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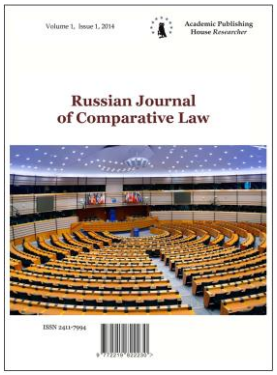

Articles and Statements

Russian Training Ship in a Grip of the NATO's Intrigues

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Abstract

In the article the issues of the freedom of the innocent passage in the territorial waters in the law of the sea of a state are considered. As an example the prohibition for the calling of the sailing ship "Sedov" at the territorial waters of Estonia and Poland in April-May 2019 were taken. Since the bark "Sedov" cannot be attributed to the class of the survey vessel (this is a training sailing vessel), no special privileges for it are provided for. In this case the states aspire to take reasonable regulations, rules and procedures providing the observance of its laws and rules for access in its harbours.

On board of the sailing ship among others there have been 72 cadets from Kerch State Maritime Technological University. The Ministry of international affairs of Estonia initially did not explain the prohibition to the sailing vessel "Sedov" to call at Estonian territorial waters. Later the Ministry of international affairs of Estonia specified the reason: on board of the sailing ship there were the cadets of Kerch State Maritime Technological University, situated in Crimea annexed by Russia, and Estonia did not recognise the annexation of Crimea to Russia. In its turn the Ministry of international affairs of Russia considered the prohibition of the calling of "Sedov" at the territorial waters of Estonia as an unfriendly act, since the basis for the secession of Crimea from Ukraine is the right to self-determination of the nation.

On the 17 March 2014 the Crimean Republic announced itself as the independent and sovereign state with Sevastopol as a city with a special status. The decision was taken under the results of the Crimean referendum and the declaration on the independence of Crimea. Many states and international organizations considered the Agreement of 18 March 2014 as the illegal annexation. Only tiny amount of states acknowledged the annexation of Crimea to Russia.

On the basis of the stated facts the findings of internationally legal nature are made that since the calling of the sailing ship at the ports of Poland and Estonia would contradict to the policy of respect of the territorial integrity of Ukraine and the non-recognition of the annexation of Crimea. The both states demonstrate that they do not respect the integrity of Ukraine and do not accept the annexation of the peninsula. After the annexation of Crimea the Western states Estonia and Poland react on this situation by the prohibition of the Russian vessel to visit the foreign ports.

Keywords: territorial waters, ship, UN Convention on the law of the sea, 1982, ports, unfriendly act.

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1. Introduction

The trip of the sailing training vessel "Sedov" № 1\100 was planned as follows: after the departure from the port in Kaliningrad, the stops in Rostock (Germany), in Tallinn (Estonia) 13-14.04.2019 and Gdansk (Poland) on 22.04.2019 were appointed.

The Ministry of international affairs of Estonia commented that the refusal to let in the vessel is connected with the non-recognition of the annexation of Crimea to Russia. The sailing vessel was also not let in in Poland. The embassy of Russia in Estonia reacted on the decision of the Estonian party with the corresponding statement. The Ministry of international affairs of Russia considered the prohibition of the calling of "Sedov" at the territorial waters as an unfriendly act. After the annexation of Crimea the West reacted with the prohibition to the Russian vessel to visit the foreign ports.

In the article the issues of the freedom of innocent passage in the territorial waters of the coastal state on the sample of the prohibition of the calling of the sailing vessel "Sedov" in the territorial waters of Estonia and Poland.

2. Materials and methods

At the course of the carried out research during the writing such research methods as systematically structural, socially legal, comparatively legal, statistical, the methods of system analysis and synthesis, logical, formally legal, problematically theoretical and others were used. During the research process the general scientific methods of cognition as dialectical method, methods of functional, logical and structural analysis and synthesis, method of generalisation and description, comparison, induction and deduction, systematically structural method of study of considered phenomenon and evolution of legal settings. Besides the special scientific methods: legally technical, method of forecasting were applied.

The provisions and conclusions formulated in the paper are based on the analysis of the legal acts regulating the international relations in the sphere of international legal regulation of the maritime security.

The legal regulatory basis of the research is composed by the international agreement, international legal customs, generally recognized principles and rules of international law, sectoral principles of international law, the principles of international law, the regulatory documents of international organizations, rules of international "soft" law and a set of the adopted on their basis regulatory legal acts of Russia and Crimean Republic reflecting the organizational, institutional, economical and other aspects in the legislation of Russian Federation in the corresponding area. Also during the writing of the article the following information sources in Russian, English and German languages were used: training publications, publications from newspaper editions, web of Internet, articles of legal magazines, statements of the President of the Russian Federation.

3. Discussion

3.1. Unhospitable refusal of Estonia

The route of the training sailing vessel "Sedov" No. 1\100 was planned as follows: after the departure from the port in Kaliningrad in its hundredth anniversary trip on 02.04.2019 and stops in Rostock, Germany, the callings at Tallin (Estonia) on 13-14.04.2019 r. and Gdansk (Poland) on 22.04.2019 were planned. The visit of sailing vessel in Tallinn was organized namely upon the invitation of the magistrate of Tallinn and its department of culture.

On board of a sailing vessel there were not only the local cadets (10 cadets from Baltic Fishing Fleet State Academy and Kaliningrad Maritime Fishing College, but also 72 cadets from Kerch State Maritime Technological University, 30 cadets from Volga Caspian Marine Fishery College).

The Ministry of international affairs of Estonia initially in no way did not argue on the prohibition to the sailing vessel "Sedov" to enter the Estonian territorial waters. Only later it was announced, that on board a vessel there were cadets of Kerch State Maritime Technological University situated in the annexed by Russia Crimea.

The calling of "Sedov" at Estonian territorial waters was planned on 13 – 14 April – some days before the visit of the president of Estonia. The incident occurred the day before the visit of the President of Estonia in Moscow on 18 April. At that namely the Estonian side asked for the meeting. The Kremlin answered on it with the conditional consent. The refusal is connected with the non-recognition by Estonia of the annexation of the Crimea to Russia – made clear in the

Ministry of foreign affairs. In its turn the Ministry of international affairs of Russia regarded the prohibition of the calling of "Sedov" in the territorial waters of Estonia as an unfriendly act (Estonia, 2019).

We should also note that the sailing vessel traveled not for the first time with the cadets from Kerch State Technological University. In summer 2018 the Russian sailing vessel also called at the port of Tallinn together with the training sailing vessel "Mir". This visit of the sailing vessel in Tallinn was organized namely under the invitation of the magistrate of Tallinn.

As one of the negative factors promoting the establishment of the negative environment in Estonia regarding the Russian sailing vessels the annual report on the threats of international security with the detailed description of danger threatening to Estonia from the side of the Russian Federation served. The report was published in March 2019 by the department of foreign intelligence of Estonia. As one of the threats the Russian civil vessels act, which supposedly regularly without permission attempt to penetrate with the intelligence purposes with the purposes in the territorial waters of Estonia.

In the report the use of the big sailing and training vessels in the intelligent purposes with the spies and и «agents of influence» participating in maritime trips, regattas and festivals all around the world is outlined. The visits of Russian vessels are accompanied by the missionary work of the Russian orthodox church, active "propaganda activity" and "collection of information" for the military purposes or carrying out of hidden Russian vessels to call at the waters of Estonia. In particular, in November of 2018 the survey vessel of the Russian academy of science "Academic Nikolay Strakhov" for the conducting of the general overhaul on the shipyard Tallinn Shipyard OÜ.

The embassy of Russian Federation in Estonia sent a letter to the Ministry of international affairs with the assistance request in obtaining a permission on the right to sail in Estonian territorial waters. Both times the Ministry of foreign affairs of Estonia without explaining the reasons refused to the Russian survey vessel in the calling at Estonian territorial waters.

Since the sailing vessel "Sedov" has for Russia a big symbolical significance, this vessel constantly is open to attack also on the political grounds. The vessel "Sedov" has already been refused in calling at foreign port without the explanation of reasons in 2014 in port of Trelleborg, where the vessel went under the invitation of the mayor of this city. The refusal followed, the vessel was forced to turn to Gdynia.

The vessel was followed by other troubles. In 2000 the vessel was arrested in France in port of the city of Brest, where it arrived for the participation in the international maritime fest. The vessel was seized on account of the debt of Russia before the Swiss company «Noga». However, the court acknowledged, that the "Sedov" is not the state property. The court decided to collect from "Noga" as a compensation to the owner of the sailing vessel more than 100 000 US dollars.

Russia considered the refusal of Tallinn in calling at Estonian territorial waters of the barque «Sedov" as a provocation (Zakharova, 2019) and regular unfriendly act.

The ship owner – the Baltic State Academy of the Russian Federation – considers this situation as a violation of the UN Convention on the law of the sea in 1982. Although in the practice of states there is no more custom to issue the licenses for the visit of ports as in the Middle Ages, in most of the ports the calling is carried out only under the preliminary permission of the local bodies.

3.2. The right of vessels to call at foreign ports

The issues of the access in its port of the vessel under the flag of other state are the issues of exclusive competence of the coastal states. The calling is free as a rule only for merchant vessels. For other vessels there is a special order of call. However, as far back as during the Third UN Conference on the Law of the Sea in 1973–1982 the problem of survey vessels was discussed.

Usually the coastal states open the port for the calling of foreign vessels in some merchant ports. This issue is an exclusive competence of a state. The access to the open ports of all merchant vessels independently on flag and without any other discrimination is free. The vessel in distress may exercise a calling at any port of a coastal state although a state has a right to exclude from a list of open ports any port as well as temporarily to close an access to all their ports, if the interests of its security require it.

Usually the ports open for the calling of merchant vessels exercising loading and unloading of freight, landing or disembarkation of passengers. The legislation of some states require to comply

with the certain procedure for calling of survey vessels as well as merchant vessels in those cases, when their calling is not connected with the exercising of mentioned operations.

The calling at port is based on the international legal principle of innocent passage, which presents the basic element of international law. At the innocent passage the vessel may not violate a freedom, good order or security (Burke, DeLeo, 1983: 391). Both in Russian Federation and in a line with other foreign states the foreign military vessels and other state vessels, exploitable for non-commercial purposes may call at maritime ports with the prior permission requested on the diplomatic channels before the presumed calling. The other procedure maybe provided for in the international agreements.

Regarding the military vessels and other state vessels of other states with the freedom of calling only for merchant vessels exercising carriage of cargoes and passengers there may be special limitations of calling in their maritime ports both directly, and prescribed as reciprocal restrictions.

In such a way although a state does not prescribe for the merchant ports in its internal legislation the worse regime of use than it is prescribed by the international law, the certain limitations may have place (Brazovskaya, 2017: 11).

However, the necessity to establish the maximum favourable conditions for the merchant navigation requires the coastal states in ports considering the current world practice, directed on the facilitation of the procedure of calling and the stay of foreign merchant vessels at ports.

The right of ports to call at foreign ports is formed already during some centuries. In the Middle Ages the freedom of vessels to call at ports was widely spread as a right of a vessel of foreign state, which is included also in some agreements concluded at that time. At the end of XIX century the attempts were taken to regulate the issues of calling of vessels at ports from the point of view of international law. In particular, such attempt was taken by the Institute of International Law, which developed a project on the regime of vessels in foreign ports. In 1898 the project was approved on the Hague session of institute. In accordance with the document's provisions the calling at ports is presumed to be free. In order to consider a port a closed one a special indication thereon is required.

The chapter 2 of the Convention on the International Regime of Maritime Ports of 09.12.1923 states that under the reciprocity condition every agreeing state is obliged to ensure to vessels of any other agreeing state the treatment equal to the one used by its own vessels or vessels of any other states in maritime ports, being under its sovereignty or power regarding the freedom of access in port and its use. In such a way, the Convention prescribed for the vessels of the agreeing states the right of free calling at any maritime port being visited by maritime vessels and serving for external trade (Brazovskaya, 2017: 10).

The freedom of access in port including the right of loading and unloading of goods, is stressed by one of the arbitrator in the arbitrage decision in a case Saudi-Arabia v. Aramco (Saudi-Arabia v. Aramco) in 1958 by professor Sauser-Hall, since in accordance with the regulations and principles of international public law the ports of any state will be open for foreign merchant vessels: they may be closed only then when the vital interests of a state require it.

The UN Convention on the law of the sea of 1982 extend the right of innocent passage not only on merchant vessels. The rules of the realization of this right is quite diverse: some states require the preliminary permission on diplomatic channels; the other only with prior notification; the third states allow the innocent passage to all vessels, which are in transit through their territorial waters.

In accordance with Art. 18 UN Convention on the law of the sea of 1982 the innocent passage includes the navigation through the territorial sea, the passage into the internal waters, calling at a roadsted or port facility. The passage shall be continuous and expedious. However, the passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose assistance to persons, ships or aircraft in danger or distress. The right of innocent passage is provided for the merchant, military, survey vessels of all states through the territorial waters.

Survey vessel shall not meet the restrictions during the calling. For calling of such vessel at ports the complicated procedure is not possible. It contradicts to the general principles of exercise of marine scientific research, in particular Art. 255 UN Convention on the law of the sea, according to which the states endeavor to adopt «reasonable rules, regulations and procedures to promote and facilitate» research, as appropriate, «to facilitate... access to their harbours and promote

assistance for marine scientific research vessels. However, “Sedov” cannot be allocated to the class of survey vessels. This is a training sailing vessel. There are no special privileges provided for this type of vessel.

In this case the states aspire in line with the existing beside in the doctrine of international law of the sea a point of view according to which the refusal to vessel in calling will be valid in that case, if the coastal state considers that the calling is connected with the threat to life and health of its citizens. The generally recognized principles and rules of international law are used by the coastal state at the development of their internal legislation on the innocent passage through the territorial sea (Brazovskaya, 2017: 14).

In an explanation followed from the Estonian side through the press-secretary of the Ministry of foreign affairs S. Kamilova that on board a vessel there are the cadets of Kerch State Maritime Technological University (Estonia, 2019), such wording merely addresses on the negative impact of struggle of the NATO with Russia for Kerch straight and annexation of Crimea in general.

3.3. The annexation of Crimea

Estonia does not recognise the accession of Crimea, considers it as an annexation and does not recognise Crimea as a part of Russia. In such a way, the issue of the permission for the calling of sailing vessel in the territorial vessel in the territorial waters of Estonia would contradict to the policy of non-recognition of the Crimean annexation, which is fulfilled by means of the sanctions and requirements on the respect for human rights.

In particular, the states dispute on the status of the Kerch Strait, whether it constitutes a part of the internal territorial waters with the corresponding legal status or based on the viewpoint of Ukraine, the US and the NATO, as a territory of Ukraine.

Considering the constant necessity to exercise the passage through the Kerch Straits, which may be interpreted also as an intervention in the territorial waters, Ukraine raises a question on the granting to the Kerch Straits of an international status. At present the status of the Kerch Straits is regulated by the bilateral Russian-Ukranian agreement on the cooperation in the use of the Azov sea and the Kerch Straitof 2003. The document was ratified by both states in 2004. According to the agreement the Azov sea is classified to the category of the internal waters of Russia and Ukraine. The situation around the Crimea escalating in the international legal context and in particular in the Kerch Strait as a result of the fact that these are exclusive Russian territorial waters.

Besides the Russia did not agree with the decision of the International Tribunal on the Law of the Sea requiring to free the Ukrainian military vessels and sailors detained in the Kerch Straits for the violation of Russian border. Russia refused to execute this decision.

The status of the internal waters excludes the possibility of foreign military vessels to call without the consent of countries, to which they belong.

At present the parties prepare the project of Russian-Ukrainian agreement covering the Azov sea, the Kerch Straits, contiguous territories of states in the Black sea. The line of the state border, which shall delimit the Azov sea on agreement of Russia and Ukraine, at present is not drawn.

The Ministry of foreign affairs of Russia repeatedly mentioned that the Kerch Strait has never been an international one as regards the UN Convention on the law of the sea.

After the referendum in Crimea on 16 March 2014 the peninsula formed part of the Russian Federation. The Western countries reacted with the accusation of Russia in violation of international law and annexation (Issaeva, 2015: 163). The taken referendum is disputed and a contested decision on accession to Russia contradicting to the rules of the Ukrainian Constitutional law, although these actions are legitimated from the viewpoint of international law, however there are the one-sided proclamation of independence.

