

**Custom In The System Of Sources Of Entrepreneurial Law Of The Russian Federation And International Practice
(By The Example Of The Eeu)***

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Abstract. *This article is devoted to a comparative analysis of the provisions of civil legislation of the member states of the EEU on custom regulation. The author concludes that the norms contained in the mentioned sources of law have a number of differences complicating the process of carrying out activities aimed at extracting profits within the framework of the integration association under consideration. The solution of the formulated problem is seen by the author in the rapprochement of corresponding norms of civil legislation of the member states of the Union. The first option of such rapprochement consists in the harmonization of the provisions of national civil legislation with regard to the norms on customs through the introduction of appropriate changes and amendments to it. The essence of the second option is reduced to the development and adoption of a unified codified certificate for the member states of the Union - the Fundamentals of Civil Legislation of the EEU. The document offers to strengthen the compulsory observance of the prevalence criterion in the territory of each member state of the Union in custom application.*

Key words: EEU, custom, entrepreneurship, custom of business turnover, harmonization.

Introduction

In 2015, the territories of five states located in the Eurasian region were merged into the Eurasian Economic Union (hereinafter - the EEU, the Union), whose membership presupposed the deepest degree of integration - the rapprochement of the economies of its member countries. L. Metcalf Kendall rightly points out that the cooperation benefit depends on its depth.¹ Therefore, the interaction of the member countries of the EEU is potentially the most beneficial for each of them. The economic aims of integration within the Union are also considered by such foreign authors as.²

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¹ L. K. Metcalf L.K. 1997. "The (Re)Emergence of Regional Economic Integration In the Former Soviet Union," in *Political Research Quarterly*, L (1997), no. 3, p. 529-549.

² S. Balakishi, "Eurasian Economic Union: Russia's New Foreign Policy in the South Caucasus," Working Paper No. 2016/1. Available at: <https://www.msm.nl/resources/uploads//09/MSM-WP2016-1.pdf>, accessed 12. 07. 2017.

R. Drazneva R., K. Wolczu 2013. *Eurasian Economic Integration: Law, Policy and Politics*, Birmingham, University of Birmingham Publishing House; K. Czerewacz-Filipowicz, A. Konopelko, *Regional Integration Processes in the Commonwealth of Independent States: Economic and Political Factors*, London, Springer, 2016; A. Jarosiewicz, 2015, The Eurasian Economic Union – more political, less economic. Available at: <https://www.osw.waw.pl/en/publikacje/osw-commentary/2015-01-20/eurasian-economic-union-more-political-less-economic>, accessed 12. 07. 2017; S. Klimanskis, 2016, Eurasian Economic Union - reality or fiction? Available at: <http://en.delfi.lt/opinion/eurasian-economic-union-reality-or-fiction.d?id=72>, accessed 12. 07. 2017. N. Popescu, N. 2014. "Eurasian Union: the real, the imaginary and the likely," in *Chaillot papers*, VL (2014), 45 p; J. Sijbren, 2016, The Eurasian Economic Union and the European Union: Geopolitics, Geo-Economics and Opportunities for Europe. Available at:

The objectives of the Union creation are as follows: the formation of a single market space providing the right for unimpeded movement of goods on its territory. The embodiment of the idea of economic unification of states becomes possible only if the legal component is carefully worked through. This means the expediency of creating a legal framework that is the basis for a uniform regulation of business relations in each of the member states of the EEU. In our opinion, such uniformity is achieved by harmonizing sources of legal norms aimed at improving relations in the analyzed sphere.

A special role in regulating relations with the participation of entrepreneurs is given to customs. Undoubtedly, the customs are applied in the process of carrying out commercial activities between the business entities located on the territory of different member states of the EEU.

At the same time, the issues about applicability of customs formed in the domestic market to legal relations arising between the entrepreneurs located in the member states of the Union require an unambiguous answer. So, for example, can a Russian entrepreneur refer to a custom formed in the Russian law and formulated as follows: "may the claim be sent by any means of communication that allow providing proof of sending, and not only by paper mail (Regulations of the Federal Arbitration Court of the North-Western District dated June 17, 2011 in case No. A56-40156/2010) ³" in the court located on the territory of any other member state of the EEU? Will this custom be considered applicable when considering a foreign economic dispute within the framework of the specified integration association? The development of answers to these questions is of fundamental importance because they determine the presence or absence of grounds for the onset of civil liability.

