

“APPROXIMATION” AND “HARMONIZATION” OF LEGISLATION IN INTERNATIONAL AND EUROPEAN UNION LAW

Having confirmed its “European choice” at the Paris Summit in September 2000, Ukraine continues the process of integration into European and international economic organizations. This requires rethinking its economic policy as well as launching global political, economic and legal reforms, in particular, approximation and harmonization of Ukrainian legislation to rules of international trade¹. It becomes an objective for Ukrainian legal scholarship to provide a methodological basis for these processes and to study doctrinal approaches to the harmonization and approximation in the field of European Union (hereinafter EU) legislation.

One has to be aware of particularities of legal system of every supranational international organization while bringing Ukrainian legislation closer to it. Thus, according to the Article 51 of the Partnership and Cooperation Agreement (hereinafter the PCA) between the EU and Ukraine that was signed in Luxembourg on the 16-th of June 1994 and ratified by the Parliament of Ukraine on the 1-th of March 1998, “an important condition for strengthening the economic links between Ukraine and the Community is the approximation of Ukrainian existing and future legislation to that of the Community”². In the Order of the President of Ukraine “Strategy of Integration of Ukraine into the EU” dd. the 10-th of November 1997 it was determined that approximation of the national legislation will be made through adaptation of Ukrainian legislation to EU legislation³. Article 2 of the Cabinet of Ministers Regulation “On the National Concept of Adaptation of Ukrainian Legislation to EU Legislation” states that adaptation of the legislation consists of three stages, inter alia preparation of extended program of harmonization of Ukrainian legislation to EU legislation⁴.

The notions of “approximation”, “harmonization”, “adaptation” of legislation are distinguished by aims and methods of legal regulation, as well as by results these processes are aimed at. In opinion of Y. Tikhomirov, approximation of legislation means a common policy of the states to determine common directions of consistent development of the national legislation in order to overcome legal differences and to achieve common legal solutions⁵. Author uses the notion harmonization along with, or even instead of the notion approximation of legislation referring to the “Treaty Between Republic of Belarus, Republic of Kazakhstan, Republic of Kyrgyzstan and the Russian Federation On Promotion of Integration in Economic and Humanitarian Fields”, in which the goals of approximation and harmonization are identical. The notions of approximation, harmonization, adaptation, model law-making are also referred to as directions and forms of the consistent development of national legal systems⁵.

Law-making activity directed towards approximation of Ukrainian legislation to EU legislation requires clear definitions of “approximation”, “harmonization” and “unification” in EU law and international law. In this context, it is crucial to distinguish the above notions as understood in EU law and international law.

“Harmonization” and “approximation” of the national legislation’s in EU law

Article 3(1)(h) of the Roman Treaty defines approximation of the Member States legislation to EC legislation as one of the EC activities and as an essential part of the EC Common Market⁶. EC law experts are not unanimous as to whether notions of approximation and harmonization are identical in the EC legislation. For example, American lawyers Bermann, Govel, Davey and Fox believe that “ap-

proximation" in English version of the EC Treaty is not a proper translation of "rapprochement" from French and "Angleichung" from German original versions of the EC Treaty⁷. Identical Dutch expression "nader tot elkaar brengen" is literally translated as "bring closer together». Besides harmonization could have a synonymous meaning to approximation in Articles 93, 95, 136 of the EC Treaty. In the opinion of the scholars the above notions of approximation and harmonization in the EC Treaty are identical and have the same content. On the contrary, a great majority of scholars in the field of Roman law have an opinion that notions of approximation and harmonization should be used with different meaning as it was supposed by the drafters of the EC Treaty⁸. We share their position and consider harmonization and mutual recognition of national rules (hereinafter - mutual recognition) to be the methods of approximation of the Member States legislation to EU laws.

The method of harmonization in the EU law means implementation of the common rules based on the provisions of primary (EC Treaty, Treaty of the European Union, Treaty of Amsterdam, other treaties) and secondary EC legislation (Regulations, Directives, Decisions and other legal acts) by Member States. Such general rules do not foresee unification of laws of Member States because they are issued solely with the purpose of the EC Common Market proper functioning⁹.

