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Labour Law in Russia: Recent Developments and New Challenges

Edited by

Vladimir Lebedev and Elena Radevich

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TRANSNATIONAL EMPLOYMENT RELATIONS FROM A LEGAL SCHOLAR'S VIEWPOINT: TERMINOLOGICAL AND TAXONOMIC ISSUES

DARIA CHERNYAEVA

"[...] Juliet: What's in a name? That which we call a rose
By any other name would smell as sweet"
—Romeo and Juliet (II, ii, 1-2)

This paper offers an outline of the perception of "transnational employment relations"[1] in a legal context. It will analyse various doctrinal and legislative approaches to the definition of the phenomenon, as well as the usage of the terms employed in its naming, its key characteristics and classifications. The author will reveal and explore the reasons for the problems that arise in the interpretation and legal regulation of the phenomenon, and will suggest some possible solutions to them.

The paper will analyse several terminological aspects of the terms used in descriptions of and references to employment relations which could be seen as falling under more than one legal order (jurisdiction). The paper will also aim to prove the hypothesis that, from a legal point of view, a transnational employment relation can be described (and differentiated from a regular "national" employment relation) through the presence of elements in which "transnationality" manifests itself and the number of such elements in a particular relationship. From this viewpoint, we can divide all transnational employment relations into two groups according to whether the "transnationality" of its elements is connected with one (simple relationship) or more (complex relationship) countries (legal orders) except the observer's country (legal order).

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[1] The term "transnational employment relations" in the title and the opening parts of the paper merely serves as a starting point for the study and a time/space saver to make references more compact. It should not be seen as an ideal or recommended naming of the phenomenon in question.

1. The Naming Problem Iceberg

The naming of the phenomenon of "transnational employment relations" is doubly controversial due to the fact that it combines two already ambiguous terms: "transnational" (which might sometimes be substituted for "international", "transborder"/cross-border, "inter-jurisdictional", etc.) and "employment relations" (which do have a precise meaning in the majority of national legal sources and even a recommended interpretation on an international level,[2] but may still be defined somewhat differently in different countries). While the lack of consistency in the definitions of the first part of the term (transnational) has enjoyed some scholarly attention, the problems which the second part of the term (employment relations) gives rise to are almost never discussed in such a context where two or more legal orders are involved. I therefore compare this terminology issue with an iceberg which has a clearly visible part (i.e. that which has been much discussed) while the bigger part of the problem remains hidden as it is rarely addressed either in doctrine or in research.

Due to publication constraints and in an attempt to control the level of both verbosity and abstraction, this paper will address only the first of the aforementioned aspects, i.e. those relating to the issue of "transnationality". I hope to continue this study and move on to the second part of the "iceberg" in other paper(s).

1.1. The Transnational Nature of Employment Relations: A Doctrinal Discussion

The term "transnational" dates back to Jeremy Bentham's understanding of "international law" (or, to be more precise, "international jurisprudence"), as dealing with the "conduct… [of] members of different states".[3] This understanding takes into account only the specifics of the parties ("subjects") of the relationship (i.e. its "subjective" aspect) but demonstrates no awareness of the possibility that its other aspects (i.e. object[s],[4] facts crucial to the definition of its nature or its procedural peculiarities), might have a similarly "international" character.

[2] See ILO Recommendation No. 198 concerning employment relationship (2006).

[3] Bentham, J. 1939. *An Introduction to the Principles of Morals and Legislation.* Hayes Barton Press, 276.

[4] It is widely known though that in his later works Bentham also addressed this issue. See Bentham, J. 1838-1843. "Principles of International Law," in *The Works of Jeremy Bentham*, ed. Bentham, J. (Edinburgh: William Tait. Vol. 2).

Nowadays legal scholars, being more experienced in dealing with various transnational legal issues, tend to include most of the other aspects of the relationship in its definition and description. W.W. Park, for example, states that "…characterization of a transaction as international or domestic might be made according to two principal criteria: the nature of a transaction or the parties' residence",[5] thus embracing both objective and subjective aspects of the phenomenon in question.