The foregoing allows us formulating the research objective: a comparative legal analysis of the rules of law of the member states of the EEU, establishing a legal status of the custom, aimed at forming the reader's view on the procedure for regulating the entrepreneurial relations with its help and making proposals for their harmonization.

At the time of the study, its relevance became particularly important due to an increase in the number of trade ties between the member states of the Union. So, for example, the import of manufactured goods and agricultural raw materials for their production from the Republic of Belarus to Russia grew from 2,100 mln. US dollars in January-August 2015 to 2,941 mln. US dollars in January-November 2016. In 2016 the figures showed a turnover increase between the countries noted, which was a prerequisite for the emergence of a greater number of disputable situations compared to the previous period and, as a consequence, the need for better entrepreneurship regulation.

<http://www.sieps.se/en/publications/european-policy-analysis/the-eurasian-economic-union-and-the-european-union-geopolitics>, accessed 12. 07. 2017.

³ V. Orobinsky, 2013, "Encyclopedia of Customs," in *EZh-Yurist*, IXL (2013). The document is provided by Consultant Plus.

Materials and methods

The presented research was based on the data formulated in the doctrinal and legislative sources of the member states of the EEU. The methodological research base consists of the methods of analysis, synthesis⁴ and comparative comparison.

Results

The states being the EEU members are characterized by a Romano-German monistic system of law. This means that the leading role in the regulation of business relations is given to legislative acts, where the civil codes occupy the central place. The Civil Codes of the member states of the Union, being sources of norms that outline the legal framework for the entrepreneurship existence, contain the following provisions defining the legal status of custom:

1) the Civil Code of the Russian Federation⁵: Art. 5 is devoted to the custom in the specified codified regulatory legal act. A refusal of the Russian legislator to use the term "custom of business turnover" and the use of a more general "custom" concept is of fundamental importance. The following features of the custom are specified in the article:

a) it is a regulator of social relations arising in different spheres, including the implementation of entrepreneurial activities and activities of a different kind;
b) it is not stipulated by law;
c) the custom is to be applied irrespective of whether it is fixed in any document.

2) the Civil Code of the Republic of Armenia ⁶(*hereinafter - the CC RA*): Art. 7 of the CC RA, which fixes the term "custom of business turnover", is devoted to the analyzed legal category. The custom characteristics reproduce its features fixed in the CC RF: similar to the provisions of Art. 5 of the CC RF, the Armenian legislator recognizes the custom as the rule of conduct that has been developed and widely applied in any area of business activity, which is not stipulated by law, regardless of its fixation in any document. Para.2 of Art. 7 of the CC RA establishes a restriction on the application of customs of business turnover, which contradict the mandatory provisions of the law and the contract.

3) *the Civil Code of the Republic of Kyrgyzstan* (The Civil Code of the Kyrgyz Republic dated 08.05.1996 No. 15 (Part One) (as amended on 16.12.2016)) (*hereinafter - the CC RKg*): the main custom characteristics are fixed in Art. 4 of the CC RKg. The Kyrgyz legislator, like the Armenian legislator, retained the term

⁴ E. Barnett-Page, J. Thomas, "Methods for the synthesis of qualitative research: a critical review". Available at: <http://eprints.ncrm.ac.uk/690/1/0109>, accessed 12. 07. 2017.

⁵ ***, "The Civil Code of the Russian Federation (Part One) dated 30.11.1994 No. 51-FZ (as amended on 07.02.2017)," in *Official Gazette of the Russian Federation*, no. 32, 05. 12. 1994. p. 3301.

⁶ The Civil Code of the Republic of Armenia dated 17.06.1998 (as amended on 30.12.2015). – Access mode: http://online.zakon.kz/Document/?doc_id=31420016#pos=0;400, accessed on 12. 07. 2017.

