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Perceptions of Transnational Employment Relations in Russia: Policy and Practice.

Presenting author: Daria V. Chernyaeva
Organisation/affiliations & address details of presenting author: National Research University "Higher School of Economics, 119017 Russia Moscow M. Ordynka, 17. Tel. +7 495 53 17 91, Fax: +7 499 152 11 13, E-mail: dchernyaeva@hse.ru ; empllaw@gmail.com

INTRODUCTION

The paper aims at analyzing the role of various legislative and policy sources in delineating the conceptual and regulative frameworks for transnational employment relations. This type of employment relations is still perceived as a novelty in Russia and is not actually reflected in the Russian legislation. However while during the last decades the legislature has not provided for a consistent approach to the understanding of this phenomenon, the perception of it is now being formed - more or less successfully - on the international/interregional and corporate levels, as well as in contemporary research and in everyday practice.

The paper offers an outline of recent academic studies defining particular groups and categories of transnational employment relations proposed by the Russian scholars, explaining problems that arise in the legal regulation of this phenomenon and suggesting possible ways of their solution.

Apart from this the paper summarizes principles for the transnational employment relations regulation provided in interregional and bilateral treaties (mostly of the Commonwealth of Independent States and of the EuroAsEC levels). The author describes commonalities and variations of approaches that can be found in these documents, makes an effort to explain the reasons that have brought them about and gives some assumptions of their possible effect and productive usage at the national and enterprise levels. These speculations are supplemented with an analysis of enterprise level developments – both national and multinational – in regard to transnational employment relations that embrace introduction of new concepts and instruments, bringing to light new aspects of the phenomenon and spreading good practices on sectorial or inter-sectorial levels.

Among other issues discussed in the paper there is an assumption that the time has come to give a more serious recognition of the so called "soft law sources" which can now be found on both international/interregional and enterprise levels. While these sources are widely used in practice they still lack official recognition and any particular status in the Russian legal doctrine.

This abundant data demonstrates some clear similarities and differences. Therefore it is argued that the field has been developed to the point where particular generalization and systematization can be performed to make the legislative amendments possible in the nearest future. The author provides several examples of such generalizations and amendments and makes an inference of their effect onto the policy and practice of all the stakeholders involved in transnational employment relations or responsible for their regulation in the Russian context.

METHODS

The paper is based on an analysis of the doctrinal literature, legislative sources, international treaties and case law touching upon the phenomenon of transnational employment relations. The various approaches to the problem of naming of the phenomenon and of description if its structure were analyzed, and an attempt was made to reveal the most consistent conceptions.

An emphasis was made onto the works published by Russian scholars in order to familiarize the readers with the Russian scholarship and regulations in the field. However these approaches are analyzed in the context of established international ones where it is appropriate and applicable.

The analysis embraces the limitations of the terms used and the perspectives of their application on national and international levels.

RESULTS

It is found that no consistent approach to the naming of the phenomenon has been developed in the doctrinal literature either published in Russian or in English. There have been more than three different wordings suggested and widely used but all of them suffer from serious deficiencies. These deficiencies make the concept even less distinct and add much confusion to its regulation and interpretation.

The author makes an assumption that as for now the most suitable naming of the phenomenon might be an "external cross-border employment relations" or "transnational employment relations" and argues for its further popularization and promotion.

The study has also revealed that it is possible to classify the transnational employment relations into simple (i.e. involving two national legal orders) and complex (i.e. involving three and more national legal orders).

It was also found that while it seems timely and appropriate to consider legal norms regulating transnational employment relations as an institution of both labour law and private international law, the Russian legislator demonstrates reluctance in employing this approach. The traditional attribution of these norms only to the private international law branch of law leads to extension of the Civil Code section devoted to general conflict of laws rules onto transnational employment relations and abstaining from an introduction of a special regulative regime for such relations in the Labour Code.

DISCUSSION

In the field of theoretical speculations concerning transnational employment relations there are at least three aspects that have been widely discussed in the Russian labour law and private international law scholarship during the last decades. The first is the correct naming and the essence of the notion itself. The second relates to an internal classification or systematization of these relations. The third concerns to the place of legal norms regulating this phenomenon among (or inside) other branches of law.

