saarekallas OÜ v. Estonia, 2007: 52), Article 7 (Radio France and Others v. France, 2004: 20; OAO Neftyanaya Kompaniya Yukos v. Russia, 2009: 499), Article 8 (Wieser and Bicos Beteiligungen GmbH v. Austria, 2007: 68), Article 9 (Glas Nadezhda

EOOD and Anatoliy Elenkov v. Bulgaria, 2007: 59), Article 10 (OOO Ivpress and Others v. Russia, 2013: 80), Article 11 (Geotech Kancev GmbH v. Germany, 2016: 44), Article 13 (Sylenok and Tekhnoservis-Plus v. Ukraine, 2010: 89; Amat-G Ltd and Mebaghishvili v. Georgia, 2005: 54), Article 14 (Sovtransavto Holding v. Ukraine, 2002: 101), Article 1 of Protocol No. 1 (Centro Europa 7 S.r.l. and Di Stefano v. Italy, 2012: 188), Article 3 of Protocol No. 1 (TV Vest AS and Rogaland Pensjonistparti v. Norway, 2008: 44, 61, 78), Article 2 Protocol No. 7 (Siglfirðingur ehf v. Iceland, 2000: 4), Article 3 Protocol No. 7 (Wouterse, Marpa Zeeland B.V. and Metal Welding Service B.V. v. the Netherlands, 2002) and Article 4 of Protocol No. 7 (Grande Stevens and Others v. Italy, 2014: 228). In view of the applicability of the non-discrimination requirements set forth in Article 14 of the Convention to businesses, there is also nothing preventing consideration of the provisions of Article 1 of Protocol No. 12 to the Convention.

One of the most important rights for the proper functioning of business is the peaceful enjoyment of possessions. An analysis of the case-law of the Court reveals that in all the cases where the Court awarded the highest amounts of just satisfaction, it had found a violation of Article 1 of Protocol No. 1 to the Convention (right to property) (Tymofeyeva, The Highest Amounts of Just Satisfaction, 2015: 255-271). The case of *OAO Neftyanaya Kompaniya Yukos v. Russia*, where the Court awarded to the applicants EUR 1 866 104 634 (OAO Neftyanaya Kompaniya Yukos v. Russia, 2014: 26, 35), remains the frontrunner among this type of cases.

Theoretically, regarding the other material provisions of the Convention and its Protocols, following the logic of the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, 2014), business entities may complain of a breach of all the provisions of the Convention. The judgment at issue confirmed that, under exceptional circumstances, NGOs may complain of a violation of even the right to life (Article 2). However, it should be noted that the applicant in the *Câmpeanu* case was a non-profit human rights organisation and was not recognised as a victim under Article 34 of the Convention but received a special status of a *de facto* representative. Therefore, it is very unlikely the Court would follow this example with regard to business entities and even if it would decide to do so, there is a significant difference in the position of a victim and a representative.

This segment of the paper involved an analysis of business entities as the victims of human rights violations. Next to be evaluated is the question if the Convention provides for the possibility in considering them to be the breach culprits. Discussion on the issue of the probability to find the business entities responsible for the respect for human rights is forthcoming.

II. Duties of business entities under the Convention

This section aspires to provide an overview of the possible duties of business entities based on the provisions of the Convention and the Court's case-law. Before beginning to elaborate on the subject-matter, it should be noted that the terms 'obligation' and 'duty' for the purposes of the current study are synonymous. The author is nonetheless aware of the fact that academic studies do not all reach the same conclusions as to the definition of these two concepts. Given the fact that Article 1 of the Convention provides only for obligations of states, the position of business entities as human rights obligors under this treaty is very unclear. Therefore, one of the main research goals of this segment is to establish whether and to what extent the Convention can serve as a basis of corporate responsibility to respect human rights. The study provides a list of the norms, which may envisage possible obligations of business entities and the corresponding case-law in the footnotes to illustrate it. The classification of duties is of great importance in determining the status of businesses under this treaty.