"custom of business turnover". The rest of the provisions of Art. 4 of the CC RKg reproduce the meaning of Art. 7 of the CC RA.

4) *the Civil Code of the Republic of Kazakhstan*⁷ (hereinafter - *the CC RK*): the custom definition is given in Art. 3 of the CC RK and has a number of differences from the relevant provisions of codified regulatory legal acts that are the sources of private law of the above countries. The essence of differences is as follows:

a) the Kazakhstan legislator applies both terms - "custom" and "custom of business turnover". Using the word "including", the customs of business turnover are included in the number of customs. Thus, the CC RK allows using the custom to regulate the civil legal relations, while emphasizing the custom of business turnover in order to improve relations in the field of entrepreneurship;

b) the custom is not subject to application in the territory of the Republic of Kazakhstan, if it contradicts the current legislation. Contradiction to the contractual provisions as a restriction to the application of the analyzed legal category in the CC RK is not established.

5) *the Civil Code of the Republic of Belarus*⁸ (hereinafter - *the CC RB*): The CC RB does not contain an independent article devoted to the legal regulation of custom. The term "local custom" is found in Art. 222 of the CC RB, which determines the appropriation procedure for the public property. By virtue of the norm laid down in the specified article of the CC RB, in cases when, along with other grounds, the local custom allows picking berries, catching fish in forests, water basins, etc., the ownership of things is acquired by a person, having carried out their picking or catching. In accordance with Art. 1093 of the CC RB, the international customs not contradicting the legislation of the Republic of Belarus, among other sources, may serve as a basis for determining the law that is subject to civil legal relations involving foreign citizens or foreign legal entities or complicated by another foreign element.

The foregoing testifies to the diversity of approaches to regulating custom in the member states of the integration association under consideration. The main differences are as follows:

a) the custom definition as an independent source of norms regulating private legal relations is not fixed at the level of the CC RB in the Republic of Belarus; custom is not a source of law in the Republic of Belarus;

b) heterogeneity of the terminological apparatus;

c) differences in the list of grounds excluding the use of the analyzed source of law.

⁷ ***, "The Civil Code of the Kyrgyz Republic dated 08.05.1996 No. 15 (Part One) (as amended on 16.12.2016)," in *Journal of the Jogorku Kenesh of the Kyrgyz Republic*, VI (1995), p. 80.

⁸ ***, "The Civil Code of the Republic of Kazakhstan (General Part), adopted by the Supreme Council of the Republic of Kazakhstan on 27.12.1994 (as amended on 26.07.2016)," in *Journal of the Supreme Council of the Republic of the Republic Kazakhstan*, no. 23-24 (1994), Appendix, and no. 15-16 (1995), art. 109, no 20 (1994), art. 121.

In addition, attention should be paid to the differences in customs that have developed in different member states of the EEU and reflect their specificity (national, linguistic, conditioned by the population mentality, legislation specificity). So, for example, there is a reference to the custom of blood feud in the law of the Republic of Kazakhstan.⁹

The identification of formulated discrepancies raises a reasonable question: how much they interfere with the interaction between entrepreneurs registered in the member states of the Union. We believe that the described difference in approaches to the regulatory consolidation of custom may create certain difficulties in the process of implementing the interstate trade relations.

Firstly, in the case of indicating the use of custom to regulate relations arising from the contract concluded between the business entities located in the member states of the EEU, whose laws differ in terminology, it is not clear which concept should be used: "custom" or "custom of business turnover". The application of a category not contained in the state law of one of the parties to the contract will require clarification of its meaning in order to exclude the double understanding by this party.

Secondly, in case when the party to the contract is an entrepreneur registered in the Republic of Kazakhstan, the law of the given state is applicable; then it is possible to use a custom that is contrary to the contract. Such an approach may serve as a prerequisite for depriving the other party of the possibility of fully enjoying the rights granted to it by the contract.