The process of harmonization of the national legislation in the EU in accordance with the Articles 94, 95 of the Roman Treaty is pursued through issuing directives by the Council of Ministers or the EC Commission from the concept of the European Parliament on economic and social problems. According to the Article 249 (3) of the EC Treaty a directive shall be binding, as to the results to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form, and methods of its implementation.

Methods of approximation of the Member States legislation

History of creation of the EC market witnesses, that harmonization of the legislation in the EU member-states is achieved and fulfilled in the followings forms: a) total harmonization - provisions of EC directives are to be literally and fully, without derogations, implemented into Member States' legislation; b) partial harmonization - only Member States' legislation related to the intra-community trade is harmonized while legislation in domestic issues is left unchanged; c) minimum harmonization - EC directives set out common rules in the form of mandatory de minimus rules while Member States can follow higher national standards; d) optional harmonization - Member States and undertakings independently choose to apply either harmonized EC common rules or provisions of domestic legislation¹⁰. The most successful harmonization has been achieved in the spheres of freedom of establishment and rendering the services in the EC Internal Market.

The method of mutual recognition is younger than the method of harmonization in EC law. Being brought into life by the European Court of Justice (hereinafter - the ECJ), the method of mutual recognition was formulated for the first time in the White Paper "Formation of the Internal Market". It was proposed to simplify the method of harmonization of the EC law and to substitute it where possible by the method of mutual recognition. The method of mutual recognition has been applied for the first time by the ECJ in the cases *Dassonville* and *Cassis de Dijon*¹¹ in order to remove measures inhibiting freedom of movement of goods in trade between the Member States. The ECJ formulated the method of mutual recognition as an obligation of all Member States to remove on their territory any direct or indirect discrimination of free movement and sale of goods that were legally produced and

accepted to sale in other Member States. Any Member State should mutually recognize rules and standards applied in other Member States.

The method of mutual recognition foresees exceptions from the Internal Market freedoms for the EC Member States. These include those exceptions that "have been proved by new data of scientific research" and required by the need to protect public health and public security, environment and industrial environment, consumer rights. However, even after adoption of the measures on harmonization of Member States' legislation by the EC Council of Ministers or the Commission any Member State has discretion to follow provisions of national legislation by reasons of the national interest under condition of mandatory notice of the EC Commission. Within six months the Commission considers practicability of preserving the above-mentioned provisions of a Member State's domestic law. Latter could be recognized as void if they promote direct discrimination or covered limitation of intra-community trade and impedes the functioning of the EC Common Market. In case of abuse of the above exceptions the Commission or Member State can apply to the ECJ (Article 95 (9) Roman Treaty).

Methods of harmonization and mutual recognition have accelerated the approximation of legal systems of the Member States and establishment of the EC Common Market. Application of the above methods of approximation of legislation gave opportunity to the Member States to apply most convenient forms and methods of implementation of the EC legislation into their own national legal systems.

Associate or full EU membership candidate countries should harmonize their own national laws to EC common rules or to approximate their own national legislation in order to apply the method of mutual recognition of the EC norms and standards¹². Harmonization of the candidate countries legislation can be achieved in any form that is most appropriate for the national interest of the candidate countries, however, with the obligation to conform to the EU membership criteria and to establish competitive market environment.

"Harmonization" and "unification" of legislation in International Trade Law

Process of harmonization of International Trade Law was initiated already in the 20-ies of the twenties century. In 1923 there were signed first Geneva Protocols on International Commercial Arbitration and in 1927 group of scholars under the leadership of Ernest Rabel launched the drafting of international conventions on international sale of goods¹³. At present the need to harmonize legislation in the sphere of International Trade Law becomes more urgent. Business communities, which promoted the process of harmonization in international trade, are interested in unified regime of international trade and elimination of trade barriers. Most successfully harmonization is being carried out in the following spheres: dispute resolution (international commercial arbitration), bank and financial services, international sales of goods.

