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Развитие механизма разрешения трансграничных потребительских споров в Евразийском экономическом союзе
The Development of the Cross-Border Consumer Dispute Resolution in the Eurasian Economic Union

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Abstract: The article provides the analysis of current international regulation in order to identify problematic aspects arising from the resolution of cross-border consumer disputes on the territory of the Eurasian Economic Union. The author gave a brief history of the formation of the institution of consumer protection, the most promising international practice in the field of cross-border consumer disputes resolution, and made a conclusion about the lack of regulation of the procedure for judicial and out-of-court protection of consumer rights at the level of Eurasian integration.

Keywords: consumers, cross-border consumer disputes, the Eurasian Economic Union, international jurisdiction, conflict of laws.

Аннотация: Статья посвящена анализу актуального международного регулирования на предмет выявления проблемных аспектов, возникающих при разрешения трансграничных споров, вытекающих из договоров с участием потребителей, на территории Евразийского Экономического Союза. Приведена краткая история формирования института защиты прав потребителей, наиболее перспективная международная практика в сфере разрешения трансграничных потребительских споров, а также сделан вывод о недостаточности нормативного

регулирования процедуры судебной и внесудебной защиты прав потребителей на уровне евразийской интеграции .

Ключевые слова: потребители, трансграничные потребительские споры, Евразийский Экономический Союз, альтернативные способы разрешения споров, международная судебная юрисдикция, коллизионное регулирование.

It goes without saying that consumer spending plays a significant role in the economy of every modern developed country. For example, in the USA, according to the Congressional Research Service, it comprises roughly two-thirds of gross domestic product. [1, p. 1] In Germany, final consumption expenditure is higher than 72% of GDP. This is also relevant for the Eurasian Economic Union countries with final consumption expenditure accounting for more than 60% of their GDP. [2] Even concerning the disastrous effect of 2007-2009 financial crisis, the events of 2014 in Russia and the current COVID-19 pandemic, there is still a permanent growth of the consumer spending, which actually drives the whole economy development. Therefore, legislators in every country understand the importance of legal protection of consumers, who are commonly declared as a weak party in contracts with businesses.

The origin of the consumer protection doctrine has a centuries-old history that varies depending primarily on the legal system being examined. The United Kingdom was likely the first to establish roots of the doctrine. Grown out of controversy between "freedom to contract" and equity, the problem first appeared in late seventeenth century when young noblemen received "inadequate" consideration in sales of their birthrights. English case law than developed the principle of non-intervention in a contract freely entered unless it involved "trading on a weakness of the expectant heir". It led, in turn, to increasing deference to principles of unconscionability of terms of the contract and provided a court more opportunities to intervene. [3] However, the development of generally applicable unconscionability rules met the courts' resistance. Thus, there was a need of a statutory concept, that would piece together the doctrine. The Unfair Contract Terms Act of 1977 seems to serve as the solution. Nevertheless, even it "…does not provide a remedy against all unfair contractual terms. Its primary function is to protect consumers against clauses that either exonerate one party from liability for negligence or the non-performance of the contract, or that restrict this liability". [4, p. 470]

In Germany the unconscionability doctrine, or what may be called so in comparison to English approach, was described and codified in 1886 by three general provisions in Bürgerliches Gesetzbuch. [4, p. 482] Section 138 establishes that a legal transaction which is contrary to public policy is void. The second clause covers the situation of granting clearly disproportionate advantages due to exploitation of another party's weakness. Section 242 prescribe performing the obligation according to the requirements of good faith, and section 826 prohibits using rights with only intention to inflict damage on another person.[1] There is no all-in-one consumer protection act and variety of rules may be found in different legislation. Besides of aforementioned BGB some regulation against entrepreneur's malpractice is provided by "Act against unfair competition" and "Act against restraints of competition", although the last one mainly deals with undertaking's behavior on the market. The influence of the European Union is essential too, especially the Unfair contract terms directive of 1993, that set general rules of consumer protection[2] and was amended several times.

