European Research Studies,
Volume XVIII, Issue 4, Special Issue, 2015 *pp. 129 –140*

The Problem of Determining the Place of International Civil Process in the Legal System of the Republic of Kazakhstan

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Abstract:

In the science of private international law under international civil process usually means a series of procedural issues related to the protection of the rights of foreigners and foreign legal entities in court. This issue of access of foreign persons to justice, their position in the process, international jurisdiction, legal assistance the courts and other judicial authorities of each other, the collection of evidence, the establishment of the content of foreign law, recognition and enforcement of foreign judgments, notarial acts, designed to serve as collateral rights of domestic citizens and legal persons abroad. According to another understanding, international civil procedure - a comprehensive institution of private international law governing the relationship and interaction of national and international procedures defined in the procedural rules for the protection and the establishment of civil rights.

Key Words: *international law, civil proceedings, legal system, foreign courts, agreements on jurisdiction*

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Introduction

The term "international law" was just a formality, since we are not talking about some kind of international examination of the particular case, and since there is no universal international organization designed to deal with disputes between entities (parties) from different countries. Sometimes, instead of the concept used a better term - "international civil procedural law," under which it would be possible to realize a set of legal principles and rules of a procedural nature as common to the defined international agreements, as well as directly established by the legislation of each country.

Specialists in the field of MPP little attention drawn to it, to what area of law - public or private - is an international civil process. T.N. Neshataeva highlights two features of IHL: the process necessary for identifying and protecting the civil rights of the individual; the process is public, since it is connected with the implementation powers of the state or interstate body. [1]

It is because of the fact that international humanitarian law applies to public law, it follows, according to VF Popondopulo is correct assertion that IHL only formally refers to the MPP, but in fact is part of the national civil process. [2]

According to H. Shak, idle is the question, is an international civil procedural law in the private or public. Although it is considered primarily as a procedural law in general, a part of public law, nevertheless there are strong elements of private law. His goal rather private law, whereas the means by which he uses rather public law. From this perspective, one can hardly rank as an international civil process to one or another branch, it should be accented as an independent legal matter. [3]

Meanwhile, in our opinion, it is the assignment of a public law or private law is the main criterion for the possible inclusion of IHL in the IPL. In particular, until recently, existed in the science of private international law determining the international civil procedure law as a regulated activity of the courts and other law enforcement agencies to resolve civil cases, complicated by a foreign element, began to be criticized.

Methodology

The fact that the understanding of the international civil process as the activities of the national judiciary to resolve disputes involving foreign parties, now is not correct either in terms of legal terminology, not from a position of content.

Firstly, there is justified in this context the use of the phrase "civil proceedings"? The jurisprudence civil proceedings are understood solely as the activities of the court to resolve civil disputes. Activities of other bodies, although very similar in purpose and object, considered as a separate enforcement proceedings.

In this connection, more use can be called the true language of regulations, such as ligaments terminology "civil proceedings in cases involving individuals ino¬strannyh" or in the literature "proceedings in cases with a foreign element."

As a positive trend, it may be noted that over the past few years a number of studies on international private law, civil and arbitration process the authors refused to use the term "international civil proceedings", although in some cases only within the section title or chapter. [4]

The use of the word "international" in the framework of the concept is even more objections. In particular, it does not seem justified its use in the context of the general characteristics of legal affairs, WHO-penetrating under international traffic, for cases dealt with in domestic judicial and other authorities, primarily on the basis of domestic law. Undoubtedly, the settlement of disputes "with a foreign element" courts often apply international treaties. But at the same time, courts must adjudicate on the basis of domestic law.

Results and Discussion

Activities of the separate international judiciary can be evaluated as international civil proceedings (the process).

A breakthrough was an attempt T.N. Neshataeva look at the international civil process as the activity not only on the national judicial authorities, but also international bodies (under international civil process she understands the complex international and national rules governing the relationship and interaction between national and international bodies, great-vosudiya (other law enforcement agencies). [5])

In addition, in recent years an increasing number of jobs, evidence of a broader understanding of the phenomenon, referred to as "international civil procedure." Thus, A.A. Mamaev Institute studying international jurisdiction, jurisdiction of the courts examine the different states in civil cases, jurisdiction of arbitration and jurisdiction of administrative bodies in civil cases, complicated by a foreign element [6]; AND IN. Fedorov, exploring international civil procedure, divides it into international humanitarian proceedings (European Court of Human Rights, the Inter-American Court of Human Rights), international civil procedure (Court of Justice, the Court of First Instance of the EU, the International Tribunal for the Law of the Sea) and civil procedures within international criminal justice (the international tribunals, the International Criminal Court of Rome). [7]

Thus, taking into account these arguments, it should be recognized not entirely successful use of the term "international civil proceedings" to refer to civil proceedings in cases involving foreigners, and, as from the perspective of civil procedural law, and from the standpoint of international law.