In the international law the "annexation" is a violent gaining possession by one state of the territory of the other state against their will. The annexation is considered to be a cause for war (Merkel, 2014).

The right on self-determination is acknowledged by the international community for nations and peoples, since nation or people has a special status of the subject of international law under the condition that they struggle for their release and created special government agencies, joined by the single center, authorized to appear on behalf of the nation or people in interstate relations.

Besides the acknowledgment of other state as a subject of international law is a one-sided voluntary act of state. Of course, continuous non-recognition, dictated frankly by the political

concerns and ignoring the reality of international life, may become a factor seriously complicating the interstate relations (Mezhdunarodnoye pravo, 2008: 171), as indeed happened in this case.

The Russian Federation was accused in annexation – the violent seizure of a territory of the other state and issuance of the corresponding legal act on its accession. Allegedly the principle of territorial integrity was violated, inviolability and territorial integrity of the state borders in the modern international law, since the voluntary expressed consent of the interested parties fails.

For the classification of the situation with Crimea the definition «annexation» is considered to be not sufficient, than it is already possible to define it as a secession, since the promulgation of state independence based on the referendum enacted the separation from Ukraine. After that the claim to join the Russian Federation followed.

In two days after the referendum (Merkel, 2016) on 18 March 2014 Russia signed the agreement on Crimean accession. The government of Crimea together with Russia argued its behaviour with the right on self-identification of a nation as a basis for the secession of Crimea from Ukraine and the foundational principle of international law (Marxsen, 2014: 385) in accordance with art. 1 (2) of the UN Charter, Declaration on Principles of International Law, 1970.

According to the Western doctrine Crimea did not become an independent state since the narrow legal requirements for the secession have not been complied with. In their view Crimea till not does not belong to Ukraine.

In the resolution of the UN General Assembly A/RES/68/262 of 27.03.2014 (A/RES/68/262) on the territorial integrity of Ukraine it is stressed that the referendum carried out in Autonomous Republic of Crimea and City of Sevastopol on 16 March 2014 does not have a legal force. The referendum held in Autonomous Republic of Crimea and City of Sevastopol on 16 March 2014 was not authorized by Ukraine. The mentioned in the resolution states, international organisations and specialized authorities are encouraged not to recognize any change in status of the Autonomous Republic of Crimea and City of Sevastopol on the basis of the abovementioned referendum and restrain from any actions or steps, which may be interpreted as a recognition of any such changed status. It is considered that the referendum could not become a basis for any change of status of Autonomous Republic of Crimea and City of Sevastopol. In view of the West Russia violated the international law during the Crimean crisis applied the military force for the control on the peninsula (Issaeva, 2015: 163). In such a way, the territorial integrity of Ukraine was violated by Russia (Marxsen, 2014: 385). The world community assumes that Russia abused the existing in the world practice precedent with Kosovo (Tolstykh, 2014: 42).

The states are encouraged not to recognise any change in status of Autonomous Republic of Crimea and City of Sevastopol. However, the situation with accession is still caused with the limitation of the autonomy of Crimea by Ukraine since 1994. Namely the cancellation of the Constitution of Crimea and a number of laws adopted by its Supreme Council, adoption of laws «On the status of the Autonomous Republic of the Crimea» and «On the deliniation of power between the organs of state rule of Ukraine and the Republic of Crimea» lent to it the status of the ordinary administrative territorial entity as a part of Ukraine. However, it abolished the state status of Russian language. The maintenance of the integrity of a state met a contradiction with a right of people on its own statehood (Tolkachev, 2014: 91). Besides in that period there was a very active anti-Russian propaganda company, which was carried out by the Ukrainian idelolgists still before the situation in Maidan (Mal'kova, 2017: 31).

Only tiny amount of states acknowledged the accession of Crimea to Russia (Marxsen, 2014: 391). On 17 March 2014 the Republic of Crimea declared itself an independent sovereign state with Sevastopol as a city with a special status. The decision was taken following the results of the Crimean referendum and Declaration on independence of Crimea (Postanovleniye, 17.03.2014; Postanovleniye, 06.03.2014).

Many states and international organisations considered the Agreement of 18 March 2014 (Ukaz of the President of the RF of 17.03.2014 № 147 "On the recognition of the Republic of Crimea"; FKZ of 17.12.2001 № 6-FKZ "On the procedure of becoming a part of the Russian Federation and formation in its part of a new subject of Russian Federation") as an illegal accession (Agreement between the Russian Federation and Republic of Crimea on accession in the Russian Federation of the Republic of Crimea and formation of the new subjects as a part of the Russian Federation of 18.03.2014, further — Agreement). Ukraine considers Crimea as an occupied territory (Mal'kova, 2017: 4).

Crimea becoming a part of the Russian Federation was regulated by the agreements (the Agreement), legislation of the Russian Federation (the Constitution of the RF, federal constitutional law of 17.12.2001 No. 6-FKZ, federal constitutional law of 21.03.2014 № 6-FKZ «On the accession in the Russian Federation of the Republic of Crimea and formation as a part of the Russian Federation of new subjects – Republic of Crimea and city of federal significance Sevastopol», Enactment (Ukaz) of the President of Russia № 147 of 17 March 2014 «On the recognition of the Republic of Crimea», Statute (Postanovleniye) of the Constitutional Court of Russian Federation of 19.03.2014 № 6-P «On the compliance of the constitutionality of the not entered into force international agreement between the Russian Federation and the Republic of Crimea on the accession in the Russian Federation of the Republic of Crimea and formation as a part of Russian Federation of new subjects») and legislation of Crimea and Sevastopol as new subjects of Russian Federation (act of referendum of 16 March 2014 in Crimea, «Declaration on independence of Republic of Crimea and city Sevastopol» of 11 March 2014).

On 21 March 2014 in accordance with the FKZ «On the accession in the Russian Federation of the Republic of Crimea and formation as a part of the Russian Federation of new subjects – Republic of Crimea and city of federal significance Sevastopol» in article 65 of the Constitution of Russia of two new subjects were included – Republic of Crimea and city of federal significance Sevastopol.

In such a way, from a legal viewpoint the adoption of the Republic of Crimea as a part of Russia complies with the rules of the valid Russian legislation and principles of international law (Balutskaya, 2016: 45).

Estonia supported the situation with Crimea following the situation with the NATO. The minister of foreign affairs Sven Mikser officially states that Crimea for Estonia remains a part of Ukraine.

Accession of Crimea by the Russian Federation is considered to be not legitimate. Estonia condemns such actions of the RF as a compulsory call of the local population into the army, the requirement to take Russian citizenship, the detention of the Ukranian military sailors in Kerch Straits.

The statement of the minister of foreign affairs of Estonia regarding the Crimea represents the illegal inclusion of Crimea as a part of Russia. Crimea is a part of Ukraine. According to the statement of minister there is a militarization of the peninsula. Estonia even condemns the construction of the bridge through the Kerch Straits without the permission of Ukraine and not only represents threat for security, but also may lead to the limitation of the access of the merchant vessels in the Ukrainian port states.

Supporting the sovereignty of Ukraine and its territorial integrity Estonia considered the situation in Crimea as a violation of international law by means of the application of sanctions and their updating (Zayavleniye, 2018).

3.4. Unhospitable refusal of Poland

After the calling at Estonia on 22 April 2019 the arrival to Poland was planned. However, Poland also did not let him enter the sailing vessel in their territorial waters. The press-secretary of the Ministry of foreign affairs of Poland Ewa Suwara also mentioned that the calling of the sailing vessel at port contradicts to the policy of the respect of the territorial integrity of Ukraine and non-recognition of the annexation of the Crimea». The decision was adopted by the premiere minister of Poland Mateusz Morawiecki. In such a way, the Polish state demonstrated that it respects the integrity of Ukraine and does not accept «annexation» of the peninsula.

As can be seen, after the annexation of Crimea the Western states Estonia and Poland reacted on this situation with the prohibition to this Russian vessel to visit the foreign ports.

4. Results

The refusal from the planned on 13-14 April 2019 calling of “Sedov” in Estonian territorial waters is connected with the non-recognition by Estonia of accession of Crimea to Russia. In its turn, the Ministry of foreign affairs of Russia interpreted the prohibition of the calling of “Sedov” at the territorial waters of Estonia as an unfriendly act. During the research it was stated that onboard a vessel cadets of the Kerch State Maritime Technological University, it told in particular about the negative act of struggle of the NATO with Russia for Kerch Straits and accession of Crimea in principle. One of the negative factors encouraging the establishment of the negative environment

in Estonia regarding Russian sailing vessels appeared to be published in March 2019 by the department of external intelligence of Estonia the annual report on the threats of international security with the detailed description of the dangers threatening to Estonia from the side of the RF.

The ship owner – the Baltic state academy of the RF – considers this situation as a violation of the UN Convention on the law of the sea, 1982.

5. Conclusion

Estonia does not recognise the annexation of Crimea, considers it illegal and refers to the non-recognition of Crimea as a part of Russia. In such a way, the issuance of permission for the entry of the training vessel in the territorial waters of Estonia would contradict to the policy of non-recognition of annexation of Crimea, which is exercised also by means of the sanctions and demands to comply with human rights.

Many states and international organizations considered the Agreement of 18 March 2014 as illegal accession, but Ukraine considers Crimea as an occupied territory. Nevertheless from the viewpoint of Russian law the adoption of the Republic of Crimea as part of Russia complies with the rules of valid Russian legislation and principles of international law. Estonia also considers that the integration of Crimea as a part of Russia is illegal. Till now Crimea is a part of Ukraine. At present a militarization of the peninsula takes place. The construction of the bridge through the Kerch Straits without the permission of Ukraine, since it presents a threat for security and may lead to the limitation of access of merchant vessels in the Ukrainian port cities.

In such a way, a conclusion is made that after the accession of Crimea Western states Estonia and Poland reacted on this situation with the prohibition to this Russian vessel to visit foreign ports.

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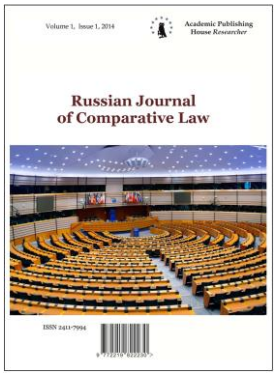

Consequences of Globalization of Law

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Abstract

This paper analyses the consequences of the process of globalization of law, as a part of the general process of globalization. In this respect, the legal and social consequences of the globalization of law are observed both at the international and national level. The few of the most singnificant consequences of the globalization of law at the international level are presented in the section on transformation of the contemporary law in the process of globalization. Considering the fact that the legal and social consequences of the globalization of law at the national level are inextricably linked, both types of consequences are presented at the same time. In doing so, various characteristics of the countries were taken into account, on the one hand those of developed countries and, on the other hand, of developing countries and undeveloped countries. The consequences of the globalization of law have been analysed through the characteristic examples in all social areas – technology, economy, politics and culture. In the field of use of technology, primarily information technology (IT), as well as biotechnology, that is technology of genetic modification of living organisms, were taken as the examples. The consequences in the field of economy are analysed through the examples of the adoption of the legal framework of the market economy, the liberal model of foreign trade and regional economic integration. For the purpose of analysing political consequences, the harmonization of national regulations with a democratic legal framework was taken as the example. In the cultural sphere, the consequences of the adoption of legal institutes on the death penalty, ban of smoking and regulation of the environmental protection were observed.

Keywords: globalization, law, international law, technology, economy, politics, culture.

1. Introduction

In order to fully comprehend the phenomenon of globalization of law, apart from determining its character, methods and causes (Dabovic, 2018). It is necessary to look at both legal and social consequences which this process brings, not only at the global but at the national level as well. Namely, one should realize that the process of globalization of law is a part of the process of globalization, as a general social global phenomenon of the modern world. All its causes and consequences, interact between each other, while the consequences becoming new causes, leading to acceleration of this process. The process of globalization has been particularly intense since the end of the 1980s, therefore, we have observed precisely this period in the research. In addition, the process of globalization directly leads to the transformation of contemporary law by its objective and subjective causes. The transformation of modern law primarily refers to overcoming the traditional classification into large legal systems of Civil Law, Common Law and Sharia law, as well

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as the classification into international law and national law and all other types of standard classifications in the contemporary law (between public international and private international law, etc.). Also, the process of globalization of law, indirectly, leads to the harmonization of law at the global level, mainly through international legal instruments, whether binding or non-binding ("soft law"), which is the greatest and most significant legal implication. These changes in law, indirectly, lead to the change in all social areas – technology, economy, politics and culture. Given that these social changes are reflected differently on individual countries, due to their different national characteristics and above all the degree of social development, the social consequences of globalization of law will be observed, taking into account the division between developed countries (the OECD member countries) on the one hand and on the other hand, developing countries and undeveloped countries. The classification into developed and developing countries with undeveloped countries is theoretical, used for the purposes of this research. Namely, within the group of developing countries, a group of countries with the fast-growing economies (Brazil, Russia, India, China and South Africa – BRICS) have reached and in some cases got ahead the developed countries.

Besides, at the national level, in the field of technology, the consequences of the implementation, or the non-implementation of adequate regulations in terms of e-business, the right to privacy and computer crime were analysed. In addition, the effects of different legislative approaches to the use of biotechnology, in particular genetic modification of living organisms (GMOs), were also analysed in this area. In the field of economy, the consequences of adopting the legal framework of the market economy, foreign trade liberalization, as well as regional economic integration were analysed. In the area of politics, the consequences of the third wave of democratization in the world were analysed, which includes the issues such as the reception of the most important international conventions in this field, as well as the issues on corruption, foreign debt and armed conflicts. In the field of culture, the consequences of the reception of legal institutes on the death penalty, ban of smoking and sustainable development based on environmental legislation were observed.

2. Methods and materials

This study is based on the previously published monography in Serbian by this author (Dabovic, 2007), with the exclusive reference books, relevant regulations, both international and national, and sources of data, as well as with the additional comments and conclusions. During the preparation of the study, the formal-legal method, method of text analysis, comparative method and statistical methods were used.

3. Discussion

3.1. Transformation of the contemporary law in the process of globalization

In the contemporary law, the process of globalization in all social areas (technology, economy, politics and culture) reflected simultaneously and generate further flow of these processes which interconnects to each other. Also, law at the global level also undergoes transformation, so that the gap between major legal systems (Civil Law, Common Law, Sharia Law) is gradually being lost, as well as between public international law and private international law, international law and national law, and all other traditional classifications of law.

Firstly, the differences between major legal systems are becoming smaller and, in some cases, it is possible to speak of a special "mixed" legal system, which raises the question of whether all legal systems have already become mixed. The most prominent example is the EU law, concerning the fact that all national civil courts of the member states must take into account the decisions of the Court of Justice of the European Union, while, on the other hand, the countries that practise Common Law must incorporate European legislation into their legal system (Frohlich, 2014).

In the field of international law, the process of globalization of law resulted in the constant development of this branch of law, starting from the end of the World War II, so that the development became extremely intense right from the beginning of the last decade of the 20th century. The development is reflected on a global and regional level, both in quantitative and qualitative terms. Namely, in the mentioned period there was a rapid increase in the number of adopted international legal documents (resolutions, conventions, decisions, etc.), principally by the UN, which declared precisely the period 1990-1999 the "decade of international law", but also at

the initiative of other global and regional governmental and non-governmental organizations (UN Resolution 44/23). In addition, two international war crimes courts (for the former Yugoslavia and Rwanda) were established, as well as the International Criminal Court, and the number of international arbitrations were increased significantly. A qualitative shift is, first of all, that, unlike the traditional system of international law, in which subjects were exclusively internationally recognized states, the jurisdiction of international law has increasingly been extending directly to individuals. Also, one can notice the trend of growing importance of the so-called soft law, or norms that are not legally binding for the countries, but which reflect the readiness of the countries to participate in the international community (Druzin, 2016).

