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FORMATION OF THE REGIONAL MODEL

OF INTERNATIONAL LEGAL REGULATION OF LABOUR IN ASEAN

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ABSTRACT

Cooperation among ASEAN members at work bears the stamp of a special Asian civilizational approach to international law. For the regional community ASEAN is important to combine the ideal and optimal, legal and social values and practices that will help protect the interests and rights of workers, including migrant workers.

Feature of the international legal regulation of labour within ASEAN is predominantly non-contractual nature of the adopted acts, whether the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007 and the ASEAN Human Rights Declaration 2012.

The main priorities of the regional regulation of labour are not in favor of labour rights, and in favor of economic development, which is a global trend, so the first place is to ensure the free movement of skilled workers, and in the Bali Declaration on ASEAN Community in the global community of nations (Bali Consent III), adopted in 2011 at the 19th Summit of Heads of State and Government of ASEAN, the theme of regional mobility and mutual recognition of professional qualifications "migrated" from the Economic Community to the Socio-cultural Community. A second area of cooperation in their attitude to migrant workers: promotion of fair and appropriate employment conditions for the payment of wages, and adequate access to decent working and living conditions for migrant workers, with adequate access to legal and judicial systems of the host countries, without prejudice to their laws, regulations and policies.

Keywords: International labour law, ASEAN Community, regional mobility, professional qualifications, free movement of skilled workers, migrant workers

INTRODUCTION

Among the variety of regional models of international legal regulation of labour special place occupies model created within the Association of Southeast Asian Nations (ASEAN).

10 ASEAN countries are highly heterogeneous in terms of their economic development, Cambodia, like Laos, is one of the world's poorest countries with a per capita income of 400 U.S. dollars, while in Singapore it is over 30 thousands U.S. dollars, which in turn almost 40 is higher than even the successfully pursuing a policy of "updating" of Vietnam [1].

ASEAN Member States have made international commitments in the field of labour but the liability is not the same: they are all members of the International Labour Organization, ratified a number of ILO conventions, all states in the region have ratified the International Convention on the Rights of the Child in 1989 (though the Additional Protocol on the procedure of communications 2011 ratified only by Thailand), Only all states have ratified the International Covenants in 1966 on Civil and Political Rights (hereinafter - ICCPR) and on Economic, Social and Cultural Rights (hereinafter ICESCR) (Vietnam, Cambodia, Indonesia, Laos, Thailand, Philippines) and none of them have recognized the obligation of the additional protocol to the ICESCR in joint on the procedure of individual complaints, only three states in the region accepted a compulsory International Convention 1990 on the Protection of the Rights of All Migrant Workers and Members of Their Families (Cambodia, Indonesia and the Philippines).

The analysis of ratifications of ILO conventions by ASEAN Member States shows that in average they very cautiously take on the international obligations in the field of labour, on the average a ratification package of one country accounts 18 conventions, though there is a variation from 2 to 37 conventions. Most ASEAN States have ratified not the whole package of eight fundamental conventions, but only 5-6 conventions, only Cambodia, Indonesia and the Philippines fully performed the commitment under ILO Declaration on Fundamental Principles and Rights at Work 1998.

It is noteworthy that in the history of the ILO had only two cases of denunciation of the fundamental Conventions, and both of these cases occurred in the ASEAN countries: Singapore (1979) and Malaysia (1990) denounced the Forced Labour Convention, in because of disagreement of governments in these countries with the view of the ILO supervisory bodies on the definition of "forced labour" in relation to the labour of prisoners².

Among ASEAN members there is a clear leader in the adoption of international labour standards - Philippines, which has ratified 37 ILO Conventions, including all the fundamental Conventions. On the other hand, there is his anti-hero - Myanmar, the violation by the military regime that came to power in 1988 of the Forced Labour Convention has been the object of the ILO efforts during many years.

Only in the 2012 International Labour Conference decided to remove restrictions from Myanmar on a temporary basis [3] and at the 102nd Conference in 2013 finally abolished the regime of restrictions.

Integration cooperation in ASEAN has features that reflect the specifics of the Asian way of thinking. It should be emphasized, especially the rejection of constructing a regional integration organization on the basis of the supranational and follow the mechanism of decision-making based on consensus. According to A. Baykov the ideal in East Asia appears not universal but selective, not the maximum but dosed integration into the economy under the strict control of sovereign national governments [4].

Instead of the term "integration", which, to date, in jurisprudence is associated with the presence of "supranationality" within ASEAN uses the term "regionalism", meaning preferential rapprochement towards common goals [5].