In Soviet Union consumer relationships was regulated by the Civil Code of the Russian Soviet Federated Socialist Republic. But the lack of legislation was obvious, meaning the need to draft the

1 German Civil Code (BGB), available at: https://www.gesetze-im-internet.de/englisch_bgb/ (accessed 08.12.2020).

2 Council Directive 93/13/EEC of 5.04.1993 on unfair terms in consumer contracts, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML (accessed 08.12.2020)

dedicated law on the protection of the consumers' rights. Nonetheless it was not finished before the dissolution of the USSR. [5, p. 92] Further development of consumer protection mechanisms within the territory of the former Soviet Union generally based on the evolution of the Eurasian economic integration.

Consumers' rights protection is a wide category. Having its own features in every country, it includes primarily state control and supervision over the observance of laws, protection by public consumer formations and judicial protection. By analyzing the current and previous functioning of the Eurasian Economic Union (EAEU), as well as its regulatory framework in the field of consumer protection, the last-mentioned tool, the disputes resolution, still stays mostly out of the legislator's sight. The Section XII of the Treaty on the Eurasian Economic Union guarantees only the accessibility of the national treatment on the territories of the other Member States. The Section 3(3) of the Protocol on Agreed Policy in the Sphere of Consumer Protection establishes the need of development of legal awareness of consumers, in particular their awareness of available administrative and judicial remedies.[3] Thus, regulatory legal acts of EAEU do not provide any solid procedural rules. From this point of view, I must also agree that achievements of CIS integration do not possess such potential for the future of EAEU, as they did for the Eurasian Economic Community. [6, p. 302]. Despite apparent intentions of Eurasian Economic Commission (EEC) in the sphere of consumer disputes resolution, the stagnation has not yet been overcome, especially concerning cross-border consumer transactions, that become increasingly important as the world moves rapidly to the formation of a digital market, which means a number of purchases via internet will only grow in the foreseeable future. That thesis is confirmed by the recent reach of online sales in Russia its historic high. [7]

Before assuming the possible ways of development of the cross-border consumer dispute resolution, we should examine the current situation in the EAEU, the most successful international experience and possibilities of its implementation in relationships between Member States.

For example, we decide to order a new sportswear in kazakh online-shop with a prepayment. After receiving the package, we notice that the quality of this sportswear is unacceptable, moreover the label says it was manufactured in China, instead of Kazakhstan, which is claimed on the website. The first thing that we have to do is to contact the shop, explain the situation and request the return. In the best case, conscientious seller will meet the requirement. But, if he will not, our rights should be protected by a court.

It raises two questions. First is the jurisdiction, meaning which court has the power to administer justice. On the territory of the EAEU the judicial competence is regulated since the formation of CIS, in particular by the art. 4 of the Agreement of 20 march 1992, art. 22-25 of the Minsk Convention and art. 20-22 of the Kishinev Convention. [6, p. 312] The Kishinev Convention was not ratified by Russia. According to the art. 1 of the Agreement of 1992 it regulates the matter of resolving the disputes, arising out of contractual and other civil-law relations between economic entities, hence it does not suit us.[4] The Minsk Convention does not contain any special provisions concerning consumer relations, which makes the use of its rules controversial. As is known, whenever there is a treaty on legal assistance between States, we should choose the jurisdiction on the basis of this treaty. Otherwise, rules of national legislation apply. [8, p.81] Taking into account that Minsk Convention regulates relations either between citizens and legal entities, author sees no evident reason not to use it in consumer relations. Article 20 declares defendant's domicile as the key in determination of jurisdiction. It also establishes options when courts of contracting party are competent: trading or another

3 Treaty on the Eurasian Economic Union of May 29, 2014 (Section XII and Appendix № 13), available at: http://www.eurasiancommission.org/en/Documents/Art60_61_An13%20Treaty%20Courtesy%20translation.pdf (accessed 08.12.2020).

