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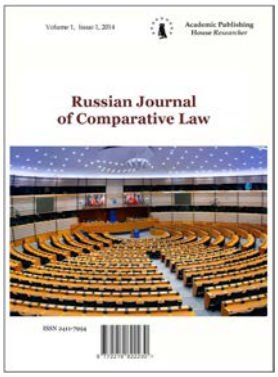

Articles and Statements

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Arbitration and LC Fraud Disputes: a Comparative Approach

Hamed Alavi

Tallinn Law School, Tallinn University of Technology, Tallinn, Estonia
Ehitajate tee 5, Tallinn 19086
Faculty of Law, Universitat Autònoma de Barcelona, Barcelona, Spain
Lecturer, PhD candidate
E-mail: hamed.alavi@ttu.ee

Abstract

Historically, litigation is the method of choice for resolving fraud related disputes in Documentary Letters of Credit (hereinafter - LC). However, it is difficult to meet the standard of proof and obtain injunction and stop bank from paying to fraudulent beneficiary. In late 1990's Blodgett and Meyers proposed for the first time the possibility of referring LC fraud cases to arbitration for the purpose of resolving them by industry experts in shorter period and lower costs in comparison with litigation. Despite the fact that after almost twenty years from Blodgett and Meyer's proposal, arbitration is not a popular method for resolving LC fraud disputes, it can be considered as an open option for resolving fraud disputes by parties to the letter of credit. Current paper, tries to find an answer to the question of why arbitration is not a popular method in resolving LC fraud cases by exploring existence of possibility to handle LC fraud disputes via arbitration and study legal concerns on the way of arbitrating such cases. On this basis, main research questions will be:

(i) whether or not LC fraud cases can be referred to arbitration;

(ii) What can be important aspects of arbitration agreement between parties in LC fraud disputes;

(iii) What types of remedies are available in case of referring cases of LC Fraud to arbitration tribunal;

(iv) Finally, paper will discuss the possibility to resolve LC fraud cases with reference to DOCDEX Rules.

Keywords: International Trade, Arbitration, Documentary Letters of Credit, Fraud, Litigation.

Introduction

Despite the fact that fraud is first recognized exception to the autonomy principle of Documentary Letters of Credit, and fraud rule is recognized in many jurisdictions, still dealing with LC fraud in court has many disadvantages [1; 2]. Among others, defrauded party is dealing with

problems like: different standards of proof and difficulty to obtain injunction, long period and high cost of litigation process [3], challenges for enforcement of interlocutory injunction if account party succeeds in obtaining it from the court and finally, overcoming the court's opinion in undermining the authority of independent principle in smooth operation of documentary letters of credit. In case of LC fraud, difficulty is existence of different contracts. Namely, underlying sales contract between applicant and beneficiary and contract of the Credit from one hand between bank and applicant and from other hand between bank and beneficiary. Although, it is a common practice for parties to sales contract to refer their disputes to ADR (particularly Arbitration), as an intermediary to finance the international transaction, bank has no interest in being involved in arbitration process when disputes arise in the framework of underlying sales contract. Mistrust of banks in resolving disputes via arbitration is attributed by some scholars to their criticism on lack of sufficient knowledge of international national banking practice among arbitrators [4]. Non-involvement of bank in contract of sales between parties has been emphasized in Article 4 of UCP 600:

"Credits v. Contracts

A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defenses by the applicant resulting from its relationships with the issuing bank or the beneficiary." [5]

Therefore, it is not unexpected that banks take distance from any disputes in underlying contract between applicant and beneficiary by providing standard LC application form with emphasize on jurisdiction of particular court in dispute resolution clause. The same applies to the LC contract between issuing bank and beneficiary where litigation is the only form of dispute resolution proposed in standard contract form between parties [6].

Materials and methods

In this paper author presents study on possibility to use arbitration as a method for dispute resolution in LC fraud disputes. On the basis of electronic research in academic legal databases, an extensive comparative study has taken place among existing literature and case law on using arbitration as method for resolving LC fraud disputes in legal practice and possible remedies for affected party by fraud. In the study the author has applied the method of descriptive and comparative analysis and the method of synthesis.

Discussion

Application of above mentioned condition in contract between bank and parties to the Credit makes it difficult for applicant to seek justice via ADR methods instead of dealing with difficulties of litigation when facing with any potential fraudulent conduct of beneficiary. However, in late 1990s, Blodgett and Mayer proposed the arbitration as alternative to litigation in legal cases relevant to LC fraud in international trade [7]. Their proposal in practice consists of two main parts: Firstly, buyer and seller in the underlying sales contract between agree that, method of payment in their transaction will be Documentary Letters of Credit, applicable law to it will be UCP and all relevant disputes will be referred to arbitration [7, P. 462] . The power of arbitrator further would be defined as issuing award, determination of fees for attorneys and relevant damages (consequential and compensatory) in case of beneficiary's approach with a fraudulent and abusive claim for payment [7]. Parties might even agree on inclusion of punitive damages in arbitral award where evidences establish the outrageous conduct of either party under contract of sales [7].

Secondly, as existence of arbitration agreement between the buyer and seller would not prohibit buyer to seek injunction from court in order to stop bank from payment to seller while facing with his abusive and fraudulent demand for payment, an arbitration clause is proposed for being included in LC contract between bank and applicant [7, P. 462-463]. Blodgett and Mayer formulated an arbitration clause in their proposal as following: "account party agrees that it will not seek to prohibit payment under the LC in any event where the bank receives documents conforming to the credit's requirements; account party agrees that any legal claims or equitable actions arising from the seller/beneficiary's fraud ,the problem of quality, lack of quantity, or non-existence of goods will be pursued directly against the seller whether by arbitration and not litigation" [7]. On the basis of above mentioned arbitration clause in the LC contract between bank

and applicant, the right to seek injunction in court against fraud of beneficiary will be self-denied by applicant and instead the matter should be referred to arbitration tribunal. With reference to above mentioned arbitration clauses in underlying contract of sales and LC contract, court will dismiss any application of for granting interlocutory injunction and case will be automatically referred to arbitration tribunal.

In justification in their proposal, Blodgett and Mayer argue that replacement of litigation with arbitration will reduce the cost of LC operation , correct the fallacy of the belief that litigation is the only way to provide remedy for beneficiary's fraud [7], and it does neither need forum establishment nor problems are too specific that arbitrators would not be able to deal with them [7, P. 464].

According to Blodgett and Mayer, while seller enjoys the benefit of being paid under LC after presentation of complying documents, buyer has the advantage of access to arbitration award including consequential and compensatory damages in case of fraudulent demand for payment by beneficiary. Recognition of the New York Convention on Enforcement of Foreign Arbitration Awards in many jurisdictions guarantee the enforcement of award issued by arbitration tribunal.

After almost 20 years from proposing to use arbitration instead of litigation in cases of LC fraud by Blodgett and Mayer, there is no significant turnout towards using arbitration in banking practice in general and in international LC operation in particular let alone its application to cases of LC fraud disputes. As a result, current paper tries to find an answer to the question of why arbitration is not a popular method in resolving LC fraud cases by exploring existence of possibility to handle LC fraud disputes via arbitration and study legal concerns on the way of arbitrating such cases. On this basis, main research questions will be whether or not LC fraud cases can be referred to arbitration? What can be important aspects of arbitration agreement between parties in LC disputes? What types of remedies are available in case of referring cases of LC fraud to arbitration tribunal? Finally, paper will discuss the possibility to resolve LC fraud cases with reference to DOCDEX Rules.

In order to answer above mentioned questions, paper will take a comparative approach and study the subject matter in different jurisdictions.

Current situation of Arbitration as an alternative to litigation in international LC disputes

As it has been mentioned earlier, almost after 20 years from the proposal of Blodgett and Mayer arbitration could not establish itself as an alternative for litigation in LC fraud disputes. Some of the reasons behind such failure can be traced in limits of proposal. First of all, Blodgett and Mayer completely remove the possibility to use litigation from their proposal. As a result, even in case of committing material fraud by beneficiary, it is impossible to seek for injunction order as the fastest available remedy to stop payment process. Second, proposal only takes into account the fraud committed by beneficiary and totally neglects other possible forms of fraud in LC operation. Finally, there is not clarification in scope of fraud in Blodgett and Mayer's proposal as it does not differentiate the fraud in underlying contract from fraud in LC operation which is totally different issues from technical perspective [8].

While discussing the fraud in LC operation, important role of bank as a party to the LC contract should not be neglected and despite the fact that many scholars confirm positive turnout of banks to arbitration within recent years [9] , still it is not possible to consider arbitration as a popular method for solving financial disputes in banking community [10]. Generally, bankers consider arbitrators as not being aware of principles of their business while arbitrators criticise lack of sufficient appreciation towards their practice among bankers [10].

Connerty [11], comments on different reasons for bank's reluctance to use of arbitration in solving LC fraud disputes. Experience of commercial courts in financial centres seems sufficient for resolving fraud related disputes under the Credit contract, therefore, there is no need for application of arbitration in above mentioned cases. Also, by using arbitration for solving the LC fraud disputes, banks will be deprived from access to summary judgement issued by national courts. Other reasons for lack of bank's interest in using arbitration as dispute resolution method in LC fraud cases can be summarized as: Difficulties of enforcing international arbitral award in comparison with enforcement of national court order and possibility to delay the arbitration process by applying to court for determining jurisdiction of arbitrational tribunal and validity of arbitration agreement.

In practice review of statistics from ICC Court of Arbitration Secretariat in 2003 shows that only in 9 cases banks were involved as parties while at the same time no banker was arbitrator in 1135 pending cases before the same court at that moment.[10]

According to James Byrne, arbitration has not been a successful alternative for litigation in LC disputes as it is easier and less time consuming to get the result in court rather than educating arbitrators about principles of international LC operation [12]. Statistical reports of ICC Arbitration Court confirm Byrne opinion by showing that in 1994 only 11.7% of submitted disputes where relevant to banks [13]. Even Blodgett and Mayer admit that arbitration cannot be the best way for resolving all types of LC disputes, but they confirm that it can be used successfully in cases of fraud and nonexistence of goods [7, P. 464].The unsuccessful experience of International Centre for Letter of Credit Arbitration(ICLOCA) in the USA which was established by International Institute of Banking Law and Practice (IIBLP) can be considered as another evidence for failure of arbitration in replacing litigation to resolve relevant disputes to LC transactions. It has been argued that in the Europe most of LC disputes are resolved through litigation and by agreement between parties rather than using arbitration [14].

In contrast many scholars believe that arbitration as a faster and more cost effective dispute resolution method is becoming more and more popular in banking society [15]. With reference to ICC statistics, Henefeld comments on raise of arbitration cases in banking and finance between 2008 to 2010 from 7.2% to 15%. [16]. Some scholars consider use of experienced arbitrators who are familiar with banking world as a reason behind increasing popularity of arbitration in banking and finance sector in recent years [15, P. 266].

Possibility to resolve fraud disputes by arbitration

Arbitrability is the notion which defines possibility to deal with dispute through arbitration[17]. It can be defined as legal restriction on jurisdiction of arbitral tribunal and validity of arbitration agreement [17].

American law has recognized the jurisdiction of arbitral tribunals which handle fraud cases [18].

In English Law, “matters which are (not) capable of settlement by arbitrators” is the term used in practice more than arbitrabiltiy [17, P. 282]. Arbitrabliity is determined by common law in England as Arbitration Act of 1996 in England and Wales has not determined arbitrability clearly [8, P. 176]. Section 81 (1) of the arbitration act refers determination of arbitrability to “any rule of law” where law is common law. According to Rutherfeld and Sims, arbitrability is defined in a very broad term under English law and it is difficult to find a dispute which does not qualify for settlement by arbitration [19] .However, English Law does not recognize the jurisdiction of arbitral tribunal in case of disputes that “affect public at large” (possible negative effect on public policy) and particular types of illegal contracts [20]. In case of *Lornrho* where the claim was made on the basis of breaching the contract and also on tort (negligence and conspiracy) the court decided that tortuous claim should be referred to arbitration due to connection with contractual claim and existence of arbitration agreement [21; 22]. Some scholars also comment on possibility in English Law to refer fraud cases in LC operation to arbitration tribunal in the same vein as litigations in national courts [8].

So far, ICC Court of International Arbitration has dealt only with one LC fraud case [23]. In *Bank (Thailand) v. Bank (Spain),* defendant bank (Spanish bank) issued a letter of credit upon request of a Spanish importer in favour of Thai Exporter . The credit was confirmed by a Thai bank and first payment was executed by issuing bank. However, second payment was rejected as result of beneficiary's fraud and presentation of forged document. On the basis of UCP (1974 version) the award established that defendant bank was not obliged to honour the fraudulent presentation by beneficiary [23].

The concept of arbitrability of LC fraud has been supported by different arbitration scholars including Georges Affiki [8, P. 177] . He argues that arbitration can offer advantage of expertise and rapidity more than adjudication; however, suitable mechanism for dispute resolution should be defined on the case to case basis. Therefore, it is possible to conclude that despite the fact that arbitrability is not a clearly defined notion, there is an agreement on possibility to refer LC fraud disputes to arbitral tribunal.

Arbitration Agreement in LC Fraud Disputes

Agreement of parties to solve their disputes in arbitration will result in their rejection of chance to solve same disputes by litigation. Therefore, the main outcome of including arbitration agreement in the contract is withdrawal from the right to decide about disputes in court while having the right to solve existing disputes in a private process [24]. Within the arbitration agreement, parties consent on procedural rules, language, location, governing law and arbitrators in the format of a clause included in the contract of sales.

Many legal systems recognize the principle of Separability of arbitration clause. As a result, arbitration clause might stay valid even when main contract is recognized as void or null [25]. According to the principle of Separability, allegations regarding termination of contract of sales based on its nullity will not remove jurisdiction from arbitrators as validity of arbitration clause solely depends on relevant factors to itself , including genuine submission of arbitration request, capability of parties to agreement as well as formality and content of agreement. Since fraud can affect the validity of the contract, it is necessary to distinguish between situations in which whole contract is affected by fraud and when arbitration agreement is not affected [22]. It has been argued that main incentive of fraudulent party is to benefit from conducting fraud in the underlying contract and as result, in case of implementing the separability principle and taking the matter to arbitration even after nullification of main contract; it will be possible that award to be against fraudster and in favour of affected party. The Separability principle has been recognized globally and by most arbitration laws [26].

For example, under English Arbitration Act 1996, section 7 confirms that invalidity of another agreement will not result in non-existence, invalidity, or ineffectiveness of arbitration agreement since it should be considered as a different agreement. The English court in *Harbor Assurance (UK) Ltd v. Kansa General International Insurance* [27] ordered on separation of arbitration agreement included in the contract from the contract itself. Also the decision of the Court of Appeal and House of Lords in case of *Premium Nafta Products Limited & Others v. Fili Shipping Co & Others* [28] which confirmed separabiltiy of arbitration clause from validity of main contract has received a warm welcome in business society. In this regard, it has been argued that the decision of House of Lords in *Premium Nafta Products Limited & Others v. Fili Shipping Co & Others* limits access of parties to court when they have already agreed to proceed their dispute resolution via arbitration [8].

There is an argument among scholars regarding application of arbitration agreement in underlying sales contract to the cases of fraud in Documentary Letters of Credit [29]. According to the principle of autonomy of Documentary Letters of Credit emphasized in article 4 of UCP 600, banks deal with documents not goods and performance of parties in underlying sales contract will not affect their guarantee of payment under LC [30]. Therefore it is possible to conclude that including arbitration clause in underlying sales contract may not affect the fraud disputes in Documentary Letters of Credit as first of all, the international contract of sales has been signed between importer(buyer) and exporter (seller). But, parties to LC contract are not the same. In Documentary Letters of Credit different contracts exist and parties to them are not the same. For example, contracts in LC operation include: contract between applicant and issuing bank, contract between issuing bank and beneficiary, contract between beneficiary and nominated or confirming bank and finally, contract between nominated or confirming bank and issuing bank where each contract is only binding to its parties. Therefore, banks which are not party to underlying sales contract cannot be affected by its contents.