In volume 7 of the course of international law professor E.E.Obminskiy suggested that within ASEAN actually acts called "subsidiarity" principle, according to which the

decision-making and regulation at the regional level should be carried out only insofar as they cannot be conducted at the national level[6]. It should be noted that the principle of subsidiarity today underlies European regional integration, acting as the principle of a different manifestation of the supranational level of the European Union.

Association of South-East Asia was originally developed as a regional community that will seek solutions to problems mainly in the socio-economic sphere. However, the determining factor of the ASEAN creation was the political one: a mechanism for collective counteraction to common threats and policy coherence. Among the factors that influenced the creation of the ASEAN stand out: the fear of the communist threat (the war in Vietnam, China, the USSR), the desire to distance himself from the former colonial powers: France (after the defeat in Indochina) and the UK, the need for rapid economic breakthrough and need four states in the region: Malaysia, Singapore, Thailand and the Philippines) to restrain the ambitions of Indonesia in the framework of multilateral association.

All of these factors have affected the nature of the regional association of Southeast Asia, forming a collective identity in a very slow, gradual development of a sense of community, approval of practices to harmonize positions on controversial issues.

The aims of the ASEAN enshrined in the founding Bangkok Declaration 1967 include accelerating economic growth, social progress, cultural development among its members.

In the Declaration of ASEAN Concord II (Bali consent II) 2003 was first defined structure of future ASEAN Community consisting of three pillars: Security Community, Economic Community and Socio-Cultural Community.

One of the objectives of ASEAN in socio-cultural sphere called promotion for regional mobility and mutual recognition of professional qualifications, talents, and advanced training.

A key event in the history of the adoption of the ASEAN November 20, 2007 the Charter of the regional organization [7], its entry into force 15 December 2008 removed the legal questions about the legal personality of an international intergovernmental organization, comprising the states of South-East Asia. International legal personality enshrined in Article 3 of the ASEAN Charter.

As an objective in item 5 of Article 1 the Charter contains a provision for the creation of a single market and production base, including contributing to the movement of entrepreneurs, professionals, talents and employees.

For the first time in the Charter was fixed an objective to promote and protect human rights and fundamental freedoms with regard to the rights and obligations of ASEAN Member States (item 7 of Article 1).

These two goals differently influenced international legal cooperation between Member States in the field of labour in the future showing the distribution of competences in the field of labour between the three communities:

Issues of regional labour mobility carried to the competence of the Economic Community;

- issues of decent work promotion, labour protection, promotion and protection of rights of certain categories of the population (women, children, older persons and persons with disabilities), promotion and protection of migrant workers rights are in the competence of Socio-Cultural Community;

- sphere of the promotion and protection of human rights, including cooperation with the ASEAN sectoral bodies on development of the instrument for promotion and protection of migrant workers rights - is related to the conduct of the Political and Security Community.

Institute of free movement of labour in the ASEAN formed under the strong influence of the General Agreement on Trade in Services (hereinafter - GATS), which among its four modes of supply of services allocated to the provision of a service provider of one country through the presence of individuals in this country on the territory of another country ("the presence of individuals") [8]. To date, The free flow of skilled labour is governed by the ASEAN Agreement on movement of natural persons, signed in Phnom Penh (Cambodia) November 19, 2012 (hereinafter - Agreement MNP) [9].

Said agreement made pursuant to the Plan in 2015 and the ASEAN Framework Agreement on Services 1995 (hereinafter - AFAS) and is generally consistent with the commitments made by Member States of ASEAN under GATS: it deals only with the temporary movement of persons in accordance with the fourth method of AFAS delivery services. 4th mode of supply of services enables companies of ASEAN Member States temporarily to send their staff to other countries to provide services. MNP agreement specifically limits the range of subjects - there are business visitors, contractual services suppliers, and employees, transferable within the corporation. Therefore, it covers skilled workers, professionals and managers, and only for their temporary stay. MNP agreement does not provide for a permanent stay of such persons or movement of any person (for example, unskilled workers), even on a temporary basis.

One of the essential elements in building the ASEAN single market serves the free flow of services, in order to facilitate their movement within the region, ASEAN is also working on the recognition of professional qualifications.

Recognition of professional qualifications, education, work experience fixed in Article 3 of the Framework Agreement on Services 1995. Today in preparation for the establishment of the ASEAN Economic Community signed seven regional agreements on mutual recognition of professional qualifications in areas such as services: medicine, dentistry, nursing, accounting, engineering services, architecture, surveying.

In the framework of the Socio-Cultural Community was adopted non-binding instruments on promotion and protection of vulnerable persons: women, children and migrant workers.

In 2007, ASEAN adopted the Declaration on the protection and promotion of migrant workers' rights [10].

