International Journal of Business, Human and Social Sciences
ISSN: 2517-9411
Vol:6, No:6, 2012

Kazakhstan and Hague Conference on Private International Law: The Unification of Collision of Law in International Trade

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***Abstract*—**This article discusses the prospects of participation of the Republic of Kazakhstan in Hague Conference on Private International Law on the unification of collision law in the international trade.

The article analyzes some conventions on international trade. The appropriate conclusions based on the opinions of scientists and experts in this field have been made. First, all issues presented in the form of gaps or spaces in conventions should be the subject to direct negotiations in the course of the activities of Hague Conference, and have a comprehensive feature, be transparent and taken under simplified procedure.

Secondly, one should not underestimate the value of conventions that do not become active due to various reasons and having a positive impact on the development and improvement of national legislation and practice in the field of private international law.

Thirdly, Kazakhstan has to reconsider its attitude to Hague Conference, having become its full member and aiming at providing constructive and fruitful cooperation with both the organization itself and its member states.

***Keywords*—**Hague Conference on Private International Law, Hague Conventions, unification, collision norms, international trade, international private law, integration.

I. Introduction

THE experience of European integration is very important for Kazakhstan and other former Soviet states aimed at real integration. At present formal relations between Kazakhstan and Europe are built not only in bilateral interstate format, but also in the format of relations of Kazakhstan - European Union and Kazakhstan - the OSCE [1]. The integration decisions penetrate into the legal system of the state through the process of harmonization and unification. Fast development of international trade relations among states and overcoming of the contradictions and gaps in the law call for rapprochement of the Kazakhstani national law with the legal system of the European Union.

Cooperation among international organizations whose aim is to unify private international law plays a major role in the establishment of comprehensive and effective systems of international trade development.

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"The main goal is to work for the unification of rules of law, which could be achieved either by international organization or under the auspices of international organization" [2].

Among these organizations, the Hague Conference on Private International Law is of particular note. It was established in 1983 by the initiative of the Dutch lawyer Mr. T. Asser (and with the support of the Kingdom of the Netherlands) with the primary goal of framing common legal rules or, rather, unified collision rules.

Although the Conference was established for certain countries similar in social, economic, cultural and legal development and with similar social and political systems, it has been a permanent international, intergovernmental organization since 1955.

Thus far, the Hague Conference on Private International Law consists of 72 members: 71 states, including leading countries in Europe, Asia, the United States, and Africa, and one integrative region, the European Union. Sixty-eight other states, which are not members of the Hague Conference on Private International Law, have ratified or joined one or more Conventions [3].

The Conference's new charter was ratified in 1951 and adopted in 1955. According to the charter, the Hague Conference aims "to work for the progressive unification of the rules of private international law" (Article 1). All members of the current Hague Conference have participated in one or more sessions of the Conference and accept the present charter [3].

The Hague Conference today is a global organization promoting cross-border cooperation while solving civil and trade law problems. Since 1951, the Conference has prepared more than 40 international conventions on various cross-border issues for the benefit of citizens, companies and other organizations [4].

The continued existence and activities of the Conference are supported by the current trend of economic internationalization across the globe, in which has created a great need for unified collision law.

The Russian researcher Mr. V.P. Zvekov highlights the term "diversity," using it to describe the scope of the Hague Conventions, which embrace numerous areas within private law relations [5]. Issues accepted at the sessions of the Hague Conference are divided into groups that correspond to the abovementioned functions (legal regime of international contracts, international civil procedure, family and succession relations, etc.).

Primary international legal acts governing the unification of collision norms for international trade include the following Hague Conventions: June 15, 1955 on the law applicable to international sales of goods; April 15, 1958 on the law governing transfer of title in international sales of goods; March 14, 1978 on the law applicable to agency; and December 22, 1986 on the law applicable to contracts for the international sale of goods.

II. Research And Results

The first document, Hague Convention on the law applicable to international sales of goods dated from June 15, 1955 is remarkable by the reason that it is not only the first international legal experience of unification of conflict rules, but it also has the greatest number of states - participants of the multilateral international instruments of this kind on entering into legal force on September 1, 1964. It had a significant effect on the development of subsequent international treaties on conflict of law.

The convention has been ratified by the following countries: Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger. Luxembourg, the Netherlands and Spain have signed the Convention. Belgium denounced the Convention on 19February, 1999.

The Convention of 1955 contains 12 Articles, 5 of which define the scope of the Convention and the right applicable to international sales of goods, the other ones (Articles 6-12) are complementary [3].

The Kazakhstani researcher G.B. Ispayeva speaks about imperfection of certain rules, namely, the Convention does not give a definition to the international sale and does not indicate signs that determine the nature of the sale. In Art. 1 the concept of sale is disclosed by citation of certain types of transactions falling within the scope of Convention, and by excluding certain types of transactions from this scope of [6].