Secondly, as a sign of mutual assent, agreement on resolving disputes via arbitration should be mentioned freely by involved parties in the contract [24]. As a result, in many national and international laws including section 5 of English Arbitration Act 1996 and article II of New York Convention, it is mandatory for arbitration agreement to be in written format in order to prove agreement of parities [31]. For signatory countries of New Convention, in case of conflict between national law and its content of convention, it has been argued that New York Convention is prevailed over national law [29].

It is possible to conclude that possibility to settle fraud disputes in Documentary Letters of Credit by arbitration depends on involved parties to the dispute , existence of arbitration agreement among those parties and nature of claim (whether it is against parties in underlying contract or parties in LC contract).

Applicable Law and Fraud Disputes in Documentary Letters of Credit

There is no doubt about importance of applicable law in the contracts of sales under which parties agree to refer their disputes to arbitration [32]. While dealing with contractual problems and disputes, contract law is the most important reference. However, fraud is not a fully discovered area either under national contract laws or international frameworks for regulation of international sales contracts. With reference to English Law, fraud is covered under contract law as misrepresentation where misrepresentation of one party will entitle the other one to step out of her liabilities under the contract [33].In addition to the right to claim for damages. Relevant regulations of damages are mostly tort law; however, in English law it is possible to face with liability under tort law and contract law at the same time. English law does not provide clear view on liabilities and rights of affected party when other party commits fraud in the framework of contract.

The United Nations Convention on Contracts for The International Sales of Goods (CISG) is frequently chosen as the applicable law where the arbitration is the preferred method of dispute settlement by parties [29]. Despite the fact that CISG does not provide any direct reference to fraud in international sales contracts, it neither imposes any restrictions on rights and liabilities defined by national law to contract parties affected by fraud. Article 4 of CISG provides excluded issues from the scope of convention. Therefore, by regulating issues resulting from contract, article 4 of CISG in fact safeguards protection of national law for affected party of fraud in an international sales contract [34].

As it was mentioned earlier, CISG does not provide any direct guidance for cases involving fraud, however, problem of fraud has not been totally excluded from the Convention. According to article 74 of the CISG, it is possible to consider the fraudulent conduct as breach of contract and conducting fraudulent conduct by one party provides other party with eligibility to benefit from damages for breach of contract [35].

Remedies for fraud in arbitration proceeding

In the arbitration process, interim measures are those remedies which are granted before announcement of final award [24]. Power of arbitration tribunals to award interim measure was limited for many years, or not recognized in many jurisdictions as it was considered to be granted only under court's discretion [36].After coming into force of the UNCITRAL Model Law on International Commercial Arbitration, granting interim measures are included among powers which signatory countries provided for arbitral tribunals [37]. It also worth of discussion that the term "interim measure" has not been reached a harmonized interpretation and still different jurisdictions provide different guidelines about how, where and when to use them [38]. Despite the fact that jurisdiction of arbitration tribunals to grant interim measures has received global consent, there is no global agreement on whether or not to include interlocutory injunction or freezing order among such measures [17]. Granting *ex parte* order without notice of beneficiary in case of emergency is another necessary issue which is facing with silence of different national and international arbitration regulations [26]. Another important issue in this regard is the difference between granting interim measures against parties to the arbitration agreement or against third parties as arbitration agreement can limit the power of arbitrator to issue awards only against parties to the agreement [22].

In this section, paper studies English, American and German approaches to interim measures in arbitration in general and in case of fraud.

England

In England, Arbitration is regulated under Arbitration Act 1996, the New York Convention, the Geneva Convention 1927, the Administration and Justice Act 1920, the Foreign Judgement Acts 1933 and Common Law [39]. On the basis of Arbitration Act 1996 , according to agreement between parties, the arbitrators are entitled to power of ordering security for costs, inspect property, preserve property and preserve all evidences [40]. Therefore, Arbitration Act 1996 entitles the arbitrators to use freezing orders and interlocutory injunctions as interim measure upon express agreement of parties.

In the case of *Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA* [41] with reference to section 44 in the Arbitration Act 1996, English court supported the New York ICC Arbitration award between Petroleos de Venezuela SA and Mobil Cerro Negro Ltd by granting a freezing order which clearly shows the power of English Courts to support foreign arbitration awards. However,

supportive attitude of English courts towards enforcement of foreign arbitration awards does not mean that they will use their power in awarding interim measures as they preferably refer the case to arbitration tribunal when parities have inserted an arbitration agreement in their contract and included such measures into the arbitration agreement [18]. For Example in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [42]"the HL decided that it had jurisdiction, but refused to issue the injunction order because of the potential conflict between the court's tentative assessment of the merits of a case and respect for the choice of arbitral tribunal by the parties" [8].

The United States of America

Federal Arbitration Act of 1925 and Uniform Arbitration Act of 1955 are two federal statues for regulating arbitration [43]. According to Huela, in ratification FAA and UAA at federal level, Congress was following goals of overcoming traditional hesitance of U.S. Courts in accepting arbitration as recognized form of dispute resolution and making sure that U.S. States will enact mandating statues relevant to arbitration agreement's enforcement [44]. The USA is member of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, European Convention on International Commercial Arbitration of 1961 and Inter American Convention on International Commercial Arbitration (Panama Convention of 1975) are other international treaties on arbitration applicable in the United States of America. Despite the fact that membership in Panama Convention seems a logical act due to high level of trade between the USA and other counties in American Continent, the United States joined the European Convention on International Commercial Arbitration (1961) due to its supplementary role to the New York Convention (1958) and convention's provision which was providing State to be a party to arbitration agreement [45; 46]. At the Federal level, it has been argued that American Congress enacted the FAA in order to convince American courts about legitimacy of arbitration as an alternative method for dispute resolution and overcome reluctance of US in enacting statues on enforcement of arbitration agreements [43].

Although, the FAA and UAA are both silent regarding capability of arbitration tribunal to award interim measures; it has been held by US Courts that arbitrators have power to grant such measures as long as it is not contradictory with content of arbitration agreement between parties [47].

In case of *Pacific Reins. Mgmt Corp vs Ohio Reins Corp* [48], the Ninth Circuited argued: "temporary equitable relief in arbitral proceedings can be indispensable to preserve assets or enforce performance which if not preserved or enforced may render the final award meaningless" [48]. In accordance with pivotal rule of FAA on enforceability of arbitration agreements .there is no American authority which shows that according to FAA, arbitration tribunal cannot grant interim measures despite express agreement of parties [47]. However, only few courts referred to FAA on lack of arbitration tribunal's authority to award interim measures where parties have not clearly such capability to it by parties to arbitration agreement [47]. For example, low court of *Swift Indus.Inc. v. Botany Indus,Inc* [49] held that : "having reviewed the agreement in the light of its language, its context and the parties' apparent intent , and in terms of the question of the arbitrator's authority to fashion relief we conclude that the arbitrator's award of a six million USD cash surety bond does not draw its essence therefrom and that it is in manifest disregard thereof and must be set aside" [49]. As a source of arbitration tribunal's power to grant interim measures, arbitration agreement in the contract complies with applicable rules chosen for arbitration agreement like, *lex loci arbiri*, rules of international institutions for arbitration and law of the seat of arbitration [50].

In the United States, FAA, State Law and the New York Convection govern the enforcement of interim measures granted by arbitrators [51]. According to FAA and the New York Convention interim measures only have an interim function and as a result of tendency to exclude them from final awards [52], it is impossible to enforce them by court. However, with reference to section 9 [53] and 10 of FAA, US case law confirms the view that interim measures are final awards and enforceable in majority of claims [52; 53; 54; 55]. In the case *of Yasuda Fire & Marine Insurance v. Continental Casualty*, an interim measure granted by arbitration tribunal in order to oblige defendant to open an interim letter of credit in response to release request by the plaintiff, court had to decide on the basis of sections 9 and 10 of the FAA whether the granted relief was an award or not. With reference to decision of Pacific *Reinsurance v. Ohio Reinsurance* where interim arbitral order to deposit money under dispute in an escrow account as final, the court held [56; 57]:

"The arbitration panel in this case ordered Yasuda to post an interim letter of credit to protect a possible final award in favour of CAN. [...] Because this relief protects CAN's interests, CAN has the right to confirm the order in the district court, which it has done. Analogously, Yasuda should have the right to attack this relief. The interim relief represents a temporary equitable order [...] calculated to preserve assets [...] needed to make a potential final award more meaningful. [...] We find that an interim letter of credit constitutes an 'award' under section 10 and that the district court had jurisdiction to consider Yasuda's Petition to Vacate".[56]

Germany

The Tenth Book of Code of the Civil Procedure also known as ZPO (*Zivilprozessordnung)* contains the German Arbitration Law. The new German Arbitration Law which is based on 1985 UNCITRAL Model Law in International Arbitration came into force on 1 January 1998 [44]. Also in 1992 Germany recognized institutional framework for national and international arbitration by gathering all existing arbitration institutions under the umbrella of German Institute of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*) [58].

Enacting the new law of Arbitration in Germany was an end to the dispute regarding power of arbitration tribunal in granting interim measures [59]. On the basis of the article 17 of UNCITRAL Model Law, Section 1041 (1) of ZPO provides arbitrational tribunal with power to grant interim measure [18]. Arbitration tribunal has the power to evaluate which measure is suitable and necessary for each particular case and there is no limit on its power to grant different types of interim measure [60]. In contrary, court can grant interim measures which meet the prerequisites defined in law [61].

Article 1041 (2) provides power for arbitration tribunal to grant interim measures that do not fit the enforcement system in Germany, as according to the provision, court might redesign the measure granted by arbitrators in order to meet necessities for enforcement [61]. This will gain importance where arbitration tribunal grants interim measures that are not ordered in Germany like granting worldwide freezing order similar to English law [61].

Under ZPO, s.1042(2) provides that court has the power to enforce the interim measure granted by arbitrators except for cases that application for similar interim measures has been already done to the court on the basis of s.1033 of same law [62]. It should be notices that German courts only order protection of interim measures which are provided under German law [63]. Section 1062(1) comments on the Court of Appeal to be the competent court for enforcement of measures granted by arbitrational tribunal. However, where party fails to refer the matter to specific court, the District Court of the seat of arbitration has power to enforce interim measures granted by tribunal.

In conclusion, it is possible for arbitrational tribunals in different countries to grant interim measures against cases of fraud. However, having such power depends on inclusion of granting it to the tribunal in arbitration agreement by parties and also providing such possibility to arbitrators by national law of the country in which the arbitration is taking place as well as the country in which interim measure is going to be enforced.

Arbitration Tribunals and Punitive Damages

It has been globally accepted that powers of arbitrational tribunals are not similar to powers of the court as for example arbitrators cannot convict someone to prison or impose fine. Such penalties are generally governed under national law and executed by judges.

In practice, principle of equivalence is governing damages and compensations in the field of civil law and full compensation in tort and contract law establishes that victim must receive such compensation as if harm has never been done. Complementary to this idea is notion of liquidated damages and contractual penalties in cases of anticipatory breach of contract recognized by CISG [64]. However, their enforceability depends on national law [65]. Full or fair compensatory damages seem to be insufficient in international trade and more damages might be required by victim for example in cases of fraud, violence, malice and oppression [66; 67]. Such punitive damages do not follow the goal of compensating victims, but to punish the wrongdoer and prevent such faulty actions in future [68].

According to the proposal of Blodgett and Mayer it is possible to provide arbitrational tribunal (in the frame work of arbitration agreement) with the power to award punitive damages in particular situations. However, area of punitive damages is a debated train as national laws show diversified attitudes towards it.

Since fight against corruption and fraud has become a global phenomenon [69], it is possible that arbitrators respond to such behaviours with awarding punitive damages. On one hand, it is argued that awarding punitive damages by arbitrators will be against the principle of fairness as a result of limited review on arbitral procedure and awards [67]. On the other hand, it is not possible to neglect challenges imposed by applicable law of the seat of arbitration on the awards. Under the English law, authorities are against enforcement of punitive damages and generally, English courts do not enforce the penal law [70; 71]. Although, English law does not consider the enforcement of punitive damages in contradiction with public policy, case law has strong influence on enforcement process [72].

Historically, in the United States of America existence of punitive damages goes back to the case law in England. However, they have more recognition than English law particularly in cases of fraud and extreme civil offences and, it is still valid argument whether or not arbitration tribunal has power to award punitive damages [66; 73]. However, on the basis of Supreme Court's ruling, under the regulation of state law, parties may agree to grant arbitrators with power to award punitive damages [74].

In Civil Law Countries like Germany, punitive damages as legal concept are not popular. German legal system does not recognize punitive damages since they are understood as undue enrichment in favour of victim. Therefore, do not conform to doctrine of proportionality between damage and compensation [66]. German Courts reject enforcement of punitive damages as being against the public policy [66].

As a result, it is possible to conclude that arbitrators should consider different issues while making decision on awarding punitive damages, First of all , such power should be attributed to the arbitrator by parties to the arbitration agreement. Secondly, arbitrators should act upon authority available by applicable law of the dispute. Thirdly, law of the country in which arbitration is taking place should be considered as award is granted in accordance with national law and public policy of the country of the seat of arbitration [67]. Finally, arbitrators should consider the enforceability of the award [73]. Therefore, only having the power to grant punitive damages in not sufficient for awarding them. Arbitrators should carefully observe all relevant aspects of the award before granting it.

DOCDEX Rules and LC Fraud Disputes

In 1997, International Chamber of Commerce introduced Documentary Instruments Dispute Resolution Expertise (DOCDEX) in order to resolve LC disputes with the help of an expert based panel [74]. DOCDEX was revised in 2002 in order to include disputes over demand guarantees and documentary collection in addition to LCs. The main idea behind introduction of DOCDEX was using an independent, prompt expert decision panel to resolve disputes based on content of ICC Rules and financial instrument's contract [75]. DOCDEX process can start by request of one party to the dispute or all involved parties. On the basis of documents submitted by parties, panel of three experts will make decision which should be reviewed by the Technical Advisor of the ICC Banking Commission. DOCDEX decision is non-binding in principle, and unlike arbitration awards, it will not receive any legal follow up regarding enforcement. It is also argued that DOCDEX rules are meant more for resolving disputes on documentary discrepancies in international operation of LCs [11]. Additionally, according to Article 1.1 of DOCDEX, relevant disputes to these rules are connected to ICC regulations. As result, it is questionable whether or not DOCDEX process may resolve LC fraud disputes where UCP 600 takes the silent potion regarding LC fraud and leaves them to be governed by national laws. Other issue which raises doubts about applicability of DOCDEX rules in fraud related disputes of LCs is their procedure and decision making process. It is possible to initiate DOCDEX procedure even by one party in the dispute and without participation of the other party proceedings might continue. Therefore, it is not necessary for parties to agree upon insertion of DOCDEX rules in their contract. Another concerning issue is non-binding nature of DOCDEX decisions where a binding award is necessary in LC fraud disputes as it is unlikely to solve them on the basis of voluntary decisions.

Therefore, it is possible to conclude that DOCDEX rules are more suitable for discrepancy problems and other technical issues in international LC operation and do not provide strong basis for resolving LC fraud disputes.

Results

From technical perspective it is possible and desirable to reduce time and cost of dispute resolution process in LC fraud cases by referring them to arbitration rather than traditional litigation. The trend of considering arbitration for resolving LC fraud disputes started in late 1990s with works of Blodgett and Meyers and received support by that time from different legal scholars and institutions. Despite the fact that parties to LC fraud dispute can benefit from numerus benefits of arbitration, its use in such cases is limited and rare. There are severe problems on the way of replacing traditional approach of resolving such cases via litigation with more flexible dispute resolution methods like arbitration. As a result of conducting research in available legal literature, current paper considers reasons behind unpopularity of using arbitration as a dispute resolution method in LC fraud cases as following: Establishing the jurisdiction of arbitration tribunal for to issue an award in LC fraud disputes, hesitation of banks lack of interest among them in using arbitration as a dispute resolution method, lack of harmonized regulation regarding LC fraud disputes at international level, difficulties on the way to enforcement of international arbitration award and problems to issue punitive damages in arbitration process of LC fraud disputes . Therefore, with emphasize on complicated process of International LC transaction and existing complexities in LC fraud disputes, further research is recommended in order to clarify unclear and vague areas of using arbitration in LC fraud disputes and prepare the ground for more harmonized legal approach to the subject matter at international level.