It is therefore necessary, on the basis of the main characteristics of the test contact phenomena (hereinafter referred to as the science of private international law "international civil process") with respect to a definition of the conceptual apparatus. Weak scientific development of a number of issues of international civil procedure evidence not that the international civil procedural law cannot exist now as an independent sector, and that in this area of research is not yet sufficiently studied the concrete forms of connections of international civil procedural rules with rules of private international law and other sectors, are not matched the criteria for systematization and structuring of international civil procedural law, are not taken into account the needs of the practice.

One of the main obstacles here is the whole block of the outstanding issues of the general theory of law, automatically turning into sectors of the national legal system and to a certain extent, the problem of international civil procedural law.

For decades debating jurisprudence on the definition of the place and the role of international civil procedure in the regulation of relations arising out of international civil turnover. The solution to this problem is complicated by a number of circumstances, and above all the fact that, as already indicated, is not solved a global problem of general theoretical nature - are not defined the content and location of the actual procedural law in the legal system of the Republic of Kazakhstan, and its ratio to the material and have consequently not solved the problem of determining the nature and place of the international civil process.

From here there is one of the first methodological problems of international civil process - determining the ratio of the categories of "form" and "content" with regard to the establishment of the place and the definition of independence of international civil process.

Many modern scholars (V.A. Vasilenko, Y.I., Hart T.M.) shared the position expressed in the XIX century in the early Marx's article "The debate over the law on theft of wood" that the procedural law - it's just a form of existence of substantive law: "... the substantive law, however, has the necessary inherent procedural form ... the process is only a form of life of the law." [8] From this premise it follows, as a rule, the conclusion: the substantive rules is a form of social relations, and procedural - a form of material, so the procedural rules derived from the material (and, according to T.M. Hart, secondary).

In this connection, according to some scientists (Y. Melnikov), procedural rules may be in the material industry, "so the focus should be on including the procedural rules, which are in the material sectors of the group of substantive law."

This general theoretical position has been accepted by a number of scientists in the field of private international law (T.N. Neshataeva, L.P. Anufrieva, Boguslavskiy

M.M.), which led to the birth of the concept, according to which international civil procedure (as a system of due process) is part of private international law as a branch of the substantive law, not national civil process. This approach deserves special attention, because It is a bold attempt to withdrawal of international civil procedure of the process industries, no doubt because of this important and specific characteristics of these rules, as they are transnational in nature. However, it seems that this interpretation does not fully coincide with the real state of things, because the substantive rules governing physical relationship, while the procedural rules governing other, procedural legal relationships, ie they are directed to different objects, then cannot be a form of each other. In connection with what other scientists (A.T. Bonner) came to the conclusion that the procedural law cannot be a form of the material, as they regulate different social relations, and both serve as their legal form and the former cannot be a form of the second, and the second – the content first.

So, for the independent existence of procedural law, for a long period of time, actively support V.O. Lucin, V.M. Gorshenev, P.E. Nedbaylo and others. For example, V.O. Lucin considers that the inclusion of procedural rules in the financial sector "creates some uncertainty ... for this sector cannot be called material." In private international law the approach expressed G.K. Dmitrieva, who opposed the inclusion of international civil procedure in the private international law in force mismatches main characteristics of objects (procedural and material characteristics, respectively).

However, different approaches to determining the place of international civil process in the legal system due to not only the legacy of understanding of general theoretical problems, but also the fact that its rules are in different areas of law: in the civil procedure, arbitration procedure, international private law, etc. . Moreover, the rules of international civil procedure (as understood by science private international law) are dispersed on codes of these industries, firstly, greatly complicates their systematization, a comprehensive study and especially the possibility of combining an independent legal education, as they are extremely difficult to remove from pandektnyh sources and regroup, and secondly, many scientists and representatives of various branches of the law say the same questions "their" and study them with their characteristic "sectoral" approach and methodology used in different means. Thus, these issues are not adequately assessed, problems systematize accumulated a large volume of specific regulatory material (which, in addition to a large amount, complicated by the fact that she has to wear a cross-cutting, complex character), there are problems to overcome gaps and internal collisions. And – as a result of rupture of a unified system of international relations of civil procedure.

