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THE PROBLEMS OF THE APPLICATION OF LAW OF UNRECOGNISED STATES IN INTERNATIONAL LAW

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The article is devoted to the study of the problems of the application of law of unrecognized states in international law. The concept of application of foreign law in general and the legislation of unrecognized states in particular is defined. It is indicated that the relation to foreign law, as an actual circumstance or as a legal category, is determined by the method of foreign law application, which varies depending on the legal family to which a particular state belongs. Two main theories concerning recognition are investigated: declarative and constitutive. The notions of "unrecognized states" and "unrecognized governments" are delimited.The peculiarities of the application of the law of unrecognized states in international law are defined.

Key words: application of foreign law, establishment of content of foreign law, qualification of foreign law, unrecognized states, unrecognized governments, international recognition, sovereignty.

кандидат філологічних наук, доцент, Мясоєдова С. В., Комлик А. В. Проблеми застосування права невизнаних держав в міжнародному праві/ Національний юридичний університет імені Ярослава Мудрого, Україна, Харків;

Стаття присвячена дослідженню проблем застосування права невизнаних держав в міжнародному праві. Визначено поняття застосування іноземного права загалом та невизнаних держав зокрема. Вказано на те, що відношення до іноземного права як до

фактичної обставини чи як до правової категорії визначається методом застосування іноземного права, що різниться залежно від того, до якої правової сім'ї належить певна держава. Досліджено дві основні теорії щодо визнання: декларативну і конститутивну. Розмежовано поняття «невизнані держави» та «невизнані уряди». Встановлено особливості застосування права невизнаних держав в міжнародному праві.

Ключові слова: застосування іноземного права, встановлення змісту іноземного права, кваліфікація іноземного права, невизнані держави, невизнані уряди, міжнародне визнання, суверенітет.

Introduction. The modern world can be said to exist in the era of globalization caracterised by the unprecedented internationalization of civil and economic circulation. Thus, foreseeable is the situation when a foreign element can be observed in private legal relations, which, in its turn are to cause the problems concerning the sphere of International private law. Besides the political map of the world, where the old states disappear and the new ones are created, is undergoing significant transformation, so the issue of the application of the law of unrecognized states in international private law, which has not been comprehensively researched in both national and foreign literature, requires a more detailed study.

Analysis of recent research and publications. Many legal scholars – both Ukrainian and from abroad – have contributed to the research of the issue of the application of the foreign legislation by domestic courts of law and of the correlation between different methods by which national courts are to apply the foreign legislation, among them are such legal scientists as M. Agarkov, L. Anuphriieva, G. Dmytriieva, L. Lunts, V. Kysil, A. Popov, Ju. Tymohov, V. Tolstyh, V. Truten, V.

Chubarev and others. The works by L. Berdegulova, A. Bolshakov, T. Dalyavska, S. Kaplina, D. Kenol, P. Kolsto, D. Nikolaiev, S. Osipova, S. Pegg, G. Perepelytsia, M. Platonova, A. Sebentsov, M. Rigl to some extend focus on the problem of unrecognized states.

Taking into account the dynamism and diversity of the practice of applying the foreign law of states in general, and of the unrecognized states in particular as well as the importance of defining the problematic issues of the application of the foreign law of unrecognized states in international law, it is necessary to emphasize the need for a more detailed analysis of the problems arising in the application of the law of unrecognized states in international private law.

The purpose of the article. The aim of the article is to identify the main problems arising in the application of the law of unrecognized states in international law.

Presenting main material. The law can be applied or not to be applied outside the country where it is established by the legislator. Both courts of general jurisdiction and arbitration, as well as lawyers, legal advisers and notaries are regarded as professional participants in the litigation in case there is a necessity to apply the law of the other state rather than the legislation of our country. Moreover, it can concern both a trial and an extrajudicial procedure.

Courts of Ukraine apply foreign law ex officio, guided by the principle of iura noviy curia. However, international commercial arbitration by its nature is obliged to apply foreign law since it always considers the contradictions that arise in international commercial relations.

Ukrainian defense lawyers and notaries today take an active part in the humanitarian and business communication of representatives of all nations, and they are real subjects to apply foreign law in Ukraine and abroad.

In other words, the application of foreign law is a law-enforcement process that is carried out by the court and other law enforcement agencies (notaries, state executive bodies, etc.) on the basis of and within the frameworks of national law in accordance with the generally recognized principles of international law [1, c.64].

The attitude to the foreign law as an actual circumstance or as a legal category is determined by the method of foreign law application, differs depending on the legal family a particular state belongs to.

Thus, in the doctrine of countries of Anglo-Saxon or common law (the United States, Great Britain and others), foreign law serves only as one of the actual circumstances to be proved. Therefore, for common law, the qualification of foreign law as a fact is traditional [2, c.312]. The English doctrine points out that "the only law that the judge applies is the law of the place where the case is being examined, and the rights that he enforces are only rights arising from the law of the place of trial.

However, in the case of a foreign element, a foreign law is a fact that must be taken into account, therefore, the judge seeks to create and enforce a right, if possible, analogous to that which would have been created by a foreign court, if he considered such a case intrinsically» [3, c.243].

English law features four fundamental approaches to foreign law: 1) foreign law is a fact, not a law; 2) as a fact, foreign law must be formally proved, as its content of the judge is unknown, it must be proved by a specialist; 3) as a fact, foreign law must be brought to the attention of the court in the same manner as the process for other facts; 4) If the foreign party does not declare or can not prove the foreign party, the court will apply English law on the basis of the presumption that foreign law is the same as English [4, c.67].