These purely theoretical problems reflect the general approach of the Russian scholars towards legal studies. This approach implies (or requires) a sound theoretical foundation for every core concept in a field or branch that shall preferably be unanimously accepted by the majority of scholars and, preferably, practitioners. It is believed that without such foundation it is hardly possible to formulate any concise theory in a particular sphere and to develop a well-grounded legal regulation of various relations manifested in it. Having said this I would suggest that in this context the case of transnational employment relations shall be perceived as complicated.

The naming problem

Russian legal scholarship has developed various more or less formal names for this phenomenon. Many scholars employ a straightforward approach and call it "international employment relations" (Dovgert, 1992; Shesteryakova, 2007; Kiselev, 2003, etc.) assuming that: (1) it is obviously "employment relations"; (2) it happens between representatives of different nations (i.e. on an "inter-national" level) involving several (at least two) national legal orders. Authors using this naming usually do not go deep into substantiation of this choice in a belief that it is understandable without special explanations and automatically comes to mind when one speaks about the phenomenon. This naming seems to be used as a generally recognized term and when the context is clear does not cause interpretational problems.

However when the context is not that clear, the naming "international employment relations" can lead to confusion. Its main problem lies with the word "international" being actually polysemantic (or better to say, bi-semantic) in an everyday language. And there are reasons to believe that it is the case for both Russian and English languages and possibly some other languages as well (see Collier, 2001). The word "international" is traditionally used to indicate two levels of implementation: (1) implemented above the national frontiers, on an interstate or intergovernmental level – as in the case of international

organizations or international treaties; and (2) aimed at application in regard to another state or a selection of states, - as in the case of an "international passport" or an "international migration". To make the situation even more complicated an "international law" must be mentioned which shows an absolutely different dichotomy, suggesting that something "international" may be either public or "private". If we add here the complexity of the legal language itself, the picture becomes fully complete.

Thus a confusion between such notions as, for example, a "regulation of international employment relations" (embracing all norms - both national and international - applied to the phenomenon under consideration) and an "international regulation of employment relations" (embracing only international legal norms – those of international agreements, etc. - applied to any employment relations in general) comes as an almost inevitable result of using the term. This difficulty definitely does not favour a wider usage of the term "international employment relations" as least in the Russian-speaking environment. However we may recall the case of the "contract of service" vs. "contract for services" acknowledged yet by the Romans (Sohm, 1892; McDonell, 1904, etc.) but being still used side by side (though still producing much confusion in everyday practice and sometimes even in courts – see Freedland, 2003, etc.).

Nonetheless despite all the problems described, the above mentioned naming seems to be one of the most acceptable in terms of easiness of its interpretation in a particular context. All other namings for the relations based on transnational labour are at least not less problematic.

For example if we took the term "transborder" (or "cross-border") to define the phenomenon discussed, it would also make sense to add the above mentioned (and as we've already revealed, somewhat confusing) term "international" to it – to indicate that we meant an national but not "intra-national" borders and speak about something beyond the single state territory (and/or jurisdiction). Otherwise we risk to face a misunderstanding in regard to federative states (like Russia, Germany or the USA) and to the states with a considerable political and/or legislative autonomy of the regions (like Spain or the UK). As we all know, having not only external borders with other countries but also internal ones between its states or provinces, these countries may allow its regions to regulate labour more or less differently.

This approach embraces conflicts of law rules and regulations covering workers who travel between the regions of the country. In such cases it shall be suggested to distinguish external transborder employment relations (i.e. going beyond or through the state borders) and internal ones (i.e. going beyond or through the borders of the intra-state administrative and territorial entities). The term "cross-border employment relations(hip)" can be found in labour law scholarship published in English (Evju and Novitz, 2012; Lazar 2008; Royle, 2006, etc.) while Russian law scholars seldom make use of it (Dmitrieva, 2010).