Conclusion

Current paper tried to review possibility for using arbitration as an alternative method rather than litigation in resolving LC fraud disputes in the field of comparative law. From theoretical perspective and with reference to Blodgett and Mayer, in LC fraud disputes, arbitration can be a faster and more cost effective method than going to court. However, due to complex nature of fraud in operation of documentary letters of credit, referring to arbitration in order to resolve such problems is not easy in practice. By taking a comparative approach among different national laws, it became clear that first challenge for using arbitration in LC fraud disputes is jurisdiction of arbitral tribunal to grant an award in such cases.

Other important challenge is existence of arbitration agreement between parties. Problem will rise when bank is party to LC fraud dispute and since there is no place for arbitration in standard LC contract between banks, beneficiary applicant; banks prefer litigation process rather than arbitration and arbitration agreement does not have any place in standard LC contracts between bank with either applicant or beneficiary.

Other existing challenges for resolving LC fraud disputes by arbitration can be listed as: silence of UCP regarding fraud problem in LC operation, different approaches of national legal systems available remedies for victim which was explored from the perspective of interim measures and punitive damages as well as enforcement problem of arbitral awards in international arena. Therefore, scholars cannot agree on possibility for resolving LC fraud disputes by arbitration better than litigation. However, further research on using other alternative dispute resolution mechanisms instead of litigation in LC fraud cases is highly recommended.

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Арбитраж и споры по делам о мошенничестве с документарными аккредитивами: сравнительный подход

Хамед Алави

Tallinn Law School, Таллиннский технический университет, Таллин, Эстония
Ehitajate Tee 5, 19086, Таллин, Эстония
Юридический факультет, Университет Барселоны, Испания
к.ю.н., преподаватель
E-mail: hamed.alavi@ttu.ee

Аннотация. Исторически сложилось, что судебный процесс является одним из способов решения споров по мошенничествам в отношении документарных аккредитивов. Тем не менее, трудно встретить стандарт доказывания и получить судебный запрет и остановить банк от уплаты получателю-мошеннику. В конце 1990-х годов Blodgett и Мейерс впервые предложили обращаться по "аккредитиыным" мошенничествам в арбитраж. Цель – решение спора экспертами в более короткие сроки и снижение затрат по сравнению ссудебным разбирательством. Несмотря на это, арбитраж пока не является популярным методом для разрешения споров по случаям мошенничества с аккредитивами. Автор пытается ответить на вопрос "почему"? Основные проблемы, освещаемые в статье: 1) можно ли и когда передавать в арбитраж мошенничества в отношении аккредитивов; 2) каковы существенные условия арбитражного соглашения по такого рода спорам; 3) какие типы средств доступны в случае рассмотрения таких споров в арбитраже; 4) может ли арбитраж применять Правила DOCDEX?

Ключевые слова: международная торговля, арбитраж, документарные аккредитивы, мошенничество.

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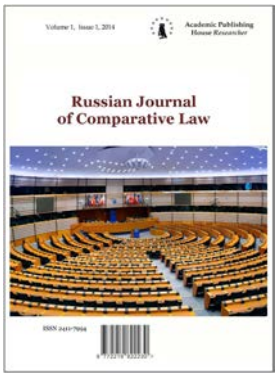

UDC 343

The Development of Legal Rights in the American Legal System

Roberto Rosas

St. Mary's University School of Law, San Antonio, Texas, USA
One Camino Santa Maria, San Antonio, Texas 78249
Doctor of juridical science, professor
Email: rrosas@stmarytx.edu

Abstract

This article takes a snapshot of some of the most controversial topics in American society today and the juridical response to these topics by individual states, the United States Congress, and the United States Supreme Court. Although there are numerous legal topics that deserve mention and analysis, this article is limited to the discussion of nine fairly new rights created by state and federal laws. The rights discussed in this article include the following: 1) The right to open carry a firearm; 2) The right to consume marijuana; 3) The right to marry or to civil unions between same-sex couples; 4) The right to sexual offender residential information; 5) The right to the protection of victims of human trafficking; 6) The right to the protection of the environment; 7) The right to privacy in relation to unsolicited telemarketing telephones calls; 8) The right to determining what medical treatment to receive and the right to organ donation; and 9) The right to euthanasia or death with dignity. This article briefly addresses the topics of sexual and racial discrimination. Finally, the most far-reaching decisions handed down by the United States Supreme Court between 2013 and the present are discussed.

Keywords: firearm, marijuana, civil union, same-sex marriage, sexual offender registry, human trafficking, environmental protection, unsolicited telemarketing telephone calls, organ donation, medical treatment, euthanasia, death with dignity, sexual discrimination, racial discrimination.

Introduction

Currently, the United States recognizes an extensive variety of individual rights. Although many are already recognized, the government can consider it necessary to create additional rights to conform to society's evolving characteristics and to protect their citizens. Although new rights are usually derived from previously established rights they still allow society to continue making progress.

There are two general categories of rights that are recognized in the United States: natural and non-natural rights. Under the category of natural rights there is a right to life, a right to liberty and a right to property; from these three rights many other recognized rights are derived. For example, the right against deprivation of one's life and the right against suffering abuse and injury are derived from the right to life. From the right of liberty are derived such rights as the right

to free expression and the right to bear arms. The right to reside in a decent home is derived from the right to property [1].

Non-natural rights are divided into two general categories: rights of the person and citizenship rights. Non-natural rights of the person include the right to contract and the right to due process of the laws for those individuals who are subjected to criminal prosecution. Among other rights non-natural citizenship rights include the right to vote and to be elected, and the right to the enforcement of these rights [1].

In addition, universal rights exist that are recognized internationally and have been adopted by the United Nations (UN) in several treaties, conventions and declarations [2]. The United Nations was the first to recognize the necessity of establishing and protecting certain human rights at a global level. The Universal Declaration of Human Rights approved by the UN is based on the recognition of four principal rights. The first is the right to freedom of speech and expression throughout the world. The second addresses religious freedom. The third is the right to obtain economic security for one's development and well-being. The fourth is the right to be free from fear or apprehension. This article will address the fairly new legal rights that have been recognized in the past years.

Materials and methods

The principal sources for this article writing are as follows:

(1) the most important treaties that define the fundamentals of international law from *The Universal Declaration of Human Rights approved by the United Nations*. These universal rights exist in that they are recognized internationally and have been adopted by member states of the United Nations in several treaties, conventions, and declarations;

(2) national laws of many states and judgments of national courts were taken from the Supreme Court of the United States (SCOTUS) blog. Those rights give insight to some of the most controversial topics in American society today and the judicial response to these topics by individual states;

(3) the process of researching general scientific methods of cognition as well as private law methods were used following the Bluebook method.

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The right to open carry a firearm

Over the past recent years, gun control has been a controversial topic that has rocked the United State's core. With mass shootings on the rise, there is a national drive to reduce gun violence [3]. The Second Amendment of the Constitution, which allows the right to bear arms, is an important issue at the moment. Gun activists and gun control groups have been consistently lobbying to Congress to create legislation in their favor [4].

There are two different ways in which citizens can carry firearms in the United States: open carry and concealed carry. In the United States, there is no federal law that establishes the issuance of concealed or open-carry permits; such laws are left to the states. All states permit the carrying of firearms, but each state differs on whether they allow open carry or concealed carry. “Open carry” means that the firearm can be seen by observers. “Concealed carry” means that the firearm is holstered and hidden from other’s view [3].

In the past, concealed carry had been the default law amongst most states. There are three categories into which state concealed carry laws can be divided: (1) “may issue,” which means that the permit to conceal carry will be issued on a case by case basis, with no specific requirements to fulfill, (2) “shall issue”, means that once the requirements have been satisfied, the permit shall be given, and (3) “unrestricted,” which means there is no permit required [3]. For unrestricted states, there are state laws stating where it is and is not allowed to enter with a concealed gun [3].

In recent years, the practice of open carry has seen a substantial increase in the United States. As of today, there is no federal law that restricts or allows the open carrying of handguns in public [5]. The term “open carry” refers to the law that allows concealed handgun license holders to display a holstered handgun in plain sight as they go about their daily activities. Open carry laws differ widely from state to state. As of 2015, twenty-seven states permit open carry without requiring the citizen to apply for any permit or license, fifteen states permit open carry with restrictions, and eight states prohibit open carry [6]. Some justifications for states allowing the

open carrying of handguns are: (1) open carry is a visible deterrent to crime and (2) open carry provides quicker access than concealed carry does [7].

One main issue that open carry laws have to face is whether the right to openly carry a firearm increases or deters crime. The states that do allow open carry reason that their states are now safer because thieves are less likely to engage in criminal activity against a person who is armed. Researcher Gary Kleck found that 92 percent of criminal attacks are deterred when a gun is merely shown [7]. However, being able to claim that one policy is the sole responsible for a change in crime trends is daring. Compiling the crime rate of a state is dependent on many factors, including environmental and socio-economic factors [7]. According to the Uniform Crime Reporting figures of 2012 compiled by the U.S. Department of Justice, the statistics show that laws that allow open carry of firearms make states safer, or at least, don't make them more dangerous [8]. State Representative Matt Gaetz of Florida presented this statistic during his sponsorship of a bill that would allow open carry of firearms in the state of Florida. Clearly, there are many more factors to this statistic [8]. A problem with such a simplistic approach is that it is assumed that the groups of states are identical, which they are not. As of right now, it is unclear whether allowing citizens to openly carry their firearms is an actual deterrent of crime rates [8].

Although contrary to popular beliefs, open carry has never been ruled as an explicit right under the Second Amendment of the U.S. Constitution by any court. In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court of the United States held in a 5-4 decision that the Constitution's Second Amendment applies to an individual's right to possess firearms for traditional lawful purposes [9]. The Supreme Court ruled that an individual's right to own a gun for personal use is protected under the Second Amendment. Justice Antonin Scalia wrote about the elements of the Second Amendment, "We find that they guarantee the individual right to carry weapons in case of confrontation" [9]. Scalia continued, "Like most rights, the Second Amendment is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose" [9]. The ability to open carry does not derive from our Second Amendment, but rather from the constitutions and statutes of the states.

Effective January 1, 2016, the State of Texas became the newest state to pass a law regarding the open carry of handguns. All the more surprising was that Texas was the first state to ban its citizens from carrying handguns, a restriction that lasted for more than 125 years [10]. Now, twenty years after the Legislature approved the carrying of concealed handguns, lawmakers now have legalized the openly carrying of holstered weapons. However, the law will still ban the usage of handguns in certain public places including churches, hospitals, correctional facilities, and certain premises where alcohol is served or sold. Business owners are offered the opportunity to ban customers from openly carrying the handguns by posting signs in their stores' entrances. Potentially ignoring the signs risks violating trespassing laws and incur penalties and fines.

Since open carry has become more frequent, corporations have been the first to respond to these laws by asking their customers not to bring firearms into their stores. Major retailers such as Whole Foods, H-E-B, and Whataburger, whose principal place of business is located in Texas, have given similar views regarding open carry within their premises. Whole Foods spokesperson Michal Silverman said, "We have opted not to allow firearms on the premises except for store security." An H-E-B spokesperson said, "We have always asked our customers to conceal their weapons." Whataburger said, "Customers tell us they are uncomfortable." Most of these businesses expressed that they have updated their signage outside their stores to disallow weapons on premises. Some national retailers including Target, Starbucks, and Chipotle, have asked gun owners to not bring their weapons to their businesses [11]. These types of measurements have put retailers in a fine line position. Gun-right activists have started to boycott retailers that prohibit open carry, arguing a violation of their rights to bear arms. On the other side, gun control advocates argue that stores that allow customers to bear arms make them feel unsafe while shopping. Stuck in the middle of a gun war, retailers fear the risk of losing business to either side [12].

The right to consume marijuana

Under the Controlled Substances Act of the United States of America, marijuana is a schedule I drug, and its use is illegal. Marijuana "has a potential for abuse... has no currently accepted medical use in treatment in the United States [and] there is a lack of accepted safety for use of the drug or other substance under medical supervision" [13]. It is a federal offense to use marijuana. However, since 1996, twenty-three states and Washington D.C. have allowed the use of marijuana

in some form [14]. Most of these states allow the use of marijuana for medical purposes. The Institute of Medicine, in agreement with these state laws, issued a report stating that medical marijuana has a "potential therapeutic value... primarily, for pain relief, control of nausea and vomiting, and appetite stimulation" [15]. Further scientific data shows that marijuana "is effective in relieving some of the symptoms of HIV/AIDS, cancer, glaucoma, and multiple sclerosis" [15]. A number of states have reduced the penalty for possession of small amounts of marijuana. Other states allow the recreational use of the drug, with legal quantities varying from state to state.

With its use being illegal federally but not statewide, the Obama administration encouraged the federal prosecutors to not prosecute people who used marijuana for medical purposes legally in the states that allow such use [15]. In 2014, the United States House of Representatives passed a bill prohibiting the DEA, the lead agency for domestic enforcement of federal law drugs, from arresting medical marijuana patients in states where it is legal to use marijuana for treatments [16]. Since at the federal level the use of marijuana is illegal, both non-users and users of the drug are confused as to what is lawful. States, such as Virginia, have allowed doctors to prescribe individuals marijuana since decades ago. However, because there is a federal law that prohibits doctors from prescribing marijuana, these state laws are held to be invalid. Doctors in these states can only write a recommendation to use marijuana, but cannot prescribe it to a patient [17].

Today, statistics show that a majority of Americans support the legalization of the recreational use of marijuana [18]. Currently, the legal purchase of recreational marijuana is allowed in four states – Alaska, Colorado, Oregon, and Washington, as well as in the District of Columbia. Many other states are in the midst of deciding whether to legalize the drug. There are many arguments both against and for the legalization and decriminalization of marijuana. Most of the arguments made against are moral, emphasizing that it is after all a drug. On the other side, supporters argue about "a potential tax revenue, job creation, and reduction of the burden of offenders on state prison systems" [19]. Allen St. Pierre, executive director at the National Organization for the Reform of Marijuana Laws, argues that "legalizing marijuana would generate revenue where we now hemorrhage out billions and billions of dollars" [19].

On December 2015, the federal government asked the United States Supreme Court to avoid taking a case brought against Colorado's legalized marijuana laws by Nebraska and Oklahoma [20]. Nebraska and Oklahoma claim that Colorado's legalization laws has negatively impacted them since "modern-day bootleggers" are crossing over to Colorado buying "pot" legally and illegally crossing state lines [20]. Oklahoma and Nebraska have sued Colorado with the hope of making the state's legal marijuana system illegal. In prior cases, the Supreme Court has always tried to avoid getting in between state disputes. At the federal level, marijuana remains illegal. Unlike in Colorado, where citizens are allowed to grow, posses, and consume marijuana, but cannot leave the state with it. The Supreme Court has not responded on whether it will take the case [20].

The right to marry or civil unions between same-sex couples

January 2016, thirty-five states in the nation allowed civil unions between same-sex couples. In addition, the District of Columbia also allows same-sex marriage. These thirty-five states have allowed same-sex marriage by court decision, by state legislature or by popular votes [21]. California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico, Oregon and Pennsylvania have all allowed same sex marriage through court decision. Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island and Vermont have allowed same-sex marriage through state legislature. Maine, Maryland and Washington have allowed same-sex marriage through popular vote.

In 1997, the state of Vermont was sued by a number of homosexual and lesbian couples to obtain marriage licenses and have their relationships legally recognized [22]. The plaintiffs were three same-sex couples who had lived together in committed relationships for periods of four to twenty-five years [22]. Two of the couples had raised children together [22]. Each couple applied for a marriage license from their respective town clerk, and each was refused a license as ineligible under the applicable state marriage laws [22]. The Supreme Court of Vermont addressed the issue of whether the State of Vermont may exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples [22]? The Common Benefits Clause of the Vermont Constitution reads, in part, "that government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part

only of that community...” [22]. The court stated that the plaintiffs could not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry [22]. In December of 1999, the Supreme Court of Vermont ruled that the prohibition of same-sex marriages unlawfully discriminated against gay couples. The court ordered the legislature to correct the problem by legalizing same-sex marriages or by establishing a type of civil union that can be registered; thereby granting gay couples the same rights as heterosexual couples [23]. Consequently, homosexuals in the State of Vermont have been able to obtain certificates of civil unions since July 2000 [24].