On the other hand, under the influence of integrative changes in the process of globalization, the area of national law is experiencing a transformation towards the growing internationalization, that is, the harmonization of national regulations with the regulations at the international level, both global and regional. Thereby, the process of internationalization does not include equally all branches of law within one legal system. The most internationalized are the areas of trade, finance, electronic communications, especially internet, as well as the environmental protection (Snyder, 2002). The process of approximation of international law, on the one hand, and national law, on the other hand, is also reflected on the phenomenon of harmonization of law. Namely, during the period of modern national states there was a clear distinction between the international law and the domestic law of national states. The harmonization of law followed these parallel but independent flows: an internationally recognized sovereign state adopted an international convention by its own decision, therefore such law was incorporated in the recipient country by direct transposition or based on a special law. In the case of the adoption of law, the law was transferred from the national legislation of one state to the national legislation of another state, either in segments, that is, in specific legal norms or decisions, or completely. However, in the period of intense globalization, when a clear boundary between international law and national law is lost, the harmonization of law is achieved in the way which has elements of harmonization with international law and the reception from a national legislation. This problem may best be analysed in the case of the reception of EU law by non-member states, either by the European countries that have chosen to go through the fulfilment of conditions for joining the EU, or by European or even non-European countries which have taken a certain EU legal norm only because of its quality.

The law of the EU is, in fact, by its method of creation (based on international agreements), supranational international law of the member states. However, with the transformation of this organization into a political community and the introduction of the parliament, president, executive bodies, and other state features, as well as with the limited and defined territory, the elements of national legislation appear, the law of the EU increasingly takes on its own identity. Therefore, the reception of this law primarily by non-member countries, but also by the member states, cannot be clearly characterized as the adoption of international law, nor as the reception of foreign national law.

This is the case with many other international governmental and non-governmental organizations that initiate harmonization of law at the global level. Namely, in the frame of international law, recommendations, guidelines and models of laws (soft law) are increasingly being adopted by these organizations. Further, the norms lead to the reception of national legislation from the countries that have previously aligned their legislation with these principles to those countries that do so later. In this way, a legal norm that resulted from the international level is "nationalized" in some of the national legislations of the countries that have complied with the international law (they are most often the developed countries, which have stable state institutions and a built-in legislative apparatus). Then other countries, which are late in the process of harmonization with the given international principles (most often developing countries and undeveloped countries), would recept the finished, harmonized national legal norm.

As international law takes on a considerable importance of functioning of the modern national states within the international community, the harmonization of law is increasingly based on international law, unlike in the era of colonial conquest and the creation of modern national states with their own legal systems, which was based on the reception of national law of other states. This is, precisely, the basic distinction between the colonial and the modern way of harmonization of law.

3.2. Consequences of (non) harmonization of the legal framework for the application of new technologies

In the process of globalization, new technologies, primarily IT, but also biotechnology and other advanced technologies, lead directly or indirectly to the acceleration of this process, during which some drawbacks of the application of these technologies, or relevant regulations, may already be identified. The consequences of the reception of the legal framework regulating the application of new technologies in the recipient country depend not only on the adopted legal norms but on their adequate application and other social circumstances of the recipient country as well.

Although there are two opposing approaches in regulating the IT field in the world, one representing the United States (governance by self-regulation) and the other one representing the European Union (governance by legislation), the harmonization of the different manners of regulation has occured mainly by taking the legal norms from international legal sources (both binding and non-binding) at the international level as a result of the explosive growth of IT application. Namely, the harmonization has been achieved, among other things, in the areas of electronic business, privacy protection and computer crime, since the international business practices imposed in order to prevent the growing abuse of the Internet.

By the reception of law in the field of electronic commerce, primarily on the basis of documents prepared by the UNCITRAL, the harmonization of legislation in this field is achieved on a global level. United Nations Convention on the Use of Electronic Communications in International Contracts (2005) – 18 members; UNCITRAL Model Law on Electronic Signatures (2001) – 33 signatories; UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998 – Legislation based on or influenced by the Model Law has been adopted in 72 States and a total of 151 jurisdictions. Prior to the publication of these binding documents, a small number of countries had had regulations in this area, but many of them had been obsolete, or incomplete. Disparities in national regulations in this area leads to legal uncertainty in the international business. Therefore, the countries which do not have adequate legislation on e-commerce are excluded from the global market, that is, a sustainable expansion.

In the countries that have regulated electronic commerce in accordance with the international standards and the UNCITRAL law models, the volume of retail trade (B2C) generated in this way is has rapidly been increasing over the years. The share of e-commerce in total retail sales of products is in the USA in the period from 1998 to 2016 increased from about 0.2 % to about 8 % per year (United States Census Bureau, 2018).

It has been found that the development of e-commerce has a significant impact on the prices, structure of trade, the labour market and tax policy in the countries that are included in the world market in this way. However, the harmonization of measures and institutions, which is necessary to ensure an adequate environment for e-commerce, poses challenges to the legislative policy of each country, especially to developing countries, which should make major structural changes to harmonize with the international legal standards in a short period of time (Coppel, 2000).

In order to protect privacy rights of individuals in an unlimited, virtual space, it is necessary to harmonize national laws of all countries. The ease with which electronic data is transmitted across national borders allows for the protection of data to be avoided by transferring it to a third country that did not adopt such regulations. Given the inconsistency of these systems, the countries that advocate the regulation of privacy protection through national regulations (the EU and the countries that have harmonized their regulations in this area with the EU regulations) limit the exchange of data with the countries that do not have such a system, or have not yet developed any of these legal protection systems (the USA, etc.). However, since 2000, the Safe Harbour Agreement between the EU and the US Chamber of Commerce has left the possibility of overcoming this problem for IT companies from the United States (International Safe Harbour Privacy Principles). International Safe Harbour Privacy Principles consists of several decisions of the American Chamber of Commerce in order to implement the principles of protection of the right to privacy, prescribed by the special EU Directive. Therefore, the EU enact the Decision 2000/520/EC. Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the secure harbour privacy principles and related to frequently asked questions issued by the US Department of Commerce. However, at the request of the citizens, this Decision was abolished in 2015 by the

European Court of Justice. The creation of the new legal framework with the same goal is underway, called the EU-US Privacy Shield.

The international character of information technologies, and in particular the Internet, besides its positive sides, opens the possibility of its abuses or the occurrence of negative consequences in the form of specific criminal acts related to this area. Since this area is regulated by national regulations, the lack of regulations in a country, or the disparities in regulations with international standards, can lead to consequences in other country. Lack of international coordination and cooperation can have major negative consequences primarily on trade, but also on economy in general, as well as in the field of politics and culture, at the national or international level. This is the reason why entire sectors of the world economy, such as banking and international air transport, are largely, or even fully, on the international telecommunications networks (OUN, 1999).

Therefore, this issue is being addressed by the special international convention of the Council of Europe, by which the obligation of certain technical equipment, staff training for the use of such equipment and the establishment of special institutions (centres) for international communication is determined in the countries which accede it, in Europe and other countries in the world (Convention on Cybercrime, 2001). By the beginning of 2019, this convention was accepted in some way by 66 countries, out of which 25 are outside Europe. Also, in order to raise the level of security in developing countries, the developed countries, directly or indirectly, through their companies (Cyberbit, Cyberark, etc.), undertake technical assistance to these countries, i.e. to their governments, the private sector and citizens.

In recent years, a great debate has been developed in the world about the harmfulness of genetically modified organisms. In doing so, the public is mainly concerned about the possible consequences of consuming food containing GMOs (about which there are different scientific attitudes), as well as about the pollution of the environment or uncontrolled entry of GMOs into the environment. On the other hand, GMO companies claim that there are no health risks from GMO products. In relation to the producers-consumers, there has been a formation of different legislative policies in individual countries, ranging from liberal, through cautious too restrictive. Namely, the strongest advocates for the application of this technology, and therefore the liberal legislative policy on this issue, are the USA, Canada and Argentina, which are at the same time the largest GMO producers. The EU is at the head of the countries that prefer the cautious approach to this technology (although in France and Germany, several companies are engaged in the production of GMOs), while the restrictive policy is represented by 39 countries in the world (2015).

Although the harmonization of regulations at the global level has not yet occurred in the field of GMOs, there is an increasing awareness in the international community that this is necessary because of intensifying interconnectedness of the modern world. Consequently, the different national legislative policies led to convergence, in the direction of greater control over the use of GMOs. Namely, in the United States, a new regulation was passed at the federal level which introduces the obligation to label GMO products, while in the EU a regulation was adopted that allows Member States to bring regulations in this area that are significantly more restrictive than the EU legislation (Directive (EU) 2015/412).

3.3. Consequences of harmonization of law in the field of economy

When it comes to the globalization of law in the field of economy, the consequences of the process may be viewed in relation to finance, international trade and regional trade integration. In the field of finance, the developing countries were encouraged to carry out "structural adjustment", based on various international mechanisms, or to adopt an adequate legal framework, or certain individual legal norms. However, one may conclude that the impact of this legal framework cannot be viewed separately from other social elements in the country of the recipient. Namely, according to many empirical data, the reception of the legal framework which is promoted by international financial organizations, above all the IMF and the World Bank, should favour the developing countries that receive it, enabling them faster economic growth than other developing countries. On the other hand, it has been empirically proven that the mere adoption of an adequate concept of economic policy, or an appropriate legal framework, in itself (or even predominantly) does not produce the desired effects, but other social factors have to be taken into account (the development of infrastructure, raising the level of education, etc.).

In general, if the economic results of developing countries are to be observed in the period since the onset of the intense globalization process, the significant economic advancement of this

group of countries can be noticed. Specifically, GDP per capita in the period 1992-2017 amounted to an average of about 4.9 percent in the developing countries and about 1.9 percent in developed countries, which implies that in this long period of intensive economic globalization, or in the expansion of the legal framework of the market economy, developing countries have developed much faster than developed countries. Also, in the last five-year period (2012-2017) the GDP growth ratio per capita of developing and developed countries was favourable for developing countries (4.3 %, compared to 2.6 %). In addition, starting from 1991, the overall balance of payments of developing countries showed a deficit until 1999, and from then on, until 2017 it showed constant surplus. On the other hand, the developed countries were in constant deficits in the period from 1998 to 2014 (UNCTADSTAT).

Thus, based on the most important economic parameters, observed over a long period since the beginning of the adoption of the legal framework for the market economy, it can be concluded that developing countries have made significant progress in the economic development from developed countries. However, not all developing countries achieved the same results in this period. Namely, the data reveals that five advanced economies (BRICS) achieved an overall average GDP growth per capita higher than overall growth in developing countries (5,5 % versus 4,9 %). These countries have created a national legal framework that has allowed their economies to participate in the world market and thus significantly increased their revenues. On the other hand, countries that did not sufficiently participate in the global economy, such as the countries of Saharian Africa, recorded a smaller increase in the same period (an average of 2,9 % per year) (UNCTADSTAT).

Although the data indicate the link between the adoption of the legal framework for the market economy and the achievement of economic growth, several relevant empirical researches concluded that the economic prosperity for developing countries is not provided solely by this parameter, but rather it depends primarily on other factors.

Thus, in one IMF document it is stated that it is important to ensure that the benefits from globalization is of equal distribution. In that sense, education and training reforms should help workers acquire the appropriate skills for the development of global economy. Apart from this, the policies that extend access to finances for the poor also help, as well as further liberalization of trade that increases the export of agricultural products from developing countries. Additional programs may include providing adequate income support to alleviate the process of change, and that health care should be less dependent on continuous employment and increased healthcare contributions (IMF, 2008).

In the area of foreign trade, the total foreign trade balance of developing countries in the period 1992-2017 showed a deficit until 1998. However, it has constantly been in surplus since 1999, while in the given period, developed countries permanently showed a deficit in this area (UNCTADSTAT). The effects of the expansion of the liberalization of foreign trade in developing countries, or their adoption of an adequate legal framework, designed largely by the WTO, which has been intensified since the mid-1990s, must be viewed comprehensively, as well as in the finance field. Namely, in addition to the fact that, according to the data, it can be concluded that developing countries generally achieved economic progress in the mentioned period, all other circumstances, which do not contribute to the creation of the fair and stable world market, must be taken into account, especially in the field of agriculture. Namely, at the WTO Ministerial Conference in Nairobi in 2015, the member states adopted a historic decision to abolish export subsidies for agriculture and establish discipline with regard to the measures supporting exports with the same effect (WTO).

The economic effects of regional trade integration, that is, the harmonization of trade regulations in countries in a region are also complex and must be viewed in a wider economic and social context. Further, according to the available data, it can be concluded that the harmonization of trade regulations in a particular region, although very important for the general integration of the countries in the given region, does not lead to the intensification of regional flow of goods (or, in some cases, services, people and capital). The effects of such integration are influenced by many factors, primarily economic, but also general, of both the recipient countries and other countries within the framework of integration.

Namely, according to the data on internal and external exports and imports of the regional trade integration, several trends can be observed in the previous period: Firstly, during the period

of their existence from 2005 to 2018, regional economic integrations have substantially increased their total foreign trade (UNCTADSTAT). Secondly, although in this period, the economic cooperation within the economic regional integration has been formally developed, by extending liberalization, the share of internal exports and imports (within the integration) in the total exports and imports has not changed significantly, and in some cases has even been reduced (UNCTADSTAT). Thirdly, regional integration of developed countries, as well as regional integration in which some of the members are developed countries, make most of the total trade within the integration, but on the other hand, although being in regional integration, developing countries achieve most of their total exports and imports with the countries outside their integration (UNCTADSTAT). Finally, developing countries, if involved in the integration with other developing countries, economically incline towards developed countries, i.e. trade integration of developed countries in their region, e.g. the CEFTA countries have achieved the largest foreign trade with the EU since the beginning of this economic integration (UNCTADSTAT; Omokiniovo Efanodor, 2013).

3.4. Consequences of a democratic legal framework in the process of globalization

Harmonization of civil and political law, which in the process of globalization is achieved in a country by reception of legal norms, mainly from international legal instruments, formally leads to the establishment of a democratic legal framework. However, the implementation of the recepted law may be different. Namely, the expansion of a democratic culture is not promoted by the adoption of regulations that meet international standards, but their proper implementation is necessary too. The developed countries have a long democratic tradition and established democratic institutions; therefore, they have already adopted modern international democratic legal framework, and they have succeeded in applying these regulations adequately. On the other hand, developing countries, apart from some exceptions, they have failed to build up stable and efficient institutions and adopt a democratic culture, therefore fail to implement the democratic legal frame appropriately.

A properly implemented democratic legal framework is a political system that fully meets the political demands of its citizens, that is, a system in which citizens enjoy at least the medium level of freedom and equality, whereby citizens can check for themselves whether the state institutions follow the goals of freedom and equality in accordance with the rule of law. Therefore, for the existence of democratization in one society, it is not enough only to adopt a democratic legal framework that establishes multiparty elections and proclaim the political and civil rights of citizens, but it is necessary to: multi-party elections be held in a democratic manner; that the political and civil rights of the recipient's country's citizens are secured; as well as that there is the responsibility of political leaders towards citizens and the effective power of government.

Given the different levels of implementation of the democratic legal framework in the current democracies, according to an independent research conducted in 2017, the classification into "free" countries was established, i.e. countries in which the democratic legal framework is applied in an adequate manner, "partly free" countries (the countries where the democratic legal framework is only partially applied) and "non-free" countries (the countries where a democratic legal framework is not applied) (Freedom House, 2018). In this research, based on various indicators, it is determined in principle that democracy in the world is in crisis. Namely, out of the observed 195 countries, less than half of them (45 percent) may be characterized as "free", while 30 percent of the countries are characterized as "partially free" and even 25 percent are "non-free". However, there is a clear distinction between the developed countries and developing countries: while the first, with one exception (the USA), are almost entirely classified as "free", others are predominantly characterized as "partially free" and "non-free". In addition, the decline in the democratic level in the observed year, compared to the previous one, was recorded in only four European countries, while fifteen countries are from Africa, Asia and South America (Freedom House, 2018).

The problem of the functioning of young democracies, i.e. their adequate implementation of the adopted democratic legal framework, is most commonly the weakness of democratic institutions that should apply these regulations, which is primarily caused by corruption, i.e. the abuse of authority and infiltration of criminal elements into these institutions (Transparency International, 2018: 1). Besides this, the general social climate is important in which the rules on the protection of basic civil and political rights are applied, which primarily relates to the economic

growth, but also to the security, that is, the circumstance of the outbreak of conflicts. Based on one survey in 2018, which included 165 countries, it was observed that the political participation of the citizens, observed regionally, is best in North America and Western Europe, with an index of around 8 (out of 10), while in South America, Eastern Europe, and Asia with Australia index is around 5, and the Saharan Africa's regions, of the Middle East and Sub-Saharan Africa achieve an index of around 4. In this regard, not only was the reception of the democratic legal framework in a country was assessed, but also its adequate implementation as well, the real involvement of citizens in the political sphere of their own country (The Economist, 2018).