Almost the same is the case of an "inter-jurisdictional employment relations" which also requires clarification concerning its "externality" or "internality" in regard to a state. Apart from this the term "inter-jurisdictional" is more habitual for private international law scholars (see Chernichenko, 2002; Carducci, 2012; Buxbaum, 2009, etc.) while labour law scholars and students may experience difficulties having almost no examples of its application in their field of specialization.

I would say that the two above mentioned wordings are relatively efficient in reflecting the nature and the essence of the phenomenon without falling into confusion or controversies. For being commonly accepted this approach might just lack a concordance of the majority of labour and private international law scholars concerning its further promotion, popularization and much more consistency in its application.

It is also mostly private international law scholars who argue that the phenomenon of transnational labour relations should be called "employment relations with a foreign element" (Spector, 2004). There are reasons to presume that this wording has been borrowed from the foreign private international law scholarship through the works published in Russian (either translational or original) (see Luntz, 1973 at 140-170 with an analysis of foreign private international law doctrines, their interrelation and their influence onto the pre-Soviet and the Soviet Russian private international law scholarship; Boguslavskiy, 1988 at 11-12; see also an analysis of existing studies of this notion in the Russian scholarship in Erpylyova, 2012 at 26-30). Sometimes the authors use this wording along with another ones (Kiselev,

2003) in order to emphasize that the relations are not considered from some highest "international" (i.e. interstate or intergovernmental and upper than any "national") point of view but from a particular national ground standing on which we see some of the elements of such relations as "foreign". For these authors the "foreign element" is the main specific of the phenomenon which predetermines the problems in their legal regulation in a particular national legal order which traditionally experience difficulties in getting beyond the national nature of its norms, institutions and procedures.

For labour law scholars the term "foreign element" still remains a bit alien and can be rarely found in their papers. The main discussion on the applicability and the essence of this term unfolds between the of international private law scholars (Erpyliova, 2005; Kolobov, 2006; Zvekov, 2004; Boguslavskiy, 2002 at 21, etc.). Most of them base this perception on the traditional private international law understanding its object as relations that include a "foreign element" (among the Russian private international law scholars the best description of this specifics is believed to be given in Luntz, 1949 along with the description of the aspects (or "structural elements") of such relations in which this element manifests itself).

This approach was criticized by prof. A.A. Rubanov (Rubanov, 1984) who pointed out that the so called "foreign element" apparent for so many scholars is not actually an element of a relationship at all but should be considered more a characteristic of some elements of a relationship, i.e. of its subjects (employer and employee) or its object (work/labour). This characteristic can be of "foreign" or "international" nature, and the latter can be attributed to either public (f.i. a public international service) or private (f.i. a work for transnational corporations) field depending on the level of the relations established. At the same time a consistency in the "foreign element" definition does not necessarily imply that the term itself can be effectively used to define transnational employment relations.

There are also works in which the author abstains from including the terms "foreign element" into the naming of the phenomenon calling the latter "employment relations with a foreign participation" (Kiselev, 2003; Kozlovskiy, 2000). In these cases the author observes that a particular "foreign element" can be found only in several types of such relations but not in all, and that sometimes such relations are not of employment but rather of civil or mixed nature. Therefore it is argued that including these terms into the naming of the phenomenon would be inappropriate.

I dare say that the wording that includes "foreign element" or "foreign participation" into the naming of the phenomenon is acceptable only in national scholarship when analyzing the problem from a position of a particular national legal system which sees anything outside its jurisdiction as "foreign". But this approach is hardly effective and relevant when describing the phenomenon from an entitative point of view.

In the title of this paper I used an alternative to these imperfect wordings which uses the word "transnational" instead of the problematic terms of "international" or "transborder" or something with a "foreign element" or "foreign participation". It was done intentionally but it was not meant to emphasize its usability. The term "transnational" just sounds modern and allows a researcher or a practitioner to clearly distinguish this type of relations from anything existing on a truly international or supranational level. This term is widely used in scholarly papers and books on transnational labour written in English (Ficher and Sydow, 2009; Perkins and Shortland, 2006; Rose, 2004, etc.). At the same time it is almost nonexistent in the literature published in Russian or is mentioned without any particular terminological explanations or comments (Kiselev, 1999). This may be attributed to the unwelcome association of this term with transnational corporations which - apart from being hardly "workers' best friends" - are not actually a "representative employer" for transnational employment relations where there are also many other types of specific employers (a natural person with a lex personalis different from that of his/her employee(s), a national subsidiary of a foreign corporation, an international organization, etc.).