As a result of the Supreme Judicial Court ruling in *Goodridge v. Department of Public Health*, since 2004, same-sex couples have been able to legally obtain marriage licenses and marry in Massachusetts [25]. In *Goodridge*, same-sex couples denied marriage licenses filed action for declaratory judgment against Department and Commissioner of PublicHealth, alleging that department policy and practice of denying marriage licenses to same-sex couples violated numerous provisions of state constitution [25]. The plaintiffs were fourteen individuals from five Massachusetts counties [25]. The plaintiffs included business executives, lawyers, an investment banker, educators, therapists, and a computer engineer, and many were active in church, community, and school groups [25]. The question the Supreme Court of Massachusetts addressed was whether, as the department claimed, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether, as the plaintiffs claimed, this categorical marriage exclusion violated the Massachusetts Constitution [25]. The Supreme Court of Massachusetts held that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution [25].

Shortly after the Massachusetts decision in *Goodridge*, in 2005, Connecticut became the second state in the nation to enact a state law providing civil unions to same-sex couples. In Kerrigan v. Commissioner of Public Health, eight same-sex couples denied marriage licenses brought action against state and local officials, seeking declaration that any statute, regulation or common-law rule precluding otherwise qualified individuals from marrying someone of the same sex, or because they are gay or lesbian couples, violates the state constitution [26]. The issue presented by this case was whether the state statutory prohibition against same sex marriage violates the constitution of Connecticut [26]. The Supreme Court of Connecticut held that, in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm [26]. In addition, the Court held that, “(1) our state scheme discriminates on the basis of sexual orientation, (2) for the same reasons that classifications predicated on gender are considered quasi-suspect for purposes of the equal protection provisions of the United States constitution, sexual orientation constitutes a quasi-suspect classification for purposes of the equal protection provisions of the state constitution, and, therefore, our statutes discriminating against gay persons are subject to heightened or intermediate judicial scrutiny, and (3) the state has failed to provide sufficient justification for excluding same sex couples from the institution of marriage” [26]. In October of 2008, the Supreme Court of Connecticut ruled that it was a violation of the equal protection act to ban same-sex marriages [27].

In 2008, the Supreme Court of California ruled that same-sex couples have a right to marry. Shortly after the decision, Proposition 8 “proposed a state constitutional amendment that defined marriage as a relationship between a man and a woman” and was passed in November 2008, again banning same-sex marriage in California” [27]. Proposition 8, which was officially titled “Proposition 8- Eliminates Right of Same-Sex Couples to Marry, was a statewide ballot proposition in California” [28]. On November 4, 2008, voters approved the measure and made same-sex marriage illegal in California, but on Wednesday, August 4, 2010, a federal judge ruled that Proposition 8 is unconstitutional under the U.S. Constitution and barred its enforcement [28]. Same-sex marriage resumed in California in 2013 since the U.S. Supreme Court decided to overturn proposition 8 [29].

In April of 2009, the Supreme Court of Iowa ruled that it was unconstitutionally to ban same-sex marriages and subsequently Iowa began performing same-sex marriages in June of 2009 [30]. In *Varnum v. Brien*, same-sex couples who had been denied marriage licenses by county recorder

brought action challenging statute limiting civil marriage to a union between a man and a woman [31]. The Supreme Court of Iowa had to decide if the state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution, as the district court had ruled [31]. The Court held that the Iowa Code section 595.2 was unconstitutional because the County has been unable to identify a constitutionally adequate justification for excluding plaintiffs from the institution of civil marriage [31].

The following year, in 2010, New Hampshire and the District of Columbia both allowed same-sex marriages. In 2011, New York allowed same-sex marriages through state legislation. In 2012, both Washington state and Maine allowed same- sex marriage; Washington through legislation and Maine through a public initiative [27].

New Jersey, Delaware, Maryland, Minnesota, Rhode Island, and New Mexico, all legalized same-sex unions in 2013 [29]. In 2014, Pennsylvania, Oregon, and Illinois joined the other fifteen states and the District of Columbia in allowing same-sex marriages [29]. The majority of these states allow civil unions and domestic partnerships.

As of October of 2014, there has been a drastic increase in the number of states that have legalized same-sex marriages from nineteen to thirty five. Surprisingly, thirteen states legalized same-sex marriage in the month of October of 2014 [32]. These states include, Alaska, Arizona, Idaho, Indiana, Nevada, North Carolina, Oklahoma, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

Today thirty five states are issuing marriage licenses to same-sex couples: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington state, West Virginia, Wisconsin and Wyoming, as well as Washington DC, which sets its own marriage laws but is not legally a state [32]. If the trend over the past three years is any indication of the future, it is likely that the United States will see an increasing number of states that will legalize same-sex marriages.

The right to sexual offender residential information

Sex offenders registration and notification programs are essential for public safety. These programs work as a system for monitoring and tracking sex offenders after they are released [33]. In 1947, in the United States, California was the first state to have a sex offender registration program, but this program was not public and did not include community notification [33]. Almost 50 years later the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was passed in 1994, in honor of Jacob Wetterling, an 11 year old child who was abducted at gunpoint while riding a bike and never seen again. This law required states to have a sex offender list [34]. That same year on July 1994, in the state of New Jersey, Megan Kanka, a 7 year old, was brutally raped and murdered by a neighbor who was a two-time convicted sex offender [35]. In response to this incident, the state of New Jersey passed a law that required the registration of every sexual offender with the local police departments. Many residents in the state, not satisfied with the effectiveness of this requirement, urged that the law be modified in such a way that residents would be notified every time a sex offender moved into their neighborhood [35]. The law was amended just 89 days from the date of Megan's death and became known as Megan's law [35]. Even though other states had existing laws that required the local registration of sex offenders, Megan's law was the catalyst for the drafting of new laws, both state and federal, that expanded the protection of the American public from registered sex offenders. In 2002, the Supreme Court of the United States affirmed the public disclosure requirement [36]. Four years later, in 2006, the Adam Walsh Child Protection and Safety Act was signed by President George W. Bush, and by 2007 it had become law [37]. The Act organizes sex offenders into three tiers based on each state's own statutes; the tiers are not necessarily separated by the seriousness of the offense committed nor the risk of the sex offender doing a second offense [37]. Tier 3 offenses include but are not limited to sexual acts with someone unconscious, sexual acts with a child under the age of 12, sexual acts involving force or carried out under threat [38]. Tier 2 offenses generally consist of non-violent sexual offenses involving minors [38]. Tier 1 offenses usually consist of non-violent offenses that involve victims who have reached the age of consent; includes both felonies and misdemeanors [38]. The Act requires Tier 3 offenders to a lifetime registration and an update of their whereabouts every three months. Tier 2 offenders must register for 25 years and must

update their whereabouts every 6 months and Tier 1offenders must register between 10-15 years and have an annual verification of their whereabouts [38].

Section 2250 of Title 18, of the United States Code dealing with Child exploitation and obscenity sets forth the law for sex offenders. It is a federal offense for a sex offender to not register on the Sex Offender Registration or to fail to update his registration as required [39]. The law also prohibits sex offenders from engaging in interstate travel, foreign travel or entering, leaving or residing in an Indian reservation [39]. Registering on the Sex Offender Registration means each sex offender will register their: name, address, employment, vehicle, fingerprints, a DNA sample, criminal history, a recent photo and other information; not all this will be available to the public [40]. The public will be able to see the sex offender's name, his/her current location and his/her offenses [40]. This information could be found on a website, by anyone interested, in all states including the District of Columbia [40]. A sex offender who does not register properly can face fines and up to 10 years in prison. A sex offender who does not register properly and commits a violent federal crime can face up to 30 years in prison [40].

In 2014, an unexpected twist started surfacing. Nowadays people are arguing that the sex offender registry is too harsh, and that the consequences are becoming tougher based on a flawed stereotypes and not on concrete evidence [41]. One of the arguments is that not all sex offenders commit a second offense, which is what community notification strives to prevent [41]. One of the advocates for less harsh penalties is Jacob Wetterling's mother, the mother of the little boy who was abducted while riding a bike and has since then never been seen. Ms. Wetterling goes on to say "These [sex offenders] are human beings who made a mistake. If we want them to succeed, we're going to need to build a place for integrating them into our culture" [41]. For now, there are no bills waiting to be signed that would prevent tougher sentences, although some attorneys have begun the pursuit of having legal changes for registered sex offenders [42].

The right to the protection of victims of human trafficking

The issue of human trafficking became a focal point in 2000. In the beginning of the 21st century, at least 700,000 people were reported as victims of international trafficking each year, 14,500–17,500 of which are women and children who are trafficked specifically into the United States [43]. In 2000, the Trafficking Victims Protection Act (TVPA) was created to, “ensure just and effective punishment of traffickers, and to protect their victims” [44]. This law was signed by President Bill Clinton October 28, 2000 [45]. According to the Social Security article, the new law states that regardless of immigration status, noncitizens who have been or are victims of “severe forms of trafficking in persons in the United States” and will be eligible to receive many of the benefits that are received by citizens, including Supplemental Security Income (SSI) [45]. “Severe forms of trafficking in persons in the United States," is defined as:

“Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; and, The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery” [45].

SSI is provided for victims of human trafficking who are under the age of 18 or are older than 18 but have been certified by the Secretary of Health and Human Services, after consulting with the Attorney General, as “cooperating in every reasonable way in the investigation and prosecution of severe forms of trafficking, and who have made a bona fide application with the Immigration and Naturalization Service for a new "T" immigration visa” [45].

Currently, the TVPA includes three separate components, which are normally referred to as the “three P’s.” These three sections are Protection of Unaccompanied Trafficked Minors, Prosecution of Human Traffickers, and Prevention of Human Trafficking.

One of the TVPA’s goal was to increase the Government’s efforts to protect foreign nationals who have been victims of trafficking [46]. These efforts included protection of witnesses who had previously not been eligible for government protection and “non-immigrant status for victims of trafficking if they cooperated in the investigation and prosecution of traffickers (T-Visas, as well as providing other mechanisms to ensure the continued presence of victims to assist in such investigations and prosecutions)” [46]. According to an article from the United States Department of State, “adequate victim protection relies on effective partnerships between law enforcement and

service providers, not only immediately after rescue, but also as they work to facilitate participation in criminal justice and civil proceedings" [47].

The next element of the "3Ps" is prosecution of human traffickers. The TVPA strengthen the ability for the United States government to prosecute human traffickers. These efforts included, but were not limited to:

"Creating a series of new crimes on trafficking, forced labor, and document servitude that supplemented existing limited crimes related to slavery and involuntary servitude; and recognizing that modern-day slavery takes place in the context of fraud and coercion, as well as force, and is based on new clear definitions for both trafficking into sexual exploitation and labor exploitation: Sex trafficking was defined as, "a commercial sex act that is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age."[4] Labor trafficking was defined as, "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery" [46].

The Department of State will then evaluate whether the "government will prescribe a maximum prison sentence of at least four years' deprivation of liberty for the crime of trafficking in persons and vigorously prosecute alleged trafficking offenders" [47]. All of the sentences will consider the severity of the person's involvement in human trafficking, as well as the gravity of the crime [47]. The last element of the "3Ps" is prevention of human trafficking. The goal of preventing human trafficking includes taking measures such as:

"Rectifying laws that omit classes of workers from labor law protection; providing robust labor law enforcement, particularly in key sectors where trafficking is most typically found; implementing measures that address significant vulnerabilities such as birth registration and identification; carefully constructing labor recruitment programs that ensure protection of workers from exploitation; strengthening partnerships between law enforcement, government, and nongovernmental organizations to collaborate, coordinate, and communicate more effectively; emphasizing effective policy implementation with stronger enforcement, better reporting, and government-endorsed business standards; and tackling this global crime at its root causes by monitoring product supply chains and reducing demand for commercial sex" [47].

Individuals who are victims of human trafficking and are interested in applying for the T-visa that was approved by the TVPA, can download the new I-914 form from the U.S. Citizenship and Immigration Services website [48].

The Trafficking Victims Protection Act of 2000 also created two types of nonimmigrant visas. The first are U visas, which are given to victims of certain crimes who are currently assisting or have previously assisted law enforcement officials in the investigation of current or past crimes [49]. These visas allow victims to temporarily remain the United States with a nonimmigrant status through the process of assisting law enforcement officials [49]. Individuals with U visas who have met certain conditions can potentially receive permanent resident status. However, Congress limited these visas to 10,000 per year [49]. Individuals who believe they may qualify for a U visa may complete the "USCIS Form I-918, Petition for U Nonimmigrant Status" (Form I-918) [49]. The second form of nonimmigrant visas are T visas, which are for victims of human trafficking [50]. People may be eligible for T visas if:

"They are or were victims of human trafficking; are in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry due to trafficking; Comply with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking (or you are under the age of 18, or you are unable to cooperate due to physical or psychological trauma); demonstrate that you would suffer extreme hardship involving unusual and severe harm if you were removed from the United States; Are admissible to the United States. If not admissible, you may apply for a waiver on a Form I-192, Application for Advance Permission to Enter as a Non-Immigrant" [50].

Individuals who are victims of human trafficking and are interested in applying for The T-visa that was approved by the TVPA, can download the new I-914 form from the U.S. Citizenship and Immigration Services website [51].

The Trafficking Victims Protection Act of 2000 has been amended multiple times throughout the years. Three years after the TVPA of 2000, the U.S. Department of State passed the Trafficking Victims Protection Reauthorization Act of 2003 [52]. This reauthorization of the TVPA focused on

authorizing more than $200 million over two years to help combat human trafficking [53]. In addition, this reauthorization required the U.S. government to terminate any contracts with "overseas contractors who engage in sex trafficking or commercial sex, or who used forced labor" [53]. This reauthorization also created a federal civil cause of action that will allow victims of human trafficking to sue their traffickers [53]. Furthermore, it will "allow state and local law enforcement officials to assist in identifying trafficking victims for immigration purposes, who may then become eligible for federal social benefits and will extend benefits to additional family members of the trafficking victims" [53]. The Attorney General will also be required to present an annual report of U.S. Government activities that are being implemented in order to combat human trafficking [54].

In 2005, Congress passed the Trafficking Victims Protection Reauthorization Act of 2005 [53]. This reauthorization of the act expanded the amount of money to be spent on combating human trafficking from $200 million over two years, to $300 million over two years [53]. In addition, this act authorized "new programs to serve U.S. citizen or legal permanent resident victims of domestic human trafficking, including a pilot program for sheltering minors" as well as, "grant programs to assist state and local law enforcement efforts in combating human trafficking" [53]. It also addressed sex tourism through implementing prevention programs and expanded "federal criminal jurisdiction to trafficking offenses committed by U.S. government personnel and contractors while abroad" [53]. Finally, this reauthorization required the U.S. Agency for International Development to "conduct studies on prevention and protection of trafficking victims abroad and authorizes $5 million for a pilot treatment program" [53].

In 2008, Congress passed the William Willberforce Trafficking Victims Protection Reauthorization Act of 2008 [55]. Before this reauthorization there was no provision that focused on protecting unaccompanied minors that were trafficked to the United States. Although this Act did not necessarily take care of all of the court and immigration process issues concerning unaccompanied trafficked minors, this Act did however strengthen these kids' protection. First, "the Act addresses the need to provide legal counsel to unaccompanied minors" [56] by requiring the Secretary of State to "ensure, to the greatest extend practicable that all unaccompanied alien children have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking" [57]. Secondly, the Act "requires that the custodians of unaccompanied minors participate in the Legal Orientation Program," [56] in which the parents will be "educated about the immigration process, the court proceedings, and basic legal information" [56].

Currently in 2014, there has been an increasing amount of unaccompanied minors crossing the Mexico border into the United States. In 2014 alone, there have been over 67,00 children who have crossed illegally into the United States [58]. The majority of these unaccompanied minor come from Mexico, Honduras, El Salvador, and Guatemala [59]. It is believed this number will only continue to increase due to the nature of the violence these children face in their countries [59].

The right to the protection of the environment

On May 16, 1994, in Geneva, the United Nations' first Declaration of Principles on Human Rights and the Environment was written, establishing for the first time a direct relationship between human rights and the environment. The Declaration demonstrated that the already accepted human rights for the protection of the environment include the right of all persons to have a secure, healthy, and ecologically acceptable environment [60].