The problem of labour migration in the region of South-East Asia is sharp enough to ASEAN countries account for 14 million migrant workers, accounting for about 14% of the number of migrant workers in the world (105.5 million in 2010, according to the ILO Estimates/UNPD estimates on stock of migrants) and in the framework of regional ASEAN community has about 6 million migrants (World Bank)

in ASEAN have both traditional labour-exporting States as Vietnam, Indonesia, Cambodia, Laos, Myanmar, the Philippines, and the States of labour-importing - Brunei, Malaysia, Singapore, Thailand.

Main characteristics of labour migration in ASEAN:

Temporary, assuming the conclusion of fixed term contracts (usually 2 years) with the establishment of restrictions on the transition to another employer or to another activity and without the right to family reunification and marriage for low-skilled workers;

Labour migration has a distinct gender, 43% of all migrant workers - women working in the private sector; male migration is associated with the so-called 3D public sectors (D - Dirty, Dangerous and Demeaning job);

A significant proportion of labour migration is illegal;

"Migration industry" is a significant participant of the labour market in the ASEAN countries [11].

Despite the importance of labour migration for ASEAN member states, most of them have been very cautious to participate in international legal agreements on labour migration. As a result it was adoption of instrument in the form of declaration.

This tool is the first of its kind in the region. The Declaration is unique in that it specifically addresses the protection and rights of migrant workers from the regional point of view and from the point of view of the duties of origin, transit and destination to ensure orderly migration process.

To coordinate the implementation by States of the Declaration established the Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the rights of migrant workers within the organizational structure of the meeting of Senior Officials for Labour (SLOM).

One of the results of the Committee on Migrant Workers should become the draft instrument for the protection and promotion of the rights of migrant workers, the task of developing it is before the Committee. At the last meeting of the Committee in May 2013 in Bandar Seri Begawan, Brunei was determined date for submission of the final version of the instrument - 2014 [12]. And the legal form of the instrument: "mandatory" agreement or recommendation act will be determined at the final stage of discussion.

Other result was the organization, since 2008, the Forum for migrant workers - a platform for discussion of the problems of labour migration in the region, open to representatives of governments, employers, trade unions, NGOs, research centers and political institutions. Technical assistance in organizing the Forum has a number of international organizations, including the International Labour Organization and the International Organization for Migration. Within the ILO there is a special project aimed at reducing the exploitation of migrant workers, "Tripartite action on the protection and promotion of migrant workers in the ASEAN region (ASEAN Triangle)".

Under the Political and Security Community ASEAN Declaration on Human Rights was adopted November 18, 2012 in Phnom Penh (Cambodia).

It reaffirmed the general obligation of States to such documents as the Universal Declaration of Human Rights, the UN Charter, the Vienna Declaration and Programme of Action, and the United Nations Convention on the Rights of child of 1989.

The Declaration reaffirms the commitment to the universal concept of human rights, however, has its own specific list of rights and freedoms that are of priority for the regional ASEAN community.

Based on the analysis of the content of the Declaration it seems overly optimistic assumption of professor Christian Tomuschat, that ASEAN has joined the basic point of view on human rights [13]. However, such an assumption was made prior to the adoption of the ASEAN Declaration on Human Rights.

List of labour rights is small, and it does not contain whole even fundamental labour rights, as reflected in the ILO Declaration 1998.

ASEAN Declaration consistently comply with limits of common international obligations as part of the right to the prohibition of slavery or servitude (Item 1), enshrined the prohibition of smuggling and human trafficking, but there is no prohibition of forced labour, as it is a sore point for Myanmar and it is not contained in the Universal Declaration of Human Rights 1948.

Item 27 of the Declaration emphasizes the presence of "specific" list of human rights for another three ASEAN labour rights:

- the right to work, to free choice of employment, to use fair, decent and favorable conditions of work and access to support schemes for the unemployed (paragraph 1);
- the right to form trade unions and join the trade union of his or her choice to protect his or her interests, in accordance with national laws and regulations (paragraph 2);
- the prohibition of economic and social exploitation of children or youth. Use of child labour or youth labour harmful to health or morals, for the dangerous life that can damage normal development, including education, should be punished. ASEAN Member States should limit the age below which paid child labour should be prohibited and punished (Paragraph 3).

Thus, the volume of labour rights enshrined in the Declaration of ASEAN is substantially narrower than the scope of the Universal Declaration, not to mention the later documents, says nothing about equal pay for equal work, to just and favorable remuneration, the right to rest and vacation.

One more non-binding document for Member States was adopted by ASEAN Ministers of Labour as a compromise between economic integration and internationally recognized rights at work - ASEAN Guidelines on good industrial relations practice adopted in Hanoi in 2010[14].