In particular, the Convention is not applied to: sales of securities, sales of registered ships, vessels, or aircrafts, or to sales upon judicial order or by way of execution. It shall apply to sales based on documents (Art. 1). Exclusion of these types of transactions has the following reasons: securities that have a specific nature of legal regulation in the international sphere have a uniform character; as in every country, there are peculiarities of legal regulation regarding aircraft and vessels, causing differences in national laws of foreign countries [6].

The Convention is applied, in particular, to sales based on the documents; to contracts to deliver goods to be manufactured or produced shall be placed on the same footing as sales provided the party who assumes delivery is to furnish the necessary raw materials for their manufacture or production (Art. 1) [3].

Russian scientist professor N.G.Vilkova in her work analyzed the features and general provisions of Convention of 1955.

She notes that “the principle of autonomy of the will of the parties in the choice of applicable law is established in the framework of universal unification for the first time: “A sale shall be governed by the domestic law of the country designated by the Contracting Parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract” (Art. 2) [7].

The novelty in Convention is foremost the rule placed in Art. 6. As N.G. Vilkova notes, for the first time in this Article “a rule that is repeated later in the subsequent Hague Conventions is included, and it is about that in each of the Contracting States, the application of the law determined by this Convention may be excluded on a ground of public policy”. Namely in this Convention, the issues of transfer of ownership and transfer of risk of accidental loss, which are important to the sellers, is also separated for the first time (that is, relationships connected with the transfer of risk, are subject to the legal effect of this Convention) [7].

Secondly adopted Convention on the law governing transfer of title in international sales of goods on April 15, 1958 fills up the previous Convention, it is identical with it in scope of application and the developers, as it is logically follows from the official name, while accepting it pursued the main goal - to resolve the issue concerning the law governing transfer of title to the goods sold.

Although this Convention, in contrast to “its predecessor” has not yet entered into force, its influence on the creation of the domestic legal system and the development of law enforcement cannot be denied. Convention has been ratified by Italy, signed by Greece [3].

The content of general provisions of Convention of 1958 can be characterized is as follows: firstly, “the law applicable to the contract of sale determines four situations between the parties: 1) the time up to which the seller is entitled to the goods and benefits and other gains associated with the product; 2) the time up to which the seller bears the risks associated with the product; 3) the time up to which the seller is entitled to compensation of damages associated with the product; 4) as well as the validity of reservations about the preservation of title (Art. 2) – hence, by identifying the law applicable to the contract of international sale of goods on the basis of Convention of 1955 and following the rules of this Convention, approaches to address these issues also can be identified” [8]; and secondly, “in the relationship of the parties of the contract for the international sale with third parties the reference to the law of goods location is used as a conflict of criteria.

On the basis of this conflict of criteria following provisions are determined: ... the transition of ownership for the goods sold to the buyer in respect of any person, other than the parties to the contract of sale (however, the right of ownership is recognized as transferred to the purchaser, if such a transfer of ownership rights is recognized by the domestic law of that countries where the goods sold was previously) (Art. 3); ... the opposition the rights for the goods sold by the seller, but not paid to creditors of the buyer, such as the privileges and rights of possession or ownership, in particular due to an action for rescission of the contract or by virtue of clause the preservation of property rights (regulated by the domestic law of the country where the goods sold at the time of first claim or claims for enforcement) (Art. 4).

In the case of a sale of goods based on the documents, if these documents represent the goods sold, the rights for the goods sold by the seller, but not paid to creditors of the buyer is regulated by the domestic law of the location of these documents at the time of first claim or claims for enforcement (Art. 4) [3].

With regard to disputes affecting the relationships of buyer with third parties, the matter was resolved in the Art. 5, according to which the rights that the buyer may oppose to a third party claiming with respect to property rights, or any other real right in respect of goods sold (governed by the domestic law of the country where such goods were at the time of submission of such claims)" [7].

The third international instrument mentioned in this part of the work, namely Convention on the law applicable to agency (agency agreements) on March 14, 1978, regulates the relations connected with the conflict of laws issues in the field of representation, that is those relationships that do not have direct connection with the contract for direct international sale of goods and aim to promote products in other ways.

It was signed and then ratified by Argentina, the Netherlands, Portugal, France, and entered into force in the relations between these states from May 1, 1992 [3].