The declaration is divided into five parts. The first part of the declaration expressed that human rights, the right to an ecologically healthy environment and peace are interdependent and indivisible rights that all persons, present and future generations, should enjoy. The second part established that all persons have the right to live free from contamination, environmental degradations, as well as all activities that have a negative effect on the environment or threaten lives, health and the well-being of individuals. At the same time, it recognizes the right to the protection and preservation of the air, land, flora, animal life and the natural processes and essential areas necessary to maintain biological diversity and ecosystems. It also gives all persons a right to safe and healthy food adequate to their well-being and to right to a safe and healthy working environment [60]. The third part deals with the right of information and of opinion. It recognizes all persons have a right to information concerning the environment, including but not limited to information necessary for public participation in environmental decision-making.

A person seeking this information should not encounter an undue financial burden; the information should be available under reasonable time, should be clear and should be understandable. All persons have a right to express opinions regarding the environment and they have a right to human rights and environmental education [60]. The fourth part delegates duties to all persons and to the States regarding the environment. All persons have a duty to protect and preserve the environment while all States have a duty to respect and make sure the environment is secure, healthy and ecological. One of the State's duties includes controlling, licensing, regulating or prohibiting any activity that could be potentially harmful to the environment. All States also have to ensure that any international agencies or organizations they join observe the rights and duties of the Declaration [60]. The fifth and last part of the Declaration sets forth that all persons are entitled to a social and international order in which the rights of the Declaration can be fully fulfilled [60].

In the United States, the struggle between economic development and the protection of the environment continues. In 2008, the Environmental Protection Agency (EPA) drafted new rules, that if had been approved, would have permitted mining companies to discard waste generated by their activities in high mountain areas, including rocks and dirt, into rivers and other running waters [61]. If these new rules would have been approved it would have been great for the mining operations, especially those in West Virginia and Kentucky as well as other mining states in the western part of the nation [61]. Although some would have benefited from the new rules, in 2011, the EPA, under the Clean Water Act, stopped the proposal disposal of mining waste into streams [62]. The Clean Water Act regulates the discharge of pollutants into waters of the United States [63]. It was originally enacted in 1948 and was named the Federal Water Pollution Control Act, but it expanded in1972 and renamed the Clean Water Act. Under this Act the EPA has been able to implement pollution control programs and water quality standards. The Act also makes it unlawful for anyone to discharge large pollutants into navigable waters without a permit, obtained by the EPA, named the National Pollutant Discharge Elimination System [63].

Besides the Clean Water Act, recently, the United States has had many issues with global warming. The concern over global warming has been a major environmental topic on minds of the American public. This should be of no surprise since global warming has had an incredible increase in the past years; there is more carbon dioxide today than there has ever been in the past 800,000 years [64]. With the increase of global warming come many dangers to the public; some consequences of global warming include massive fires, droughts, and severe hurricanes [65]. Accordingly, the U.S. Global Change Research Program reports the temperature in the United States has increased by 2 degrees in the last 50 years [66]. Former Vice-president Al Gore was awarded the 2007 Nobel Peace Prize, sharing it with the Intergovernmental Panel on Climate Change, a network of scientists [67]. Mr. Gore's cautionary film about the consequences of climate change, "An Inconvenient Truth," won the 2007 Academy Award for best documentary [68]. The film was about Mr. Gore's campaign to make global warming recognized as a worldwide issue [69]. In 2009 Mr. Gore won a Grammy Award for Best Spoken Word Album for his book "An Inconvenient Truth: The Planetary Emergency of Global Warming and What We Can Do About It" [70].

More recently President Obama made a pledge to reduce the United States' carbon emissions by 17 percent, from 2005 levels, by 2020, this goal should be met by following the rules of the Environmental Protection Agency. At the United Nations Climate Summit the President of the United States gave a speech aimed at world leaders to confront climate change; his main focus being China. The President acknowledged that the United States and China were the countries with the biggest economies but the biggest polluters. In his speech he said it was their responsibility as big nations to start the change [71].

Another global warming activist, David Suzuki, just kicked off his environmental rights tour in Canada. Mr. Suzuki co-founded the David Suzuki Foundation in 1990, "to find ways for society to live in balance with the natural world that does sustain us" [72]. The environmental rights tour he just launched is a campaign to add clean air and water rights to Canada's constitution [73]. He believes a healthy environment should be included in Canada's legal framework [73].

The right to privacy in relation to unsolicited telemarketing telephone calls

On January 28, 2003, the Do-Not-Call Implementation Act was introduced sponsored by Representatives Billy Tauzinand John Dingell and it was signed into law by President

Bush on September 2003. This Act allowed the Federal Trade Commission to collect fees for the implementation and enforcement of a "do-not-call" registry, and for other purposes [74]. Even with President Bush's signature several federal district courts did not agree with the list. Finally, on February 17, 2004, the Tenth Circuit Court of Appeals, upheld the constitutionality of the law that enforced the do not call list [75].

After the law was constitutionally upheld several states in the nation have approved laws that protect consumers from unsolicited telemarketing telephone calls. These new state laws are based on section 64.1200 of Chapter 47 of the Code of Federal Regulations, prohibiting any person to conduct telephone calls without previous authorization using any automated or artificial system to make such calls [78]. The prohibition extends to facsimiles, computers and other means of communication that are utilized with the intention of sending an unsolicited commercial message [78]. Even when the consumer authorizes the acceptance of these solicitations, the law prohibits the making of telephone calls before 8 a.m. and after 9 p.m. [78]. The federal law establishes additional requirements before permitting these systematic telephone calls. One requirement is that the person or company making the phone calls needs to have established procedures for maintaining a list of persons that do not want to be bothered by calls [78]. These procedures should exist in writing and be available to anyone who wishes to review the lists upon request [78].

Although placing your phone number on the Do not Call Registry will stop most calls, it will not stop all unsolicited calls; there are a few exceptions. The Federal Communications Commission (FCC) explains that these restrictions are not applicable to emergency calls that are necessary for the safety and health of the consumer, calls that are not typically commercial in nature, calls from non-profit organizations, calls that do not constitute telephone solicitations or calls under which the consumer has already established a commercial relationship [77]. The FCC suggests that to suspend unsolicited telemarketing calls, the consumer has only to indicate clearly the desire to be placed on the National Do Not Call Registry, which is managed by the Federal Trade Commission. Anyone can register online at www.donotcall.gov or by calling toll free 1-888-382-1222 from the home or cell phone they wish to register [78]. The FCC suggests that consumers maintain a list of all those commercial entities with whom they have already requested to be placed on the do-not-call list [79].

The United States Congress approved two Bills that if signed into legislation would permanently authorize the FCC to collect fees from telemarketers to fund the program and also make the do-not-call list permanent [80]. On February 15, 2008, President George W. Bush signed into law the H.R. Bill 3541: Do-Not-Call Improvement Act of 2007 [81]. This renewal allowed consumers to register only once instead of every five years, and allowed the removal of a number from the list only if the number is invalid, disconnected, has been reassigned, or the owner of the number asks to be removed [81].

The FCC can impose fines against telemarketers who violate the do not call registry, but does not award any individual damages [82]. Although no individual damages are awarded, individuals who suspect a company is violating the registry should file a complaint [82]. Complaints can be filed online by filling out the complaint form or can be filed by being sent to the FCC's Consumer Center. The complaint should include your basic information, identifying information of the caller, whether the caller advertised or sold any property, goods, or services, and more importantly whether you had already told the caller/company you did not want to be called [82]. In May 2014, the company Sprint was fined $7.5 million for violating the registry; as part of the settlement they also had to implement a two-year plan with the FCC so that their employees are familiar with the registry [83].

Less than a year after the National Do Not Call Registry began, a survey indicated that people who registered for the list saw a reduction in the unsolicited calls they received; from an average of 30 calls a month to about an average of 6 per month [84]. Since its inception, about 72 percent of Americans have taken advantage of the program, 77 percent of those say that they have seen a reduction in their unsolicited telemarketing calls [84].

The right to determining what medical treatment to receive and the right to organ donation

In the United States, individuals have the right to decide in advance what method of medical treatment they wish to receive in case the become physically or mentally incapacitated and lose the ability to communicated. The Department of Health and Human Services, on behalf of the

Administration for the Financing of Medical care, stated that adults in hospitals, infirmaries, and another medical institutions, have certain special rights including the right to have their medical and personal records kept confidential and the right to decide what medical treatment they wish to receive. The right to make organ donations and decide about the types and extent of medical care they would like to receive or refuse is based on the federal Patient Self-Determination Act (PSDA) [85].

The Patient Self-Determination Act requires that all health institutions that receive federal funds under the Medicare or Medicaid programs should provide patients that are getting medical care in hospitals or extended care facilities, entering into hospice or home care enrolling in HMOs information regarding their right to make their own decisions with respect to their medical treatment [85]. The PSDA also requires for health care agencies to ask patients whether they have an advance directive, if they do not, patients have the right to prepare the document. An advance directive is a legal document by which an individual can make medical and health-care informed decisions [86]. The two main types of advance directives are “living wills” and “Durable Power of Attorney for Health Care.” A living will is the oldest type of advance directive and it is both signed and witnessed. A living will normally instructs a physician to either withhold or withdraw from medical procedures if the patient is unable to make their own decisions about their medical treatment [86]. On the other hand a Durable Power of Attorney for Health Care is a legal document that is also signed and witness but instructs a designated individual to make decisions about the patients' health on his/her behalf [86]. Neither one of these two types of advance directive methods require the presence of an attorney.

In regards to organ donation, all the states in the nation have adopted some version of the Uniform Anatomical Gift Act. The principal reasons for establishing rules for the legal donation of organs include: the determination and limitation of which persons can make legal organ donations; the determination of the rights of the closest family members of the patient; the specific provisions under which these donations can be carried out; and the establishment of the rights of the family members as to their remains of the body once the organs have been removed [87]. In 1987, the Uniform Anatomical Gift Act was amended which consisted of seventeen sections as opposed to the 1968 version, which included eleven.

In 2014, the state of Pennsylvania had a big movement to promote organ donation after a case involving the parents of a two-year old girl who wanted to donate her organs and save other children lives [88]. “Organ donation organizations and many in the medical community support the effort to update the state's organ donation law” [88]. The proposed bill in Pennsylvania would “streamline and codify best practices for organ donation at medical facilities across the state, supporters say, and increase donation education to expand the pool of donors” [88].

The right to ethanasia or death with dignitiy

In the United States, Henry Hunt attempted to legalize euthanasia for the first time in 1906 at the General Assembly of Ohio [89]. Mr. Hunt was introducing this concept on behalf of Anna Hall, a heiress who had watched her mother die of liver cancer; Ms. Hall was determined to ensure no one else had to suffer the same pain her mother did. She was so dedicated to ensure others would not suffer that she wrote an extensive letter and organized a debate on euthanasia at the annual meeting of the American Humane Association of 1905. Following Ms. Hall's determination, Mr. Hunt proposed a bill at Ohio's General Assembly that basically asked for euthanasia to be legalized. Mr. Hunt's bill proposed the administration of an anesthetic to bring a patient to death. There were some requirements that had to be met: the patient must have had to be of legal age, and of sound and mind; the patient must had been suffering from a fatal injury or an irrevocable illness or must had been in great physical pain. The bill also proposed that before the anesthetic was administered the case be heard by a physician, required informed consent in front of three witnesses and also required that three physicians agree it was impossible for the patient to recover. Ultimately, the bill did not pass, and for the following years the euthanasia debate was significantly reduced [89].

The controversy over the legality of euthanasia is so great and serious that as of June 2014 only four states have legalized physician- assisted suicide. From those four, three (Oregon, Vermont and Washington) have legalized it through legislation, while the state of Montana has legalized it through court ruling [90]. Three states (Alabama, Massachusetts, and West Virginia) and the District of Columbia have prohibited physician-assisted suicide via common law [90].

Four other states (Nevada, North Carolina, Utah and Wyoming) have no laws prohibiting assisted suicide [90].

The law of the state of Oregon that allows assisted suicide, the first state in the United States to allow assisted suicide, is referred to as "death with dignity." The law is heavily regulated and there are a variety of requirements that must be met; solely age or disability are not enough [91]. Although the requirements are not exactly the same as Mr. Hunt's bill proposed, they are very similar but might be harder to meet. The main requirements include: suffering from a terminal disease and voluntarily expressing wishes to die [91]. A disease is considered terminal if it is incurable and irreversible and if by a reasonable medical judgment it is determined that it would cause the patient's death within six months [91]. Voluntarily expressing a wish to die includes a wish made both verbally and in writing [91]. The individual must be well informed which means he must know of his medical diagnosis, his prognosis, the probable results of taking the medication, and must be aware of any feasible alternative [91]. Depression cannot be a cause for assisted suicide [91]. If a physician believes his patient is suffering from a psychological disorder, a psychiatrist disorder or from depression that is impairing his judgment, he must refer the patient to counseling [91]. At least 15 days must go by from when the patient makes the initial oral request to die to when the prescription is given, and at least 48 hours shall elapse from when patient makes written request to die to when the prescription is given [91].

In the year 2013, 122 residents of the state of Oregon had prescriptions written to them to end their lives. From those, 63 ingested the medication, 28 did not take the medication but died of other causes, and 31 have an unknown status. Since the inception of Oregon's Death With Dignity Act, 1,173 persons have had prescriptions written and 752 persons have chosen to end their lives through physician-assisted suicide [92].

The federal government's response to Oregon's Death with Dignity Act has changed in recent years. Under the Clinton administration, then Attorney General, Janet Reno wrote a letter to Congress in June 1998 stating that federal prosecution of Oregon physicians who fully comply with Oregon law would be beyond the scope of the Federal Controlled Substances Act of 1969 [93]. However, in November 2001, then U.S. Attorney General, John Ashcroft, announcing the Bush administration position, indicated that he did not consider the assistance of a patient in committing suicide a legitimate medical proposition and declared that any physician that used any drug to accelerate the death of any of his/her patients would be violating the Federal Controlled Substances Act (CSA) and would be penalized by having his/her medical license suspended or revoked. During that same year, several physicians from the state of Oregon provided lethal doses to 44 terminal patients, 22 of which satisfactorily obtained their objective. Due to the opposition demonstrated by the current administration against the Death with Dignity Act, the state of Oregon initiated a lawsuit to try to block any interference by the federal government with the imposition of this law. On April 17, 2002, the United States District Court for the District of Oregon issued a permanent injunction enjoining Ashcroft from employing, enforcing, or giving legal effect to the Attorney General's directive. Although the original patients involved in the case died from their respective terminal illness, the Bush administration continued their fight against physician-assisted suicide under Ashcroft's successor, Alberto Gonzales. However, the Supreme Court upheld Oregon's Death With Dignity Act in Gonzales v. Oregon by a margin of 6-3 in a hard fought victory for states' rights [94]. In 2008 the state of Washington enacted the same law while the state of Montana did not regulate the same safeguards [95].

In 2010, a survey made in the United States of more than 10,000 patients showed that approximately 46% of physicians believe assisted suicide should be allowed, while 41 % believe it should not; 14% believe it depends on the situation [96]. The topic is so controversial that another survey done in 2013 showed different results. This survey had approximately 2000 participants, from those, two-thirds did not believe in physician-assisted suicide, from those two-thirds, 60 % of the participants were from the United States [97]. Physicians against assisted suicide believe assisting a patient to his/her death violates their oath of doing no harm. Physicians for assisted suicide believe a physician should have autonomy and just like they assist at a birth, they should be able to assist at a death [97].

One of the most well-known advocates for physician-assisted suicide is Jack Kevorkian. [98]. He has been labeled by some as "Dr. Death" since he claims to have helped 130 terminally ill people end their lives. Some consider him a hero since he set the platform for the reform; he insisted,

"dying is not a crime" [98]. In 1999, Kevorkian was convicted of second-degree murder for his direct role in a case of voluntary euthanasia. He was sentenced to 10 to 25 years but was released on parole after serving 8 years, after agreeing, as part of a long list of conditions, not to participate in future suicides [99]. In 2008, Kevorkian announced his plans to run for Congress as an independent. He ran and received 8,987 of the votes, which were 2.6% of them [100].

More recently in 2013, Dr. Iain Kerr, a Scottish doctor admitted he had helped four individuals commit suicide by either giving them sleeping pills or telling them how many antidepressants they needed to take to end their lives. Dr. Kerr believes the law should change because there may be times when a patient's "... preferred course of action will be suicide or to be assisted to die" [101].