There are also other wordings suggested for or used as a name of the phenomenon discussed (see Andrianova, 2002; Petrova, 2005; Kiselev, 2003 at 8-11, etc.) but their occurrence in the published works is scatter. It is obvious that there is still no one single naming which makes everyone happy. However the name "transnational employment relations" seems to be the most generally acceptable until we have something more unambiguous.

Unfortunately this perception is still found only in doctrinal literature. However I believe this might be a matter of time. The conflict of laws rules and the oldest Russian norm in the field of transnational employment relations appeared almost simultaneously, the former is not only some 8 months older than the latter, but also dates back to, - and was partly developed on the basis of, - the respective Soviet legislation that was in force (with various amendments) for about 80 decades while the contemporary norms regulating labour migration had been introduced as a complete novelty with almost no legislative prehistory. Therefore the time may not have come to judge their efficiency and the level of their development.

The current Russian legislation and other relevant governmental documents support the perception of a transnational employment relation as of either containing a "foreign element" of being of a "transborder nature".

Thus the term "foreign element" can be found in the norms covering "nouns": persons, places, entities, etc. For instance we may see it in article 414 of the Code of Merchant Shipping of the Russian Federation that stipulates the conflict of laws rules for the cases involving "…foreign citizens of foreign judicial persons or complicated by a foreign element". It is also mentioned in the Part III of the Civil Code of the Russian Federation in the article 1186 on the choice of law rules applicable to civil relations with participation of foreign persons or complicated by a foreign element" and in the article 1204 on the governmental participation in the civil relationship complicated by a "foreign element", and in par. 2.1, 2.2 and 3 of the Conception of development of the civil legislation of the Russian Federation (approved by the Presidential Council on codification and further improvement of the civil legislation on 07.10.2009) devoted to amendments of the conflict of laws rules in the Civil Code of the Russian Federation which in some cases (like employment disputes resolution or defining the relative authorized to receive unpaid wages of a deceased employee, etc.) are applicable to transnational employment relations as well.

It is logical that the same approach is employed by the Russian judicial system which is traditionally sluggish in the accommodation of all relatively new concepts. While it is rarely mentioned in courts, the Informative Letter of the Presidium of Supreme Court of the Russian Federation No. 10 of 25.12.1996 in par 9 mentions "foreign element" as the key feature of the relationship in question between a Belorussian and a Russian companies concerning the recovery of damages arose from the payment of disability pension fees for an injured employee of the plaintiff (the Belorussian company) to the Social Protection Fund of the city of Grodno. There also other examples from the case law in which courts used this concept in their argument on applicability of the conflict of laws rules (see Decision of the Supreme Court of the Russian Federation No. AKPI12-1558 of 23.01.2013 concerning the civil servants' accommodation subsidy volume in the case of the foreign residential property ownership, Decision of the Supreme Court of Arbitration of the Russian Federation No. VAS-7777/2010 of 07.11.2011 concerning the recovery of damages arose from a transnational freightage, etc.).

At the same time we must admit that Russian legislation on transnational employment relations has not evolved to such level of theorization and abstracting. As for now it does not consider a transnational employment relation as a general concept but speaks about particular examples (or types) of such relations: employment relations with foreign citizens employed in the Russian federation, secondments and assignments abroad, taxation in particular cases of transnational employment relations, etc.