The generalized analysis of the contents of Convention allows providing its following features:

1) By initiation of the developers, it combines approaches inherent in the "common law" and continental law. Based on this principle, determines the law applicable to relationships of an international character arising where a person, the agent, has the authority to act [7], acts or purports to act on behalf of another person, the principal, in dealing with a third party. It shall extend to cases where the function of the agent is to receive and communicate proposals or to conduct negotiations on behalf of other persons (Art. 1) [3].;

2) the provisions of the Convention are also applicable whether the agent acts in his own name or in that of the principal and whether he acts regularly or occasionally, that is, this international legal instrument could be used not only in such "traditional" agreements like contracts, commissions, consignment, agency, etc., but also in the agency contracts for the law of countries of «common law», and also when the actions of the representative (broker, agent) are regular, or sporadic (Art. 1) [3].;

3) the principle of autonomy of the will of the parties referred to Art. 4 of Convention, based on the fact that the law, as determined in accordance with it, shall apply regardless of whether it is the law of the Contracting States or not. This means that this Convention is the first international treaty, allowing coordination of the parties belonging to the States Parties to the Convention, application to their relationship to the law of country, which has no relation to the Convention [7]. This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case (Art. 5) [3].;

4) at the absence of choice of applicable law by parties of the agreement (contract), the applicable law shall be the internal law of the State where, at the time of formation of the agency relationship, the agent has his business establishment or, if he has none, his habitual residence (Art. 6) [3]. Exception of the common rules of Convention on freedom of choice of applicable law by parties and of adopted in it general connecting factor, has been stated in Art. 9: whatever law may be applicable to the agency relationship, in regard to the manner of performance the law of the place of performance shall be taken into consideration.

At the same time, the general approach of the developers of Hague Convention of 1978 to the conflict of laws principles that determine the applicable law is as follows: the reference to the collision law of country of representative's (agent) commercial enterprise location is fixed with the exception of this conflict criteria in favor of However, there are two exceptions to these general criteria: first, Art. 16 indicates that when application of Convention effect may be given to the mandatory rules of any State with which the situation has a significant connection, and secondly, Art. 17 considers the rule of public policy.

These exceptions were first enshrined in this Convention and had further consolidation in the domestic law of states, such as the Civil Code of the Republic of Kazakhstan (special part) from July 1, 1999 (Articles 1090, 1091) [9].

We cannot not evaluate in this context, the role of Hague Convention of 1978 and the codification of the relevant regional acts. For example, many of its rules and regulations contained in them were used in the development of Rome Convention on the Law Applicable to Contractual Obligations, which was been signed by the states - members of the EU in 1980 and entered into force on January 1, 1991.

December 22, 1986 in the framework of Hague Conference on Private International Law completely "new", compared to Hague Convention of 1955, the international act - Convention on the law applicable to contracts for the international sale of goods had been adopted.

It not only carried out a revision of the first Convention, but also adopting by the states-participants of the Conference under the influence of Vienna Convention of 1980 on Contracts for the International Sale of Goods, reproduced basic principle of collision of Hague Convention of 1955, as well as many evolutionary rules of conflict of law that are included in the text of the last Convention.

In addition, Hague Convention of 1986 introduced in the legal system and practice some improvements and additions that were not reflected in Hague Convention of 1978 and Vienna Convention of 1980. First of all, we should pay attention to the fact that unlike Vienna Convention of 1980, Hague Convention in 1986 put in the concept of "goods" a different meaning: now, this term includes: a) ships, vessels, boats, hovercraft and aircraft, b) electricity (Art. 3) [3].

As Hague Conventions of 1955 and 1978, Hague Convention of 1986 recognizes autonomy of parties in choosing the applicable law, but complements it by providing the parties with the possibility to determine the applicable law based on a set of conditions of contract and the conduct of the parties. The latter considered in Convention as a whole (paragraph 1 of Art. 7) [3].

Compared with the same Hague Conventions of 1955 and 1978, in the text of the Convention two new rules concerning applicable law were first secured: 1) the rule that such a choice may be limited to a part of the contract (paragraph 1 of Art. 7), 2) the rule that the parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it (paragraph 2 of Art. 7). However, in this regard, it should be noted that as set forth in Hague Convention of 1986 collision criteria coincides with the same criteria of Hague Convention of 1955: according to paragraph 1 of Art. 8 To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract [3].

Further Convention developing Hague Conventions of 1955 and 1978 determines, in accordance with Art. 15, in the Convention "law" means the law in force in a State other than its choice of law rules, and Art.17 does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the contract.

Since Convention was adopted mainly because of the need to revise the Hague Convention of 1955, many of its innovations can be determined by comparison with the norms of the first international treaty. First of all, this approach suggests that Hague Convention of 1986 is much more, accurately to three expanded the list of situations in which the connecting factor used is different.

In contrast to Hague Convention of 1955, Convention, adopted in 1986, in paragraph 3 of Art. 8 also provides for the first time the possibility of application of the law, with which a contract for the International Sale in all the circumstances, for example, the contractual relationship between the parties, has a closer connection with another law.

M.M. Boguslavsky in connection with the inclusion of this exception in Convention as a conflict of principle notes that it "demonstrates the growing influence on the processes of unification of common law countries, primarily the United States" [10].