4 Agreement of March 20, 1992 About procedure for the dispute resolution, connected with implementation of economic activity, available at: http://www.consultant.ru/document/cons_doc_LAW_1597/ (accessed 08.12.2020).

economic activity of defendant's enterprise on the territory of contracting party, performance of an obligation and defamation claim. Thereby if seller's company has no offices or branches on the territory of consumer's country, such claim should be brought to court in seller's country. But we have another ground to seek protection at home – the place of performance, though it is not always easy to define even for the court itself.[5] The best solution for both parties is to determine it in contract. But if contract is silent, then we should appeal to principles of international law, in particular to the UNIDROIT Principles, which establishes in Article 6.1.6 that non-monetary obligation is performed by obliged party at its own place of business.[6] But this approach leaves consumer without proper legal protection, though it can further be found in conflict of laws rules. Should be also mentioned, that modern national legislation seems to be quite more advanced and flexible than provisions of Conventions. Article 402 of the Civil Procedure Code of the Russian Federation now allows Russian courts to hear the case if the defendant disseminate advertising in the Internet, aiming at receiving attention of consumers on the territory of the Russian Federation.[7] Interpreting seller's orientation towards Russian consumers, courts primarily pay attention to consequences following the interaction with the website like conclusion of the contract. [9, p.103]

The second question is about the conflict of laws. If the choice of competent court, as we have seen, still has unfilled gaps in legislative regulation, the choice of law to be applied in the case is more clear. As it shown in the recent explanation of the Supreme Court of Russian Federation on the use of international private law, if conflict-of-laws rules are prescribed by an international treaty, the court must follow these rules. But at the same time the Supreme Court underlined that neither Agreement of 1992 or Minsk Convention contain any special provisions for determination of the applicable law for contracts with consumers, and that means the court should use national legislation. In the Article 1212 of the Civil Code of Russian Federation interpreted the theory of "directed activity", which is common for European approach too. [9, p. 97] That definition was also explained by the Supreme Court in mentioned ruling.[8]

Since we ordered and prepaid the sportswear directly on the website, seems reasonable to assume that the site was at least on Russian language, showed prices in Rubles or had a contact information for Russian customers. All that mean, according to Russian legislation, our rights must be protected by peremptory norms in the field of consumer protection, provided by the Civil Code and Law of the Russian Federation on the protection of the consumers' rights. In particular, in case of discovery of defects or receiving false information about the commodity, we have a wide selection of remedies, like demanding a replacement, decreasing of the price, returning of the amount paid and other.

As we have seen, currently the resolution of consumer disputes on the territory of Eurasian Integration takes a long legal procedure with a lack of unified or harmonized regulation. In order to improve this situation, we should probably learn from the experience of another integration union.

In addition to the Unfair contract terms directive, the core principles of consumers' rights across the European Union are established by the Consumer Rights Directive of 2011. Nonetheless it does not cover the disputes resolution, although was amended in 2019 with provision on online entry point

5 Decision of the Supreme Court of the Russian Federation of 21.01.2020 № 305-ЭС19-12690, available at: https://kad.arbitr.ru/Document/Pdf/42a32c61-cc93-4ee9-914d-35a3c833666f/ba8708fe-b36e-4f6c-bf89-593fd3127c23/A40-227636-2018_20200121_Opredelenie.pdf?isAddStamp=True (accessed 10.12.2020).

6 UNIDROIT Principles of International Commercial Contracts 2016, available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (accessed 10.12.2020).

7 Civil Procedure Code of the Russian Federation: federal law of 14.11.2002 № 138-ФЗ // СЗ РФ. 2002. № 46. Ст. 4532., available at: http://www.consultant.ru/document/cons_doc_LAW_39570/ (in Russian) (accessed 10.12.2020).

8 The Supreme Court plenary decision № 24 of 09.07.2019, available at: https://rg.ru/2019/07/17/vs-dok.html. (accessed 10.12.2020).

developed by the European Commission to be user-friendly, in order to ensure that citizens have access to up-to-date information on their consumer rights and on out-of-court dispute resolution.[9] The last one also may be called as Alternative Dispute Resolution or ADR. "The current over-riding economic imperatives of governments are highly relevant. In order to rescue the economy, governments have to cut public expenditure and incentivise the growth of private business. They do not want to impose unnecessary transactional costs (through unnecessary regulation or litigation) on business, but they do want competitive and hence innovative markets, in which the rules are observed. Increasing emphasis has been placed on extra-judicial dispute resolution, since this may be particularly relevant for small claims by consumers and SMEs". [10, p.20] That is one of the reasons why importance of ADR is increasing significantly. From the legal point of view, consumers get an easier access to justice and can protect their rights with little incidental costs and in a short time. That also leads to more manufacturer's or seller's responsibility.