A. Types of obligations

Likewise in respect to the rights of businesses under the Convention, the author suggests distinguishing between two groups of duties depending on their substance. **The first group** will encompass ***the human rights obligations***, which reflect the rights envisaged in this treaty. **The second group** covers ***the procedural duties***, to the large extent foreseen by Article 35 of the Convention. This provision imposes a duty on the applicant to comply with admissibility requirements such as exhaustion of domestic remedies (Magyar Keresztény Mennonita Egyház and

Others v. Hungary, 2014: 50) or lodging an application within a six-months period from the date on which the final decision was taken (Centro Europa 7 S.r.l. and Di Stefano v. Italy, 2012: 101-105).

The next possible division of the obligations of a subject of law contains distinguishing between direct and indirect obligations (Karavias, 2013: 927). **A direct obligation** signifies a duty directly imposed on a person or entity by law and **an indirect obligation** is implied, derived from the objective and purpose of a statute. For the purposes of our research, ***the direct obligation*** is the one specifically mentioned in the text of the Convention and ***the indirect*** is the duty, which is not prescribed therein, but the one that can be derived based on its text. The indirect duties are those set forth by the states on a domestic level with the aim to regulate the conduct of businesses in order to comply with the norms of the Convention.

B. Direct obligations of business entities

The concept 'direct obligation' for the purposes of the current study signifies the duty specifically set forth in the text of the Convention. According to the typology mentioned above, these direct obligations may be divided into further two groups: 1) procedural and 2) human rights. Because of the relevance to the research question of whether business entities could or should hold human rights obligations, the procedural duties will be discussed only in brief. It would be sufficient to say that, for instance, Article 35 of the Convention envisages a duty for a business entity to comply with the six-month rule. This duty was confirmed in the admissibility decision in the case of *Benet Czech, spol. s r.o. v. the Czech Republic*, where the Court specifically expressed the idea that the applicant company did not comply with its obligations under the Convention. In particular, the Court noted that it "does not find any exceptional circumstances why the applicant company could not have complied with the six-month time-limit." (Benet Praha, spol. s r.o. v. the Czech Republic, 2010). This example clearly demonstrates that both the text of the Convention and the Court's case-law may impose certain direct obligations on business entities. Non-compliance with these requirements may lead to a sanction in the form of a rejection of the application. However, it is necessary to stress again that these are **direct procedural obligations**.

One may disagree and argue that the procedural requirements do not equate with holding obligations. However, if we have a look on the wording of some Court's judgments and decisions, we may see that these requirements are called 'the obligations'. For instance, in the judgment in the case of *Pirali Orujov v. Azerbaijan*, we can find a phrase "this does not relieve him of the obligation to comply with the six-month rule" (Pirali Orujov v. Azerbaijan, 2011: 53). The same expression was used in a number of other cases of the Court (E.g. see: Niğit v. Turkey, 2006; Doshuyeva and Yusupov v. Russia, 2016: 32; Aydin v. Turkey, 2008: 39). Similarly, in the case of *Brajović and Others v. Montenegro* (Brajović and Others v. Montenegro, 2018: 40) and the hundreds of others,* the Court speaks about the "obligation to exhaust domestic remedies" as set forth in Article 35 of the Convention. Therefore, these procedural requirements could be seen as a certain type of procedural obligations in the meaning of this treaty.

The procedural duties or obligations in issue have to be dinstinguished from the procedural human rights obligations, such the state's obligation to conduct effective criminal investigation under Article 2 and 3 of the Convention (Akandji-Kombe, 2007: 32). The latter signify procedural human rights substantive obligations, not the duty to comply with procedural rules in the sence of Article 35 of this treaty. The similar title may lead to confusions in understanding. For example, Professor Wilt and Sandra Lyngdorf in their paper titled *Procedural Obligations Under the European Convention on Human Rights* discuss "the obligation to exhaust local proceedings" (Van der Wilt, Lyngdorf, 2009: 47) and the "obligation to instigate" (Van der Wilt, Lyngdorf, 2009: 48). Overall, for the purposes of this paper, the procedural obligations under the Convention are the duties to fulfil the procedural requirements as set forth in this treaty, mainly in Article 35.

