Revisiting the issue of legal personality of transnational corporations in private law

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Abstract

In the modern world, the number of subjects of international law continues to increase. This is due to the increase in commodity circulation and investment activity of business structures. This paper addresses the issue of the essence of the legal personality of transnational corporations as legal entities via analysis, synthesis, comparative method, comparative legal method, methods of dialectics. As a result, The combination of nationality and personal statute creates an enormous difficulty in determining the nationality of legal entities. we can conclude that the basis for the international legal personality of the legal entity is its domestic legal personality.

Key words: Transnational Corporations, Legal Capacity, Personality.

Revisiòn del tema de la personalidad jurídica de las empresas transnacionales en el derecho privado

Resumen

En el mundo moderno, el número de sujetos de derecho internacional sigue aumentando. Esto se debe al aumento en la circulación de productos básicos y la actividad de inversión de las estructuras empresariales. Este documento aborda el tema de la esencia de la personalidad jurídica de las empresas transnacionales como entidades legales a través del análisis, la síntesis, el método comparativo, el método legal comparativo y los métodos de dialéctica. Como resultado, la combinación de nacionalidad y estatuto personal crea una enorme dificultad para determinar la nacionalidad de las personas jurídicas. Poemos concluir que la base de la personalidad jurídica internacional de la entidad jurídica es su personalidad jurídica nacional.

Palabras clave: corporaciones transnacionales, capacidad jurídica, personalidad.

1. Introduction

The question of whether the activities of the TNCs should be governed by the international law has been controversial since the 60s of the 20th century. The German researcher Friedmann (1962) has already considered the international corporations as active participants in modern international law in his work 'The Developing Structure of International Law in 1964'. In his work The Changing Structure of International Law, he proves that the international legal relations extend beyond the borders of states and cover not only the international organizations, but the private corporations as well. In addition, Friedmann (1962) denies the legal significance of the principle of sovereignty in international law. Other authors, such as Cassese (1986), an Italian expert in international law, defended the position that the multinational corporations are not independent carriers of legal rights and obligations, as the states do not intend to endow them with such (Andreev, 1995). Any corporation, even the most sophisticated, is a developed form of legal entity. A legal entity is an association of people and allocated capital, it is a civil law institution, which is characterized by such universal legal criterion as a legal personality.

2. Methods

For the study, the following methods were used: analysis, synthesis, comparative method, comparative legal method, methods of dialectics and some other methods determined by the field of study.

3. Results and discussion

The concept of legal personality is traditionally understood as a special legal quality, which is established by law and allows a person to become a subject of law. Legal personality, as is known, includes legal capacity (it can be general, sectoral and special) and active capacity, some researchers also identify delictual capacity. We know that if legal capacity is the abstract ability of a person or an organization to have subjective rights and legal obligations, then the active capacity is the real ability of a person or an organization to acquire, exercise and execute statutory rights and obligations by his/her/its activity. Delictual capacity is the ability of a legal entity to respond and bear responsibility under the law for the offenses committed by it. Legal personality does not depend on the desires and will of individuals, but arises only through objective law and cannot be limited or expanded, for example, by contract or will (Suleymanov and Valeeva, 2018).

If for the individuals the moment of their transformation into subjects of law is the moment of physical birth, then for the legal entities it is the moment of the official registration with the judicial authorities or the moment of the establishment. There are standby-regulatory method of creating legal entities and permissive method. In the market conditions, the majority of legal entities are created in accordance with the first method, the second way is inherent in the banks and other institutions that have a special legal capacity, and requires permission of public authorities. At the same time, legal entities, in contrast to individuals, acquire legal capacity and active capacity at the same time (the so-called legal and active capacity). The legal personality of legal entities is terminated at the time of their liquidation, that is, for example, upon the fact of making the relevant entry in the register of legal entities.

Some researchers, for example, Feldmann and Kurdyukov (1974) believe that the legal entities have special legal personality, as the content does not contradict the goals and objectives of a particular legal entity, as well as a license issued to a legal entity to carry out a certain type of activity. The civil law gives the most developed feature of a legal entity, in which it acts on the basis of a charter and/or a memorandum of association. A feature of the civil law is that the subjects of market relations - economic entities and their associations, institutions, and public organizations - are in equal position and are honored by the single economic law of the market in it. Therefore, they are all united under a single category of legal entity in the paradigm of private law. The science of civil law distinguishes between universal and special legal capacity. The first is owned by the private commercial organizations, which may have any rights and obligations under the civil law and carry out any legal activity. The application of such a broad approach is dictated by the needs of market relations that require the most flexible approach. Special legal capacity takes place when the activity of a legal entity is limited by specific objectives: for example, non-profit organizations that do not have the generally accepted goal of making a profit, strive to achieve certain generally useful goals; unitary enterprises operate only in accordance with the statutory goals, useful for the owner of their property - the state or the municipality. Braginsky (1998) believes that the legal entities, in accordance with Article 49 of the Civil Code of the Russian Federation, have a special legal capacity, and their most numerous variety - commercial organizations - have the common legal capacity.