In 2013 European Union adopted a Directive on alternative dispute resolution for consumer disputes. It declares that "ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as to offline transactions, and is particularly important when consumers shop across borders."[10] Directive says that complete system of fast and low-cost ADR covering the whole Union is yet to be developed. "The disparities in ADR coverage, quality and awareness in Member States constitute a barrier to the internal market and are among the reasons why many consumers abstain from shopping across borders". However, the emphasis on the cross-border trade is notably important, especially concerning that Treaty on the EEU, on the contrary, only focuses on national treatments of Member States. Moreover, the Directive prescribe all the ADR bodies to comply with base principles, as qualification, independence, impartiality, transparency and so on.

In 2015, there were approximately 95 ADR schemes in operation in the United Kingdom offering a range of dispute resolution processes, and 5 different types of ADR, provided by public and private bodies: mediation, conciliation, arbitration, adjudication and ombudsman. [11, p. 10] But even with such wide range of ADR, the awareness of consumers about the possibility of resolving their dispute out of court is relatively low. On the other hand, the potential of ADR is shown by the fact that 69% of consumers are likely to use ADR again and 84% of traders honored ADR decisions. [11, p. 5]

There is also a lot of ADR bodies in Germany and other European countries. They can be easily accessed through the website of European Consumer Centre [12], which is the result of Regulation on online dispute resolution (ODR) for consumer disputes. But this service does not only provide an information about accessible ADR, it is the platform for ODR. Firstly, the complainant party fills in the electronic complaint form. Then a complaint submitted to the ODR platform shall be processed if all the necessary sections of the electronic complaint form have been completed. After that, it is transmitted to the respondent party with the information about which ADR entity is competent to deal with the complaint. The ADR entity to which the complaint has been transmitted shall without delay inform the parties about whether it agrees or refuses to deal with the dispute. An ADR entity shall conclude the ADR procedure within 90 calendar days from the date on which the ADR entity

9 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance // OJ L 304, 22.11.2011, p. 64–88.

10 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) // OJ L 165, 18.6.2013, p. 63–79.

has received the complete complaint file.[11] And how was this system met in the European Union? The statistic shows, that cross-border complaints represent 45,06% of all complaints served by the ODR. The most active users of the platform are from Germany, The UK and France, and the total number of complaints now is nearly 146000. [13]

According to the Recommendation of the Eurasian Economic Commission about the application of measures directed at improvement of interaction between authorized bodies in the sphere of consumer protection, besides of goals concerning the creation of effective consumers' right protection, fair competition and quality control, there is an intention to strengthen the system of pre-trial dispute settlement.[12] Another step forward was made in 2019 with the Review of the practice of implementation of alternative dispute resolution mechanisms on the example of operation of financial ombudsman in Member States.[13] Despite its focus on the single sphere of consumer relations and comparative nature with absence of any cross-border examples, it shows that Member States understand the importance of consumer relations, modern patterns of their development and have a strong intention to move forward. Moreover, the importance of comparative researches may be proven by the statement, that "Basis for harmonization in the sphere of procedural law is similarity of civil procedure systems of Member States". [14, p. 52] Another evidence of development is the creation of portal of general information, resources and open data, via which consumer may obtain the legislation of Member States and find out where to apply for remedy. [15] Should be mentioned the proposal of Advisory committee of establishing the online dispute resolution system. [16] Unfortunately, the proposal was made in 2018 with no further actions.

With the long history of foundation and evolution, the Eurasian integration still has a lot of problems to solve. The existing controversies in practice and gaps in legislation will be a solid ground for the future research. [17, p. 46] The Eurasian Economic Union has an enormous potential comes first and foremost from people. Therefore, such vital field of law as the consumer protection must not be avoided. The history shows, that importance of this institute was realized centuries ago. Over time, it turned into the structured system of rules. And the central position in this system belongs to the dispute resolution, because it allows the weaker party to seek protection and claim its rights against a professional member of market. In terms of international integration and cross-border transactions it becomes even more relevant. Thus, the lack of special regulation, discrepancies in the existing one, poor cooperation in the field of civil process and unavailability of out-of-court ways of resolving disputes should absolutely be taken into account for the further development of the EAEU.