Regarding **direct human rights obligations** of business entities, the existence or non-existence of such obligations may depend on the distinction between 'governmental' and 'non-governmental' ogranisations. With respect to the position of the human rights holders under the Convention, the case-law of the Court requires that such an entity should be 'non-governmental'.

* The search in HUDOC as of 8 February 2018 provides for 470 judgments and decisions with the phrase "obligation to exhaust domestic remedies".

The text of this treaty, nevertheless, is silent with regard to the position of a company as a human rights obligor. Therefore, in theory, nothing prevents us from supposing that so called 'governmental' business entities may also be seen as direct human rights obligors.

The case-law of the Court contains a number of examples when the state was directly responsible for the conduct of so-called 'governmental' business entities. To remind, the business entity is a 'governmental organisation' when it exercises governmental powers, enjoys the powers beyond those conferred by ordinary private law or is established for the public administration purposes. Such an entity is dependent on the state and is subject to the jurisdiction of administrative courts. The above listed features should not be obligatory cumulative. The Court decides on the status of a business entity on the case-by-case basis.

The exercise of the governmental powers may be transferred to the companies responsible for the running of prisons, providing armed combat and/or security services (the private military and security companies (Bednar, 1/2016: 80-92), performing border control, involved in provision of medical services and many others. For example, in the case of *Dickson v. the United Kingdom* (Dickson v. the United Kingdom, 2007), the applicant placed into a ***private prison***, complained under Article 8 about the refusal of artificial insemination facilities. The Court ruled that this provision had been breached as such a restriction on the applicants' rights to respect for the private and family life was not justified. The case of *Codarcea v. Romania* (Codarcea v. Romania, 2009) concerned the absence of the means of ensuring reparation for bodily injuries caused by medical error in a state hospital. The applicant, Mrs Elvira Codarcea, was admitted to the ***municipal hospital*** of the Târgu Mureş for the removal of a skin tag on her jaw. Doctor B. recommended her plastic surgery and performed a few operations. These operations resulted in paralysis of the right side of her face and other side-effects requiring special medical treatment. The applicant initiated proceedings against Dr B. and the hospital, but to no avail. Relying on Article 8 of the Convention, she complained before the Court that the proceedings had been ineffective. The Court ruled that there had been a violation of this provision.

Both cases related to the conduct of 'governmental' entities. In the first case, it was a private entity exercising governmental powers; the second case covered the activity of a state hospital. The conduct of both institutions was attributable to the state and entailed the responsibility. This was a direct responsibility for an infringement of the provisions of Article 8 of the Convention (private and family life). It should be observed that the position of these business entities was not questioned by being placed by the Court under the *ratione personae* test.

The text of the judgment in the *Dickson* case contains a phrase that "the respondent State is to pay the applicants", which clearly confirms that the obligation in question is imposed on the United Kingdom, not the private prison. Business entities in these cases acted as *de facto* organs of the state and, therefore, there were no separate direct obligations imposed on them. In these types of cases the conduct of such subjects is equal to the conduct of the states. Therefore, one can hardly distinguish between the responsibility of the states-parties to the Convention and the liability of 'governmental' entities. Nonetheless, it is possible to expect that the state will have to deal with the conduct of 'governmental' business entities by means of controlling their activity or by enacting changes into legislation forcing the responsible subjects to comply with the Convention. From this perspective, we may conclude that the Convention indirectly imposes human rights obligations also on 'governmental' business organisations. The idea of indirect obligations will be illuminated in the following part of the manuscript.

C. Indirect obligations of business entities

The human rights set forth in the Convention do not have a horizontal effect and may not be enforced directly against non-state actors, *e.g.* legal persons. However, from a certain perspective we might consider possible indirect human rights obligations of businesses. In the commentaries to the UNGP we may find a famous expression that the "responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate." This duty arises independently of a state willingness to fulfil their own human rights obligations. At the same time, it does not diminish the obligations of states. Morover, business entities should act in compliance with national laws and regulations protecting human rights.