B. Hepple goes further by implicitly distinguishing "substantive" from "procedural" aspects and explaining "internationality" ("transnationality") in the context of labour disputes using a number of criteria. Amongst these criteria he names three which can be attributed to "substantive law" — a place of work that may be other than the place of the contracting parties' residence (objective criterion), the nationality, place of business or place of residence of the parties (subjective criteria), and two that can be attributed to "procedural law" — whether a domestic court applies foreign law (objective criterion) and whether it recognizes the jurisdiction of a foreign court (subjective criterion).[6] He also writes that "…the word "international" may be used to mark the distinction between the resolution of disputes that are truly national and those which, in some way, cross national boundaries, i.e., are transnational",[7] and warns readers against mixing up these issues of purely private international law (conflict of laws) nature with issues belonging to public international law.

However, these are rare examples of this terminology being addressed specifically in scholarly writings. Legal scholars (in Russia as well as abroad) demonstrate either unawareness of or indifference to the abundance of terms used in references to and/or in descriptions of the phenomenon of transnational employment relations.[8] There seems to be a widespread trend of referring to such relations with the most popular term

[5] Park, W. W. 2001. "Why Courts Review Arbitral Awards," *International Arbitration Reports* No. 16:27.

[6] Hepple, B. 2003. "Mapping International Labor Disputes: An Overview," in *Labor Law Beyond Borders: ADR and the Internationalization of Labor Disputes*, ed. The International Bureau of the Permanent Court of Arbitration (Kluwer Law International), 45.

[7] *Ibid.*

[8] Bisom-Rapp, S. "Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite," TJSL Public Law Research Paper No. 04-9 (note 3, at 2). Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590942 (accessed 2 February 2014). Dowling Jr., D. C. 2001. "The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium," *The Labor Lawyer* 17:1-23; etc.

"international",[9] carrying the meaning Bentham defined almost two centuries ago (i.e. relations taking place between representatives of different nations, on an "inter-national" level). Contrary to their usual attentiveness to terminology issues, modern labour law scholars almost never go deep into the substantiation of this choice as if the term was comprehensible without any special explanations. This approach is justified to some extent because the naming "international employment relation" is one of the oldest among those applied to the phenomenon[10] and seems to be used as a generally recognized term. When the context is clear it rarely causes interpretational problems, especially among lawyers and scholars dealing with such relations on a regular basis.

However, when the context is not sufficiently clear and/or contains consonant terms that have another meaning, the naming "international

[9] Grušić, U. 2012. *The International Employment Contract: Ideal, Reality and Regulatory Function of European Private International Law of Employment*. A thesis submitted to the Department of Law of the London School of Economics for the Degree of Doctor of Philosophy, September 2012. London: London School of Economics. Available online: http://etheses.lse.ac.uk/583/1/Grusic_International_Employment_Contract_2012.pdf (accessed 2 February 2014); Colvin, A., and O. Darbishire, 2012. "International Employment Relations: The Impact of Varieties of Capitalism," in *Handbook of Research in International Human Resource Management*, eds. Stahl, G. K., Björkman, I., Morris, S. (Cheltenham: Edward Elgar Publishing); Bamber, G. J., and R. D. Lansbury, eds. 2010. *International and Comparative Employment Relations*. London: SAGE Publications; Morgenstern, F. 1984. *International Conflicts of Labour Law: A Survey of the Law Applicable to the International Employment Relation*. Geneva: International Labour Organization; see also in Russian: Shesteryakova, I. V. 2007. *Kollizionnye Normy i Mejdunarodnye Trudovye Otnosheniya [Conflict Rules and International Employment Relations]*. Saratov: SGAP; Kiselev, I. Ya. 2003. *Trud s Inostrannym Uchastiem: Pravovye Aspekty [Labour with Foreign Participation: Legal Aspects]*. Moscow: MCFER, 7-8; Dovgert, A. S. 1992. *Pravovoe Regulirovanie Mejdunatodnyh Trudvyh otnosheniy [Legal Regulation of International Employment Relations]*. Kiev: UMK VO.

[10] I managed to track it back to the 1960s (see Szászy, I. 1968. *International Labour Law: A Comparative Survey of the Conflict Rules Affecting Labour Legislation and Regulations*. Leyden: A. W. Sijthoff [translated from Hungarian]), though national scholarship written in languages other than English may contain older sources (see references to Gamillscheg, F. 1959. *Internationales Arbeitsrecht*. Berlin: Mohr Siebeck made in Birk, R. 1985. *Review: International Conflicts of Labour Law: A Survey of the Law Applicable to the International Employment Relation*. Morgenstern. F. *The American Journal of International Law* 79-4: 1120-1123 (at 1121).

employment relations" can lead to unwelcome confusion.[11] The main problem lies in the fact that the word "international" is polysemic and its meaning can vary according to the context in which it is used.