According to one survey of the presence of corruption in a society, out of the 180 countries and territories at the top of the list, Denmark is the least corrupt society, and the top ten countries are also: New Zealand, Finland, Singapore, Sweden, Switzerland, Norway, The Netherlands, Canada and Luxembourg. Other developed countries have low levels of corruption, while developing countries are, as a rule, more corrupt. At the very end, among the most corrupted countries there are the least developed countries. Observed regionally, the smallest corruption exists in Western Europe and the European Union, while the most corrupted is sub-Saharan Africa. Also, there is a direct correlation between the development of democracy and the existence of corruption, so that the countries with the established democracy in terms of the presence of corruption have an average score about two times better than the countries with autocratic regimes (Transparency International, 2018: 2-6).

In addition to the weakening of state institutions caused by corruption, the adequate implementation of the democratic legal framework, or the stability of "young" democracies, is largely influenced by economic development. Namely, some empirical studies have found that democracy is more stable in conditions of economic growth and low, or moderate inflation (Diamond, 2009; Roll, Talbott, 2003: 75-89). Otherwise, with the decline in economic growth and the rise in inflation, the chances of an adequate implementation of the democratic legal framework, as well as the survival of democratic order, are drastically reduced. The growing economic backlog of most of developing countries in relation to developed countries initiated a global campaign for writing off debts to poor countries by developed countries. In fact, according to the IMF and the World Bank analyses, the public debt of developing countries, especially the poorest ones, is one of the main obstacles to their further economic development (IMF, 2019).

A very important prerequisite for the development of democracy in a state is peace, because only in the conditions of adequate safety of citizens, their civil and political rights can be respected. However, it has been noted that a large number of developing countries that have adopted a legal democratic framework in the third wave of democratization since the end of the 1980s, for various reasons, have failed to implement this legislation in an adequate manner and, in this way, with the participation of other factors, gain general social progress (Huntington, 1991). Namely, it was determined that democratization in its first stages creates favourable conditions for the emergence of armed conflicts (Söderberg, Ohlson, 2003: 1). Thus, by adopting a democratic legal framework in some of the former communist countries (former Yugoslavia, the Caucasus region, Ukraine), as well as in sub-Saharan African countries, earlier ethnic tensions have been intensified, which have jeopardized the democratic process in these countries (Marshall).

3.5. Consequences of (non) reception of law based on modern system of values

Since law is a cultural phenomenon, global harmonization of law is initiated by the creation of a universal culture, but also reversibly influences on the further unification of cultural models, leading to the effect of *perpetuum mobile*. Namely, by reception of law on the issues such as the banning of the death penalty, the ban of consumption of tobacco products in public and the protection of the environment, the recipient countries with the legal norms directly adopt formal sets of values, because these provisions regulate the relationship of a society to life, health and environment. However, while developed countries have largely received international standards in these matters, developing countries are still in the process of harmonization of the national legislations. The failure to adopt modern international legal standards that promote modern sets of values brings these countries into a kind of cultural self-isolation. Namely, these issues have direct consequences to their economic and political international co-operation (e.g. non-compliance of national environmental regulations with the EU regulations may pose an obstacle to joining EU). By refusing to take legal solutions which represent modern civilizations' values, a country declares

itself unprepared for full participation in the contemporary international community, which is not a good signal for establishing international cooperation in other areas with the country.

With the reception of legal solutions to these issues, recipient countries do not, in fact, fully adopt the cultural model of a modern society, but only a cultural pattern that relates to some of the fundamental questions of the contemporary civilization. In addition to the adopted cultural models on the relations to life, health and the environment, these countries can express their cultural identity through various legal norms in many other cultural issues (marriage, gender equality, inheritance, etc.). In this way, the harmonization of law at the global level does not lead inevitably to global cultural unification, but contributes to the rapid adoption of the modern system of values by developing countries, which further contributes to their faster development and active inclusion in the international community.

Given that human life is the most significant value of the modern systems of values, the relation of a society towards the death penalty can be taken as an indicator of the process of adopting modern values. With the intensification of the globalization process, since the late 1980s, there has been a rising trend in the number of abolitionist states. Moreover, in the cases where there is inconsistent implementation of the legal institution on the abolition of the death penalty in the countries, the indicator shows that the process of adopting modern values goes "from above", which means that the value is not accepted in a given society in an adequate way, but that the abolition of the death penalty is introduced only formally.

According to the report of the UN Secretary General, for the period 1974-1978, there were 20 abolitionist countries in the world, in 14 countries the death penalty for ordinary crime was abolished, the two countries were divided, and 116 countries were retentionist. With the fall of the Berlin Wall, which marked the beginning of intense globalization, including the field of culture, many countries, former USSR members, or the Eastern Bloc, abolish the death penalty. In addition to many countries around the world, this period was characterised by the abolition of death penalty in a number of African countries, as well. Hungary and Czechoslovakia – 1990, Yugoslavia – 1992, Moldova – 1995, Azerbaijan, Bulgaria, Estonia and Latvia – 1998, Turkmenistan, Ukraine and Latvia – 1999, Albania – 2000, and Armenia in 2003 (Amnesty International).

Furthermore, developing countries in general lag far behind developed countries in terms of adequately adopting anti-smoking regulations, which can contribute to further social lagging behind of these countries. Namely, the increased mortality due to the effects of smoking causes a decrease in the social potential, the costs of treatment of the patients suffering from the effects of smoking burden the state's budget, and the absences from work due to more frequent smokers' illnesses reduce the efficiency of the economy. Thus, the overall negative consequences of non-compliance with regulations limiting the use of tobacco products, or their inadequate implementation, can be very difficult for developing countries and reduce their chances to compensate for social lagging behind in relation to developed countries. Mozambique and Namibia – 1990, Angola – 1992, Guinea-Bissau – 1993, South Africa – 1997, Ivory Coast – 2000, as well as in the Pacific region (Amnesty International).

The globalization of law also leads to the increased harmonization of national legislation in the field of environmental protection, i.e. to almost complete legal unification in this area. Analysing the constitutions, primarily the countries in transition and European countries, as well as the countries in other parts of the world, it can be noticed that most constitutions, especially the new ones, contain provisions on environmental protection. Despite many differences, some common elements are noted in these provisions. In a large number of the constitutions, the right to a certain quality of the environment is formulated as one of the basic human rights, so that these provisions are most often found in the part dedicated to the protection of basic human rights and freedoms. Along with this right, the right to information about the environment is often formulated in the constitutions, and sometimes the rights in the field of the environment are placed in the context of sustainable development (List of National Constitutions).

Apart from the constitutional provisions, the harmonization of legislation in this area also comes at the level of specific regulations related to the particular environmental issues, such as water protection, marine protection, prevention of cross-border industrial incidents, air protection, environmental risk assessment and others. Beside the detailed ever-increasing legal regulations on the environment at the international level, more and more regulations are being adopted at the

national level, both laws and by-laws, the number of which in some countries, mostly developed, is estimated to hundreds.

The failure to adopt a legal framework that promotes environmental protection can induce multiple negative indirect and immediate consequences, which can particularly be hard for developing countries, as it can slow down social growth and thus increases their lagging behind to developed countries.

4. Results

It was found that in the field of technology, the adoption of the international legal framework on the use of IT, in relation to electronic commerce, the right to privacy and computer crime, leads to the harmonization of national legislations at a global level, which creates security in international business, achieving better economic results of the countries that have adopted these regulations. In addition, there is a gradual harmonization of the different legislative approaches towards the use of GMO, therefore citizens of all countries in the world are protected in almost the same way from possible harmful effects of the use of technology. However, the lack of the adequate international regulation, prevents full protection of citizens in this area.

In the economic field, the consequences of the globalization of law regarding the reception of the legal framework of the market economy, the liberalization of foreign trade and regional economic integration may lead to the greater economic growth of the developing countries and the least developed countries, compared to the developed countries. However, for the progress to be achieved, it is not sufficient just to adopt the given legal framework, but also other, often non-economic conditions are important, which enable its better implementation.

The political consequences of the globalization of law can be perceived on the example of the third wave of democratization, that is, the adoption of an adequate legal framework. Beside positive consequences in terms of increasing respect for human rights, i.e. allowing citizens to participate in political life, there may be undesirable consequences, like increasing corruption and the outbreaks of armed conflicts as a result of political and ethnic traditional misunderstanding.

In the field of culture, it can be noticed that by reception of the regulations on the issues such as the abolition of the death penalty, the ban on smoking in public places and the protection of the environment, cultural models of life, health and the environment protection are actually adopted, which are the cultural trends of modern civilization. Therefore, the countries that have adopted these regulations are considered to be more advanced than those who have not yet done it.

5. Conclusion

In general, it can be concluded that the globalization of law leads to positive consequences in law, both internationally and nationally, and in all social areas in the countries that participate in this process. Additionally, globalization of the law initiates a number of risks, which should be avoided both in the part of the legislation and in the implementation of the adopted regulations. Namely, the globalization of law does not inevitably lead to the unification of law at a global level, but allows the transposition of only those international legal standards into national law which can lead to the achievement of benefits in all social areas.

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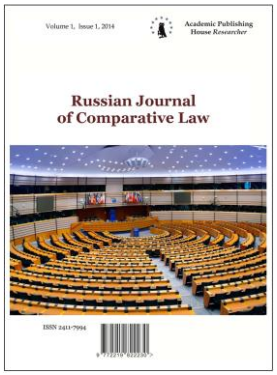

Legislation on E-Commerce and the Development of E-Commerce in Vietnam

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Abstract

Internet and other electronic means are on the way to spread greatly to all areas of social life, especially for the economic development of each country as well as the global economy. E-commerce is an indispensable and important development trend in the future of world trade, it becomes one of the strategic objectives of each country to promote the economy and expand international cooperation. Along with the positive effects, e-commerce still has many drawbacks and shortcomings such as security and safety of personal information when e-commerce transactions are multi-way connected, information exists in the form of data and transferred on the network; network security issues in general and security in e-commerce, in particular, are increasingly threatened, the emergence of high-tech criminals take advantage of personal customer information to fraud and appropriate property, especially in the field of consumer protection; the infrastructure has not yet met the growth and development of e-commerce. The article is based on the Vietnamese law on e-commerce and analyzes an overall picture of the development of e-commerce in Vietnam in recent years.

Keywords: e-commerce, e-commerce transaction, e-commerce association, the Fourth Industrial Revolution, digital economy, information technology, electronic data information, electronic means, sales e-commerce website, the e-commerce marketplace.

1. Introduction

E-commerce is a trend of commercial development that is spreading globally and Vietnam is not out of this inevitable trend. Vietnam is a developing country and is in the process of industrialization, modernization, and international integration. Along with the rapid development of science and technology, especially “the Fourth industrial revolution” is a great opportunity to improve the business environment, reduce costs, improve product quality and advance competitiveness, promote fair competition, attract international investment and gradually create conditions for developing cross-border trade, create attractive and potential investment opportunities in the field of digital technology and Internet, this is also a great opportunity for industrial production with advanced level of science and technology (Biriukov, Galushko, 2018). E-commerce is based on the digitalization system and the internet is growing rapidly. Instead of going to shops and supermarkets in the traditional way, consumers can now buy goods and use services without leaving home or office, they just need to surf the web, mobile phones, tablets or the other smart devices with the internet connection for shopping on e-commerce sites. E-commerce is booming and fundamentally changes in thinking, awareness, and ways of buying from consumers, shifting from the traditional way of buying at supermarkets and stores by buying and paying online

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via e-commerce sites. It can be mentioned the "big men" in the international e-commerce industry such as Amazon, Alibaba, Walmart, Target Corporation, Bestbuy, eBay.

E-commerce is not only a great opportunity but also a challenge for countries from around the world. The rapid rate of e-commerce has set a need to comprehensively complete the national legal framework and the cooperation among countries (in the context of the digital economy, in another way, the internet economy) when all limits, barriers and geographical position are gradually cleared away. The article provides statistics on the development of e-commerce in Vietnam, as well as the shortcomings of legal regulations and suggestions for improving the legal basis related to e-commerce.

2. Materials and methods

The article is studied based on international legal documents: UNCITRAL Model Law on electronic commerce with Guide to enactment 1996, OECD Guide to Measuring the Information Society; Work programme on electronic commerce of WTO 1998 and domestic legal documents systems that regulate issues related to e-commerce, such as the Law on electronic transactions 2005; Civil Code 2015, Law on tax administration 2006, Law on the protection of consumer rights 2010; Decree No. 52/2005/ND-CP of the Government on e-commerce; Decree No. 72/2013/ND-CP of the Government of July 15, 2013, on the management, provision, and use of Internet service and online information. In addition, there are also many research articles on this issue such as Handbook on E-commerce and Competition in ASEAN (ASEAN, 2017), Vietnam e-business index of 2018 (VECOM, 2018), E-commerce industry in Vietnam (EU–Vietnam, 2018), E-commerce development in Vietnam in the context of the digital economy (Tran Anh Thu, Luong Minh Phuong, 2018), Vietnam e-commerce White book, 2018 (iDEA, 2018).

In this article, scientific research methods are used simultaneously such as methods of analysis, synthesis, the method of comparing laws, statistical methods, dialectical materialism method.

3. Discussion

The Fourth Industrial Revolution is characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres. The speed of current breakthroughs has no historical precedent. The Fourth Industrial Revolution has the potential to raise global income levels and improve the quality of life for populations around the world. To date, those who have gained the most from it have been consumers able to afford and access the digital world; technology has made possible new products and services that increase the efficiency and pleasure of our personal lives (Schwab, 2015). Directive № 16/CT-TTG dated May 4, 2017, of the Vietnamese Prime Minister on the strengthening of the ability to access the Fourth industrial revolution, also stated that: "The Fourth Industrial Revolution, building on the fusion of digital, physical and biological technologies, internet of things and artificial intelligence, is fundamentally changing global production. The Fourth Industrial Revolution is characterized by digitization and utilization of information technology. The Revolution is taking place at different speeds in countries all over the world, but having a strong impact on all aspects of socio-economic life, which leads to a change in production methods and workforces" (Directive № 16/CT-TTg). E-commerce is a great achievement that the internet offers when changing from traditional trading methods such as shopping at shops and supermarkets, concluding paper-based contracts into transactions via electronic means. Along with the evolution of the Fourth industrial revolution, e-commerce is fundamentally changing the world economic picture with its preeminent characteristics. According to Euromonitor International, e-commerce is expected to become the world's largest retail channel in 2021. It is estimated that this sector will account for 14 % of total retail sales (Linh Anh, 2019).

So what is e-commerce and what are e-commerce characteristics that stand out from traditional forms of commerce? There are many definitions of e-commerce in international legal documents and national laws. UNCITRAL Model Law on electronic commerce regulates any kind of information in the form of a data message used in the context of commercial activities. Under the UNCITRAL Model Law on electronic commerce, e-commerce means commercial activities conducted based on data messages via electronic means to replace the use of paper-based methods of communication and storage of information (UNCITRAL, 1996: 3). On September 25, 1998,

the Work programme on electronic commerce adopted by the WTO General Council to examine all trade-related issues arising from global e-commerce. Article 1.3 of this Work programme stipulates that: “Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The work programme will also include consideration of issues relating to the development of the infrastructure for electronic commerce” (WT/L/274, 1998). According to OECD definition, an e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments and other public or private organizations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail” (OECD, 2011). Directive 2000/31/EC of the European Parliament and of the Council stated that contracts concluded by electronic means member states shall ensure that their legal system allows contracts to be concluded by electronic means. The Member States shall, in particular, ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means (Directive 2000/31/EC, Art. 9). Article 2 of the e-commerce Law of the People’s Republic of China definites that: “e-commerce mentioned herein refers to business activities of selling commodities or providing services via the Internet or any other information network” (China, 2018).