Markos Karavias in its monograph on corporate obligations under international law speaks about the duty to respect for human rights and mentions that "an obligation to respect a right may

necessitate positive action on behalf of the corporation" (Karavias, 2013: 169). With reference to the judgment in the case of *Guerra and Others v. Italy* (Guerra and Others v. Italy, 1998), he notes that "a chemical factory may be required to improve its installations" (Karavias, 2013: 169). In this case the applicants complained about failure to provide local population with information about risk factor and the direct effect of toxic emissions from the private chemical factory (owned by the Enichem agricoltura company) on their life. They alleged breaches of Article 2, 8 and 10 of the Convention. The Court observed that Article 10 of the treaty does not impose on the state positive obligations to collect and disseminate information of its own motion and, accordingly, it is not applicable in the instant case. This signifies that such an obligation does not arise also for business entities. The Court, however, concluded that there was a positive obligation to ensure effective protection of applicants' right to respect for their private and family life. And in this respect, we may suppose that the Convention can contribute to establishing human right obligations on the part of business entities to refrain from violation its provisions. The Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (OEIGWG, 2017) support this idea by obliging business entities to "adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations" (OEIGWG, 2017). With regard to the right to life, the Court held that given its conclusion as to a violation of Article 8 of the Convention, it is unnecessary to consider the case under Article 2. By this, the Court avoided in this case the discussion on whether private companies could be indirectly responsible for the respect to the right to life.

On the basis of the current Article 41 of the Convention (just satisfaction), the applicants also sought an order from the Court requiring the respondent State to decontaminate the entire industrial estate concerned, to carry out an epidemiological study of the area and to undertake an inquiry to identify the possible serious effects on residents. They did not request the termination of activities of the factory, presumably, because in 1994 it permanently stopped producing fertiliser. Referring to its well-established case-law (Zanghì v. Italy, 1991: 26; Demicoli v. Malta, 1991: 45; Yağcı and Sargın v. Turkey, 1995: 81), the Court observed that "it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention" (Guerra and Others v. Italy, 1998: 74). Although it is possible to presume that there exists an obligation of business entities to act with respect to the human rights standards envisaged in the Convention, the exact means are to be established at the national level. The precise actions should be considered within the meaning of so-called 'corporate social responsibility' (Lopez, 2013: 59; Nolan, 2013: 138; Tanja, Maarten, 2015).

As already demonstrated, indirect obligations of business entities to respect human rights are closely related to 'positive obligations' under the Convention. The concept of positive obligations means that CoE states can be obliged to act and to take active steps to ensure an effective enjoyment of the rights protected by the Convention (Klatt, 2011).

The Court has observed that the effective exercise of certain human rights may require positive measures of protection in the sphere of relations between non-state actors (Öneryıldız v. Turkey, 2004: 134; Positive obligations on member States under Article 10 to protect journalists and prevent impunity, 2011: 43). This requires the state to regulate business entities' conduct to ensure compliance with Convention norms, which forces them to act in accordance with its human rights standards. An example is the case of *Eweida and Others v. the United Kingdom* (Eweida and Others v. the United Kingdom, 2013). In this case, one of the applicants, Ms Eweida, was employed by a private company, British Airways Plc. In September 2006, she was sent home from work because of her refusal to hide her cross in breach of the company's uniform code. She remained at home without pay until February 2007, when British Airways amended its rules on uniforms and allowed her to display the cross. The Court held that in respect to the period of these four months the British authorities failed sufficiently to protect the applicant's right to manifest her religion in breach of the positive obligations under Article 9 of the Convention (Eweida and Others v. the United Kingdom, 2013: 95). Ms Eweida was awarded EUR 32 000. The media commented on this ruling by saying that: "Case was brought against UK government, not BA, so taxpayer will pick up

bill." ('Thank you Jesus!', Daily Mail) On one hand, it is clear that the direct responsibility in the case lies with the state, the United Kingdom. On the other hand, this case shows that there exists an indirect obligation for British Airways and the other private companies to comply with the freedom of religion requirements. They are under an obligation to allow their employees to display religious symbols at work. There is a great probability that following the ruling in this case, the states will seek to control the conduct of private companies in order to avoid paying a similar type just satisfaction to other applicants.