The term "transborder" can more often be found in the legislation and international treaties covering "transactional" issues, f.i. transfers, transportation, air pollution, commercial transactions, etc. Thus this term is mentioned in the article 12 of the Federal law No 152-FZ of 27.07.2006 "On personal data" and in Chapter III of the Convention on Convention for the protection of individuals with regard to automatic processing of personal data (Council of Europe, 1981, signed by the Russian Federation in 2001 and ratified in 2013) concerning transborder data transmission which both are applicable to the employees personal data an employer may gather in regard to their employment, in the Rules on the criteria of labeling markets as transborder (approved by the Decision No. 29 of the Supreme Euroasian economic council of 19.12.2012) aimed at implementation of the rules concerning breaches of the antimonopoly provisions of the articles 12 and 15 of the Agreement on unitary principles and rules of

competition (signed by Russia, Belarus and Kazakhstan on 09.12.2010) including those in the field of services, etc.

This low level of systematization is reflected in the international treaties of the Russian Federation and in corporate regulations. On an international level the most common approach is that adhering to the Civil Code choice of law provisions. The most relevant international instrument in this sense is the Decision of the Council of heads of the CIS governments "On Interstates Program of innovational cooperation of the CIS member states" (adopted on 18.10.2011) which touches upon transnational intellectual property issues (contains the "foreign element" concept in the Direction 2.2 of the Decision).

It would not be reasonable to expect that the corporate policies suggested something worth being considered in this highly theorized debate. This level of theorizing requires a comparable level of authority and an impressive variety of transnational employment relations within its competence. It is obvious that this is not the case of the majority of the Russian enterprises even if they have a transnational nature.

Varieties of "transnational employment relations"

Hitherto there have been almost no sound classifications or systematization of transnational employment law suggested either in the labour or in the private international law scholarly literature published in Russian. Therefore there is still no any widely accepted views on their contents and internal structure.

In the Russian scholarship there is actually one well known systematization of transnational employment relations suggested in 2003 by prof. I.Ya. Kiselev. He divided transnational employment relations (or according to his wording, "international labour") into five types:

- work of the Russian citizens abroad for the Russian employers;
- work of the Russian citizens for international organizations;
- labour migration of the Russian citizens abroad (external labour migration);
- work of the Russian citizens in their motherland for foreign firms or international organizations;
- work of the foreign citizens and apatrides (stateless persons) in Russia for employing organizations or natural persons (Kiselev, 2003).

This was an empirical systematization of the types of transnational employment relations existent in the first decade of the new Russian democracy. The field still bore many features and norms inherited from the Soviet era. Many of those norms were developed in the times when the transnational employment relations diversity was limited and the regulative mechanisms were poorly developed, terse and aimed primarily at keeping them aside from general public and "regular" (national) employment relations that involved the majority of the Soviet citizens.

Now when the transnational employment relations are abundant and diverse, a more systematic approach can be implemented. Until we have a more vivid discussion on this issue I would suggest a system of transnational employment relations based in the well-developed theory of legal relationship as a whole and of employment relationship in particular. Among the Russian private international law scholars a legal relationship is believed to consist of several "structural elements": (1) subjects (participating parties); (2) an object (a "matter of the relations") and juridical facts (facts that affect the relations in various senses, including engendering, changing or terminating them) (first mentioned in Luntz, 1949; see also: Marchenko, 2007; Golovistikova and Dmitriev, 2005, etc.). At the same time there is a widely accepted classification of employment relations into individual (i.e. involving only one employee) and collective (i.e. involving organizations of employees and sometimes of employers as well) (Blanpain, 2004; Mariucci, 2002; Carter, 2001; Lushnikova and Lushnikov, 2003; Nesterova, 2004; Melnikov, 2004, etc.).

When speaking of any transnational relations the majority of scholars agree that the core feature of this type of relations is that their elements belong to two or more national legal orders (national legal regimes or jurisdictions) thus hypothetically implying a conflict of laws of these orders (regimes) (see Stone, 2010; O'Brien, 1999; Story, 1834, etc.; see also in Russian: Pereterskiy, 1924; Luntz, 1949; Kiselev, 2003; Erpylyova, 2005, etc.). Relying upon this general accord I would suggest – at least until a more consistent classification is introduced – to use this commonly habitual division of employment relations into individual and collective type and to distinguish two particular groups in every type: simple transnational

relations and complex transnational relations. The idea beyond this division is to distinguish those transnational employment relations that embrace two different national legal orders (simple ones) and those that embrace (or claim to be regulated according to) more than two different national legal orders (complex ones). Actually the latter may involve as many national legal orders as possible based on the total number of subjects, object(s) and juridical facts involved, as well as on the specifics of the legal tradition(s) of the countries involved which can add an interesting and rarely studied problem of conflict of regional or communal laws when the relationship concerns several countries with considerable regional or communal legislative autonomy.