According to popular dictionaries, the word "international" generally has at least two principal meanings, and, to worsen the situation, the lists of meanings differ slightly between dictionaries of the same language[12] and between the languages themselves[13]. There are therefore reasons to believe that the problem with a uniform interpretation of this term exists in many languages.[14]

An analysis of the definitions given to the term "international" in some of the most popular explanatory dictionaries of various languages shows that, when used as an adjective, it may take on at least five meanings which can be classed into two, albeit disproportionate, groups:

1. a "between" group:
   - 1.1. general: occurring/existing/carried out between several nations;
   - 1.2. active:
     - 1.2.1. indirectly active: agreed on/sanctioned by several nations (for which there must necessarily be communication *between* them, they must be actively involved);
     - 1.2.2. directly active: used or available/intended for being used by several nations (people belonging to several nations);
   - 1.3. passive: affecting/related to several nations (as a result of which they may have something in common; they become passively involved);
2. a "beyond" group:

[11] See Dowling Jr., D. C. 2001. *Ibid.*, 3.

[12] See *Oxford Dictionary of English*. 2010. Oxford: Oxford University Press; *Merriam-Webster Online Dictionary & Thesaurus*, URL: http://www.merriam-webster.com/dictionary/international; *Collins Online Dictionary*, URL: http://www.collinsdictionary.com; etc.

[13] Compare with respective articles in Russian (Ushakov, D. N. 1937. *Orfographic Dictionary* Moscow: Uchpedgiz. Also available online, at http://ushakovdictionary.ru; Ojegov, S. I., and N. Yu Shvedova. 1999. *Explanatory Dictionary of the Russian Language*. Moscow: Azbukovnik; Kuznetzov, S. A., ed. 2000. *Comprehensive Explanatory Dictionary of Russian*. SPb: Norint), German (*DWDS Project—Digitalen Lexikalischen Systems der Berlin-Brandenburgischen Akademie der Wissenschaften*, URL: http://www.dwds.de), Spanish (*Diccionario de la lengua española (DRAE) es la obra de referencia de la Real Academia Española*, URL: http://www.rae.es/recursos/diccionarios/drae) and other dictionaries of other languages.

[14] Collier, J. G. 2001. *Conflict of Laws*. Cambridge: Cambridge University Press, 8.

2.1. effective beyond/reaching beyond/coming out of the national boundaries (borders of a particular country).

These lexical interpretations may also be classified in another way according to whether they focus on the subjective or the objective aspect of an issue in question:

1. the "subjective" interpretation is used to emphasize that the term "international" aims to be applicable/accessible to several nations so they must necessarily express their will and may even take part in its implementation; examples of this usage include "international organization" (the primary idea of which is to institutionalize and facilitate cooperation between several nations at either a governmental or non-governmental level), "international agreement" (which is wilfully concluded between several nations, often and traditionally (though not necessarily) represented by their official public authorities), "international public/private law" (which emphasizes that the particular branch of law focuses on the regulation of relationships between members of several nations representing their nations on either a public or private level), etc.; we can see that this interpretation is closer to the "between" meaning of the term;
2. the "objective" interpretation is used to emphasize that the term "international" aims to be applicable to several nations irrespective of their will and viewpoints; it is intended to be used in regard to several nations, but this aim may not necessarily be achieved; examples of such usage include "international passport" (which is supposed to be valid in several national territories but in calling it that we do not focus on whether any particular nation consider it valid on its territory), "international review" (which aims to cover several nations regardless of their consent and generally with no particular interest in their active and/or official participation), "international law" (when used as a general term and an antithesis to "national law" without going into details of its subjects, their will and nature), etc.; we can see that this interpretation is close to the "beyond" meaning of the term.

Further analysis may succeed in finding other (perhaps better) classifications. However, we can already see from the analysis shown above that the term is not only polysemicc, but that its polysemy may be interpreted or described in different ways. If we add to this the complexity of legal language itself, the picture becomes truly complete.

Now after the intricacy of the problem has been demonstrated, let us compare two notions which both contain the term "international":

- "international regulation of employment relations";
- "regulation of international employment relations".