The next example is one of the newest rulings on the subject, the Grand Chamber judgment in the case of *Bărbulescu v. Romania*, which was issued in September 2017 (Bărbulescu v. Romania, 2017: 148). Here, the Court held that the finding of a violation constitutes in itself sufficient just satisfaction for the damage sustained by the applicant. The Court awarded to the applicant only a total of EUR 1 365 in respect of costs and expenses. In theory, this case does not place the states under a threat of paying huge sums of just satisfaction. Even so, the fact that the state was held responsible for the conduct of a private company will definitely lead to the call to enact corresponding measures by the state in respect to business entities.

The applicant, Mr Bogdan Mihai Bărbulescu, was employed in the Bucharest office of S., a Romanian private company. He was dismissed for using the company's Internet network during working hours in breach of the company's internal regulations. It was proved that over a certain period of time the company had monitored his communications on a Yahoo Messenger account, including those with Mr Bărbulescu' fiancée. The applicant complained before the Court under Article 8 of the Convention that monitoring of use of the Internet at his place of work and use of data collected to justify his dismissal breached his right to respect for private life and correspondence. In the light of the fact that the applicant's enjoyment of his right to respect for his private life had been impaired by the actions of a private employer, the Court examined the complaint from the standpoint of the state's positive obligations. It noted that the domestic courts had failed to determine, *inter alia*, whether the applicant had received prior notice from his employer of the possibility that his communications on Yahoo Messenger might be monitored. It was established that Mr Bărbulescu had not been informed of the nature nor the extent of the monitoring. As a result, the Court ruled that the domestic authorities had not afforded adequate protection of the applicant's right under Article 8 of the Convention.

The above-mentioned cases illustrate that the human rights set forth by the Convention may also be breached by the conduct of private business entities, which do not exercise governmental powers and falling under the concept of 'non-governmental' organisations in the sense of Article 34. In such a situation, we speak of indirect obligations, which may be established on the basis of the Court's case-law. The judgments in question may lead to setting forth by the states the duties on a domestic level with the aim to regulate the conduct of businesses in order to comply with the norms of the Convention. This proves that ***the Convention may indirectly regulate corporate conduct by requiring states to enact and enforce legislation applicable to business entities, which reflects the human right norms of this treaty.***

Analysis of the Court's case-law conducted by the author (Tymofeyeva, 8/2017: 291-305) demonstrates that indirect human rights obligations of business entities may arise under the following provisions of the Convention: Article 2 (Öneryıldız v. Turkey, 2004: 89),* Article 3 (O'Keeffe v. Ireland, 2014: 169), Article 4 (Rantsev v. Cyprus and Russia, 2010: 198), Article 5 (Storck v. Germany, 2005: 108), Article 8 (Tătar v. Romania, 2009: 125), Article 9 (Eweida and Others v. the United Kingdom, 2013: 110), Article 10 (VgT Verein gegen Tierfabriken v. Switzerland, 2001: 79), Article 11 (Sørensen and Rasmussen, 2006: 76-77), and Article 14 (Danilenkov and Others v. Russia, 2009; Eweida and Others v. the United Kingdom, 2013: 110) of the Convention. Apart from this, indirect obligations of business entities may also be derived from the norms set forth in the additional Protocols to the Convention, such as Article 1 of Protocol No. 1

* In this case the Court found a violation of Article 2 of the Convention in connection with deaths resulting from an accidental explosion at the Ümraniye municipal rubbish site due to its regulatory framework being proved defective. Given the status of municipality in the ARSIWA, this case rather relates to a situation when a business entity acts as a state agent. However, as far as the lack of an appropriate legal framework may also influence the behaviour of private subjects, this case confirms a possibility of a corporate social responsibility.