A feature of legal entities is that they implement their legal personality through their bodies - a person or a group of persons representing the interests of a legal entity, and the actions of the bodies identical to the actions of the legal entity itself. The legal entity is responsible for the harmful acts of its bodies, and thus the delictual capacity of the legal entity is implemented. The question of whether the legal capacity of the legal entity should be unlimited was raised in the theory of law long ago. The arguments of G.F. Shershenevich, which he cites in the Textbook of Russian Civil Law (1911), are noteworthy. He identifies three main questions regarding the legal capacity of the legal entity:

1) whether the legal capacity of the legal entity is unlimited, that is, whether the legal entity can enter into all legal relations, as well as an individual;

2) whether the legal capacity of the legal entity is limited only by property rights and obligations;

3) whether the legal entities can have the legal capacity like individuals;

Answering the first of these questions, the lawyer emphasizes that a special legal capacity of legal entities is peculiar to Russian law. Despite the fact that both individuals and legal entities are subjects of law by virtue of law and are equal in this sense, the tasks of creativity are different for these two categories of subjects. If a person needs such a broad legal capacity that he/she can set and achieve various goals as a subject of a legal entity, then a legal entity is a combination of capitals and people's efforts for a predetermined goal. Sinaysky (2002) emphasized that the legal entity should not dominate a person, and therefore should have a special legal capacity. The special legal capacity of the legal entity, according to Andreev (1995), consists in its ability to have rights that correspond to the goals of its activity, and to bear the duties associated with this activity (Kokh et al., 2001).

At the same time, according to the position of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation, commercial organizations, in contrast to non-commercial ones, have general legal personality. When answering the second question, Shershenevich notes that the legal entity cannot be a carrier of those rights and obligations that are

inherent in the individuals and are related to the physical nature of a person (for example, the right to adoption). However, the legal entities have the right to a company name, to a seal, to a certain location, have a reputation - all these rights can be attributed to the so-called personal rights of the legal entity. Despite this, it can be concluded that the legal capacity of the legal entities has a proprietary nature (Sitdikov et al., 2017).

The legal capacity of the subject of law is directly connected and depends on its will, and since the legal entity is deprived of real will, then, at first glance, the organizations cannot have legal capacity. At the same time, the will of the legal entity is the will of its representatives and bodies, and this allows us recognizing its capacity. Thus, the content and the amount of legal capacity of the legal entity depend on two criteria: the purpose and the type of activity of this entity. Any legal entity operates within the framework of a goal, which is recorded in its constituent documents. If, in accordance with this goal, the legal entity has the right to engage in any legal activity, then it has the general legal capacity. When the purpose of creation strictly limits the potential activities of the legal entity, it has a special legal capacity. The main subjects of the international private law are legal entities in terms of their role in international economic relations. Due to the fact that their legal capacity, as we have already established, is determined by the legislation of the state to which such legal entities belong, this affiliation largely determines the legal personality of the legal entities in the international private law.

The Soviet professor Makarov (1924) believes that the legal entity has also a personal legal connection with the state, as the individuals have a nationality or a citizenship. In this regard, the international private law introduces the term nationality of a legal entity to denote the affiliation of a legal entity to a particular state. This relationship, in turn, is the basis of its personal statute (personal law). These two concepts are delimited as follows: nationality of a legal entity (state affiliation) is a substantive legal category, a category of public law and is used to divide legal entities into domestic and foreign by the state; personal statute (personal law) is a complex category of the municipal private partnership relating to conflict of laws, and means the law of the state, which determines the legal personality of the legal entity in a particular case. It should be noted that the doctrine includes sometimes the opinion that its nationality and state affiliation is determined on the basis of the personal law of a legal entity.

The first question asked by the researchers of the private international law in studying the position of legal entities is: which law does determine whether this entity is a legal entity? What is the law to determine the legal personality of the legal entity, since each legal order defines the legal entities in different ways? The answers to these questions can be found not in the positive law, but in the conflict of laws. In this case, the conflict of laws is a conditional branch of law, the norms of which resolve the conflict between the laws of different states and allow determining the law of the country that will be applied in this particular legal relationship with the participation of a foreign element. Such a rule consists of a scope (an indication of the legal relationship, to which such a rule applies) and a connection (an indication of the legal system, the norms of which are to be applied in this particular case).

Depending on the form of the connecting factor, there are unilateral conflict-of-laws rules (in which the country's law to be applied is called directly) and bilateral rules (the connection does not indicate the state's law, but contains the general principle for determining the applicable law). An example of the first one is clause 2 of Article 1213 of the Civil Code of the Russian Federation, clause 3 of Article 834 of the Civil Code of the Socialist Republic of Vietnam of 1995: The civil contract related to real estate in Vietnam is subject to the laws of the Socialist Republic of Vietnam. The bilateral conflict-of-laws rule is contained in clause 1 of Article 1197 of the Civil Code of the

Russian Federation (civil capacity of an individual is determined by his/her personal law), clause 1 of Article 25 of the Introductory Law to the German Civil Code of 1896 (the law of the state, to which the testator belongs at the time of his/her death, applies to inheritance).