The absence of single institution to harmonize legislation and control its application on behalf of the state - parties to international treaties, is a specific feature of harmonization in the field of international trade law. EU does have such an institution as the ECJ, which gives uniform interpretation of EU law binding for all Member States courts (Art. 234 Roman Treaty). In the sphere of International Trade law analogous institution, that could have been called the International Commercial Court, has not been established, and presumably will not be established in nearest times, taking into account different impediments of economic and political nature. Therefore, the role of drafting and interpretation of international trade law is taken up by the so-called formulating agencies. Such agencies could be intergovernmental (UN Commission on International Trade Law (UNCITRAL), Institute of

Unification of International Private Law (UNIDROIT), The Hague Conference of Private International Law) as well as non-governmental, established by multinational corporations and business of different states (International Chamber of Commerce (ICC), trade associations GAFTE, IATA). These organizations formulate legal norms and popularize them among business and states.

On the contrary to EU law, international trade law does not use notions adaptation and approximation of legislation. The process of creation of unified norms of International Trade Law is characterized as unification or harmonization of law. There are two approaches of distinguishing notions of harmonization and unification in international trade law. In the opinion of one group of experts, the notion harmonization is used to determine global legislative process on international level directed towards the harmony of international trade. At the same time unification is understood as one of the methods of harmonization that means drafting of single unified legislation on international trade in different states¹⁴. However, in our opinion, it is impossible to distinguish notions harmonization and unification in international trade law. Unification of international trade legislation can be achieved by international conventions as well as model laws¹⁵, national texts of which can vary. The notions of unification and harmonization are used as synonyms, for example, in the UN General Secretary's Report On Progressive Development of International Trade Law and in Professor Bonell's works¹⁶.

There are three major methods to achieve unified regime of legal regulation in field of international trade law. The first method is harmonization by bilateral or multilateral international conventions. Examples of this method are: Brussels Convention On Bills of Lading (1924), New York Convention On Recognition and Enforcement of Foreign Arbitral Awards (1958), Vienna Convention On Contracts of International Sale of Goods (1980). The second method is model legislation – drafting of model laws that have non-binding nature. In this case an ordinary legislative process is used in accordance with the Constitution of a state that enacts a model law. The most successful model law is the UNCITRAL Model Law on International Commercial Arbitration. According to UN data, this law was taken as a basis for national legislation of more than 25 countries including the Russian Federation and Ukraine¹⁷. However, almost all countries changed some provisions of the model law. Thus, Ukraine and the Russian Federation have narrowed and detailed applicability of the law as well as excluded the provision that granted arbitrators the right to act as *amiabile compositeurs* (intermediaries). In the UN experts' opinion, these changes, although added some peculiarities into the legal status of international commercial arbitration in different countries, are not serious obstacles for harmonization of international trade law. The third method is the so-called contractual method. It is applied in codification of trade customary law by non-governmental organizations. As a result, this method reflects in creation of private codification, standard contracts, "living documents" in the Internet and others. For example, International Commercial Chamber worked out standardized terms of sale INCOTERMS and Uniform Commercial Practice¹⁸. Moreover, "Principles of International Contracts Law of 1994" (a very successful systematization of the basic provisions of international contracts law) can also be considered as an example of the contractual method application. Although drafted by intergovernmental organization – UNIDROIT, it is a non-binding legal act and can be used by parties to regulate particular contracts between them.

The main distinction between the above methods of harmonization is that the methods of conventions and model laws are applied exclusively by the initiative of states, while contractual method is applied by subjects of a national law (natural and juridical persons) based on a party autonomy. Legal norms resulted from the convention method are of binding nature while subjects of foreign economic activ-

ity in contractual states can change the content of the norms created by the two latter methods.