In my experience even highly professional lawyers and legal scholars cannot always explain the difference between the two immediately after hearing them or seeing them written (for instance, in a conference agenda or in a master's program curriculum etc.). When one is given sufficient time to read/listen more carefully and attentively, (s)he understands that the first term reflects the first of the above-mentioned interpretations and involves only international legal norms (those established by international agreements, etc.) applied to any employment relation in general, while the second term demonstrates an example of the second interpretation and embraces all norms (both national and international, public and private) applied to the phenomenon. This example aims to show that confusion is almost inevitable when such terms are used side by side (a situation that occurs fairly often in the context of research and teaching in certain fields).

This difficulty in differentiation obviously does not favour a wider usage of "international employment relations" as a general term for the phenomenon of "transnational employment relations". However, we may recall the case of two similarly problematic consonant terms, "contract of service" and "contract for services" (acknowledged since the Romans)[15] which are still used side by side and still produce much confusion in everyday practice and sometimes even in courts.[16]

However, despite all the problems described, the above mentioned naming seems to be one of the most acceptable in terms of ease of interpretation in a particular context. All the other labels for the relations based on transnational labour are at least no less problematic.

If, for example, we took the term "transborder" (or "cross-border") to name the phenomenon (thus obtaining "transborder/cross-border employment relations"), we would have to further specify whether we mean internal borders between the federal subjects, regions or territories of a country or its external borders with other countries. This necessity would almost inevitably lead us to complementing the initial expression with the word "international" and finding ourselves back with all the problems listed above which this term brings about. However, if we refuse to do that, the term "transborder" ("cross-border") may cause misunderstanding in the case of a federative state (such as Russia, Germany or the USA) and

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[15] Sohm, R. 1892. *Institutes of Roman Law*. Oxford: Clarendon Press, 311; McDonell, J. 1904. Classification of Forms and Contracts of Labour. *Journal of the Society of Comparative Legislation. New Series* 5-2: 253-261, at 255-256; etc.

[16] Freedland, M. 2003. *The Personal Employment Contract*. Oxford: Oxford University Press.

of a state with considerable political and/or legislative autonomy of its regions (like Spain or the UK). Therefore, in any case this term seems more suitable for another context in which the aim is to emphasize that we wish to differentiate and compare the two types of "transborderness" (intra-country and extra-country). At the same time, it remains inappropriate both as a single general term for the phenomenon we are discussing in this paper and as a name for any "international" (extra-country) relations. Further refinement of the term does not help a great deal as by resolving some problems it causes others. However, the term "cross-border employment relation(ship)" is found in labour law scholarship published in English.[17] Russian scholarship seems to be blessed with using it very seldom.[18]

As well as sharing the same problem of "borders" with the aforementioned tern, the term "inter-jurisdictional" (which also requires clarification of whether the word "jurisdiction" in this context represents a "territorial" or an "objective" jurisdiction and, should it be used in the territorial sense, whether the involved jurisdictions are of different regions within one country or of different countries), relates mostly to dispute resolution and procedural aspects, and thus cannot serve as a general term for the phenomenon. It is no surprise that this term is more widespread in private international law scholarship[19] where dispute solving and procedural issues play a significant role. Labour law scholars and students

[17] Evju, S., and T. Novitz. 2012. "The Evolving Regulation: Dynamics and Consequences," *Formula Working Paper No. 33*. Available online: http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/papers/2012/WP33-Evju-Novitz.pdf (accessed 2 February 2014); Lazar, W. 2008. "Employment Agreements and Cross Border Employment: Confidentiality, Trade Secret, and Other Restrictive Covenants in a Global Economy," *Labor Lawyer*, 24-2: 195-211; Royle, T. 2006. "The Dominance Effect? Multinational Corporations in the Italian Quick-food Service Sector," *British Journal of Industrial Relations* 44-4: 757-779; etc.

[18] Dmitrieva, G. K., ed. 2010. *Mejdunarodnoe Chastnoe Pravo [Private International Law]*. Moscow: Prospekt.