Innovations of Hague Convention of 1986 as compared to Hague Convention of 1955 are outlined in the Art. 12 limits of action of the law applicable to contracts of international sales, which list is not exhaustive.

Despite the fact that Hague Convention of 1986 progressively unified the rules relating to the regulation of contractual relations in the sphere of international sales, it has not yet entered into legal force, since it requires participation of the five states. One state has ratified the Convention - Argentina. Convention is signed by three states: the Czech Republic, the Netherlands, the Slovak Republic [3].

It is important to note that Kazakhstan is not involved to the Convention of 1986. However, it should be borne in mind that in disputes with domestic legal entities and individual entrepreneurs in the courts of the states participating in the Convention shall apply rules of this Convention.

In summary, after examining all the Hague conventions mentioned in this section, one may note that all these conventions are aimed at unifying collision norms for international trade among the member states. However, unfortunately, these norms are not widely used in international practice except for those established at the Hague Convention of 1955 and the conventions of 1958 and 1986, which are no longer in effect.

Researchers have offered two primary reasons why these international legal acts are not widely used in interstate relations: first, the texts of the conventions (except the Hague Convention of 1978) serve primarily the interests of the countries that follow the principles of "civil law" (Romano-Germanic law) rather than "common law" as well as developing countries, as evidenced, for instance, by the Hague Convention of 1955; second, the conventions do not provide adequate and efficient mechanisms for solving disagreements over laws governing the regulation of certain issues in different countries, notably the Hague Conventions of 1958 and 1978. It should be noted that the Hague Convention of 1958 differentiates the contractual transfer of property in the legislation of each country, and, therefore, real property status could not be determined specifically.

Meanwhile, another reason why the Hague conventions have limited influence over the unification of collision norms is the compromising nature of such unification, i.e. only the connecting factors have been unified, which does not solve the problem of uniform regulation in full.

Moreover, "since the collision norm is, at bottom, a reference, it does not solve a problem but only indentifies a national law to address the correspondent legal relations." Therefore, as A.V. Kukin notes, "international trade relations remain part of national laws, and one could use such collision norms only in line with pre-existing rules of substantive law" [11].

III. Conclusion

Certainly, all these issues described as disadvantages or gaps should be subjects of discussion at the Hague Conference, handled as transparently as possible, and followed up with simplified procedures.

V.P. Zvekov comments that not all Hague conventions are equally popular for all member states, and some conventions have not even been adopted due to insufficient numbers. Nevertheless, the conventions that were not adopted for various reasons should not be discounted; they have affected and continue to affect the development and evolution of national legislation and practices of international private law [5].

At present, the Republic of Kazakhstan is not a member of the Hague Conference, and, notably, it participates in only two accepted conventions in accordance with: 1) the Law of the Republic of Kazakhstan of December, 30, 1999, "On acceding the Republic of Kazakhstan to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents effected at the Hague on 5 October 1961" [8], and 2) the Law of the Republic of Kazakhstan of March 12, 2010, "On ratification of The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption" [12];[13].

Among CIS countries, the Russian Federation became a member of the Hague Conference on International Private Law on December 6, 2001 and has attended six conventions, Belarus has been a member since July 12, 2001 and has participated in eight conventions, and Ukraine has been a member since December 3, 2003 and has participated in ten conventions [3].

Thus, in essence, this study presents an analysis of the general multilateral conventions on international sales of goods in that Kazakhstan is not participating.

Apart from the fact that Kazakhstan should become a party to the conventions discussed above, it should be noted, however, that adherence to them (and their ratification) will not only contribute to the development of national legislation in the sphere of legal regulation of the conflict issues, to bringing its norms and principles in accordance with international standards, but also will involve the country into the unification processes of private legal relations.

As exemplified by Russia, it is also necessary to create in Kazakhstan Information Centre of Hague Conference on Private International Law, which goal will be the promotion of private international law in our country. The experiences of Russia, Belarus, and Ukraine in at the Hague Conferences show that "in order to develop international cooperation and avoid possible collisions in view of a leading role of international contracts on foreign economic, foreign trade and customs issues prior to the accession of the Republic of Kazakhstan to the WTO and taking into account official desire of Kazakhstan to join 50 the most competitive countries of the world" [14].

In light of this, Kazakhstan should reconsider its position on the Hague Conference and become a full member, making effective cooperation with the Organization and its member states the cornerstone of its goals.

This is important for Kazakhstan's strategic national interests as it is being mentioned with increasing frequency regarding its relations with the EU (for instance, the Agreement on Advanced Partnership and Cooperation proposed for the nearest future) and with the international community. The Republic of Kazakhstan badly needs the best practices and opportunities of the Hague Conference in order to become an active and integrative part of the European and world legal framework.

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