(Fuklev v. Ukraine, 2005: 93), and Article 2 of Protocol No. 1 (Catan and Others v. the Republic of Moldova and Russia, 2012: 148, 150).

Given the content of Protocols No. 6 and No. 13 and possible obligations of business entities to protect human life, we may also consider indirect duties under Article 1 of these Protocols to the Convention, as well as Article 2 of Protocol No. 6 to the Convention. Similar to the preceding are the situations in respect of Article 1 of Protocol No. 12 and Article 14 of the Convention.

Deprivation of liberty by businesses on the basis of Article 1 of Protocol No. 4 to the Convention and Article 5 of the Convention has common features, as well as the restriction of freedom of movement under Article 2 of Protocol No. 4 to the Convention. In theory, there may arise duties of businesses under Article 3 of Protocol No. 1 to the Convention, Articles 3 and 4 of Protocol No. 4 and Articles 1 and 5 of Protocol No. 7 to the Convention.

Articles 2, 3 and 4 of Protocol No. 7 to the Convention involve criminal proceedings before the domestic courts, which are traditionally managed by the states. For this reason, we do not expect any obligations of business entities under these provisions; but if criminal justice in a state is exercised by non-state enterprises this might become an issue. This relates to *e.g.* the serving of sentence.

The description of the case-law of the Court in the footnotes would require writing a monograph. In short, the Court has acknowledged obligations of the states to control the activity of business entities in the way they take the necessary steps to ensure that the lives of people are not endangered (Öneryıldız v. Turkey, 2004: 134). The Convention also imposes an indirect obligation on business organisations to refrain from activities that may amount to torture, inhuman or degrading treatment or punishment (Costello-Roberts v. the United Kingdom, 1993: 32), as well as not to be engaged in human trafficking (Rantsev v. Cyprus and Russia, 2010: 298). Private companies may be involved in the performance of activities related to the deprivation of liberty (Storck v. Germany, 2005: 108). The Factsheet 'Companies: victims or culprits' (Companies: victims or culprits, 2013) elaborated by the Registry of the Court in the part B titled "Companies at the origin of a human rights breach" refers to cases dealing with the closed-shop agreement between a company and a trade union (Young, James and Webster v. the United Kingdom, 1981: 49), relating to environmental pollution and hazards (Taşkın and Others v. Turkey, 2004: 113; Fadeyeva v. Russia, 2005: 92) and the individual criminal responsibility of company representatives in respect of Internet publications (Perrin v. the United Kingdom, 2005). Certain human rights obligations of companies may have their origins in employment-related disputes (Eweida and Others v. the United Kingdom, 2013: 110; Sidabras and Others v. Lithuania, 2015: 116) or the reporting of individuals in the media (Von Hannover v. Germany, 2004: 80).

The Court observed that the boundaries between the state's positive and negative obligations do not lend themselves to precise definition (Dickson v. the United Kingdom, 2007: 70). Similarly, it is not easy to distinguish between direct and indirect obligations arising under the Convention. Thus, the case of *Fuklev v. Ukraine* concerning the non-enforcement of a judgment against a joint stock company, the Iskra Brick Factory (IBF), a private legal entity where the state held 13.4 % of the shares. The Court observed that "…the IBF itself enjoyed sufficient institutional and operational independence from the State to absolve the State from responsibility under the Convention for its acts and omissions …" (Fuklev v. Ukraine, 2005: 67). It concluded that a state may have a "positive obligation to enforce the judgment given against a private entity in the applicant's favour" (Fuklev v. Ukraine, 2005: 68). In the end, the Court ruled that there had been a violation of Article 6 § 1 of the Convention in view of the failure of the bailiffs to act well or to effectively control the enforcement proceedings (Fuklev v. Ukraine, 2005: 86). It was unclear if a breach of the Convention occurred as a result of state authorities' conduct or because of the state's failure to ensure the enforcement of a court ruling by a private business entity. Consequently, this same situation may serve as a basis for the indirect accountability of companies and the direct responsibility of the state. This ambiguity accompanies every aspect of indirect human rights obligations of business entities under the Convention.