References

1. *Introduction to the U. S. Economy: Consumer Spending*, Congressional Research Service, https://crsreports.congress.gov/product/pdf/IF/IF11657 (accessed December 05, 2020).
2. *The World's Bank Official Website*, https://data.worldbank.org/indicator/NE.CON.TOTL.ZS (accessed December 05, 2020).

11 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) // OJ L 165. 18.6.2013. P. 1–12.

12 The Recommendation of the Eurasian Economic Commission about the application of measures directed at improvement of interaction between authorized bodies in the sphere of consumer protection of 22.03.2016 № 2, available at: http://www.eurasiancommission.org/ru/act/texnreg/depsanmer/kk/Documents/Рекомендация%20Коллегии%20№%202%20от%2022%20марта%202016%20г.pdf (accessed 11.12.2020).

13 Review of the practice of implementation of alternative dispute resolution mechanisms on the example of operation of financial ombudsman in Member States, available at: http://www.eurasiancommission.org/ru/act/texnreg/depsanmer/consumer_rights/Documents/Обзор_финомбудсмен%202019.pdf (accessed 11.12.2020)

3. C. LeBlanc, *Land of the free market: U. S. companies continue to enjoy greater legal protection than consumer*, Suffolk Journal of Trial & Appellate Advocacy, January 1, 2018. advance.lexis.com/api/document?collection=news&id=urn:contentItem:600M-7PK1-JCBJ-K49K-00000-00&context=1516831 (accessed December 07, 2020).
4. A. H. Angelo, E. P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 Loy. L.A. Int'l & Comp. L. Rev. 455, 1992, http://digitalcommons.lmu.edu/ilr/vol14/iss3/3 (accessed December 07, 2020).
5. N. G. Gordeev, *Consumer protection in Russia and abroad*, (2016) Bulletin of the institute of world civilizations 13, at 91–101.
6. K. L. Branovitskiy, *Convergence of civil procedural law in the European Union and in the post-Soviet space*, Yekaterinburg, 2018, at 447.
7. *Online sales in Russia have reached its historic high*, https://rg.ru/2020/11/10/onlajn-prodazhi-v-rossii-dostigli-istoricheskogo-maksimuma.html (accessed December 08, 2020).
8. W. E. Batler, N. Yu. Erpyleva, *Proceedings on cases involving foreign persons in the International procedural law of Russia and Azerbaijan*, (2015) State and law 8, at 69–85.
9. L. V. Terenteva, *Grounds for establishing international judicial jurisdiction in relation to cross-border consumer disputes in the digital era*, (2019) Lex Russica 11(156), at 96–107, https://cyberleninka.ru/article/n/osnovaniya-ustanovleniya-mezhdunarodnoy-sudebnoy-yurisdiktsii-primenitelno-k-transgranichnym-potrebitelskim-sporam-v-tsifrovuyu (accessed December 10, 2020).
10. C. Hodges, *Current discussions on consumer redress: Collective redress and ADR*, ERA Forum 13, 2012, at 11–33, https://paperity.org/p/14110406/current-discussions-on-consumer-redress-collective-redress-and-adr (accessed December 10, 2020).
11. *Resolving consumer disputes: alternative dispute resolution and the court system,* https://www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system (accessed December 10, 2020).
12. *Alternative Dispute Resolution and Online Dispute Resolution*, https://www.evz.de/en/shopping-internet/alternative-dispute-resolution.html (accessed December 11, 2020).
13. *Online Dispute Resolution*, European Commission https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show (accessed December 11, 2020).
14. K. Branovitsky, A. Bessonova, *Development of civil procedure in the European Union and within the post-soviet space*, (2018) Herald of The Euro-Asian Law Congress 1, at 44–54.
15. *Protection of consumer rights in the Eurasian Economic Union*, https://potrebitel.eaeunion.org/en-us/Pages/default.aspx (accessed December 11, 2020).
16. *Advisory Committee on Consumer Protection of the Member States of the Eurasian Economic Union* http://www.eurasiancommission.org/ru/act/texnreg/depsanmer/kk/Pages/default.aspx (accessed December 11, 2020).
17. K. L. Branovitskii, *Some aspects of model regulation as instrument of approximation of civil procedure law in the post-Soviet area,* (2019) Herald of the Euro-Asian Law Congress 1(3), at 37–48.