Approximation and harmonization of legislation in international and EU law

In the International Law Doctrine there are essential differences between the notions *harmonization* and *unification* of legislation. The both notions characterize the process of bringing national and international law closer together. Practice of some international organizations such as the EC has promoted the notion of *approximation* of legislation. The main feature of this process is that it is pursued only to the extent necessary for functioning of the EC Common Market.

The content of the notion *harmonization* of legislation has its own peculiarities in EC Law. Although notion *harmonization* in international law is used to define the whole process of creation of the unified legal regime, we propose to use the notion *harmonization* in the EC law solely as one of the methods of approximation of Member States' legislation. This conclusion is based on the ECJ's case law.

Approximation of Member States legislation to EC laws provides functioning of the EC Common Market by two methods. Firstly, by creation of the "common rules" that are necessary to eliminate limitations of the free movement of persons, goods, services and capital or to eliminate factors that impede competition at the EC Common Market. In addition, all goods legally produced and accepted to sale in a Member State should be mutually recognised throughout the EC Common Market.

The notion *unification* in international law and EC law does not differ substantially and means bringing national legislation into accordance with provisions of international law by issuing national provisions that are identical to similar provisions of international laws¹⁹. EC legislation does not foresee unification of the Member States legislation as the part of the approximation process since it contradicts to the principles of proportionality and subsidiary in the EC law.

Consequently, approximation of the Ukrainian law to EU laws excludes unification of the Ukrainian and EU legal system that is the adoption of identical to European provisions of Ukrainian legislation. Approximation of Ukrainian laws to EU legislation should be achieved by implementation of common rules and minimal standards. Their aim is to enhance competitiveness of the Ukrainian economy in the single European area. For this purpose Ukraine has to apply the methods of harmonization and mutual recognition by adoption of the EC technical, health and industrial standards and harmonization with the common rules established by the EC Directives.

In our opinion, clear distinction between the notions *approximation*, *harmonization* and *unification* in international law does not have that significant practical importance as in the EU law. It is more essential to possess a clear understanding of differences between the methods of harmonization of international law in order to achieve the unified regime of legal regulation of international relations.

The articulated specification of the notions of approximation and harmonization in the EU law is of primary importance for effective adaptation of Ukrainian legislation to EU legislation.

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PRINCIPLES OF THE CONFLICT OF LAW THEORY IN THE DOCTRINE AND PRACTICE OF THE INTERNATIONAL LAW OF THE USA

As a rule, the law courts of the USA face two main questions while solving the problems of the international character and those of the conflict of laws: in the first place, whether the law court trying the given case is the proper forum or not? in the second place, the legislation of which land or state is recommended to use in this concrete case if the law court is the proper forum? To answer these questions, the American law courts apply the number of theories of solving the problems concerning the conflict of laws which were gradually formulated by both the juridical doctrine and legal practice of the U.S.A. (there are 8 – 10 the above – mentioned theories). They are applied to solve the problems concerning the conflict of laws of states and various lands.

Thus, when the American law court has to determine the legislation of which land is recommended to use for trying the concrete case containing the elements of the international character (in other words, when neither constitution nor legislation of the U.S.A. contain the standards of the law to be used in this case) in the first place, it has to decide which conflict of law theory it should apply. It is confirmed by practice that each of these theories has not only positive features but also definite drawbacks. As a result, the application of various theories for trying the same case can yield different, even contrary results.

Let us examine the main conflict of law theories which are widely used in the doctrine and practice of the international private law of the U.S.A.

Traditional conflict of law theory in the U.S.A. is so – called the doctrine of “the vested rights”. According to this doctrine, in the case of conflict of laws one enforces the legislation of the land where the rights “were vested” (i.e. they were reserved). According to L.A. Lunts the state always uses its own rights but it can recognize the subjective ones based on the international law (so – called vested rights)”, thus “recognition of the rights vested on the basis of the international law is the result of the comity of nations”¹.

To practice this theory, the law court has to do the following: in the first place, to determine the character of the legal action, i.e. to determine rights, violation of which is the result of the legal action (for instance delict, contract or proprietary). Sometimes this stage is called “the qualification” of the action. In the second stage,