Having outlined the major problems that hinder the production of a single doctrinal approach to defining the nature and place of the international civil process in the system of Russian law, the author of dissertation would like to stress that their

decision has a conceptual, theoretical and practical significance. This question is a reference, but at the same time, a single and final opinion on it not.

The question of the law of civil procedure, is not certain, but, nevertheless, the authors of most books on civil process or bypass the question, underline or coercive nature of the protection of civil rights in civil proceedings or mandatory nature of the relationship. In any case, the private right of civil process does not apply.

The structure of public law include procedural, including civil procedure, A.V. Polyakov and Yuri Tikhomirov, to explore all the main branches of public law. [9]
In our view, international civil procedure, of course, is an institution of national civil procedure and, of course, belongs to the public law. Civil procedural relationship - the relationship between the court and the participants in the process. These relations are characterized as a relationship of power and subordination. Method of civil procedural law in the books is usually characterized as imperative-dispositive. [10] However, optionality is expressed just the right actors to use or not to exercise the rights granted to them by the procedural legislation. This does not affect the imperative subordinate relations between the court and the participants in the process. In principle, the same character are the attitude of citizens and legal entities and other public bodies, often occurring on the initiative of individuals or legal entities.

In civil proceedings between the participants do not directly communicate with all their attitude taking place in court in connection with the trial. There are only two cases where the parties having direct relationship: this contract jurisdiction (prorogation agreement) and world trade. However, this is not the civil procedural and substantive relations. Few people doubt that and prorogation agreement and settlement agreement - a civil contracts. [11]

Only when the court approved the settlement agreement or the agreement recognizes the prorogation, there, along with material civil law, procedural relationship between the parties and the court. The presence of such material relationships does not affect the legal nature of the public relations process.

Based on the indisputable fact that international humanitarian law applies to public law, it cannot be regarded as an opportunity to correct its inclusion in the international private law. MPP is entirely in the sphere of private law and public law institutions it can not go.

The practical implication of this should be so. IPL and IHP are separate legal entities: MCHP - as an independent complex branch of domestic law and international humanitarian law - as an institution of domestic civil procedure.

Considering the case with a foreign element, the courts in Kazakhstan and other countries, in principle, apply in dealing with civil procedural rights issues of the

country. At the same time there may be cases where a particular concept of Kazakh law refers to the substantive law and the law of any foreign state - to the process, or vice versa. Foreign law is generally not to be applied in the Kazakh court on issues which are under Kazakh law considered procedural. Conversely, the fact that this provision is considered to be in another procedural, does not preclude its application Kazakh court if under Kazakh law, it is considered as a rule of substantive civil law.
Regulation in the Republic of Kazakhstan in the field of international civil procedure is an integral part of the judicial reform. In 1997 he was adopted by the Civil Procedure Code of the Republic of Kazakhstan. Law of the Republic of Kazakhstan "On Enforcement Proceedings and Status of Court Bailiffs"; Law of the Republic of Kazakhstan "On ratification of the Protocol to the Convention on legal assistance and legal relations in civil, family and criminal cases" of 22 January 1993; Law of the Republic of Kazakhstan "On ratification of the Convention on legal assistance and legal relations in civil, family and criminal cases", perfect in Chisinau October 7, 2002; Law of the Republic of Kazakhstan "On Ratification of the Agreement on the mutual enforcement of arbitration, economic and business courts in the territories of the Commonwealth", committed in Moscow on March 6, 1998.

The Code of Civil Procedure of RK established detailed rules on international civil procedure.

Usually, the international jurisdiction refers to the competence of the courts of a particular State to resolve civil cases involving foreign party (ies), or any other "foreign element". Only after it is established, within the competence of the judiciary of the state in general, includes consideration of the dispute, it will be possible to determine the specific court competent to consider the dispute.