4. Results

To respond the research question on the standing of business entities in the proceedings before the Court, namely on the content of their rights and duties under the Convention, the author had to first define the notion in question. Analysis of the text of the Convention and the practice of

the Court shows that there is no one definition ofaa a 'business entity' applicable for the purposes of this treaty. The standing of an applicant under Article 34 of the Convention requires that the businesses should be 'non-governmental organisations'. To be able to claim to be a victim of human rights infringement (NGO), the business entity must be able to prove that it is: 1) completely independent of the state; 2) governed essentially by company law; 3) subject to the jurisdiction of the ordinary rather than the administrative courts. Equally, the business subject is 'governmental organisation' when it: 1) exercises governmental powers; 2) enjoys any other powers beyond those conferred by ordinary private law in the exercise of its activities; 3) is established for public-administration purposes. The distinction between the 'governmental' and 'non-governmental' organisations is of key importance in determining the status of the company status in the proceedings before the Court. Human rights holders must possess features of 'non-governmental' organisations. In view of Article 1 of the Convention, the position of businesses as human rights obligors is difficult to define. The analysis demonstrates that both 'governmental' and 'non-governmental' business entities may play the role of human rights obligors.

Regarding the rights of business entities under the Convention, the author proposes to distinguish between human rights, such as freedom of speech, and procedural rights, e.g. the possibility to ask for free legal aid. The existence of human rights of NGO business entities has been proven by numerous examples from the case-law. The paper provides an exhaustive list of the provisions of the Convention envisaging their human rights in Section II. Therefore, it is absolutely clear that business entities may act as human rights holders based on this international treaty. The more difficult task is to prove that business entities may also play the role of human rights obligors.

For the purposes of identification of possible obligations of businesses, it was necessary to explain the difference between different types thereof. Two types of classification of obligations under the Convention come into consideration. The first type involves division into human rights obligations and procedural duties. The second group distinguishes between direct and indirect obligations. In view of this division, the author proves that the procedural duties, such as the need to comply with the six-month rule, may be seen as direct procedural obligations imposed on business entities by the text of the Convention. Regarding the human rights obligations, the author agrees that these direct obligations under the Convention may be imposed only on the states. With regard to business subjects, the research showed that the Convention does not impose on them such obligations directly. However, an analysis of the case-law of the Court allows us to presume that its judgments may lead to imposition by the states of duties on companies at the domestic level. These duties aim to regulate the conduct of businesses in order to comply with the norms of the Convention and may be seen as indirect human rights obligations. This study provides the list of the provisions of the Convention from which these indirect obligations of businesses may be derived.

5. Conclusions

On the whole, the research demonstrates that the Convention can contribute to establishing human rights obligations for business entities. These obligations are indirect and may be introduced through the applications of victims to the Court alleging breach of their rights by corporations in view of the positive obligations of the state-parties to the Convention. The state may impose the obligations in issue additionally by adopting relevant legislation as a preventive measure for breaches of the Convention.

This proves that business entities may have not only certain rights under the Convention, but also obligations. The case-law of the Court provided in the paper confirms that business entities may be seen as performing the roles of both human rights holders and human rights obligors. It is, however, important to distinguish between 'governmental' and 'non-governmental' business entities, direct and indirect obligations, procedural and human rights duties.

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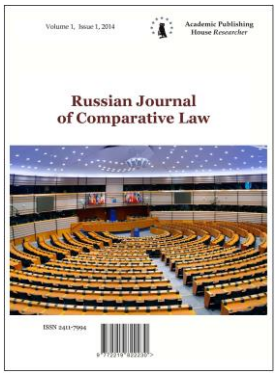

Reviews

Review of the Monograph «International Financial Standards in the Foreign Doctrine of International Financial Law» by V.V. Kudryashov

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Abstract

This paper is a review of the monograph by V.V. Kudryashov, published by INFRA-M in 2018 (Kudryashov, 2018). This 249-page monograph contains eight parts, an introduction, a conclusion and six annexes with author's translation of several international financial standards.