Currently, the legal basis for adjusting e-commerce relations in Vietnam is being strengthened and improved. Law on electronic transactions 2005, Decree No. 52/2013/ND-CP of the Government on e-commerce and other decrees and circulars related to e-commerce is the basic legal corridor regulating e-commerce activities. According to the law on electronic transactions, an e-transaction means a transaction implemented by electronic means. An electronic means is a means that operators based on electric, electronic, digital, magnetic, wireless, optical, electromagnetic technologies or similar technologies (Law on e-transactions, 2005, Art. 4). Decree № 52/2013/ND-CP specifies forms of e-commerce activities, state management of e-commerce, creating a legal basis to ensure information safety and security, protection of consumer’s right in e-commerce as well as identification of prohibited acts in e-commerce and the mechanism of dispute settlement arising in e-commerce activities. Article 3 of the Decree № 52/2013/ND-CP of the Government on e-commerce stipulates: “E-commerce activity means conducting part or the whole of the process of commercial activity by electronic means connected to the Internet, mobile telecommunications networks or other open networks” (Decree № 52/2013/ND-CP). Therefore, e-commerce is the implementation of part or the whole the process of trading goods or providing services via electronic means connected to the Internet or other open information networks. The term “e-commerce” also covers activities throughout the entire value chain of the transaction process and includes activities such as the delivery of the good to the consumer's preferred location (ASEAN, 2017: 16).

The characteristic of e-commerce is that parties do not have to meet directly in order to exchange information and conduct transactions. All e-commerce transactions are implemented via devices that are connected to the Internet and other open networks. The essence of e-commerce is that traditional commercial transactions are carried out on the basis of digital technology applications (network environment). E-commerce is not restricted within the borders of a country that allows the subjects to conduct cross-border transactions when the world is entering the era of the "internet economy". In e-commerce, all transactions have the participation of at least 3 subjects. Those are sellers, buyers, and third-party related to e-commerce activities, including traders, organizations providing e-commerce services and traders providing technical infrastructure. Moreover, all e-commerce transactions are carried out in the network environment, hence the information network is an essential foundation. These are the distinctions between e-commerce and traditional commerce. E-commerce benefits organizations, enterprises producing goods and providing services, consumers as well as the whole society.

Considering the subjects of e-commerce include: Government (G), Business (B) and Consumer (C), e-commerce is divided into some of the following main forms: Business to Business (B2B), Business to Consumer (B2C), Business to Government (B2G), Government to Business (G2B), Government to Government (G2G), Government to Citizen (G2C), Consumer to Consumer (C2C), Consumer to Business (C2B). The article 24 of Decree No. 52/2013/ND-CP lists subjects of e-commerce activities, that includes: owner of sales e-commerce websites; traders or organizations providing e-commerce services; seller; customers; traders or organizations providing infrastructure and other traders, organizations or individuals that use electronic equipment connected to other networks for carrying out commercial activities.

From the provisions of Decree № 52/3013/ND-CP, it can be seen that the law regulating e-commerce activities are conducted via not only the internet connection to computers but also mobile telecommunications networks, also known as mobile commerce (M-commerce). This is an important consideration in developing countries as the growth in smartphone usage is outstripping access to conventional computers/laptops. In fact, transactions carried out via smartphones is growing rapidly. It is anticipated that global mobile e-commerce growth revenue will increase from the US $ 1.357 billion in 2017 to the US $ 3,556 billion by 2021 (eMarketer, 2017). According to statistics from Google, in 2017 nearly 72 % of the Vietnamese population use a smartphone. As smartphones are key to conduct e-commerce activities ownership will have a profound effect on the e-commerce landscape (EU-Vietnam, 2018: 15).

Vietnam currently has one of the fastest growing B2C e-commerce markets in Southeast Asia, translating to a market size of EUR 5.5 billion in 2017. The e-commerce industry will continue to grow rapidly in the future with a forecast of EUR 8.1 billion by 2020, accounting for 5.5 % of retail sales (EU-Vietnam, 2018 : 15-16). B2C e-commerce in Vietnam today is classified into two different types: Sales e-commerce website and e-commerce services provision website. The sales e-commerce website is an e-commerce website developed by traders, organizations or individuals by themselves to serve their commercial promotion, sales or service provision. E-commerce service provision website is an e-commerce website developed by traders or organizations to provide an environment for other traders, organizations or individuals to conduct their commercial activities. The e-commerce service provision website is of the following types: E-commerce trading floor; Online auction website; Online promotion website; Other types of the website as stipulated by the Ministry of Industry and Trade. Traders, organizations or individuals may set up sales e-commerce websites if having been granted personal tax identification numbers for individuals and having notified the Ministry of Industry and Trade of the set-up of sales e-commerce websites under the prescribed procedures. Different from the subjects that can set sales e-commerce websites, the subjects may set e-commerce service provision websites that can only be traders and organizations established under the provisions of law, having a service provision plan clearly stating the structure, utilities and main information sections on the service website, rights and responsibilities of the trader or organization providing e-commerce services and service users; having registered for setting up e-commerce service provision websites and having their registrations certified by the Ministry of Industry and Trade. In fact, in 2017, the form of e-commerce via sales e-commerce websites is still dominant with 18,783 e-commerce websites, while the number of e-commerce markets is 785, the online auctions websites - 23 and online promotion websites – 106 (iDEA, 2018: 14).

Vietnamese consumers are shopping online through two main means: social media platforms and mobile applications. According to people's Internet access survey information, up to 89 % of Vietnamese people use mobile phones, 69 % use desktop computers, laptops, and 17 % use other devices (iPad, tablets, ...) (iDEA, 2018: 28). Mobile application means an application installed on mobile equipment connected to a network that allows users to access the databases of traders, organizations, and individuals to purchase and sell goods and provide or use services. Mobile applications include goods sale applications and e-commerce service provision applications (e-commerce trading floor; online sales promotion application; online auction application) (Circular № 59/2015/TT-BCT, Art. 3.1). Online ordering function is a mobile application function permitting customers to begin the process of conclusion of contracts under the terms publicized on that application, including the conclusion of contracts with an automatic information system. At present, websites and sales applications with online ordering functions in Vietnam occupy 45 % (iDEA, 2018: 70).

According to Decree № 72/2013/ND-CP, social network means an information system that provides its users with such services as storage, provision, use, search, sharing and exchange of information, including the provision of the service of creating private websites, forums, online chat rooms, audio and video sharing, and others similar services (Decree № 72/2013/ND-CP, Art. 3.22). Circular № 47/2014/TT-BCT stipulates that social networks that have one of the functions of e-commerce trading floor services should register with the Ministry of Industry and Trade in the form of e-commerce exchange. Owners of social networks should take responsibility for providing e-commerce exchange services as regulated by the law. According to 2018 statistics, 68 % of Vietnamese consumers buy goods and services via e-commerce websites (including e-commerce trading floors), 51 % via forums, social networks, and 41 % via mobile applications. The rate of popular social networks integrated on e-commerce websites includes Facebook (68 %), Google Plus (21 %), Twitter 13 %, ... (iDEA, 2018: 74).

Thus, in Vietnam, basically a legal framework on e-commerce has been developed, including the important role of Law on electronic transaction 2005, Decree No. 52/2013/ND-CP on e-commerce and other legal documents such as Civil Code 2015, Law on competition 2014, Law on bidding 2013, Law on commerce 2005, Law on protection of consumer rights 2010, related decrees and circulars on investment, finance, banking, penalties administrative related to e-commerce that create a favorable legal corridor for e-commerce development. Notwithstanding, many legal regulations are still not specific and difficult to apply in practice, many regulations seem to be inconsistent with the reality of e-commerce activities. The current situation of the e-commerce industry also has many inadequacies arising from legal loopholes as well as proficiency and awareness of all parties in e-commerce activities: state management, businesses, and consumers.

Decree 52/2005/ND-CP provides a chapter to regulate contracting in e-commerce, especially the conclusion of contracts using online ordering functions on e-commerce websites. If an e-commerce website has the online ordering function applicable to each specific goods or service introduced on that website, the introductory information about goods and services and relevant terms are regarded as a notice of proposal for conclusion of contract of the traders, organizations and individuals selling goods as notice of proposal for conclusion of contract without a specific recipient. E-documents generated by customers and sent by using the online ordering function are regarded as their proposals for the conclusion of a contract for the goods or services associated with that online ordering function. The time of conclusion of contract when the online ordering function on e-commerce websites is used is the time the customer receives the response from the trader, organization or individual selling goods to accept the proposal for the conclusion of the contract. According to the article 23 of this Decree, the Ministry of Industry and Trade shall provide in detail the process of online conclusion of contracts on e-commerce websites developed by traders, organizations or individuals to purchase goods and services. But so far, the Ministry of Industry and Trade has not yet issued any specific legal documents to guide the process of conclusion of online contracts on e-commerce websites.

While the infrastructure system has not yet met the rapid growth of e-commerce, the issue of logistics and delivery still faces many difficulties. Delivery services in Vietnam are still quite slow and do not meet the needs of consumers. With such a context, it is predicted that in the next few years, logistics and delivery will grow very strong to meet the growing e-commerce market with exponentiality. This E-commerce gold rush has resulted in a crowded and competitive logistics landscape with over 50 providers as of 2017, from traditional express services (e.g., Viettel, EMS, and VNPost) to start-ups (e.g., giaohangnhanh, supership, and giaohangtietkiem) and international players (e.g., DHL eCommerce, Grab Express, and Lazada Express) (EU-Vietnam, 2018: 18). Traditional consumption habits of Vietnamese people are to pay cash on delivery, so this is a challenge for businesses to set up a fast, economical and efficient delivery network and improve the trust of consumers. For some small and medium enterprises, such as convenience stores now use third-party services to deliver to consumers and reduce operating costs.

The other problem with current e-commerce in Vietnam is the payment method, due to consumer habits, consumers/customers prefer cash-on-delivery (COD) payment to online payment via bank cards or electronic wallets. The field of e-commerce payment is still underdeveloped, especially due to the habits and behaviors of consumers, so online payment forms, though increasing, certainly cannot replace traditional payment methods in the near future. Consumers are still concerned that when paying online, the bank account information may be revealed or

stolen, psychologically sure to receive the goods before paying in cash. Cash payments are still the preferred form of payment in e-commerce transactions, specifically, more than 80 % of transactions in Vietnam often pay in cash. The data of the State Bank shows, the ratio of non-cash payment has not changed much in the period of 2010 to the second quarter of 2018, accounting for about 12 % of the payment methods, by the end of the second quarter of 2018, slightly decreased, accounting for 11.9 %. This rate is much lower than the average level of developed countries like the US (more than 93 %) and Europe (90 %) (Phuong Thao, 2018). Lack of consumer trust is a major barrier to online payment methods in e-commerce. A recent Google Survey suggests that one in four users in Vietnam has adopted digital payment services. The digital payment services adoption in Vietnam accounts for only 25 %. On the other hand, for physical goods, while all leading e-Commerce players in the region accept payments via cash on delivery, this comes with friction and costs for both users and for e-Commerce players, which face a higher proportion of cancelled orders and incur higher charges by delivery companies (Google, Temasek, 2018: 31).

Vietnamese Constitution 2013 affirmed the rights to inviolability of personal privacy, personal secrecy, and family secrecy. Information regarding personal privacy, personal secrecy and family secrecy is safely protected by the law. Everyone enjoys the secrecy of correspondence, telephone conversations, telegrams, and other forms of exchange of personal information. No one is illegally allowed to open, control, and confiscate other's correspondence, telephone conversations, telegrams, and other forms of exchange of personal information (Art. 21). Moreover, Article 387 of Vietnamese Civil Code 2015 stipulates that in case a party receives confidential information of the other party in the process of entering into a contract, the recipient of that information is responsible for information security that in case a party receives confidential information of the other party in the process of entering into a contract and may not use such information for their own purposes or for purposes that are contrary to law. According to the Article 25 of Decree 72/2013/ND-CP of the Government on management provision and use of Internet services and online information, organizations and enterprises that establish social network have to take measures for protecting the personal information of users; notifying users of their rights, obligations, and risks when storing, exchanging and sharing information online. Providers and users of internet services and online information are responsible for ensuring information safety and security within their information system; cooperating with competent state management agencies and other organizations and individuals in ensuring online information safety and security. Activities of ensuring online information safety and security must be regularly, continuously and effectively carried out on the basis of compliance with standards and technical regulations on information safety and the law on telecommunications and internet service quality. Law on protection of consumer rights also states that consumers are ensured safety and security information when participating in transactions, using goods and services. Moreover, Law on electronic transactions 2005 and Decree № 52/2013/ND-CP contain regulations on secrecy and information security, however, safety and security of customer data are not guaranteed, many businesses have used customer data to advertise, send spam messages or resell customer data to profit. Such cases have also caused customers to encounter many troubles, their information security rights are sometimes seriously violated. Even buying customer data is done publicly and widely on electronic websites with a full range of customer data packages classified by each potential field. The price of each data customer package is offered for sale at a very cheap price, only from a few hundred thousand to several million VND (i.e. only a few hundred dollars). It can be said that buying customer data is as easy as buying vegetables, state management agencies and the current legal basis does not have an effective solution to solve this problem. This buying trend is the “source” of many troubles that consumers are experiencing, as they are continuously “terrorized” by the telesales team every day. The fact that personal data is being transformed into “public data” makes many consumers feel confused, worried.

The act of buying personal data is often traded on the internet environment, so there are certain difficulties when identifying the subject of violations. Consumers themselves do not know their information is being sold, so they cannot make suggestions to calculate their loss value and propose legal responsibility (Cam Thi, 2018). Information database in e-commerce becomes a huge resource, along with its size and speed of e-commerce development, this information resource becomes more valuable in the digital economy when all traditional transactions are being replaced by transactions through electronic means. Information security errors are a big problem for e-commerce businesses. Website security issues are becoming more complex, for example, in November 2016, a VietnamWorks.com subsystem was attacked which caused information of tens of thousands of accounts to be leaked. Many

of these accounts are shared with other users, such as Gmail, or even some e-banking applications of some banks (AIS, 2016). According to statistics and calculations of Vietnam Computer emergency response teams, in the first half of 2017, 6,303 cyber attacks were recorded in Vietnam. Including 1,522 phishing attacks, 3,792 malware installation attacks and 989 interface change attacks (VNCERT, 2017). Therefore, e-commerce websites must have solutions to secure customer information and against hackers intruding into the system to steal information. This requires online businesses to have information protection systems on their websites.

Decree 52/2013/ND-CP and related legal documents specify the responsibility to provide information on the e-commerce website as well as on e-commerce trading floors. Traders are responsible for providing information, especially information on goods, services, prices, information on general trading conditions, information on shipment and delivery, payment methods. This information must be obvious, accurate, searchable and understandable; arranged in the corresponding sections on the website and accessible online. In addition, this information must be storable, printable and clearly displayed to the consumers before the time they send a proposal for the conclusion of the contract. In fact, the problem of counterfeit goods and poor quality goods is a matter of traditional trade and more complicated in the e-commerce environment, when buyers and sellers do not meet directly, nor does the buyer be directly checked the quality of goods. Many sellers still use untrue product description information to mislead customers and gain illicit profits. Big E-commerce websites in Vietnam such as Sendo, Lazada, Shopee are being referred to as "counterfeit market" because most products are branded products but their prices are very cheap. Just spend several hundred thousand to one million VND, consumers can buy Adidas shoes, Chanel bags, Rolex watches... It is too easy to register as a store owner and sell products on big e-commerce websites. This is a "loophole" for the nefarious enterprises to mix fake and poor quality goods to deceive consumers. According to the Department of Competition and Consumer Protection, lazada.vn is the largest e-commerce website in Vietnam but it has been complained by many customers about the quality and origin of goods (Thu Huong, 2018).

Consumers are the main motivation to promote the development of the economy in general and e-commerce in particular. Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who is not effectively organized, whose views are often not heard (President Kennedy, 1962). Consumer trust is the weakness of Vietnamese e-commerce, with its booming its development, along with genuine businesses, there are also many acts of unfair competition, illegal business enterprises. This not only damages the genuine business, affecting the fair business environment of e-commerce and in the end, but victims are also still consumers. According to the survey of iDEA, the biggest obstacle for consumers when shopping online is due to poor product quality compared to advertising accounting for 77 %, concerns about disclosed personal information accounted for 36 % and the price of goods accounted for 35 %. Consumers cannot see and evaluate products, so goods received are often not the same as advertisements and are not as good as their expectations. In addition, consumers cannot determine the origin of the goods, especially when the seller provides dishonest information and does not provide the invoice so that the consumers do not have evidence and a basis for making a complaint if a dispute occurs. According to iDEA, in 2017, this unit inspected more than 300 cases of violations of counterfeit goods, counterfeit goods, and intellectual property infringing goods. The result is an administrative fine of VND 300 billion. The iDEA has recommended to consumers to avoid buying fake and counterfeit goods online. However, business people trading goods on Facebook currently do not have a legal representative in Vietnam. So this Agency recommends consumers sending information to the office of Facebook (Information society, 2019).