At the same time N. V. Plahotnyuk points out the disadvantages of such a position: in particular the court in this case is limited to the evidence of the parties to establish a foreign law. Moreover, if the parties agreed on the content of a certain foreign norm, then the court should apply it with the content recognized by the parties, even if the parties interpret the content incorrectly [4, c.67].

A similar opinion is supported by French case-law with the difference that if a rule of the foreign law is actually known or readily available to a court, the court is guided by this norm, even if the parties did not provide the relevant evidence [5, c. 359-376].

As for the Roman-Germanic legal family (Germany, Italy, etc.), foreign law is a legal category and the court sets the content of the foreign legal norm. From the point of view of the doctrine of these countries in the application of foreign law, the court does not establish the issue of fact, but the question of law [5, c. 475-489].

International private law of Ukraine, as the legal successor to the Soviet private doctrine and as the law of the state, which legal system tends to the Roman-Germanic legal family [6], maintains the view that the foreign law is a legal category, that is, a legal rule rather than a factual circumstance. Furthermore, Art. 8 of the Law of Ukraine "On Private International Law" of 23.06.2005 № 2709-IV [7, ст.8] is entitled "Establishment of the content of the rules of the law of a foreign state", and not "the bringing of foreign law". According to Part 1 of this article, when applying the law of a foreign state, a court or other authority establishes the content of its norms in accordance with their official interpretation, practice of application and doctrine in the corresponding foreign state [7, ч.1 ст.8]. Parts 2 and 3 of Article 8 of the Law, which is noted above, provide for methods of establishing the content: appeals to the Ministry of Justice of Ukraine or other competent authorities and

agencies of Ukraine or abroad or the involvement of experts in accordance with the procedure established by law. In addition, the Law provides the right to the persons involved in the case to independently submit documents confirming the content of the rules of foreign law [7, ч.ч.1,2 ст.8]. Moreover, the last one is often used by courts. This is evidenced by the practice of dealing with a foreign element, during which the court established the content of the rules of foreign law (Decision of the Commercial Court of Kyiv of July 16, 2010 in case number 54/259) [8].

On the other hand, the procedure provided for by the European Convention on Information on Foreign Legislation adopted in 1968[9] is extremely ineffective since, as N. Pogoretsky notes, hardly any mechanism or conditions for the implementation of the Convention have been created. Therefore, the courts rather tend not to consider such a way to establish the rules of foreign law [10, с.106-107].

However, the majority of foreign countries have developed common rules, according to which: "the claim can not be denied on the grounds that foreign law can not be proved"; "in any case, the court is not allowed to refuse an action on the ground of the incomprehensibility of the legal situation regarding the application of foreign law." Among these countries are Germany, Japan, Italy, Switzerland, China and others. Ukraine is also one of these states, considering that according to part 4 of Article 8 of the Law of Ukraine "On Private International Law", if the content of the rules of a foreign state is not established within a reasonable time, in spite of the measures taken in accordance with this article, the law of Ukraine shall be applied [7, ч.4 ст.8].

The application of the law of foreign states is extremely important in the study of the application of the law of non-recognized states.

As will be recalled, there are two main theories of recognition in international law: declarative and constitutive. According to the constitutive

theory, only the fact of recognition generates the international legal personality of the state, that is, directly affects its fate as a subject of international law, transforms the actual state of the formation of a new state into a legal status. According to the declarative theory, the state acquires international legal personality by virtue of the very fact of its formation, regardless of whether or not its other states, by virtue of their sovereignty, are recognized or not recognized [11, c.49]. But in fact, recognition in international law is the desire of one state to deal with another. Such a desire (reluctance) is particularly manifested in the realization of law, in particular in one of its varieties – law enforcement.

In addition, it is necessary to distinguish the recognition of the state from the recognition of the government. The difference between them is that the recognition of the state implies that the subject meets all the features that the state has to possess, and the government's recognition that a certain political force effectively manages the country.

Philipyev believes that the recognition of the state has no relation to the application of foreign law in the resolution of disputes by national courts, since "the law enforcement body applies foreign law on the grounds that it exists as a social regulator of certain social relations", and then the scientist adds "at least it concerns private law "[10, c.179].

In this sense, it can be argued that such a statement creates an ideal structure of a law-governed state, where the law is independent of the authorities (both the society itself and a particular person), the right is created by the people of a society, national courts may not perceive the right created by the state (government) and it shows only the non-recognition of the international legal personality of the state (government), but the right of the people, which objectively acts in a certain territory, they can not deny (this non-recognition in no way affects the application of the people's right in the national legal procedure). Such a point of view seems

to be reasoned especially if to recall the key feature of the rule of law - the implementation of the rule of law principle (rather than law) [12, c.330], however, unfortunately, international judicial practice sometimes demonstrates inconsistence.

Thus, the courts of Switzerland and Germany always apply the current legislation that governs relations on a foreign territory, even if one is not recognized as a state. US and UK courts can enforce laws of an unrecognized state only if the executive confirms that this does not harm the foreign policy of non-recognition.

As for Ukraine, despite the fact that under the Constitution Ukraine is a legal state, Ukrainian judicial practice goes a different way and does not allow the application of the norms of law of the state without its proper recognition by the Ukrainian government (the decision of the Odessa Economic Court of Appeal of July 18, 2006 in the case No. 15/202/06). Moreover, taking into account the fact that recently the "national" republics formed on the basis of the Donetsk and Luhansk regions of Ukraine with Russia's direct participation have joined the cohort of unrecognized, self-proclaimed entities, Ukraine's position is well-grounded.

Conclusion. Thus, taking everything into account, it can be concluded that the application of the legal rules of unrecognized states varies in different countries, and despite the fact that most of them apply the private law of an unrecognized state, Ukraine does not accept the rules of the law of unrecognized states and does not recognize the influence of such norms on regulation of social relations.

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