An example of a simple transnational employment relation may be that "based on an employment contract signed in Spain between a Chinese citizen and Spanish employer for work within the territory of Spain (or within the jurisdiction of Spain). Here the Greek and Spanish legal orders may attempt to regulate the relationship depending on particular circumstances and approaches implemented in the national legislation.

A complex transnational employment relation can occur if the above mentioned Chinese citizen signed the same employment contract within the territory of Spain but with a US employer. To make the relationship more complex we could add there a work in, let's say, Kazakhstan as an object of the contract and regular business trips to Russia and India as part of the employment conditions. Usually it is impossible to say right from the start which of the national legal orders shall be applied to which of the elements and aspects of such relationship until we go deep into the international and national conflict of laws rules and other relevant legislative norms aimed at regulating such relationship.

It is obvious that this division can be applied to legal analysis of other aspects of transnational reality as well. For instance it can be used to classify transnational family relations, transnational financial transactions, etc.

The specifics of employment law field manifests itself in the fact that both simple and complex transnational relations concerning work/labour can be further categorized as "individual" or "collective". This categorization produces forms a dichotomy between "individual transnational labour relations" (or according to the Anglo-Saxon terminology, just "transnational employment relations") and "collective transnational labout relations" (or according to the Anglo-Saxon terminology, "transnational labour relations" and according to the ILO and EU terminology, "transnational industrial relations" (see ILO, 2012; EU, 2006; 2009, etc.).

These perceptions are yet to be reflected in the Russian legislation, its international treaties and its corporate policies.

The place of legal norms regulating the phenomenon among (or inside) other branches of law
The place of the legal norms regulating transnational employment relations is perceived a bit differently in doctrinal literature and in legislation. The Russian doctrinal writings present three approaches, according to which the phenomenon is perceived as (1) either a particular institution (an area or a so called "sub-branch") of the private international law (Erpylyova, 2012 at 435-436; Boguslavskiy, 2002 at 34, etc.), or (2) one of the basic institutions of a so called "private international labour law" (or "private international employment law", which actually sounds the same in Russian) (Zvekov, 2004 at 519-542), or (3) an institution of both labour private international branches of law (Andrianova, 2006; Bekyashev, 2004; Zvekov, 2004 from 519, etc.).

This assumption leads to a conclusion that the case of transnational employment relations creates a separate and complex sub-branch of both branches at once: a "private international employment law". This relatively new establishment has borrowed its subjects from labour law, specific conflict rules – from private international law and building its object – labour implemented on the basis of employment contract but embracing several national legal orders, - using both labour and private international law structures.

International treaties (especially bilateral ones) and corporate practices adhere to the third approach. It is widely employed on an international level where the norms concerning various aspects of transnational

employment relations can be found in treaties concerning employment, educational, tax and several other matters, while on a corporate level the respective norms are scattered about the numerous in-house regulations on various aspects of regular employment relations (i.e. concerning wages, benefits and compensations, leaves, business trips, etc.).

However when it comes to legislation the second and third of the above mentioned approaches fade. In the Russian regulative context the only implemented approach is the first one.

This leads a situation where general conflict of laws rules stipulated in the Civil Code of the Russian Federation are extended onto transnational employment relations allowing the legislator to abstain from an introduction of a special regulative regime for such relations in the Labour Code. This counter-productive reluctance in acknowledgement of that obvious fact that employment relations need a separate regulation in this sphere as well impedes the development of transnational cooperation, complicates the relevant procedures and leaves much place for abuse of migrant workers' rights.

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