Under Kazakh law, the courts of general jurisdiction consider and resolve disputes arising out of civil, family, labor, housing, land, relationships on use of natural resources and environmental protection, and other relations, including relations based on authoritative subordination of one party to another, if these cases, according to the CPC RK attributed to the conduct of the court (Art. Art. 24, 215 CCP RK). The jurisdiction of the court of general jurisdiction and arbitration court consideration of disputes related to foreign persons. According to para. 6, Art. 24 CCP RK courts hear and decide cases involving foreign citizens, stateless persons, foreign organizations, foreign investment and international organizations.

The courts of the Republic of Kazakhstan shall consider cases involving foreign parties if the respondent is an organization or a citizen-defendant has a place of residence in the territory of the Republic of Kazakhstan. Also, the courts of the Republic of Kazakhstan shall consider cases involving foreign persons in cases where: 1) the management body, branch or representative office of a foreign entity located in the territory of the Republic of Kazakhstan; 2) the defendant has assets in the Republic of Kazakhstan; 3) in the case of alimony and paternity claimant has place of residence in the Republic of Kazakhstan; 4) in the case of compensation for

harm caused injury, other health impairment or death of a breadwinner, the harm caused in the territory of the Republic of Kazakhstan or the claimant has a residence in the Republic of Kazakhstan; 5) in the case of compensation for damage caused to property, action or other circumstances giving rise to a claim for compensation for damage has occurred on the territory of the Republic of Kazakhstan; 6) the claim arises from a contract, according to which total or partial execution is to take place or has taken place on the territory of the Republic of Kazakhstan; 7) the claim arises from unjust enrichment, which took place on the territory of the Republic of Kazakhstan; 8) in the case of divorce, the claimant has a residence in the Republic of Kazakhstan, or at least one of the spouses is a citizen of the Republic of Kazakhstan; 9) in the case of protection of honor, dignity and business reputation of the claimant has a residence in the Republic of Kazakhstan.

The courts of the Republic of Kazakhstan and other cases considered, if the legislation of the Republic of Kazakhstan are referred to their competence. (Article 416 of CPC RK).

The exclusive jurisdiction of the courts of the Republic of Kazakhstan are: 1) matters relating to the right to immovable property situated in the Republic of Kazakhstan; 2) The matters brought to the carrier under the contract of carriage; 3) cases of divorce Kazakh citizens with foreign citizens or stateless persons, if both spouses have a place of residence in the Republic of Kazakhstan; 4) the case provided for in Chapter 25-29 GP case special proceedings (Chapter 25 Proceedings on applications for protection of electoral rights of citizens and public organizations participating in the elections, referendum; Chapter 26 Proceedings challenging the decisions of bodies (officials) , authorized to consider cases on administrative offenses; Chapter 27 Proceedings challenging the decisions and actions (or inaction) of state authorities, local government, public associations, organizations, officials and civil servants; Chapter 28 Proceedings challenging the legality regulations; Chapter 29. Contacting the prosecutor on the recognition of acts and actions of unlawful bodies and officials.

The courts of the Republic of Kazakhstan deal with cases of special proceedings in cases when: 1) the applicant in the case of determining whether a residence in the Republic of Kazakhstan or the fact that you want to install, or have had a place in the territory of the Republic of Kazakhstan; 2) a citizen, in respect of which raises the question of recognition incapable or incapacitated, the forced hospitalization in a psychiatric hospital, a citizen of the Republic of Kazakhstan or a residence on the territory of the Republic of Kazakhstan; 3) citizen, in respect of which raises the question of recognition of missing or declared dead, he is a citizen of the Republic of Kazakhstan or had the last known place of residence in the territory of the Republic of Kazakhstan, and thus the resolution of this issue depends on the establishment of the rights and duties of citizens and organizations who have residence or residence on the territory of the Republic of Kazakhstan; 4) the thing in respect of which application is made for recognition of its ownerless, located on the territory of the

Republic of Kazakhstan; 5) securities in respect of which the application is made for recognition of the lost and the restoration of her rights corresponding (Voiding), issued by a citizen or organization residing or located in the Republic of Kazakhstan; 6) civil status, the establishment of irregularities which applied, committed civil registry state of the Republic of Kazakhstan; 7) complained notary actions (refusal of the commission) committed by a notary public or other authority of the Republic of Kazakhstan. (Article 417CPC RK).