Thirdly, the custom characterization as "prevailing and widely used" in some area is reflecting the custom essence, but hindering its use in practice at the same time. In this case, it is of fundamental importance to clarify whether the custom should be widely applied in each of the states where its subjects are located for recognizing it as a regulator of relations arising from a contract concluded by the entrepreneurs within the framework of the EEU. Or, in other words, when determining the applicability of custom to specific relations, it should be decided whether it should be widely used in the civil circulation of each country, which is the party to the contract. In our opinion, the expediency of finding the answer to this question is obvious and lies in the entrepreneur's responsibility, which can be imposed on him based on the content of the source of law under consideration.

The answer to the above question can be formulated based on two directions:

a) the principles of conscientiousness and reasonableness lying in the plane of positive law and forming the basis for carrying out activities aimed at making profit, in which it cannot be right to involve a person in civil liability in accordance with a custom that is not established in the legal order of his country from the moral and ethical point of view.

⁹ Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated 11.05.2007 No. 1 "On Classification of Certain Crimes against Life and Health" (as amended on 21.04.2011). – Access mode: <https://www.zakon.kz/88024-normativnoe-postanovlenie-verkhovnogo.html>, accessed 12. 07. 2017.

For example, let us simulate the situation: the supply contract is concluded between the business entities registered in the Russian Federation and the Republic of Kazakhstan. In Kazakhstan, in view of the fact that Kazakh is the official language and Russian is used along with it as a language of interethnic communication, all official documents, including correspondence, have traditionally been executed in two languages. This approach can be characterized as a custom in the field not related to the implementation of functions by the organs of state apparatus. Based on the mentioned principles of business organization, in the event of a dispute, bringing a Russian entrepreneur to liability for the lack of contract translation into Kazakh cannot be considered reasonable, since this custom is inherent in Kazakhstan's reality and cannot be widely applicable in the Russian Federation, so it cannot be familiar to the entity created and operating on its territory.

b) Definitions of the rules governing contractual relations, following the content of the law applicable to the contract. In this case, the sources of law of the relevant state are subject to application, regardless of their common knowledge for the subjects of commercial turnover that are parties to the contract. Let us illustrate this thesis by the following example. If parties have chosen the right of the Russian Federation as the applicable one, the norms established in the relevant sources of the Russian law and order will be applied in the settlement of the disputed situation. This means that the customs formed during the implementation of activities aimed at extracting profits in the territory of the Russian Federation will be recognized as regulators of the contractual relations illustrated. So, in this case, regardless of whether the custom of the country-counterparty is properly executed, it will be applied the custom the essence of which is as follows: if the party evades to draw up of the act when performing the contract or causing damage outside the contract, the second party shall have the right to draw up the act unilaterally with the mark "refused to sign". And such an act will be appropriate.

Thus, in the first direction, a compliance with the sign of applicability in the territory of each of the states becomes mandatory for the custom. Within the second one, this criterion is not necessary, since the custom regulates business relations as part of other sources of law, integrated into its system.

Conclusions

Summarizing the above, we note that the approaches to understanding the custom and the designation of its essence, formulated in the law of the member states of the EEU, need a rapprochement that can be carried out in two ways:

a) by the harmonization of the provisions of national civil legislation with regard to the norms on customs through the introduction of appropriate changes and amendments to it;

b) by the development and adoption of a unified codified certificate, being a private law source, for the member states of the Union - the Fundamentals of Civil Legislation of the EEU. We consider it expedient to write out clear characteristics of the "custom" concept, including "custom of business turnover" in

the document, where, in our view, should be indicated the mandatory observance of its prevalence criterion in the territory of each of the member states of the interstate association being analyzed. In this case, it will be possible to observe the principles of good faith and reasonableness when carrying out business activities within the framework of the EEU, which will entail the expansion of trade ties between its member states, due to the stability of commercial turnover and the predictability of the level of responsibility within it.

Summary

The custom, along with other sources of legal norms, is the regulator of business relations between the entities registered in the member states of the EEU. The existing discrepancies in its regulation in the national legislations of these countries testify to the need to bring their provisions closer, since in this case it will be possible to avoid complicating the law enforcement practices creating obstacles to the further development of trade relations within the Union.

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