Even more recent, in 2014, in the City of New York a debate was held named "Legalize Assisted Suicide." Before the debate 65 % of the people were in favor of legalization while 10 % were against, 22 % were undecided. After the debate 67 % were in favor, and 22 % were against, which means opponents of legalization convinced more undecided people than proponents of the legalization [102].

Sexual discrimination

Just as racial discrimination allegations began surfacing in 2014, sexual discrimination allegations did not stay behind; the main concern being sexual discrimination in the work place. Examples of sexual discrimination include, but are not limited to: hiring, employment conditions, firing, promoting, getting more benefits, etc. based on your gender [103]. It is important to note that not only is sexual discrimination against the law, but retaliation for reporting or opposing sexual discrimination is also [103]. An employer cannot "punish" an employee who either reports sexual discrimination against herself/himself or another fellow employee.

In the United States there is a statute known as Title VII [104]. Title VII is a formal equality statute that protects individuals from employment discrimination on the basis of race, color, religion, sex, or national origin [104]. Specifically, Title VII promotes the idea that everyone, whether you are a male or a female, you should be treated equally in the workplace [104]. There are several methods courts use to determine whether there has been sexual discrimination in the workplace; these are referred to as burden of proof allocations [105]. One commonly used burden of proof allocation is based on circumstantial evidence. There are three steps involved when using the circumstantial evidence proof of discrimination: [105].

"First, the plaintiff must present sufficient evidence about the challenged action (e.g., failure to promote, hire, etc.) to constitute circumstantial evidence that the plaintiff was discriminated against because of some prohibited characteristics (e.g., sex or race under title VII, or sexual orientation under ENDA). This is called the plaintiff's prima facie case. Second, the defendant must respond by simply offering a legitimate non-discriminatory reason for the action about which the plaintiff if complaining. This is calledsatisfying the burden of production. Finally, the plaintiff must present evidence that demonstrates? that is, that proves? that, despite the reason offered by the defendant, the action in reality was motivated by the defendant's intention to discriminate. This is called the burden of persuasion and may be achieved, for example, by proving that the reason offered by the defendant is merely a pretext for actual discrimination" [105].

In September 2014, a book Senator Kirsten Gillibrand wrote called "Off the Sidelines" was released. In this book Sen. Gillibrand talks about several sexist encounters she has encountered with her male colleagues. She goes on to give examples of what she was name called, such as "...You're even pretty when you're fat" [106]. She says these incidents she encountered in Congress have only made her more motivated. She is motivated to take issues such as campus and military sexual assault. She is calling women to "speak up," "gather strength," and "support one another" [106].

Racial discrimination

On August 9, 2014 an African American 19 year old, named Michael Brown was fatally shot by Darren Wilson, a White police officer from Ferguson, Missouri, a suburban of St. Louis [107]. The facts of the case are that Brown and a friend, Dorian Johnson, were walking in the middle of the street when Wilson drove up to them and asked them to move to the sidewalk. An altercation began between them, where the facts are not crystal clear. Wilson alleges Brown punched him in the face when he told him to move to the sidewalk, that hit allegedly was the first hit. From there a series of hits and punches began while Wilson was still in the car. After that Wilson got out of the

car and reached for his gun. Wilson told Brown to back off or he would shoot. Brown did not believe Wilson would shoot and started yelling at him. The argument continued until Brown reached his waistband, at this point Wilson believed Brown was armed. Brown never put his hands in the air to show he was surrendering. Wilson alleges he fired three times and realized Brown flinched, but he kept on walking towards Wilson, after a few more shots that did not stop Brown, Wilson ultimately shot him in the head which ended Brown's life. After the altercation it became public knowledge that Brown was not armed [107].

On November 24, 2014, a prosecutor from St. Louis County announced that a grand jury had decided not to indict Wilson. The decision caused a huge riot and waves of anger among those who were protesting outside the Ferguson Police Department; buildings were set on fire and the looting of several businesses occurred [108]. About a week later, on December 1, 2014 several grand jury proceedings were revealed although they are usually privileged and kept in secrecy. One key transcript that has not been revealed is the testimony of Brown's friend who was with me the day of the shooting, Johnson [109]. So far the investigation is still ongoing.

A few months before the case in Ferguson, on July of 2014, Eric Garner was confronted by the police trying to arrest him for allegedly selling illegal cigarettes. According to a video that was recorded during the confrontation, Eric Garner raised both hands in the air and, with passive defiance, told the officer not to touch him. However, one of the officers choked and pulled him into the sidewalk, rolling him onto his stomach. The video show where Eric Garner repeatedly yelled "I can't breathe! I can't breathe!" Eric Garner was later pronounced dead at a nearby hospital. He suffered a heart attack and died en route to the hospital. Officer Daniel Pantaleo, was the officer who is seen on the video choking Eric Garner. A Staten Island grand jury decided not to indict Officer Pantaleo in the case involving the death of Eric Garner [110]. An immense waive of protesters have expressed outrage due to the grand jury's decisions in both Eric Garner's case and Michael Brown's cases.

Supreme Court opinions 2014-2015

The Supreme Court of the United States has handed down several important decisions, which will have a long lasting impact.

Burwell v. Hobby Lobby Stores, Inc., is a very important case because it is the first time the Court has recognized that a for-profit corporation can a have a claim of religious belief [111]. The facts of the case are simple; David and Barbara Green, owners of Hobby Lobby did not want to provide their employees with insurance that covered for birth control pills and abortion pills; they argued this went against their religious beliefs [112]. They argued the Affordable Care Act, also referred to as Obamacare, violated their First Amendment right to religious freedom because it required them to provide coverage for pills they consider a substitute for abortion, such as the morning after pill, along with other things, such as sexually transmitted disease classes, that go against their religious beliefs [113]. Congress passed the Affordable Care Act in 2010, it relies on the Health Resources and Services Administration (HRSA) to determine what types of preventive care for women should be covered by certain employer healthcare plans. The HRSA decided all twenty contraceptives approved by the U.S. Food and Drug Administration should be covered [114]. They exempted non-profit organizations, religious employers, and employers with fewer than 50 employees from having insurance that covered preventive care if they had an objection [115]. The exemptions did not include for- profit organizations/businesses; since Hobby Lobby is a for profit organization they were required to provide insurance coverage for preventive care for woman, if they did not, they could be fined $100 per person/per day [116]. Due to Hobby Lobby's claims the Supreme Court of the United States had to decide the issue of whether religious employers can refuse to comply with a federal rule requiring their health plans to cover birth control. After much controversy, and a 5-4 vote, the Court held that the Green's did not have to provide for birth control methods in their health insurance coverage, because providing coverage did violate their religious beliefs [112]. They did make clear that this only applied to closely held corporations, not to any corporation that wanted to do this [112]. Judge Samuel Alito, one of the Judges who wrote the majority opinion stated,

"The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs".

In another case, McCullen v. Coakley, the Supreme Court determined that a Massachusetts law which makes it a crime and a violation of the First Amendment, to stand on a public road or sidewalk within thirty-five feet of a reproductive health care facility was unconstitutional. The Court held that the statute was not content-based due to the fact that it established buffered zones at only clinics that performed abortions and the fact that it exempted certain groups including clinic employees and agents. The Court also held that the statute was not narrowly tailored to serve significant governmental interest, and thus violated free speech guarantees [117].

In another important opinion, Riley v. California, the court held police need warrants to search the cell phones of people they arrest. In this case David L. Riley was arrested in 2009 after a traffic stop led officers to find loaded firearms in his car. When he was arrested the officers took his phone and searched through his contacts, messages, photos and videos; based in part on what they found on the cellphone they also charged him with an unrelated shooting that had happened several weeks before his arrest. The Court held that neither the interest of protecting officers' safety nor the interest of preventing destruction of evidence justify dispensing with warrant requirements for searches of cell phone data. The Court stated that it is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest [118]. Chief Justice John Roberts delivered the opinion of the majority saying, "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon--say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." This case is especially relevant in today's society because citizens are more reliant on technology than ever, including their cell phones.

In November 2014, the Supreme Court decided the Carroll v. Carman case. In this case police officer, Carroll, from the Pennsylvania State Police Department received a report that a man named Michael Zita had stolen a car and two handguns and had fled to the Carman's house. The officer went to the Carman's residence to investigate and believed there was something or someone in the rear of the property. The officer approached the rear of the house, announced his presence and when no one answered went inside. The Carroll's then confronted the officer and consented to a search of their house, Zita was not found. The Carmans then sued Officer Carroll for unlawful entry to the property. The officer argued his entry was legal under the "knock and talk" exception, which allows officers to knock on someone's door as long as the officers are standing on parts of the person's property that the general public is allowed to stand on. The District Court found in favor of Carroll, but on appeal the decision was reversed, the Court of Appeals said the "knock and talk" exception must begin at the front door, and they it also said the Officer did not have immunity because he violated a clear established law. The Supreme Court said there was no clearly established law that says the "knock and talk" exception must begin at the front door, since there was no clear rule Officer Carroll was entitled to qualify immunity [119].

Most recently, in June 2015, in Oberfegell v. Hodges, the Supreme Court of the United States held that "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State." This holding legalized gay marriage throughout the United States.

Results

Although the federal government may use its power to encourage states to adopt certain laws under the Tenth Amendment. The federal government is limited from directing states to enact specific legislation, or requiring officials to enforce federal laws on a state level. As such, these rights can co-exist in a mode that the government of the U.S. allows for basic rights to be protected on a federal level, and simultaneously allows the individual states to protect other rights that are of local importance. The advancement of these new rights are the result of social changes in the U.S. communities in order to adapt with society. A great sense of community and respect towards human rights and civil liberties has surfaced. These new rights in a judicial point of view, can also be viewed as a global achievement that can help past studies about each and every right in matters

comparing other countries rights. Complying also to international agreements that the United States has acquired before the world.

Conclusion

The United States of America's legal system covers a wide variety of legal topics, so wide that it would be impossible to include all of them in this article. All rights are created by federal and state laws and by Supreme Court decisions. The reason that all these rights can co-exist is that the mode of the government of the United States allows for basic rights to be protected on a federal level, and simultaneously allows the individual states to protect other rights that are of local importance without interference from the central government. These rights are the offspring of the natural and legal rights that the United States recognizes, and can be further divided between rights that are created because of necessity and those that are created because of changes in societal views. The rights considered a necessity not only would most people agree are necessary but they have been established by federal legislation and every jurisdiction in the country must recognize them. For example: the right to the protection of the environment, the right to sexual offender information, and the right to the protection of victims of human trafficking. There are some rights that are not created by necessity but because of societal views; these rights have not been established by the federal legislation and therefore are only recognized in certain regions of the country. For example, the right to open carry a firearm, the right to consume marijuana, the right of same-sex couples to marry, the right to euthanasia, the right to determine what medical treatment to receive, and the right to organ donation. Whether it is a right that derived from necessity or from changes in our society these rights are recognized because of the wide variety of topics our legal system covers.

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УДК 343

Развитие юридических прав в американской правовой системе

Роберто Росас

Юридическая школа Университета Святой Марии, США
Доктор юридических наук, профессор
E-mail: rrosas@stmarytx.edu

Аннотация. Эта статья отражает некоторые из самых спорных тем в американском обществе. Она дает юридический ответ на эти темы со стороны отдельных государств, Конгресс Соединенных Штатов и Верховного суда США. Эта статья ограничивается обсуждением девяти довольно новых прав, созданных федеральными законами. Рассмотренные в данной статье права включают в себя следующее: 1) право на открытое ношение огнестрельного оружия; 2) право потреблять марихуану; 3) право на заключение брака или гражданские союзы между однополыми парами; 4) право виновного в сексуальном преступлении на информацию; 5) право на защиту жертв торговли людьми; 6) право на охрану окружающей среды; 7) право на неприкосновенность частной жизни в отношении нежелательных телефонных звонков; 8) право на определение того, что медицинское лечение, чтобы получить и право на пожертвования органов; 9) право на эвтаназию или смерть с достоинством. В данной статье кратко рассматриваются темы сексуальной и расовой дискриминации. И, наконец, обсуждаются наиболее далеко идущие решения, вынесенные Верховным судом Соединенных Штатов в период между 2013 г. и по настоящее время.

Ключевые слова: огнестрельное оружие, марихуана, гражданский союз, однополый брак, реестр лиц, виновных в сексуальном преступлении, торговля людьми, охрана окружающей среды, непредусмотренные телефонные звонки, донорство органов, медицинское лечение, эвтаназия, смерть с достоинством, дискриминация по половому признаку, расовая дискриминация.

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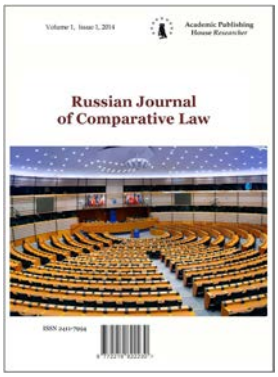

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International Humanitarian Law and Legal Status of Personnel in Private Military Companies as Participants in the Internal Armed Conflicts

Nicolay L. Shelukhin

The Donetsk People's Republic
Donetsk, pr. Bohdan Khmelnytsky, d. 102
LL.D., professor
E-mail: shelukhin2004@inbox.ru

Abstract

The article is devoted to the legal status of personnel of private military companies participating in the internal (regional) armed conflict in the east of Ukraine as part of its military formations. The article grounds the necessity of introducing a clarified concept of "mercenary" and reworded concept of "foreign volunteers" in the regulations of international humanitarian law. This article has analyzed the world experience in the field of legislative regulation of activities by private military companies. Its non-legal nature in the structure of the foreign policy activities of different states has been defined. Tendencies of expanding the scope of private military companies activities have been studied. It includes the creation of hired military units, peacekeeping, participation in domestic armed conflicts, the suppression of armed uprisings, terrorism, etc. The necessity of forming national legislation regulating the activities of private military companies has been proved.

Keywords: international humanitarian law; internal armed conflict; mercenary; foreign volunteer; private military companies; legal regulation; contractual relations.

Introduction

In recent years one can notice an increased scientific interest in the problems of the legal status of participants in the internal armed conflict, as evidenced by the numerous printed works both of scientific and socio-political nature. Dissertation and monographic studies by several authors can be called a significant contribution to the study of the legal aspects of the status of parties to the armed conflict, among them O.J. Moliboga [1], Osipov K.L. [2],, Ternovaya L.O. [3], Adelkhanyan R.A. [4], Shandieva N.O. [5], Naden O.V. [6], Loiko O.M. [7], Batrimenko O.V. [8], Korotkiy F.V. [9], Repeshko P.I. [10], Skrilnik E.A. [11] and others.

However, it appears that the designated topic is still poorly examined. First, various aspects of such a complex and multifaceted problem, as the legal status of members of regional armed conflicts, were not considered or did not get enough coverage. Second, in the framework of this topic there is still a lot of controversial issues. Third, among the modern works devoted to the problem of the status of parties to internal armed conflicts, the focus is only on its certain content and functionality features.

Systemic approaches appear to be no less significant and that will not only allow to rethink and deepen the theoretical knowledge about the status of participants in regional armed conflicts, but also to formulate practical recommendations to legislators and enforcers on this scientific foundation. In addition, today the situation in the world has changed and that requires rethinking of many ethical, moral and criminal law issues, among which one should name the problem of the legal status of participants in regional armed conflicts.

All of the above demonstrates the need for further development of the subject across the whole spectrum of the identified problems.

Materials and methods

The work was done on the materials of the international practice of hiring private military companies for the solution of challenges of international and national character. The regulatory framework governing the bilateral relations of the military conflict was fully considered. The method of comparative analysis of different countries' legislation was applied.

Discussion

1. International humanitarian law on the legal status of foreigners involved in the armed conflict

International humanitarian law (hereinafter – IHL) was codified in the Hague Conventions, the Geneva Conventions on the Protection of War Victims of 1949 and their Protocols Additional of 1977, the UN General Assembly resolutions and other documents. Certain restrictions imposed by international humanitarian law are applied to armed conflicts of an internal nature.