The problem of tax management in e-commerce is now also difficult. With about 200,000 businesses doing business on social networks, in the future, online transactions will increase both quantity and transaction value. Collection of e-commerce tax is a very important job, both having a great impact on development and bringing in the state budget revenue. In the e-commerce market, according to the technical nature of the internet, it is difficult to determine exactly the business location that e-commerce businesses use. In addition, because the establishment and transfer of enterprises are very easy in e-commerce, the tax authorities face many difficulties in determining the identity and country of residence of taxpayers. Currently, Law on Tax Administration 2006 and Decree No. 52/2013/ND-CP do not have specific regulations on tax collection in e-commerce activities, not separate e-commerce from traditional commerce. Many businesses take advantage of legal loopholes to

evade taxes. There are two common forms of tax evasion: no business registration/tax registration and no declaration or low declaration of transaction value/income for tax evasion. As a rule, a company with a permanent establishment in Vietnam must register its business, register to pay tax as a resident company in Vietnam. However, e-commerce does not require enterprises to establish any business establishment to trading, all steps of transaction, conclusion, delivery, payment... are implementation and processing via computer systems. Besides, determining whether a business or individual is residing in Vietnam is very difficult. Therefore, e-commerce companies easily ignore the tax authorities, do not carry out business registration or tax registration. No declaration or low declaration of transaction value/income for tax evasion is the most common tax evasion and most difficult to control in e-commerce business (Ly Phuong Duyen, 2015). So, it is necessary to amend and supplement the Law on Tax Administration towards the goal of creating a legal framework to apply e-tax management and be compatible with the development of current e-commerce.

Currently, the e-commerce business environment in Vietnam is developing rapidly and meeting the basic needs of consumers. However, more and more e-commerce disputes arise and increase in both scale and level. According to the E-Commerce and Digital Economy Agency, there are now many businesses and individuals promoting and providing products and services on e-commerce trading floors but the e-commerce floor management unit is not present in Vietnam, so when the dispute occurs during the transaction, the consumer is directly damaged. The legal framework for e-commerce is built in great detail, however, with the development and change of e-commerce, this legal corridor became inconsistent with the new situation. Many trade frauds are complicated and the level of violation is more serious, making the e-commerce business environment unfair, causing damage and losing consumer trust. On the other hand, when disputes occur between consumers and businesses or individuals trading goods and services via the internet, consumers do not know which agency to "knock on" to get support. Therefore, in order e-commerce activities to operate effectively, develop sustainably and improve consumer trust, according to the proposal of the representative of e-commerce trading floor Fado, the Ministry of Industry and Trade should be the arbitrator to settle digital commerce disputes (Thuy Ha, 2018).

4. Results

From the above analysis, it can be concluded that Vietnam's e-commerce is developing very dynamically. According to the E-conomy SEA 2018 of Google and Temasek, the internet economy of Vietnam is akin to a dragon being unleashed, has almost tripled in three years ($9 billion in 2018, 38 % CAGR in 2015-2018), driven by e-Commerce and Online Media (Google, Temasek, 2018: 7). The Vietnamese Internet economy is booming, it is expected that by 2025, Vietnam's internet economy will reach 33 billion USD with CAGR of 25 %. Decision № 1563/QD-TTG of Prime Minister of August 08, 2016, to approve master plan for e-commerce development in the 2016-2020 period affirms that e-commerce is an important infrastructural factor of the commerce sector and of information society; is a mean helping Vietnamese enterprises to enhance domestic market development and develop the export and import, participating in the global supply chain, increasing national competitiveness in international integration; contributing in the enhancement of industrialization and modernization of Vietnam. Vietnam's development target to 2020 will be: 30 % of the population make online purchase with the total value of 350 USD/person/year on average; B2C e-commerce sales equivalent to USD 10 billion, accounted for 5 % of the total retail sales of goods and the consumption turnover of the whole country; 100 % of supermarkets, shopping malls, and modern distribution establishments accept the payment via Point of Sale (POS) system and allow consumers to make non-cash payment when buying products; a number of large e-commerce traders which are reputable in Southeast Asia are established. In addition to bringing great opportunities in economic growth and international integration, bringing profits to businesses and to meet the increasing demands of consumers, e-commerce still has its downsides. The current legal system of e-commerce regulation of Vietnam has not yet fully adjusted the new activities arising in e-commerce. Therefore, in the coming time, it is necessary to study and amend the Commercial Law 2005, Law on Tax Administration 2006, Decree 52/2013/ND-CP and related documents to complete the legal framework to regulate and suit the new development situation of e-commerce. E-commerce has many positive effects but is also susceptible to spreading viruses, attacking websites; distributing electronic mail, spam messages; stealing money from ATM cards. On the other hand, there are also illegal transactions on the Internet such as: selling drugs, smuggling, selling fake goods. Therefore, there

should be mechanisms to control violations and ensure the safety of e-commerce transactions (Tran Anh Thu, Luong Minh Phuong, 2018). Besides, it is necessary to apply advanced technology in e-commerce management, improve the power of the state management team on e-commerce, need to stipulate strict sanctions for the acts commercial fraud, unfair competition, deceiving consumers. Overall research and regulation on non-cash e-commerce transactions, electronic payment development, logistics, and delivery services and strengthening the legal basis for consumer protection are needed. Especially for consumers, we must fully understand the necessary knowledge to protect ourselves, find out carefully the information about goods and services before buying, choose to buy goods and services on reputable e-commerce websites. E-commerce is booming and changing the shopping habits of consumers all over the world, therefore, be a smart consumer in this dynamic growing e-commerce industry.

5. Conclusion

Vietnam is a member of WTO, ASEAN, APEC, ... and actively participate in e-commerce development activities at regional and international levels. Vietnam's participation in regional cooperation agreements on e-commerce such as ASEAN agreement on e-commerce, APEC cross-border e-commerce facilitation framework strengthened the legal framework and facilitated Vietnam's e-commerce development in the near future. Cross-border e-commerce is one of the fastest growing segments of global trade, growing from practically zero two decades ago, to an estimated value of 1.92 trillion USD globally by the end of 2016. The Asia-Pacific region also had the biggest volume of sales in 2016. Cross-border B2C e-commerce sales in the Asia-Pacific region reached 144 billion USD, accounting for 35.9 % of worldwide cross-border B2C e-commerce sales. The figures are estimated to be 476 billion USD and 47.9 % in 2020 (Shi Dongwei, 2016). Vietnam e-commerce Association asserts that from 2016, Vietnam e-commerce shifted to the third phase with the fast and stable growth the key characteristics. In this period, online transactions will rise in both number and value (VECOM, 2018: 19). According to the forecasts of Google and Temasek, by 2025, e-commerce revenue in Vietnam will reach 15 billion USD. This is a very impressive number, promising a vibrant e-commerce market both in size and quality. In order to achieve these goals, Vietnam needs to come up with solutions combining the law system on e-commerce, the power of state management, improve awareness and enforcement of e-commerce laws of traders and consumers; strengthen international cooperation with countries and regions on e-commerce; improve and ensure safety for e-commerce business environment with modern technology applications, protect legitimate rights and improve consumer trust in e-commerce. In order to develop e-commerce sustainably, government, business, and consumers cannot stand outside.

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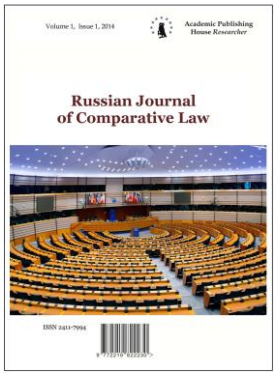

Patent Protection of Pharmaceutical Products in USA

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Abstract

The article deals with the analysis of patent rights correlation and regulation of medicines circulation procedure in USA beginning from the development process to the medicine registration by the regulatory authority. Author considers the application of the Bolar exemption and the practice of maintenance of Unified register, which includes data on effective patents at the initiative of the rights holders upon new medicine registration. The practical aspects of patent linkage system as well as an introduction into circulation of the so-called "branded generics" are considered in the article.

Keywords: patent, Medicine, USA, EU, pharmaceutical product, invention.

1. Introduction

For observing the balance of legitimate interests of rights holders and society, it is important to determine the mutual influence and correlation between the effect of patent rights and regulation of the procedure for circulation of medicines on the market from the development process to the registration of a pharmaceutical product by an authorized body. The drug approval process in the United States is regulated in accordance with the US Food, Drug, and Cosmetic Act (Federal Food, Drug and Cosmetic Act), adopted by Congress in 1938. In 1962, the Act was amended (Kefauver-Harris Amendments), and when registering a medicine, not only evidence of its safety should be given, but also data of its effectiveness, adverse reactions of the medicine should be provided.

2. Materials and methods

The following methods were used: logical, legal modeling method, as well as systematic and comparative legal methods of research of US and EU legal acts. The article was also based on acts of courts, as well as foreign analysis on the regulation of relations on the protection of inventions.

3. Discussion

In general, the regulation of the medicines circulation process is divided into four phases: an research, preclinical and clinical studies, and a procedure for new medicine registering.

The research stage includes measures to find the active substance with a certain type of pharmacological activity, which as a result may have a certain effect for therapeutic indications as a potential pharmaceutical product. As a part of this phase, new substances can be created or modified ones already created. Only potentially successful substances in terms of the indicators required for a medicine can be subject to patent.

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At the stage of preclinical studies there is a significant elimination of medicine candidates. At this stage, preliminary information about the toxicity, efficacy and other characteristics of the medicine are obtained. These characteristics include markers such as pharmacological properties, pharmacokinetics and metabolism. This research stage of medicine development is labor intensive, costly and very important (Guidance, 2005). In general, the period from research to the end of preclinical studies can take from three to six years.

Prior to initiating clinical trials of candidate medicines, a company organizing clinical trials must submit an application to the FDA to obtain permission to conduct clinical trials of a new drug. The statement includes a list of side effects, data on manufacturing, the results of preclinical studies, the chemical structure of the candidate drug, the mechanism of its action. The application must contain a detailed clinical research plan, on the basis of which the FDA makes a positive decision on the admission of the medicine to clinical trials, in the absence of an unreasonable risk for the participants in such study.

In the course of clinical trials of new medicines, four interrelated phases are identified, the last of which is possible after allowing the use of a new medicine in medical practice and its commercialization. Before the end of the first three phases of clinical studies preceding the registration of drugs, it takes from six to seven years.

The data obtained within the steps described above is included in the application for registration of a new medicine sent to the FDA, which can last more than two years. In general, the period from the research stage to the launch of a medicine on the market can take from 10 to 15 years (Qualification Process, 2005). In practice, a patent application is filed at the research stage, and by the time the medicine is approved by the FDA, the remaining period of patent protection may be only five years.

In generic development, research is not required. It is enough to use the available information about the original medicine in circulation. It takes from 3 to 5 years to develop a generic. It is not required to prove the safety and efficacy of the medicine, when submitting a generic for registration it is sufficient to refer to the research data conducted by the manufacturer of the original drug.

The adoption of the 1984 Hatch-Waxman Act was aimed at smoothing clashes between the interests of the developers of original medicines and generics for the purpose of providing society with the necessary pharmaceutical products. To achieve this goal, the Act approved provisions not only regarding the extension of patent protection, but also reducing the risk of liability of developers who are researching generics, as well as the conditions for an abbreviated procedure for registering generics.

With regard to reducing the risk of liability of generic developers, the Hatch-Waxman Act established a “safe harbor provision” or “Bolar exemption”, according to which actions reasonably aimed at preparing for an abbreviated registration procedure do not violate patent rights (The Code, § 271 (e) (1)).

Until 1984, there was a practice in the USA for manufacturers of generics to apply for registration of their medicine before the patent expires on the original drug in order to market it immediately after the patent protection expires, since the application approval process takes a long period of time (Engelberg, 1999 : 39).

In 1984, an exception was introduced on the experimental use of a patented medicine, which is not applied to cases of commercial use of the invention. Experimental use is limited to purely scientific research purposes or to “mere curiosity, entertainment purposes, or solely within the framework of philosophical research” (Peppenhausen v. Falke). The exemption for experimental use does not apply to cases of commercial use of the invention.

The starting point for introducing an exemption for experimental use, in which the basis was whether the use was commercial or not, was the decision in the case of Roche vs Bolar (Roche Products, Inc. v. Bolar Pharmaceuticals Co., Inc.), in which the court resolved the question whether the patented substance of a medicinal product could form the basis of an application for registration of a new medicinal product before the expiration of the remaining six-month patent term. The Bolar company, which produced the product, reproduced from the original drug Valium, produced by the Roche company, used the original product for the purposes of conducting bioequivalence studies and then registering the FDA product.

In a decision of the Court of Appeal of the Federal Court in the case of Roche v. Bolar on April 23, 1984, the approach of the Bolar Company was criticized. Before the expiration of the patent for the Roche medicine, the Bolar company, a generic developer, received the active ingredient of the original medicine. Bolar Company organized the studies necessary to apply for registration of its generic drug, derived from the original drug, the patent for which was owned by Roche. The remaining term of the patent for the Roche product was an additional six months. When considering the dispute in the first instance, the court ruled that the actions of the Bolar company are not a violation of the current patent, because they are subject to an exception based on the common law on "experimental use", and, as a result, are not a violation of the patent.

The first instance decision of the court was revised by the Court of Appeal, which, in its decision, explained that the exemption was not applicable for commercial research – that is, for registration purposes for further market launch (Roche Products, Inc. v. Bolar Pharmaceuticals Co., Inc.). Thus, in the decision under consideration, a rule was fixed on the need for the actual expiration of the term of patent protection, during which the generic developer cannot even submit an application for registration of a medicine.

At the same time, the decision of the Court of Appeal subsequently caused much controversy, and also caused the attention of the US Congress, which already considered the conflict of interests of innovative pharmaceutical companies and generic manufacturers (Voet, 2008: 123). One of the results of the consideration of this problem was the adoption of the Hatch-Waxman Act in 1984.

Taking into account that the act of registration in itself allows the manufacturing, use, offering for sale, sale and import of the claimed invention, it was found that filing an application for an abbreviated procedure for registering a generic with a valid patent is a violation of patent rights (The Code, § 271 (e) (2)). Thus, the result of the revision of the decision in the case of "Roshe v. Bolar" was laid in the basis of US law.

The Hatch-Waxman Act restructured the balance of rights and legitimate interests of rights holders, on the one hand, in terms of extending the term of a patent for a pharmaceutical product, taking into account the time spent during the registration procedure, and the public interest through affordable priced generics whose manufacturers were given the opportunity to bring their drugs to the market immediately after the expiration of the patent for the original drug (Kucukarslan S. and Cole J., 1994 : 511).

Although the court ruled that the exemption for experimental use in the dispute resolution was not applicable in the case of the Roche vs Bolar case, as the Bolar medicine could subsequently be put into circulation when it received approval from the FDA, the exemption was subsequently extended to preparatory measures for the application to the FDA.

The US Supreme Court ruled (Merck KGaa v. Integra Lifesciences I, Ltd.) that the use of the patented compound in preclinical studies is allowed under paragraph 271 (e) (1) of the US Code, if there is a reasonable reason to believe that the compound under investigation will be The subject of the application for registration of the medicine at the FDA and the result of the study will be data relevant to the application for conducting clinical trials or the application for registration of a new drug.

From the point of view of the limits of application of the exemption under consideration, a case-law decision (Merck KGaa v. Integra Lifesciences I, Ltd.) became a case in which the plaintiff claimed patent infringement, being the owner of five patents for a number of chemical compounds that promote the formation of organ or tissue, and that have been the subject of preclinical studies conducted by researchers for the purpose of the generic company.

The court ruled that preclinical studies aimed at identifying one of the drugs – candidates for further clinical studies are not subject to the exception set in the Hatch-Waxman Act, since the data on the results of such studies did not form the basis of the information considered by the FDA during the registration procedure. However, the Supreme Court later revised the decision and concluded that any use of patented compounds reasonably associated with the process of preparing information sent to the authorized drug registration authority, including data from preclinical studies, may fall under the established exception.