Keywords: International Financial Standards, Foreign Doctrine of International Financial Law.

1. Introduction

The topic of the monograph is of high relevance since the development, adoption and monitoring of compliance with the recommendations developed by a group of international financial regulators under the auspices of G20 constitute today the main method of influencing the national financial systems of states and the global financial system as a whole.

2. Materials and methods

The main sources for writing this article became the official documents of the international financial regulators, materials of the journal publications and archives. The study used the basic methods of cognition: the problem-chronological, historical and situational, systemic and the method of comparative law. Author's arguments are based on problem-chronological approach. The use of historical and situational method allows to reproduce assessment approach to the problem of the international financial law. Method of comparative law defines the difference in views on actual rules of activity of international financial legal entities. A systematic method does achieve a variety of disciplines (international law, financial law, administrative law etc) accessible and comparable, as present is determined by the past and the future - by the present and the past.

3. Discussion

The author not only reviews these standards, but also offers his own vision of their legal essence in the modern world. Special attention should be paid to the analysis of the legal basis for the international financial regulators' activities (Part 2 of the Monograph), as well as the analysis of the international financial standards implementation in the national legal order (Part 3), including in Russia (Part 6).

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Trying to determine the place of IFS and 'soft law' in general among the sources of international law, the author points out that "soft law presumes compliance with the basic standards and practices of states, but without the *opinio juris* necessary for the creation of 'legally binding obligations' according to the customary international law" (Kudryashov, 2018: 25). This approach is certainly interesting and deserves further development.

The author should be commended for the fundamental approach demonstrated in studying the foreign doctrine of international financial law (see, for example, Footnote 1). It may be said without exaggeration that the author has analyzed the works of almost all foreign authors addressing the issues of international financial regulation.

Also, the translation, performed on a high professional level, of several standards (Annexes 1-6) and financial terms throughout the monograph is of undoubted value as well.

In addition, the author is broadly informed and refers to the recent decisions of Russian arbitration courts that apply the OECD Model Convention for the purposes of interpretation (Kudryashov, 2018: 15-16).

At the same time, it seems necessary to pay attention to the following critical comments:

1. In our opinion, the author somewhat simplifies the domestic doctrine of international law, criticizing it for rigid approaches to consideration of international law sources, and for the lack of interest in the analysis of international financial standards.

We should note that the specificity of norm-making in international law, including by way of resolutions of international organizations, has been discussed in the Russian legal literature for a long time.

We may cite the classic work *Theory of International Law* by Prof. G.I. Tunkin, published in 1970; many works by Prof. I.I. Lukashuk (actually referred to by the author), which were devoted to sources of 'soft law'; also, there is a lot of recently published works, for example, written by B.M. Ashavsky, V.A. Konnov, I.M. Lifshitz.

2. In addition, there are some terminological inaccuracies in the work. For example, the word 'principles' (Kudryashov, 2018: 13) is put in parentheses after the word 'methods', which suggests that the author equates these two concepts, however, this is not correct. In addition, the specific principles of international financial law were not distinguished, but the principles of customary international law were indicated with mentioning of the "ascent" of the former to the latter.

3. Also, it is not quite clear what the author understands by 'public international organizations' and 'public world financial community' (Kudryashov, 2018: 45).

At the same time, the above remarks do not mar the good impression of the work in general; moreover, most of the them are of a debatable nature.

4. Results

The monograph can be evaluated as a high level scientific research of the acute and very significant issue of modern international financial law; its practical application seems to be very useful and relevant.

5. Conclusion

The monograph will undoubtedly take a worthy place in the body of scientific and educational papers on international financial and legal issues and can be recommended to anyone interested in modern trends in international financial law.

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