The results of previously conducted studies of armed conflicts suggest that they involve persons with unclear legal status. Trying to divide members of internal armed conflicts in accordance with international humanitarian law is not possible due to difference in singled out elements of the legal status of participants in international armed conflicts in international conventions. Thus, the acts of aggression of one state against the other one were identified by the UN General Assembly Resolution 3314 of 14 December 1974 defined by [12]. Regarding the conflict in Ukraine we introduce a restriction: we do not consider the legal status of participants of the internal (regional) armed conflict in the Donbass region in accordance with the "Regulations on the Laws and Customs of War on Land" because, by definition, they are members of the armed forces of one of the parties to the international armed conflict [13]. De jure, the antiterrorist operation in the Donbass (hereinafter – ATO) is not an international armed conflict, because Ukraine did not declare itself at war with the Russian Federation and did not introduce the martial law.

We consider it necessary to note that according to the rules of international humanitarian law, upon the occurrence of state of war the state provides opportunity for citizens of an enemy state, enjoying diplomatic immunity, to leave its territory as soon as possible. For other citizens of an enemy state (without immunity), restrictions on the freedom of movement up to internment can be applied [12; 23. p. 59].

The participants of the IHL of international armed conflicts are indicated with terms: combatants, non-combatants and mercenaries. Therefore, almost all the previously conducted research concerned the legal status of persons in the foregoing categories. In accordance with Article 1 of the "Regulations on the Laws and Customs of War on Land", the military laws, rights and obligations are applied not only to armies, but, under certain conditions, to militia and volunteer corps [13]. Article 43 on "The Armed Forces" of Protocol Additional I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (1977) defines the composition of the armed forces of a Party to the conflict. Persons belonging to the armed forces of this party are combatants, that is, they have the right to participate directly in hostilities [14]. For non-combatants are persons belonging to the armed forces, but their functions are confined to the care and maintenance of combat operations of the armed forces, and who have the right to use weapons only in self-defense (military quartermasters, lawyers, reporters, the clergy). Article 47 of the Protocol Additional I defines mercenaries [14]. Let’s make a reservation: this definition does not meet today's realities due to the absence of a number of legal definitions and interpretations of ambiguous expressions which reveal the concept of "mercenary". The lag in Legal

Studies of internal (regional) military conflicts from the real events occurring in their area [1] may be called another reason.

The IHL also has no clear distinction between the concepts of "mercenary" and "foreign volunteers". In addition as for the motives of their actions, it is difficult to draw a distinction between mercenaries, foreign volunteers and instructors of private military companies (hereinafter - PMCs), because they receive material compensation for all their activities. Therefore, in our opinion there is a need for a legal assessment of new developments in mercenary activities: taking on and recruitment of mercenaries by such companies that provide the power, expertise, security support on a commercial basis, and the recruitment of mercenaries via the media and the Internet. It is necessary to determine the status of these organizations, both at international and national level. Some aspects of their work (providing security services and military actions) are consistent with international law, the other (recruitment of mercenaries and active military intervention in armed conflicts) violate it.

Unfortunately, scientists and experts in the field of IHL cannot find a common approach to the concept definition of "mercenary" and "foreign volunteers". These concepts are treated by each side of the internal armed conflict with its own point of view. As a rule each party alleges it has "foreign volunteers" participating in the fighting while the opposing side uses "mercenaries." In our opinion, the problem of the concept specification of "mercenary" and formulation of the concept of "foreign volunteers" can be solved only with a comprehensive study of these phenomena from the perspective of law, sociology, political science and psychology. Initially it is necessary to make amendments to the regulations of international humanitarian law as for the specified concept of "mercenary" and the reworded concept of "foreign volunteer", and then distribute them to the level of national legislation. To carry out this urgent and significant work we propose to create an international commission to amend the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), Geneva, 8 June 1977, clarifying Article 47 “Mercenaries" and adding Article 48 "Foreign volunteers".

2. The personnel of private military companies

As a rule, employees of private military companies are present in the area of regional armed conflicts and they take part in the hostilities in the framework of the agreement between the PMC and the parties to the conflict. PMC (Private military company) is a commercial company that offers specialized services related to participation in armed conflict or military operations, as well as the collection of intelligence, strategic planning, logistics and counseling; the rights and obligations of the parties in the services provided are negotiable.

According to the UN the world volume of services in this area is $120 billion, Brooklyn University assesses it in $180 billion. And during the conflict in the Middle East and Africa private military services market exceeded $200 billion. The development of such "dangerous" segment is favored not only by the military operations, but also the internationalization of large businesses. Thus many companies (including Russia) with subsidiaries or joint ventures in Libya, Iraq, Afghanistan and African countries are forced to create their own paramilitary security structures or attract foreign mercenaries. There are more than 3 thousand similar firms in the world according to the US Congress. And this figure will only increase [15].

Private military companies can be divided into three types:

1) military service company (military provider company) - they directly participate in combat operations;

2) consulting companies (military consulting company) - they participate in the reform of the armed forces, train army units, train to handle new types of weapons;

3) logistics companies (military support company) – they are engaged in logistic support troops, military construction, maintenance of complex weapons systems.

The advantages of PMCs as to the regular armed forces should be attributed to the following: a) their use does not cause any discontent of Western European inhabitant, which may be caused by application of the regular armed forces; b) they can be a counterweight to the local military in the states with weak political institutions; c) they are capable of rapid deployment; d) losses of personnel are not counted in official government reports; e) more flexible operational management; f) no bureaucracy; g) high level of professionalism as compared to the regular troops [15].

At the same time, private military companies form ambiguous attitude to them and the cause of which is: abuse of their employees to the civilian population, terms of the staff contracts with companies do not provide all the options for the development of the situation, which reduces the flexibility of their actions in a combat situation; the lack of an agreed plan of arrangements and a single operational centre of command of troops and private military companies; the lack of data exchange and incomplete data of operation nature.

According to available information, only one company, Omega Consulting Group, legally provides services of this nature in Ukraine. It presents itself as a leading provider in the global market of private military and security business and offers customers a wide range of specialized services focused mainly on the organization and integrated management of large business projects in Ukraine and abroad [16].

The issue of normative and legal regulation of the provision of services to such specialized enterprises remained unresolved for a long time. Only on 06 October 2008 the sixty-third session of the UN General Assembly examined an informal summary of the Montreux Document prepared by Switzerland, which contained rules and principles of activity of private military and security companies in the zones of military conflicts. By 01 August 2012 this document was signed by 42 states of the world as well as by the European Union. The Montreux Document has the notion of 'private military and security companies' as private enterprise entities providing military or security services irrespective of that how they characterize themselves. The services include: armed security and protection of people and objects, maintenance and operation of fighting complexes, taking into custody of prisoners, consulting and training of local servicemen and security men [17]. On the base of the Montreux Document with participation of governmental experts from different countries of the world, as well as from Ukraine, it was developed and in November 2010 opened for signing in Geneva the international code of behavior of private military companies providing services in the sphere of security (International Code of Conduct of Private Security Service Providers (ICoC), to which 789 PMC from 74 countries joined by 1 August 2015. The existing juridical obligations of the states, private military companies and their personnel were declared in the Code. In addition the practical methods of assistance to observation of norms of international humanitarian law and standards in the sphere of human rights at the period of armed conflicts were recommended to the states. This document represents the code of rules proceeding from the norms of international law, human rights which are recommended to follow for the personnel during rendering military services. The code is not legally binding and does not touch upon the existing obligations of the states in the common international law or the international agreements, which members they are, in particular, their obligations according to the Charter of the United Nations, however, it was recognized as the first international document regulating some aspects of rendering military services [18].

Only in two countries there were created schemes which regulate the activity of PMC on the level of states (in the US and the SAR). In the US the sale of military services is regulated by the Arms Export Control Act [19], according to which every private military company is obliged to receive the license for the work abroad in the State Department. In case of license received, it may control the activity of the firm on the fulfillment of the contract. Moreover, transactions, which value exceed $50 mln. are subject to the Congress approval. In the SAR the activity of PMC is licensed by the National Committee on the control over conventional arms according to the Foreign Military Assistance Act 1998 (Act on mercenaries) [20].

The outdated UK Foreign Enlistment Act, 1870 is valid in England up to present [21]. In 2002 the British government sent to the Parliament for discussion as a law a concept of PMC licensing schemes creation ("Private military companies: options for regulation") having published it in the so-called “Green Paper” [22]. However, this law has not been adopted yet.

In the modern era of globalization there is a tendency of increase of the range and quality of services provided by private military companies. These services include:

- creation of mercenary military forces. For example, the government of the United Arab Emirates has signed a contract with one of the PMCs for the formation of a foreign mercenary battalion;

- peacekeeping engagement of PMC. In the media space there were proposals for deployment anywhere in the world of a fully equipped with heavy machinery and attack aircraft peacekeeping brigade;

- use of private military companies in regional armed conflicts;
- engagement of private military companies to combat unrest inside a state, suppress armed insurgency warfare, fight against terrorism, etc.

Results

Thus, today PMCs act as a non-legal tool of external policy of states. This tool should be defined and described according to legal standards. The market of services provided by PMCs is subject to state regulation.

Absence of legislative regulation of PMCs in Ukraine does not allow to give an unambiguous assessment of the legal status of the personnel of these companies – participants of the ATO. In our view, national legal assessment of new trends in regional military conflicts is necessary – recruitment and employment of personnel by private military companies providing services of force, expert and security nature on a contractual basis. We think it is advisable to determine the status of such organizations legislatively at the national level; the issues related to licensing and control of PMCs and their personnel should be resolved, with differentiation of social and civil status of PMCs personnel when providing services to the state (for example, if PMC representative who fought for money deserves a state award?). It is the necessity of defining the legal framework for this type of complex activity (economic, military and political) that determines adoption of the law on private military companies in Ukraine.

Conclusion

In our opinion, it is necessary to initiate the establishment of an International Commission to clarify the concept of "a mercenary" and the wording of "a foreign volunteer". Clarification of Article 47 “Mercenaries” of the Protocol Additional to the Geneva Conventions of 12 August 1949, Geneva, 8 June 1977 and Supplement Article 48 "Foreign volunteers" will be the result of the international commission work. States use private military companies as a non-legal tool in foreign policy. The market of services by private military companies is to be subject to state regulation. Absence of legislative regulation of such companies activity in Ukraine does not allow to give an unambiguous assessment of the legal status of their personnel engaged in the ATO. The problem of defining the legal framework for this type of activity necessitates the adoption of the Law of Ukraine "On Private Military Companies."

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Международное гуманитарное право и правовое положение персонала частных военных компаний, как участников внутренних военных конфликтов

Николай Леонидович Шелухин

Донецкая Народная Республика
83015 г. Донецк, пр. Богдана Хмельницкого, д. 102, оф. 815
Доктор юридических наук, профессор
E-mail: shelukhin2004@inbox.ru

Аннотация. Статья посвящена правовому положению сотрудников частных военных компаний, принимающих участие во внутреннем (региональном) военном конфликте на востоке Украины в составе ее воинских формирований. Обоснована необходимость внести уточненное понятие «наемник» и вновь сформулированное понятие «иностранный доброволец» в нормативные акты международного гуманитарного права. Проанализирован мировой опыт законодательного регулирования деятельности частных военных компаний. Определен ее внеправовой характер в структуре внешнеполитической деятельности государств. Исследованы тенденции расширения сферы деятельности частных военных компаний. В нее включены создание наемных военных формирований, миротворческая деятельность, участие во внутригосударственных вооруженных конфликтах, подавление вооруженных выступлений, борьба с терроризмом и т.п. Доказана необходимость формирования национального законодательства, регулирующего деятельность частных военных компаний.

Ключевые слова: международное гуманитарное право; внутренний вооруженный конфликт; наемник; иностранный доброволец; частные военные компании; правовое регулирование; договорные отношения.

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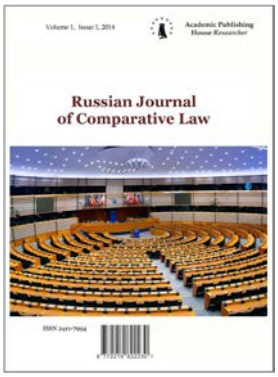

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Recent Reforms of Italian Civil Procedure (or 'The Road to Hell is Paved with Good Intentions')

Elisabetta Silvestri

University of Pavia, Italy
Strada Nuova, 65, 27100 Pavia
LL.B, LL.M., Associate Professor
E-mail: elisabetta.silvestri@unipv.it

Abstract

This essay describes some among the most recent reforms that have affected Italian civil procedure. These reforms rely heavily on the use of ADR, and particularly on mediation, arbitration and assisted negotiation, in an attempt to reduce the heavy backlog of civil cases and to speed up the resolution of disputes. In Italy, an attempt at out-of-court mediation is mandatory in a wide variety of civil and commercial cases: mediation had some ups and down, since it was made mandatory in 2010, repealed by the Constitutional Court at the end of 2012, and eventually reinstated in 2013. In 2014 two new ADR procedures were established, that is, assisted negotiation and the 'transfer' of cases already pending before courts of first instance or appellate courts to a panel of arbitrators. While assisted negotiation is mandatory for cases whose value is above a certain threshold (provided that the claim is for payment of sums of money), the 'transfer' of cases to arbitration is strictly voluntary and, as a matter of fact, it is possible only when both parties agree on diverting their case from the court system to arbitration. This essay expands on the many controversial issues raised by the 'transfer' of cases to arbitrators and, more generally, on the dangers of the 'outsourcing' of dispute resolution.

Keywords: Italy, civil cases, mediation, assisted negotiation, arbitration.

Introduction

The administration of justice, and in particular of civil justice, is one of the most critical areas of the Italian legal system. It is not necessary to expand any further on that point, since it is well known in the Member states of the EU and beyond. A variety of official and unofficial documents have demostrated that the performance of the Italian judicial system is significantly worse than the performance of other comparable countries as far as the length of proceedings and the backlogs of courts are concerned. Among the documents that shed light on this issue, it is worth mentioning a relatively recent one issued in September 2014 by the International Monetary Fund. In this document, a chapter is devoted to 'Judicial Reforms for Growth'. The conclusion of this chapter reads as follows:

'There is scope for significant improvements in the efficiency of the Italian judicial system, with potentially important macroeconomic effects. The reform should be structural, comprehensive and should have the necessary institutional support. It should also have the buy-in of all relevant

stakeholders, notably judges and lawyers. The strategy should follow a four-pronged approach: (i) reducing the backlog; (ii) promoting wider use of alternative disputes resolution proceedings, such as mediation; (iii) rationalizing the appeal system, including review by the Supreme Court of Cassation and the role of lawyers in this context; and (iv) focusing on courts' management and accountability. Such a comprehensive reform package, if taken together and effectively implemented, could help reduce unemployment and lift potential growth by increasing investment'[1].

The report emphasizes the need for structural and comprehensive reforms, but, actually, if there is anything that Italy has not been lacking since the beginning of the third Millennium it is reforms affecting the administration of justice, and in particular the treatment of civil cases. Just to give the reader an idea of the speed at which the legislators have been turning tables in the field of civil procedure, consider that the Code of civil procedure was amended in 2003, 2005, 2006, 2009, 2011 (three times), 2012 (four times), 2013 and 2014 (two times). Needless to say, it would be useless to look for a unitary and specific vision of civil justice as the inspiration of these reforms: the reality is that they have been dictated only by the need to face the emergency, meaning the tremendous caseload overburdening Italian courts. According to the most recent survey conducted by the Ministry of Justice, a total of 4,800,000 civil proceedings were pending as of November 2015: a dreadful number of cases, even though, according to the Ministry, it shows a positive trend towards the decrease of pending civil cases, which were 5,155,000 at the end of 2013 [2].

Materials and methods

The main sources of this essay are both official documents of Italy (the Constitution, the Code of civil procedure, and a few statutes amending the Code), and scholarly essays. As far as the method followed by the author is concerned, the approach is descriptive of the law in force, with personal annotations and comments aimed at emphasizing the problems brought about by the interpretation of a set of new rules, many of which have not yet produced any case law.

Discussion

Many of the reforms mentioned above have gone in the direction of increasing the use of ADR and, in general, of fostering a creeping privatization of dispute resolution. The case of out-of-court mediation, at first made mandatory, then repealed by the Constitutional Court and eventually reinstated as a compulsory step to be taken before acquiring the right to approach the court system is probably the best example of this trend [3].