However, if there is no intention to develop the medicine in the future, the provided exception does not apply. Thus, conducting a study, the results of which will not be directly part of the application for registration of a drug, but which are necessary for the development of a medicinal product, with existing patent rights, is valid and applies not only to clinical results, but also to preclinical studies, which contributes to more effective use of the "Bolar exemption" and

stimulates the early entry into the market of modified, new and innovative drugs immediately after the expiration of the patent.

And the requirement to use the data obtained as a result of using the medicine for experimental purposes, which was under patent protection during the study period, is an additional guarantee for the market entry of new products and a restriction on the misuse of the patented invention, which can be qualified as illegal use.

Simultaneously with the possibility to use the patented invention for research purposes, the Hatch-Waxman Act provided an opportunity for generic companies to take steps to prepare for the registration procedure with reference to the data of the clinical studies of the originator company during the patent term.

Based on the establishment of an Abbreviated New Drug Application (ANDA) in the Act, in order to facilitate the introduction of affordable reproduced drugs into circulation, the need for generic companies to conduct their own preclinical studies was eliminated. According to the requirements of this procedure, the applicant company must prove that its preparation has proven pharmaceutical equivalence and bioequivalence with respect to the original medicine. Evidence is data from bioequivalence studies between generic and original drug without reference to research data on the safety and efficacy of the drug (FTC, 2002).

The practice of generic manufacturers applying for registration of their drug before the expiration of a patent for the original medicine in order to bring it to the market immediately after the expiration of the term of patent protection (Engelberg, 1999: 39), which existed in the United States until 1984, was revised to ensure the effectiveness of legal protection of the rights of patent holders, as well as for the purpose of eliminating unused patents that restrict competition.

So, when applying for registration of a new drug, the applicant, who is the manufacturer of the original drug, must notify the FDA of all valid patents for the declared medicine. The data concerning patent rights are recorded in the Orange Book (Electronic orange book, 2010). This information is necessary to determine the term for approval of an application submitted under the abbreviated procedure. The original medicine manufacturer is obliged, in turn, to notify the FDA of patents for medicine that he owns, including information about changes related to a patent for an approved medicine, within 30 days of their introduction. Generic companies applying for an abbreviated registration procedure must confirm one of four conditions, according to the list of patent data on the declared product presented in the Registry.

Among them, paragraph 4: a patent which term has not expired is not used or invalidated, or the manufacturing, use, offer for sale, sale or import of a generic claimed to the abbreviated registration procedure will not constitute a violation of patent rights.

The applicant within the abbreviated registration procedure, referring to the conditions of paragraph 4, must notify the patent owner and the applicant for registration of a new medicine (New Drug Application – NDA) if these are two different persons, within 20 days of submitting an application for registration, substantiating in detail the actual and legal circumstances of filing an application on the basis of paragraph 4. The patentee, in turn, has the right to file a claim within 45 days for violation of his rights. During this time, the applicant can not apply for a court ruling on the absence of patent infringement. If the patent owner fails to file a claim within the 45 days submitted, the FDA has the right to approve the application and / or the applicant can use the opportunity to get a court ruling on the invalidity of the patent, its non-fulfillment or the absence of patent infringement.

If the patent holder files a claim within 45 days after receiving the notice of filing the application on the basis of paragraph 4 by the applicant, the application can be approved only if one of the following conditions is met: the patent has expired or the court has decided that there is no patent infringement or recognition patent invalid.

In the USA, the described system has the name “patent linkage”. In essence, this term denotes the mechanism for ensuring the protection of patent rights for a pharmaceutical product under the legal regulation of the circulation of drugs - the mechanism for ensuring patent clearance for pharmaceutical products.

The EU has not established a “patent linkage” system when registering pharmaceutical products with the European Medical Agency (EMA – European Medicines Agency), according to which such a system hinders the introduction of generics to the market (Bhardwaj et al., 2013: 316-322).

В Regulation (EC) № 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (Regulation 726/2004) and Directive of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (Directive 2001/83/EC) it was established that the registration of a medicine can be denied only on the grounds established in the acts among which there is no connection with the effect of patent rights on a pharmaceutical product. Although, for example, in Hungary, Italy, Portugal and Slovakia, there is a "patent linkage system" (Pharmaceutical Sector Inquiry Report, 2008). Despite the lack of correlation of the procedure for registration of a medicine in the European Medicine Agency with the effect of a patent, the EU has established a sufficiently long validity period for the data exclusivity.

As part of the implementation of the patent clearance mechanism for pharmaceutical products in the US, when deciding in favor of the manufacturer of the reproduced drug that there is no patent infringement, the company is given 180 days during which the FDA is not eligible for approval of other such generics (Korn DE, Lietzan E. and Scott SW, 2009: 64).

As well as the Bolar exemption, the 180-day period is an important motivation for the manufacturing of generics, including the aim of reducing the cost of medicines for the patients.

However, the establishment of this approach has led to the fact that in practice there is an introduction into circulation of the so-called "branded generics" – branded medicines produced by the company – the developer of the original medicine, registered by submitting an application for registration of a new drug (NDA). In practice, branded generics are released within 180 days of exclusivity granted to first applicants for a reduced registration procedure (ANDA) – (FDCA, Section 505 (j) (5) (B) (iv)), which allows them to compete with the first generic for market share in terms of pricing, quality and availability. The market circulation of high-quality branded generics stimulates lower prices for generics, which would not be such a favorable consequence for the consumer if only one generic was in circulation for a certain period of time (FDA, 2005).

The impact of increased competition in the manufacturing of branded generics was fixed by the Federal Trade Commission, which found that price cuts were more than double stimulated by the introduction of branded generics to the market (Federal Trade Commission, 1999).

On the other hand, the withdrawal of branded generics when using licensing agreements (Combe, 2006: 47-62) at a reduced price may adversely affect competition, since interest for circulation of generics from other market participants may be lost (Hamdouch, Perrochon, 2000 : 46).

Considering that the patent system and the medicines registration procedure at the FDA function interdependently, it is worth to dwell on the consequences of introducing such a system, which manifests itself in the use of agreement strategies by originating companies, according to which the pharmaceutical company – the patentee pays a potential competitor – the generic manufacturer for refusal to challenge the patent or delay entry to the market at a lower cost for a period of 180 days. This is the so-called. pay-for-delay agreement (Pay-for-Delay Deals, 2013).

The US Federal Trade Commission successfully challenged the legitimacy of such agreements as part of the proceedings before the District Court of Appeals, which asserted that the agreements were illegal. However, as a result of the court's consideration of a number of cases in 2005, the "pay-for-delay" agreements were exempted from antitrust lawsuits, as a result of which the number of concluded agreements increased from three in 2005 to 19 in 2009, which cost consumers 3.5 billion US dollars per year (Pay-for-delay, 2010).

However, in 2012 the court justified the possibility of concluding such agreements to the extent that the restriction of competition is based on privileges under the current patent if, according to the agreement, the generic withdrawal is not limited after the patent expiration (Federal Trade Commission v. Watson Pharmaceuticals, Inc.).

According to the US Federal Trade Commission, agreements of this kind adversely affect competition, increase health care costs, and reduce consumer welfare (Pay For Delay, 2010). The US Federal Trade Commission has repeatedly challenged the legitimacy of such agreements in court, which resulted in conflicting decisions (Roane, 2011).

In 2012, the United States Federal District Court (In Re K-Dur Antitrust Litig.) established a generalized conclusion that any such agreement should be found to restrict trade freedom, unless the purpose of the payment is not related to the delay in entering the generic into the market or if conditions are established by agreement to facilitate competition.

However, it should be recognized that the consideration of patent infringement disputes from the point of view of antitrust laws can be permissible only to the extent that it is relevant to the question of the actual doubts of patent rights, including in relation to their scope (Ullrich, 2007).

For comparison, in the EU practice, the existence of a payment condition (Whish, 2008: 786), as well as the assumption about the final practical result of an agreement between the originator and the generic manufacturer, cannot serve as a basis for ascertaining the fact of a violation of competition (Biriukov, 2018; Holman, 2007: 489). However, in the case of an agreement between competitors that goes beyond the limits of the exclusive rights, these actions will be recognized as restricting competition on the basis of a direct ban set forth in Art. 4 (1) Guidelines for the EU Technology Transfer Treaty (Guidelines on the application of Article 101).

4. Results

It should be recognized that the measures provided for initiating the challenging of patent rights at the stage of the registration procedure stimulates a more efficient functioning of the circulation of medicines on the market in the legal field from the point of view of industrial property rights. And the provisions of the Hatch-Waxman Act provide incentives for the production of generics in terms of, for example, the use of the Bolar clause and the 180-day exclusivity priority when applying to the FDA, and the development of innovative products, for example, in connection with the possibility of extending the patent.

5. Conclusion

The unified register of patents for pharmaceutical products serves to ensure the patent protection system. At the same time, the basis of protection in terms of the circulation of medicines is the initiative of the right holders and the good faith of applicants for registration of generics. The period during which the originator and the generic company negotiate a possible threat of patent infringement may be a deterrent to the introduction of the generic into circulation. The negotiation process is a private-law element of relations in the sphere of medicines circulation.

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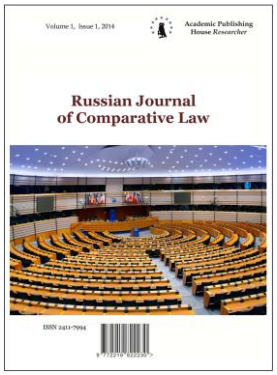

Termination of an Employment Contract on the Basis of "Just Cause" Unilaterally: The Practice of CAS in Relation to Football Clubs from the PRC

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Abstract

The practice of concluding employment contracts by professional football players and coaches, assistant coaches with clubs from China demonstrates some usual business practices encountered in football related to the conscientious and negligent performance of these contracts by the parties. To identify them, let us turn to the available appeal practice of the Court of Arbitration for Sport (hereinafter – CAS, arbitration) regarding the decisions of the FIFA Committee on the status of players (hereinafter – the Committee). In this article, we turn to all disputes involving clubs from the PRC, considered by arbitration, and united by the question of applying "just cause" for termination of an employment contract by one of the parties.

Keywords: employment contracts with football players, employment contracts with coaches and assistant of coaches, termination of an employment contract with a football player, "just cause", practice of FIFA Committee on the status of players, Court of Arbitration for Sport (CAS), practice of CAS, football clubs from the PRC.

1. Introduction

Applying subsidiarily the law of Switzerland in labor disputes, CAS drew attention to the "just cause" wording: "In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice" (Code of Obligations). However, as follows from this article of the Code, the immediate termination of an employment contract for the just cause should be announced only in circumstances where the party has committed a serious breach of contract. This regulation corresponds to the CAS position previously expressed by arbitration in CAS 2009/A/1956 dispute: the immediate termination of labor relations should be used as an "ultima" measure. Therefore, a football player who does not receive payment for more than three months has, as a rule, the "just cause" to terminate an employment contract (CAS 2014/A/3584).

2. Materials and methods

This study is based on the results of previously published works of the authors, as well as a few researchers of the problems of unilateral termination of an employment contract with a football player (Czarnota, 2013; Gardiner, Welch 2007; Ongaro, 2011). At the same time,

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consideration of the disputes involving clubs from the PRC and united by the question of applying "just cause" for termination of an employment contract by one of the parties through the prism of key decisions of the Court of Arbitration for Sport for UEFA regulation was not previously studied for the listed authors.

In the process of conducting the study, the formally dogmatic method, the problem method, the legal modeling method, and the system method were used, which are not the first time the authors are involved in studying the sports law.

3. Discussion

In the process of considering the dispute CAS 2015/A/4158, according to the club, the coach could not prove the grounds for termination of the contract.

First, the payment was made in advance, but the club was not obliged to make payments for two months when the coach actually refused to perform his duties. Evaluating the club's argument, CAS reasonably disagreed with it, because the evidence submitted by the parties did not testify consistently about it. One of the sums was transferred to the coach after he officially started to fulfill his duties and it can be recognized as an advance payment because the coach signed a document confirming receipt of sums, and also that the sums received will be deducted from his future salary. Of course, even if one imagines that the document signed by the coach would not contain such unambiguous wording, it is difficult to present a large sum of "one-time financial support", as the coach stated in his objections. On the other hand, another sum transferred to the coach before the start of the labor relations, not accompanied by his duty to sign the document of receipt, should be assessed as help from the club, compensating minor expenses at the initial stage of cooperation between the club and the coach who moved to China.

Therefore, CAS did not consider this sum a part of the coach's salary. The club's failure to pay subsequent wages, according to CAS, did not create a "just cause" for the coach to terminate the employment contract: the debt was approximately 20 % of the salary and lasted 17 days. Although a "just cause" is evaluated on a case-by-case basis, it is necessary to take into account the CAS practice mentioned earlier about the need for long-term wage arrears as "ultima". Therefore, the duration of the club's violation of its obligation to the coach did not create a "just cause", as there were no aggravating circumstances: constant, unexplained or unjustified delays in payment. It means that the coach did not have a "just cause" to terminate the employment contract due to the club's wage arrears.

Secondly, as the club argued in CAS 2015/A/4158, the reserve team of the club is part of a professional team, so the coach was obliged to perform his duties in relation to it. The coach claimed that he was replaced by another professional, but from the evidence presented by the parties it followed that five days before leaving China, he held his first training session with the team. At the same time, the coach was unable to provide CAS with evidence as to why he was allowed to coach the team on that date if he had previously been replaced by another person.

As a result, the arbitration was not fully convinced (that means the "comfortable satisfaction" standard of proof) that the coach was replaced by another professional. The witnesses attracted by the coach showed inconsistency in their testimony and, in fact, neither they nor the coach were able to name the officials of the club who announced to the latter the decision to replace him in the coaching position. On the other hand, even if the coach was asked to work with the reserve team, CAS reasonably did not regard this fact as contrary to the duties of the coach. As you can see from the materials of the case, the coach was hired as the "head coach of the professional team "Qingdao Zhongneng Football Club" and when considering the dispute, there was no evidence that the reserve team of this club consists of amateur players. In addition, according to the provisions of the employment contract, the coach was obliged to attend all training, matches, briefings and other events.

Therefore, CAS was not fully convinced by the arguments of the coach and considered that the latter did not have a "just cause" to terminate the employment contract unilaterally due to the suspension from the training of the club's professional team.

Thirdly, in CAS 2015/A/4158, the club appealed to the fact that the employment contract did not contain provisions requiring the club to obtain a work permit and a visa for the coach. Despite this, the club voluntarily unsuccessfully asked the coach to provide his passport to assist in these matters. Considering the club's arguments, CAS did not agree that the employment contract does

not indicate the club's obligations regarding the receipt of a work permit and visa by the coach. The general presumption in labor relations is that if the club intends to transfer these obligations to the coach, then it must include an unambiguous wording in the employment contract. In its absence, the club as an employer is presumed to be obliged to facilitate the obtaining of work permits and visas. In the dispute under review, evidence was presented showing that the coach arrived in China on a tourist visa and that he started working, waiting for the club to provide him with a work permit and a work visa.

Therefore, the club apparently gave reason to the coach to believe that would help in these matters, as evidenced by the club's attempts to contact the coach to obtain his passport in order to obtain a visa. In this case, the arbitration used the well-known doctrine of venire contra factum proprium (prohibition of contradictory behavior of participants in legal relations), which prevents the club from changing its previous position.

Thus, in labor relations under consideration, it was the club that accepted the obligation to facilitate the obtaining of a work permit as well as a visa. The physical absence of a coach in China should be seen as detrimental to the interests of the club, but not to the interests of the coach, as it affected the sports and financial performance of the club due to the preservation of labor relations. In fact, the coach terminated his employment relationship on the same day he left China, without waiting or making any personal effort to obtain the necessary documents upon his return to his home country.

For example, the coach could require the club to apply for a work permit and visa by sending the necessary documents. As it was established in the process of dispute consideration in arbitration, the club has not received any messages from the coach and therefore there is no evidence of the club's refusal to cooperate on this issue. Perhaps CAS would have considered the grounds for termination of the employment contract differently if the coach, while staying in his home state, had not received any messages from the club for a long period of time or had sent to the club his application for a work permit and visa together with a set of documents and had not received a response. In this situation, it would be possible to consider the behavior of the club as evidence of disinterest in the work of the coach and, consequently, violation of obligations under the employment contract. Therefore, the situation in the CAS 2015/A/4158 dispute cannot be considered "just cause" for termination of the employment contract.