In respect of disputes relating to the field of international civil procedure, it is essential to concluding agreements on jurisdiction. Kazakh legislation allows the possibility of contractual jurisdiction. Thus, Art. 419 Code of Civil Procedure of Kazakhstan in cases referring cases involving foreign parties to the exclusive jurisdiction of the court the parties may agree to change the jurisdiction of the case, ie, prorogation conclude an agreement before the court to his own production. The competence of the foreign court may be provided a written agreement between the parties, except for cases in respect of which exclusive jurisdiction is set (for example, claims for land rights, claims against the carrier under the contract of carriage). Prorogation agreement may provide for the transfer of the dispute to the competent court of a foreign state. If there is prorogation agreement to refer the dispute to the competent court of a foreign state court at the request of the defendant RC stops the proceedings between the same parties on the same subject and on the same grounds taken to its production according to the rules of general jurisdiction.

Functions of the court as the authority of each state are usually limited outside the national territory. Therefore, for legal proceedings abroad the court of one state must apply for assistance to the judicial authorities of another country (hand summons to court, examine witnesses living abroad, to gather evidence and take other action procedural). Under the letters rogatory in international practice as an appeal court of one state to the court of another State with a request for the production of legal proceedings in the territory of another state. The development of international co-operation has led to the fact that along with the execution of court orders was a broader concept of providing legal aid, under which in the area of private international law was understood not only the execution of court orders, and assistance in obtaining information on foreign law.

According to article 423 of the Republic of Kazakhstan courts sent them to perform in the manner prescribed by law or international treaty of the Republic of Kazakhstan, orders of foreign courts on the production of certain proceedings (award notices and other documents to obtain explanations of the parties, witnesses, production expertise and on-site inspection, etc. .), except in cases where:
1) execution of the order would be contrary to the sovereignty of the Republic of Kazakhstan, or would threaten the security of the Republic of Kazakhstan; 2) execution of the order does not fall within the competence of the court.

Execution of orders of foreign courts on the implementation of certain procedural actions carried out in the manner prescribed by law, unless otherwise provided by international treaty of the Republic of Kazakhstan. The courts of the Republic of Kazakhstan can apply to foreign vessels with the instructions on the execution of certain proceedings. The order of the courts of the Republic of Kazakhstan relations with foreign courts is determined by law and the international treaties of the Republic of Kazakhstan.

Action to judgment pronounced by a court of a State, in principle, restricted to the territory of that State. Admissibility of recognition and enforcement of a foreign judgment is determined by national legislation and international agreements in which it participates. The recognition of a foreign judgment is that it serves as confirmation of civil and other rights and obligations to the same extent as the decision of the domestic court. In some cases enough to make the decision it was only recognized (such as divorce). In other cases, the decision must be also carried out, i.e., subjected to a special procedure to resolve performance (for example, the issuance of exequatur or registration in a specialized registry). Thus, the recognition of a foreign judgment is a prerequisite for its enforcement; for enforcement are usually set additional requirements beyond those required for the recognition decision.

Conclusion

The Republic of Kazakhstan recognizes the following decisions of foreign courts not requiring enforcement by their nature: 1) only affecting the personal status of citizens of the state, the court which ruled; 2) on the termination or invalidation of marriage between Kazakhstan and foreign citizens at the time of divorce at least one of the spouses resided outside the Republic of Kazakhstan; 3) on the termination or invalidation of marriages between Kazakh nationals, if both spouses at the time of divorce lived outside the Republic of Kazakhstan.

The Minsk Convention of 1993 and, respectively, in Kishinev Convention in 2002 much attention is paid to the recognition and enforcement of decisions. Among the objects of recognition and enforcement in the territory allocated made by other parties to the convention solutions for institutions of justice civil and family cases, including court approval of a settlement agreement in such cases, notarial acts against liabilities, as well as court decisions in criminal cases for damages. There are rules in the conventions dedicated to the recognition of not requiring the implementation of decisions, including decisions on divorce and other issues.

Recognition and enforcement of decisions currently in the Republic of Kazakhstan is allowed under the multilateral agreements of the CIS and bilateral treaties on legal assistance concluded with the states - participants of the CIS, Albania, Bulgaria, Hungary, Vietnam, China, Cuba, Latvia, Lithuania, Mongolia, Czechoslovakia,

Estonia, Yugoslavia, as well as Algeria, Argentina, Greece, Iraq, Spain, Italy, Cyprus, Tunisia and some other countries.

Recognition and enforcement of certain categories of cases can take place in accordance with certain multilateral international agreements.

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