The first section relates to a sound legal basis for the regulation of labour relations which needs to take into account national economic and social conditions and in particular guarantee and protect the basic rights and requirements of employers to manage their business and to grow and that of the workers to just working conditions, stable employment, minimum standards, a safe and healthy working environment and to express their views as well as participate in decision-making that have significant implications for themselves or their workplace.

The second section is devoted to the fundamental rights of employers and employees.

have called the right of employers and workers to associate freely and carry out their own affairs. Freedom of association and the effective recognition of the right to collective bargaining are recognized as fundamental labour principles only when the law has relevant international obligations, and they are in full or truncated format available only in six ASEAN Member States. The right to collective bargaining in the guidelines does not allow, under certain conditions apply collective action to resolve collective labour dispute, it is only an adequate complaints handling mechanism to facilitate the peaceful settlement of disputes.

Section VI "Dignity and Best Practices" reaffirms the principle of international labour law, as reflected in the ILO Declaration of Philadelphia that labour is not a commodity, are some other rights of both workers and employers.

Thus, emphasis is placed on bilateral cooperation and collaboration, strengthening mutual trust and respect, reciprocity purposes and benefits, fair behavior with limited international treaty obligations.

CONCLUSIONS

Feature of international legal regulation of labour within ASEAN is predominantly non-binding nature of the adopted acts, whether the Declaration on the Protection and Promotion of the rights of migrant workers 2007, or Human Rights Declaration 2012.

The main priorities are, as we have seen, is not in favor of labour rights and in favor of economic development, which is a global trend, so the first place is to ensure the free movement of skilled workers.

Nevertheless the second pillar cooperation is related to migrant workers: promoting fair and appropriate employment protection for the payment of wages, and adequate access to decent working and living conditions for migrant workers, with adequate access to legal and judicial systems of the host countries without prejudice to their laws, regulations and policies.

DISCUSSION

Cooperation among ASEAN members at work bears the imprint of the special Asian institutional approach to international law.

Right in Asia, according to B.S.Chimni is not perceived as the primary response and resolve the issue of protecting the dignity of foreigners. Asian cultures may tend to rely instead on the social values and traditional practices to ensure their protection [15].

Exactly the same situation in the international legal context exists in the area of labour rights in ASEAN. For the regional community is important to combine the ideal and optimal, legal and social values and practices that will help protect the interests and rights of workers, including migrant workers.

It should be stated that ASEAN continues to do extremely timid steps towards expanding the scope of regional cooperation in the field of labour, but, nevertheless, it makes them, and this is encouraging.

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FRANCHISING AND TRADEMARK PROTECTION: PERSPECTIVE OF

CHINA

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ABSTRACT

This paper analyzes the manifestations and reasons of infringement to the franchisors' trademark from the Chinese perspective in the franchising sector. Some judicial cases are selected and dissected to indicate the trademark rights to be protected in China and some countermeasures were put forward to protect the trademark rights from the franchisors' perspective. As the cornerstone of the franchise method of doing business, trademarks, symbols of goodwill, embody the great value and convey the valuable assets of the owners. If a franchisor is to capitalize on the exclusivity of its unique intellectual property, legal protection of its valuable assets is essential and crucial in China today with the spectacular development since franchising was introduced into China in the 1980s because infringement often happens to the franchisors' trademark due to the lack of consciousness of protecting their rights. It is shown that the standards and effectiveness of trademark protection should be reinforced in the Chinese legal jurisdiction as well as in the drafting of a franchise agreement.

Keywords: franchising; trademark; infringement; protection; countermeasure

INTRODUCTION

Franchising, as an increasingly popular form of expanding an existing business or an alternative means of entering an industry, which has revolutionized the distribution of goods and services in most industry sectors, has witnessed a tremendous development since the concept of franchise was introduced into China in the 1980s. Among the options of market entry, franchising combines the franchisors' intellectual property rights and franchisees' capital and investment. Franchising has gained an unexpected substantial economic benefits by means of expansion at lower cost, standardized management, in the combination of abundant labor resources in Chinese market after its entry into China, actually franchising is deemed as an important legal approach of effectively engaging an entrepreneurship and creating a well-known trademark.[1] Today China has become the world's second largest and fastest growing economy with the most number of franchises. According to the Annual Report of Franchise Development in China delivered by the China Chain Store and Franchise Association in 2013, China has more than 10,000 chain store businesses and brands, including over 1000 franchise systems, surpassing 40,000 outlets, covering 70 industries by the end of December 2012. The franchise business model has grown from non-existent to an attractive business option and accepted by local entrepreneurs and investors. The promulgation of *Regulations on the Administration of Commercial Franchise* by the State Council, accompanied by two implementation measures issued by the Ministry of