While at the beginning the promotion of ADR was presented as the choice necessary to embrace more civilized and therefore better ways to resolve civil disputes, with one of the latest reforms – the one enacted in the Fall of 2014 – the legislators have whipped off their masks, passing a statute whose official title is 'Urgent measures for the privatization (of dispute resolution) and for the disposition of pending civil cases' [4]. Privatization is this author's free translation of a neologism invented by the legislators for this occasion: in fact, the Italian word 'degiurisdizionalizzazione' has no specific translation (and cannot even be found in a good Italian dictionary), but it implies the removal of civil cases from the court system, and their diversion toward private methods of dispute resolution.

The measures contemplated by the statute are many; two seem worth mentioning, meaning the new 'assisted negotiation' and the 'transfer' of pending civil cases to arbitrators. The former will be described briefly, while more attention will be paid to the latter.

The 'assisted negotiation' is an out-of-court procedure, whose aim is to resolve a dispute by an agreement that the parties are supposed to reach with the assistance of their attorneys, based upon a contract in which the parties have committed themselves to cooperate in good faith so as to put an end to their dispute amicably. The interesting aspect of the 'assisted negotiation' is that it is mandatory for any claims for damages arising out of road traffic accidents, as well as for any claims for payment of sums in excess of 50,000 Euros, whether the payment is claimed as the consequence of a contractual obligation or as the result of a tort.

And now let us examine the most curious reform, the 'tranfer' of cases pending before both a court of first instance and a court of appeals to a panel of arbitrators. The relevant rules will be described as they are, in their sheer madness, with some comments here and there and an emphasis placed on the problems they bring about.

The 'transfer' is available in any civil cases, provided that the matter at stake is arbitrable, meaning it does not entail any rights the parties cannot freely dispose of (for instance, rights concerning personal status, such as marriage, parenthood, and the like). Labor cases can be tranferred to arbitrators only if arbitration is specifically allowed by collective agreements. The 'tranfer' is available also for the cases in which the defendant is a public administration and the value at stake is below 50,000 Euros.

The 'transfer' is possible only insofar as it is requested jointly by both parties at any stage of the proceeding, but before the case has been remitted to the judge for the decision, meaning before the moment when the parties have lodged their final briefs with the court.

If the requirements of the 'tranfer' are met, the judge will transmit the case to the Chairman of the local Bar Association. Either the parties or, if they disagree, the Chairman himself will choose the arbitrators among the attorneys who have been enrolled in the local Bar for at least five years. Once the arbitrators have been appointed, the case will continue before them 'as it is', meaning that time bars, estoppel, and in general any legal limitations that in the judicial proceeding have prevented the parties from changing their strategy, producing new evidence and so on can neither be revisited nor modified: in other words, the arbitrators pick up the case where the judge left off. That said, the arbitration proceeding shall follow the general rules laid down by the Code of civil procedure for domestic arbitration (Articles 806-838), and the arbitral award shall have the same effects as a court judgment.

If the 'trasfer' is requested on appeal, the award must be rendered within 120 days from the appointment of the arbitrators. If this deadline is not complied with, the parties must resume the case before the court of appeals. If they fail to resume the case, the proceeding shall be discontinued. If the arbitrators render the award, the award is challenged, and eventually declared null and void, the case must be resumed before the court of appeal within 60 days from the date when the judgment declaring the arbitral award null and void has become final (meaning, it has become *res iudicata*).

Does the reader feel at a loss like this author does, faced with such a mess? Which kind of arbitration is this? Certainly, it is not a form of court-annexed arbitration, because once the 'transfer' takes place, any court's supervision over the arbitration procedure stops; it is not a 'regular' arbitration that the parties could choose, at least in theory, even after the beginning of litigation, since – should they opt for arbitration – the litigation would have to be discontinued and the arbitration proceeding would start from scratch. On the contrary, according to the new statute the 'transfer' implies that the case continues before the arbitrators, who – as mentioned above – pick up the case where the judge left off. Therefore, in spite of the fact that the new rules provide that the 'transfer' to arbitrators shall follow the Code's rules governing domestic arbitration, this author believes that the legislators have delivered a new legal 'monster' that is difficult to qualify, and whose purpose is unclear.

The interpretation of the new rules raises a variety of problems. Just to mention some, consider, for instance that the parties may request the 'transfer' of the case to arbitration logding with the court a joint application: nothing is said about the form (written or verbal) that the application is supposed to have. That is unexplicable, in light of the fact that, according to the Code of civil procedure, the arbitration agreement must meet specific requirements, namely it must be made in writing; it must describe the object of the dispute; and it must include the appointment of the abitrators or the indication of the manner in which they will be appointed. But, most of all, what is difficult to understand is why the parties should agree, perhaps at a late stage of litigation, to divest the court of the dispute so that it will be decided by a panel of arbitrators. There are no incentives at all: no financial incentives, because on top what the parties have already invested in term of court fees, attorney fees, costs of experts witnesses and the like, they will have to pay for the arbitrators' services. Neither can the parties count on time incentives, since the rules fail to provide for a time limit within which the arbitrators are expected to render their award, considering that the time limit of 120 days refers only to the 'transfer' of a case pending on appeal. Besides, even supposing that the arbitration procedure will proceed faster than adjudication, the legislators seem to have moved from the assumption that both parties have the same interest in a quick resolution of the dispute, while in practice it is quite common that one party (in general, the defendant) has a strong interest in dragging things out as long as possible. And what about multiparty litigation or,

even worse, the cases in which the joinder of parties is mandatory? These are just some of the many questions that are left unsolved.

Neither does the procedural flexibility that could make the transfer of the dispute to arbitration appealing work as an incentive for the parties, since the case lands before the arbitrators 'as it is'. The consequence is that the parties will not have any possibilities to change their defensive strategies, nor will they be able to reverse – so to speak – what they have done in the judicial proceeding or to take any initiatives that would be barred in the adjudication.

Another critical point is the following: according to the new rules, the award has the same effects as a judgment. The problem is that, according to Article 825 of the Code of civil procedure, the party seeking enforcement of the award must file certied copies of both the award and the arbitration agreement with the court of first instance at the seat of arbitration. If this rule is considered applicable, then we will be faced with a sort of legal 'vaudeville', with a case that goes madly from the court to the arbitrators and then back to the court.

Another aspect of the new rules that seems worth investigating concerns the arbitrators: the choice of the parties is limited, since the arbitrators can be selected only among the attorneys who are members of the local bar. It is superfluous to emphasize, on the one hand, how this limitation runs against the traditional freedom of the parties in the choice of arbitrators and, on the other hand, how high is the risk of conflicts of interest, because of the vicinity of the attorneys for the parties and the prospective arbitrators. Very little attention is paid to the problem of independency and impartiality of arbitrators, but that is a fault of the whole Italian arbitration law: in this regard, it is worth mentioning that the Code of civil procedure does not impose on arbitrators any duties of disclosure, even though it lists a variety of grounds for challenging and disqualifying arbitrators. As far as attorneys are concerned, the Code of conduct for Italian Lawyers seems to address the problem in a more serious way, requiring that attorneys appointed as arbitrators must disclose to the parties every relationships, facts and events that are likely to affect their independence [5].

A few final words on the 'transfer' to arbitrators of a case pending on appeal. In this author's opinion, this is the apotheosis of madness: leaving aside the technical issued raised by the new rules, the idea that a judgment issued by a member of the judiciary can be reviewed and possibly quashed by a private judge is simply repugnant. It is true that the courts of appeals are the courts in worste shape from the point of view of backlog, but a State that believes that the problem can be solved devolving the appellate review to arbitrators is a State that disowns willfully one of its fundamental powers: and this is unacceptable, even under extreme circumstances.

Results

As mentioned above, the 'transfer' of cases to arbitrators has not taken off, in part because the rules governing it are poorly written and difficult to enforce, but essentially because the legislators did not provide for any incentives persuading the parties to remove their case from the court so as to have it decided by aritrators. As far as the assisted negotiation is concerned, so far its success is modest.

Conclusion

The reforms described above fall within the concept of outsourcing judicial functions. In this author's opinion, this is a form of outsourcing that cannot be regarded as a blessing, but, on the contrary, as a pure betrayal. The rethorics of ADR or, even worse, the self-celebrating hymns by which attorneys have saluted the new rules as the long-awaited recognition of their fundamental contribution to the process of improving the administration of justice are simply out of place: the Italian government has openly aknowledged that it is unable to do its job, that is, to grant its citizens the right to access to courts, a right enshrined in the Constitution.

In 2012, a distinguished British Professor Dame Hazel Genn, delivered a very inspirational lecture on the state of civil justice in England. The title of the lecture is 'Why the privatization of civil justice is a rule of law issue'. In light of the situation of public justice in Italy, this author cannot help subscribing to Professor Genn's point of view, and finds it appropriate to close this essay quoting a passage from the lecture: '[the removal of most civil diputes from the public justice system] has the potential to undermine the rule of law and that, together with the barriers that are being erected to access to justice for citizen, will have have a corrosive influence on public respect

for and compliance with obligations and responsabilities under the law, and provide encouragement to those who would flout their legal responsabilities' [6].

References:

1. See 'Italy – Selected Issues', IMF Country Report No 14/284. P. 4–16 // https://www.imf.org/external/pubs/ft/scr/2014/cr14284.pdf, at P. 15.

2. Relazione sulla performance 2014 – Ministero della Giustizia // https://www.giustizia.it/giustizia/it/contentview.wp?previsiousPage=mg_1_8_1&contentId=ART1195837.

3. Silvestri E., Jagtenberg R. 'Tweeluik – Dyptich: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation. Netherlands-Vlaams tijdschrift voor Mediation en conflictmanagement. 2013. Vol. 17. P. 29-45.

4. Reference is made to statute no. 162 of November 10, 2014.

5. A new version of the Code of Conduct for Italian Lawyers entered in force at the end of 2014. An official translation into English of the Code, prepared by the National Bar Council is available, // www.canestrinilex.com/resources/ethical-code-italy/

6. Hazel Genn, 'Why the privatization of civil justice is a rule of law issue'. 36th F.A. Mann Lecture, Lincoln's Inn, 19 November 2012 // https://www.ucl.ac.uk/laws/judicial-institute/layout-components/36th_F_A_Mann_Lecture_19.11.12_Professor_Hazel_Genn.pdf.

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Последние реформы итальянского гражданского процесса (или "Путь в ад выстлан благими намерениями")

Елизабетта Сильвестри

Университет Павии, Италия
Strada Nuova, 65, 27100 Pavia
LL.B, LL.M., Associate Professor
E-mail: elisabetta.silvestri@unipv.it

Аннотация. Статья описывает некоторые из самых недавних реформ итальянского гражданского процесса. Эти реформы в значительной степени полагаются на расширение использования посредничества, и особенно арбитража и помощи в переговорах. Они нацелены на упрощение рассмотрения сложных гражданских дел и ускорение разрешения споров. Основное внимание уделяется описанию роли суда в договорном посредничестве, различиям в формах разрешения споров, условиям использовании. Кроме того, анализируется процедура, установленная для судебной медиации. Затрагивается вопрос о критериях, которые применяются для отличия посредничества и примирения.

Ключевые слова: Италия, гражданские дела, медиация, посредничество, помощь при переговорах, арбитражный процесс.

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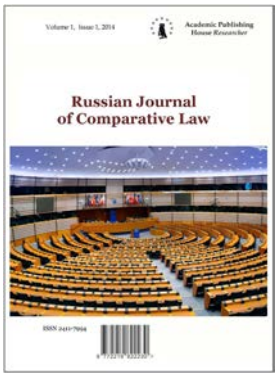

Reviews

UDC 343.73 (075.8)

Review: Currency Law: a textbook / team of authors: ed. P.N. Biriukov, V.E. Ponomarenko. M.: Justicia, 2016. 286 p. (Bachelor and master)

Alexei A. Moiseev

Russian Customs Academy, Russian Federation
Комsomolsky Avenue, 4, Moscow Region, Lubertsy City 140009
Doctor of law, professor
E-mail: moiseev@customsacademy.ru

Russian legal, banking and finance and academic community can now benefit from a high-quality textbook "*Currency Law"* [1] for Bachelor's and Master's students edited by professor Pavel Biriukov, the founder of Voronezh scientific school of international law, the head of International and European Law Department of Voronezh State University, and associate professor Vladislav Ponomarenko, lecturer at Monetary Relations and Monetary Policy Department of Financial University under the Government of the Russian Federation.

A distinguishing feature of the textbook is its succinctness combined with detailed consideration of all the basic provisions of currency law and currency regulation. The textbook fully covers the issues of monetary and financial regulation. The authors consider both international legal aspects of currency regulation and domestic legislation on the issue.

The textbook describes history of the international monetary system, the basics of implementation of international currency law rules in Russian legislation, legal issues of regional monetary integration by giving an example of the European Union (EU) and the Eurasian Economic Union (EAEU) etc. Thus in chapter V, devoted to the European Union, the authors examine the history of European economic and monetary union and its place within the EU. They emphasize that the economic and monetary union is the highest legal form of states' economic integration which "means that states pursue coordinated economic policy – economic union, while introducing common currency (single currency) – monetary union".

Highly relevant is chapter VI on the legal basics of monetary integration in the Eurasian Economic Union. The authors examine the development of monetary integration in Eurasian region, modern problems of currency control in the EAEU and common economic space of the Member States and the main trends in monetary integration development within the EAEU.

Special attention is paid to the issues of currency regulation, currency control and liability for violating currency law in the Russian Federation. The textbook describes all the main aspects of Russian monetary policy such as general characteristics and the place of currency law in the Russian legal system, sources of currency law and territorial application of currency law rules, the notion and types of monetary legal relations, subjects and objects of monetary legal relations, legal basics of currency regulation and currency restrictions in the Russian Federation, legal status of

currency regulation bodies and legal regulation of domestic currency market, the state exchange rate and rights and obligations of the residents when carrying out currency transactions. The textbook gives a detailed description of the currency control mechanism in the Russian Federation, its forms, types and methods, bodies and agencies. The authors analyze the exercise of functions and information and legal cooperation of the subjects of currency control as well as rights and obligations of the residents during the inspections of the currency control bodies and agencies. The authors specify administrative and criminal liability for violating currency law rules in Russia.

It is necessary to emphasize the relevance of the topic of paragraph 3.5 devoted to currency control and counteracting legalization (laundering) of proceeds from crime and financing of terrorism. The paragraph interprets the meaning of Federal Law of 07 August 2001 N 115-FZ "*On Counteracting Legalization (Laundering) of Proceeds from Crime and Financing of Terrorism"* specifying that "internal control is the activity of organisations performing operations with monetary funds or other assets for revealing operations to be put under obligatory control and other operations with monetary funds or other assets, connected with legalisation (laundering) of proceeds from crime, and financing of terrorism".

The authors were challenged to write a textbook in the conditions when the textbooks on currency law are abundant in Russia and the demands for any new book grow higher. Undoubtedly, P. Biriukov and V. Ponomarenko excelled. All the relevant issues of currency law, which have practical value, were incorporated into a succinct edition, which proves the proficiency and knowledge of its authors and a detailed research they conducted. Paraphrasing the Russian poet N. Nekrasov, there is not enough room for the words in the textbook but there is plenty of space for thoughts.

The textbook consists of six chapters and contains definitions of the key notions. It satisfies the requirements of the Federal State Standard of Higher Education and is recommended by the Academic Board on higher legal education. The textbook has good methodological basis aimed at forming skills and enlarging students' knowledge. The abstract states that the target audience of the textbook includes students of law and economics departments as well as academicians and researchers interested in currency law. However, the target audience is much bigger and should have been expanded in the abstract.

The textbook is well incorporated into the Russian system of training lawyers, especially those that specialize in international and state law. Analyzing the close connection between national and international law in currency and financial sphere, the authors point at their specific interaction. All international legal currency regulation mechanisms can be implemented only when the appropriate local legal rules and mechanisms are available on a specified territory.

Примечания:

1. Валютное право: учебник / коллектив авторов: под ред. П.Н. Бирюкова, В.Е. Пономаренко. М.: Юстиция, 2016. 286 с.

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Алексей Александрович Моисеев

Российская таможенная академия, Российская Федерация
140009, Московская область, г. Люберцы, Комсомольский пр., д. 4
Доктор юридических наук, профессор
E-mail: moiseev@customsacademy.ru