The assessment of the presence or absence of "just cause" for the termination of the employment contract by the club with the assistant coach was carried out in CAS 2015/A/4161. As follows from the correspondence presented in CAS, labor relations with the assistant coach was terminated by the club unilaterally on the basis that the assistant coach did not fulfill his duty to lead the training of one professional team's group three times.

In reviewing the testimony of the witness, CAS drew attention to its inconsistency. In the first statement, which was given by the assistant coach, the witness affirmed the existence of an employment contract, a copy of which was not provided to the assistant coach. However, in the second statement of the witness which was submitted by the club, absence of data on signing by the assistant of the employment contract was noted. Therefore, CAS did not accept the testimony as evidence and did not consider the videos and photographs of the applicant's meetings with the club's management to be sufficient to reach an unambiguous conclusion about the existence of the employment contract (CAS 2015/A/4161: para. 89).

Note that the Regulations oblige professional football players and clubs to conclude contracts in writing (Regulations: art. 2). This rule has been verified by CAS practice (CAS 2014/A/3739&3749). However, the requirement cannot be extended to coaches and assistant coaches, as their agreements are not subject to Regulations, except for the extension of the jurisdiction of the Committee to disputes related to their professional activities. Therefore, CAS required subsidiary recourse to Swiss law to resolve the issue of the existence of an employment relationship: "The expression of intent may be express or implied" (Code of Obligations: art. 1 (2)). The possibility of the implied relationship in the dispute CAS 2015/A/4161 required proof by answering questions (1) about the presence of an assistant coach under the leadership of the club; (2) the participation of an assistant in the sports activities of the club; (3) the presence of mutual responsibility between the parties; (4) the receipt by the assistant of some payment from the club (CAS 2015/A/4161: para. 92).

As follows from the letters submitted by the assistant in resolving the dispute, the club appointed him to train one of the professional team's groups, but he refused to fulfill his obligations to conduct training three times, which forced the club to release from the post of assistant coach of the football club "Qingdao Zhongneng Football Club" and to dismiss from the club. After analyzing the data letters, CAS made the following conclusions. First, the club really appointed a famous person to work as an assistant coach. Secondly, the assistant was subordinated to the local acts of the club, on the basis of which it was necessary to perform his obligations in preparing the team, which confirms his involvement in the club's sports activities.

Thirdly, the club required the assistant to carry out training in relation to a certain group of a professional team. Fourth, the club relieved the assistant from his duties and terminated legal relations due to the refusal to fulfill the previously directed requirements for the implementation of professional duties. Fifth, the letter states that the club has the right to refuse the services of an assistant if it is not satisfied with the level of performance of their duties by the latter. Sixth, in the last of the letters, the club informed the assistant about the need to take back the amount due to him as a "debt of the club" and thus complete the termination procedure. Since the club did not specify the details of the "debt", it can be assumed that they meant remuneration for the professional activities of the person (CAS 2015/A/4161: para. 100-101). This is one more characteristic feature of the employment relationship between the employer and the employee.

Taken together, these facts indicated that the assistant coach was under the direction and control of the club, which is typical of entities acting as employers. If we assume the opposite and assume that the person was not an assistant, but was an intern under the supervision of the head coach (as the club insisted), then you should expect the coach to engage in a discussion of the claims regarding the trainee's activities. It is the trainer who better understands the trainee's responsibilities, and therefore appears to be the appropriate person to resolve the misunderstandings that have arisen. In particular, it can be considered that the club, by its actions and behavior, has created reasonable grounds for believing the existence of an employment relationship. It means that there were mutual obligations between the parties, which are characteristic of the relations between the employer and the employees. In addition, article 344 (a) of the Swiss Code of obligations imposes on the club the burden of proving the status of an intern in the absence of a written training contract. For example, the club could submit documents about the applicant's attendance of courses or programs for professional coaches in the relevant organization.

However, in CAS 2015/A/4161, the club did not fulfill the burden of proof and could not confirm the status of the claimant as an unpaid trainee of the head coach (CAS 2015/A/4161: para. 104). Even if we assume that the person was at first really an unpaid intern, then the following facts confirm the true intention of the parties and their understanding of the transformation of relationships into labor relations by nature – between the employer and the employee.

The legal consequences of terminating an employment relationship in the absence of "just cause" should be considered subject to the provisions of chapter IV of Regulations. However, the club appealed to the impossibility of applying this chapter as directed, in his opinion, to maintain contractual stability only between clubs and professional football players, but not between clubs and head coaches, assistant coaches. Indeed, the Regulations does not contain an algorithm for determining compensation in labor disputes between clubs and coaches, assistant coaches (Regulations limits the scope of the provisions of this act to the rules governing the status of professional football players, their right to participate in sports activities and their transitions (transfers) between clubs belonging to different associations) (Regulations: art. 1), which means that it will be necessary to refer to the applicable Swiss subsidiary legislation. As referred to CAS, in accordance with the provisions of the Switzerland Code of Obligations: "Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration" (Code of Obligations: art. 337c (1). In addition, part 3 of this article requires that the amount of compensation due be calculated on the basis of what the person received upon termination of the employment relationship, or as compensation for another job, or that which she intentionally did not want to earn, having the opportunity.

For example, in the case of CAS 2014/A/3525, the club did not provide evidence that the assistant coach received a new job during the period during which labor relations with the former club would remain, or that they intentionally did not look for a new job. For example, in CAS 2014/A/3525 the compensation was deducted from the salary of the player received in the new club after the termination of "just cause" unilaterally employment contract with the previous club. Therefore, the assistant coach in the dispute in question had the right to compensation for the unilateral termination of the employment contract by the club. In the absence of any evidence to the contrary, the existence of an employment relationship between the club and the assistant should be recognized during the period for which an employment contract has been concluded between the coach and the club. On the other hand, in the absence of a written contract between the parties, in which the financial conditions would be fixed, one should not a priori base on the assistant's statements about the amount of his remuneration, but should seek agreement with the club's head coach and other evidence (CAS 2014/A/3525: para. 62). As a result, it was precisely this wage of an assistant coach that was considered to determine the compensation due to him from the club.

More complex situations of employment contracts arise in the presence of two agreements: the employment contract and the agreement on the rights to the image of the player. In CAS 2015/A/4039, the football player terminated the employment contract, as he considered on the grounds of "just cause", notifying the club of the failed, but due under two contracts of payments.

Considering the payments in favor of a football player, CAS drew attention to the following points. The first of the payments received by the football player from the club should be considered as part of the salary since the player himself did not indicate in his statement that he regarded the payment as part of the sum for signing it. The second of the payments was made not by the club, but by the company of the same name. Given that the company was a party to the contract on the rights to the image of a football player, CAS reasonably regarded this amount as part of the remuneration for the transfer of these rights (CAS 2015/A/4039: para. 74, 76). Thus, the arbitration considered that the player had been paid all the amounts due until he had unilaterally terminated the employment contract with the club.

The employment contract between the club and the professional football player in CAS 2015/A/4039 contained a clause on the right of the player to cancel unilaterally if the club had wage arrears for more than three months. The player did not dispute such clause of the agreement and signed it, thereby agreeing with the unequivocal wording of the condition. It followed from the case file that the wage arrears did not exceed 36 days, which meant, in accordance with the doctrine of pacta sunt servanda, the absence of a breach by the club, which would be serious for the "just cause" to occur. At the same time, the mentioned condition of the employment contract could not be recognized as invalid as pursuing the interests of only one party – the club. First, a professional football player previously played for several clubs in Asia, he was assisted by an agent, which means he was well acquainted with such a condition of the contract in clubs from China and could, if necessary, get preliminary legal advice on the consequences of the application of the said condition. Secondly, the player agreed with the division of payment of labor relations into two contracts and accepted the principle of payment. Of course, he knew or should have known about the rather controversial scheme of payment for his work, but never raised the issue during the term of both agreements (CAS 2015/A/4039: para. 106). Assessing the behavior and actions of the player in the complex, we can assume that he wanted to terminate his employment relationship with the club, despite several requests from the club. Thus, it can be stated that the club tried to continue labor relations, but did not meet with understanding from the player, who apparently decided not to cooperate with the club anymore. Indeed, the club's debt violated contractual obligations, but such a violation was not serious ("ultime") to be a "just cause" for the player to terminate the employment contract.

4. Results

Termination of labor relations in professional sports should take place when the "injured" party cannot honestly expect the other party to continue the relationship since the latter has committed a serious violation of the contract (CAS 2008/A/1447, CAS 2009/A/1956). Before resorting to such an "ultima" measure, as indicated by arbitration in CAS 2014/A/3460, the party is advised to notify the violating party of the need to stop the violations: despite the fact that it is not obligatory to notify about this in labor relations in professional sports, arbitration considers as

an important step that may affect the cessation of the violation, especially if such a violation has not reached a "totally unacceptable level". Thus, in CAS 2015/A/4161, the employment relationship with the assistant coach (1) was terminated three days after missing the last of the three training, (2) the club did not provide any evidence of his previous unacceptable behavior, (3) the club did not provide any explanation to the assistant about the reasons. Following the requirement of conscientious behavior of participants in labor relations, the club was required, at a minimum, to begin disciplinary proceedings against the assistant — he could be sent a warning to stop violations, and then, if the unacceptable situation persisted, other disciplinary sanctions would be applied to the assistant, such as a reprimand or a fine. Dismissal should have been the last measure of disciplinary liability if the violation reached a serious level and "... not all employee errors unequivocally give the club the right to unilaterally terminate the employment contract". Acting within the framework of the above reasoning and relying on the facts proved in the process, CAS reasonably considered in 2015/A/4161 that the absence of an assistant in three workouts cannot be considered as serious violations justifying "just cause" the termination of labor relations unilaterally by the club.

We agree with the position of CAS that the wage, which is stated by the assistant coach in the absence of evidence of a copy of a written contract with him, which is three times less than the coach's salary cannot be questioned as disproportionate or inadequate in relation to the cost of services provided by the assistant. The assistant has the right to compensation, which corresponds to what he would have earned if the relations of the parties were formalized by the employment contract. This conclusion is confirmed by the doctrine of restitution used by the CAS (CAS 2008/A/1519&1520).

5. Conclusion

CAS in assessing the existence or absence of "just cause" follows its practice (CAS 2007/A/1352; CAS 2008/A/1447; CAS 2008/A/1517; CAS 2009/A/1956) and requires that one of the parties commit a serious breach of contract. The determination of the existence or absence of a "just cause" shall be made in accordance with the circumstances of each particular dispute. Behavior that violates the terms of the employment contract, by default, cannot serve as an excuse for termination of the employment contract on the initiative of one of the parties. However, if more than one breach is continuing, then the inadmissibility of the conduct of the party to the contractual obligations reaches such a level of seriousness that the other party is entitled to terminate the agreement.

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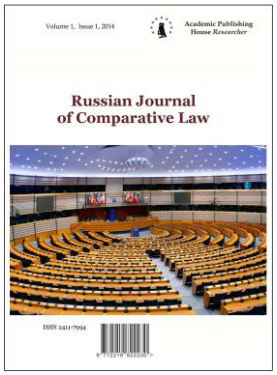

Reviews

Review of the Textbook «Comparative Law: Textbook / P.N. Biriukov, D.V. Galushko; Voronezh State University. Voronezh: Publishing House of VSU, 2018. 380 p. ISBN 978-5-9273-2689-1»

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Abstract

This is a review of the textbook entitled «Comparative law» by Pavel Biriukov and Dmitry Galushko of Voronezh State University, Russia. This contribution has a value for both, scholars interested in the fundamentals of comparative law as a methodology and for students wishing to successfully accomplish the courses in comparative law and international law. The authors present and analyze in detail the modern legal developments in national legal systems. Each chapter of the book is supplemented by questions for the students to deepen their understanding of the matters discussed in it. This is a benefit of the textbook from the perspective of the methodology of teaching comparative law. This textbook is a much welcome contribution that will undeniably assist the students taking international law as well as comparative law courses in self-studies.

Keywords: comparative law, legal systems, legal families, international law, EU law.

1. Introduction

In the era of globalization, the value of comparative law acquires greater significance. It helps the reader to understand the features of development in a particular national legal system or in a group of such systems. Recently, Russian scholarship faced new developments in the field of comparative law. Specific monographs, textbooks, and methodological guidelines began to be actively published by Russian researchers. This contribution by the authors from Voronezh State University where the Department of international law and comparative law has a long scientific tradition is particularly welcome.

2. Discussion

Since the development of a given legal system on the basis of national legal traditions inly is unthinkable, this contribution is of high value for Russian law students. The role of national elements in the law has fundamentally changed over the recent years. Preserving the unique traditional feature of legal regulation should go side with the best legal practices of other jurisdictions, going in line with the international standards of human rights protection. Effective implementing legal reforms in Russia would hardly be possible based on national experiences that are subject to scrutiny by international human rights bodies, especially relating the right to a fair

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trial or the right to liberty and security of person, freedom from inhuman and degrading treatment, or freedom of expression, assembly and association. On the other hand, such scrutiny is also topical for many other states. For instance, in the case of Anchugov & Gladkov v. Russia (European Court...) the European Court of Human Rights criticized the Russian Federation for disenfranchisement of prisoners. At the same time, the tradition of disenfranchisement to the detail of a crime exists also in other states (Baer, 2012: 999), which is the practice that has own logics behind it. Hence, the urgency of studying the logics according to which other legal systems function becomes crucial. Therefore, the scientific input of the textbook under consideration is timely and relevant for Russian audience.

The contribution under consideration is well structured. It consists of eleven chapters covering the issues as:

- the logics in national legal systems in the context of their multi-faceted understanding;
- the problems of defining the subject and choosing the right methodology for certain comparative law studies;
- the issues of practical application of comparative law by the courts and other public authorities with an account of such issues as international law, international integration, transformation of law;
- as well as the postulates of religious and traditional legal systems.

In attempts to adapt the textbook also to legal practitioners, the authors present and analyze the modern developments and challenges in national legal systems, providing the reader with the most recent materials such as legal acts and decrees. All materials analyzed in the textbook are supplemented by special notes regarding interaction of international and domestic legal orders that speaks for a good quality of this contribution also from the perspective of methodology of teaching.

Chapter Three, dealing with the issues of "implementation, unification and harmonization of legal norms" (Biriukov, Galushko, 2018: 74-89) analyses theoretical approaches to comparative law as a methodology. It also determines the role of international law in domestic legal orders, comments on its influence on national law, and predetermines tendencies of its development. The issue of Russia's relationships with international human rights law has become most topical after the adoption of Federal Law No. 7 FKZ of 14 December 2015 on Amending the Organic Law "On the Constitutional Court of the Russian Federation." That law provided the Constitutional Court with the power to rule on the constitutionality of decisions by international human rights courts and, therefore, to find them non-executable. Taking into consideration the said developments, deeper analysis of the role of constitutional law in national legal order, especially applied to the Russian Federation, the textbook by P. Biriukov and D. Galushko is noteworthy. In my opinion, this is a significant benefit of the textbook for M.A. level students who deal both, with international law and with comparative law.

At the same time, the scope of the textbook includes not only theoretical and methodological questions but also practical cases and examples of judicial use of comparative law.

Each chapter contains special questions to be contemplated by the students during the course (Biriukov, Galushko, 2018: 29-73). This is a good teaching technique advancing self-studies and calling the students to delve into theoretical issues thinking about the most complex and fundamental categories of comparative law.

Moreover, in line with the requirements of modern Russian academic standards, the textbook contains special case-type assignments allowing the students and professionals to challenge the level of their comprehension as well as to direct the teaching process towards problem-solving cognitive activities.

3. Results

The textbook is logically structured, written in good legal language, is easy to read and comprehend by the students. It is a good contribution for M.A. level students, post-graduate students, as well as for anyone else who is interested in in-depth comparative studies of legal systems.

4. Conclusion

This contribution by P. Biriukov and D. Galushko can be seen as both, a scientific work and a textbook for educational use. It carries out a dual function, i.e., it sums up the modern theories of

comparative law allows the reader to open new interpretations of interactions between individual legal phenomena that operate within the legal systems of various types.

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