Depending on the source, the conflict-of-laws rules are divided into international (enshrined in the international treaties) and national (domestic), depending on the action nature - imperative (the law to be applied is strictly delineated) and dispositive (the law to be applied can be determined and changed by the parties). An example of an imperative rule is Article 1207 of the Civil Code of the Russian Federation (the right of the country where these vessels and facilities are registered applies to the right of ownership and other real rights to air and sea vessels, inland navigation vessels, space objects subject to state registration, their exercise and protection), an example of a dispositive rule is clause 1 of Article 1211 of the Civil Code of the Russian Federation (in the absence of an agreement of the parties on the applicable law, the law of the country with which the agreement is most closely associated, applies), Article 26 of the Law of the Republic of Poland International Private Law of 1965 (if the parties have not chosen the law, the obligation is governed by the law of the place of stay or residence of the parties at the time of contract conclusion). The combination of nationality and personal statute creates an enormous difficulty in determining the nationality of legal entities. A company may have its head office in one state, conduct its main activity in the second one, and be registered in the third one, with the company's shareholders being the citizens of different states (Suleymanov, 2017).

4. Summary

Thus, we can conclude that the basis for the international legal personality of the legal entity is its domestic legal personality. Firstly, legal entities become such as a result of the registration procedure (incorporation), which is regulated by the national legislation of the state. Secondly, national legislation defines such an essential element of international legal personality as personal law. The personal law makes an impact on how a legal entity will act within the international law. In the case of the TNCs, it should be noted that, being a system of legal (and non-legal) entities, such corporations, the structural parts of which have different personal laws, do not have a single legal personality. Their legal personality is reduced to the legal personality of individual units. We have in some sense an unbalanced, distorted picture: despite the fact that the structural parts of a corporation are ultimately united by a single goal of the activity, they are not a single subject of the private international law. This is the reason of many difficulties in the legal regulation of the TNCs.

5. Conclusions

1. The personal law (statute) of the legal entity is the law by which its intraorganizational relations and external status are regulated.
2. Today, there are several generally accepted theories to determine the personal law of the legal entity: control theory, incorporation theory and settledness theory (location theory). In Article 1202 of the Civil Code of the Russian Federation, the Russian legislator established the principle of incorporation as a rule (the personal law of the legal entity is determined by the place of company's registration).

3. For the purposes of our research, we see it reasonable to introduce the concept of supranationality of the legal entity. In the context of the problem we are considering, the supranationality of the TNCs can be defined as the scope of the powers of the corporation and its units to make decisions defined by the constituent documents of the corporation and its structure, which are mandatory for the entire corporation; it is also the subordination of the various structural parts of the TNCs to different legal systems. Consequently, the decisions of the TNC parent company will always be refracted through the prism of the rule of law that is valid for a particular subsidiary.

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References

ANDREEV, V. 1995. **Problems of Legal Personality in Entrepreneurial Activity**. Legal Regulation of Entrepreneurial Activity: Collection of Articles. M. p. 22. Colombia.

BRAGINSKY, M. 1998. **Legal Entities**. Economy and Law. Nº 3. pp. 11-21. USA.

CASSESE, A. 1986. **International Law in a Divided World**. Clarendon Press. p. 103. UK.

FELDMANN, D., and KURDYUKOV, G. 1974. **The Main Trends in the Development of International Legal .** Publishing House of the Kazan University. Vol. 131. Kazan. Russia.

FRIEDMANN, W. 1962. **The Changing Structure of International Law**. Columbia Law Review. Vol. 62. pp. 1147-1165. Colombia.

KOKH, H., MAGNUS, U., VONMORENFELS, P. 2001. **Private International Law and Comparative Law**. International Relations. pp. 213 - 218. Moscow: Russia.

MAKAROV, A. 1924. **Basic Principles of Private International Law**. Legal Publishing House of the People's Commissariat of the RSFSR. p. 69. Moscow. Russia.

SINAYSKY, V. 2002. **Russian Civil Law**. M., pp. 119-121. Russia.

SITDIKOV, R., ZAGIDULLIN, M., VALEEV, D. 2017. **Classification of the measures of legal responsibility in the enforcement proceedings**. QUID: Investigación, Ciencia y Tecnología. Nº 1. pp. 1315-1321. Ecuador. South America.

SULEYMANOV, M. 2017. **On the Issue of Legal Personality Possession by the TNCs**. Interactive Science. Nº 13. USA.

SULEYMANOV, M., and VALEEVA, G. 2018. **The Development of Corporations and Corporate Law in the World and Russia throughout History**. HELIX. Vol. 8. Nº 1: 2420-2423. USA.