[19] See MacDonald, K. 2009. *Cross-Border Litigation: Inter-jurisdictional Practice and Procedure* [e-book]. Canada Law Book; Available from: Bibliotheksverbund Bayern, Ipswich, MA (accessed 4 February 2014); Buxbaum, H. L. 2009. "Competition in the Private Enforcement of regulatory Law," in *Economic Law as an Economic Good: Its Rule Function and Its Tool Function in the Competition of Systems*, eds. Messen, K. M., M. Bungenberg and A. Puttler (Munich: Sellier European Law Publishers), 129-136; Chernichenko, O. S. 2003. *International Legal Aspects of the Jurisdiction of States*. PhD thesis. Moscow: Diplomatic Academy of the Foreign Ministry of the Russian Federation; etc.

may experience difficulties in the application of this term as there are almost no examples of its usage in either doctrine or practice in their field of specialization.

It is also mostly private international law scholars who argue that the phenomenon should be called "employment relations with a foreign element".[20] This term can be used either alone or with other labels.[21]

The specifics of the works using this wording backs the hypothesis that it has been borrowed from foreign (not Russian) private international law scholarship through works published in Russian (either in the original language or translated).[22] I assume that this wording may seem attractive because it allows one to avoid the confusing "international" sphere and to move towards the less problematic "foreign" one, which generally requires nothing more than a particular reference point. However, although this approach solves one problem it produces a further two.

Firstly, the term "foreign element" is problematic in itself. Inasmuch as the Russian labour law scholars see this term as somewhat alien and rarely make use of it in their papers, it was, again, private international law scholars, who formulated the main interpretation of this term in the Russian legal scholarship.[23] This interpretation follows a traditional

[20] Merrett, L. 2011. *Employment Contracts in Private International Law*. Oxford: Oxford University Press, 2; Morgenstern, F. 1984, *op. cit*; Belogubova, O. V. 2013. Koliziyni-pravove regulyuvannya trudovyh vidnosyn, uskladnenyh inozemnym elementom, v mijdunarodnomu sudnoplavstvi [Conflict Legal Regulation of Employment Relations Complicated by Foreign Element in International Shipping]", *Aktualni Problemy Polityky*, 50:120-130; Protasova, A. S. 2011. Коллизионное регулирование трудовых отношений, осложненных иностранным элементом: проблемы и перспективы [Conflict Regulation of Labour Relations Complicated by a Foreign Element: Problems and Perspectives]. *Vestnik Buryatskogo Universiteta*, 2: 224-227; Spektor, A. A. 2004. *Trudovye Otnosheniya, Oslojnennye Inostrannym Elementom, Kak Object Mejdunarodnogo Chastnogo Prava (Employment Relations Complicated by a Foreign Element as an Object of Private International Law)*. PhD thesis. Moscow: RGTEU; etc.

[21] Kiselev, I. Ya. 2003, *op. cit.*

[22] See Boguslavskiy, M. M. 1988. *Private International Law: A Soviet Approach*. Dordrecht: Martinus Nijhoff Publishers, 11-12; Luntz, L. A. 1973. *Kurs Mejdunarodnogo Chastnogo Prava [Course of Private International Law]*. Moscow: Yuridicheskaya Literatura, 140-170 (an analysis of foreign private international law doctrines, their interrelation and their influence on the pre-Soviet and the Soviet Russian private international law scholarship); Erpylyova, N. Yu. 2012 *Mejdunarodnoe Chastnoe Pravo [Private International Law]*. Moscow: Jurait, 26-30 (an analysis of existing studies of this notion in Russian scholarship).

[23] Erpylyova N. Yu. 2005. *Mejdunarodnoe Chastnoe Pravo [Private International Law]*. Moscow: Prospekt, 7-10, 25-29; Kolobov, R. Yu. 2006. *Osnovy Postroeniya*

private international law understanding according to which, in brief, the object of this branch of law is formed of relations, which include a "foreign element".[24] Labelling the discussed phenomenon as a subcategory of such relations, scholars apply this general interpretation to it and furnish it with the same distinctive, "foreign", element.

This approach has been criticized by A.A. Rubanov[25] who pointed out that the so-called "foreign element", while being apparent to many scholars, is not actually an element of a relationship at all, and should instead be considered more a characteristic of certain elements of a relationship, i.e. of its subjects (employer and employee) or its object (work/labour). Russian labour law scholars tend to support Rubanov's view, stating that the "foreign element" as it is described by its proponents cannot be found in a number of the relations in question.[26] They therefore abstain from using expressions that include "foreign element" at all or at least as a single name, and try to find other wordings to name the phenomenon, such as "employment relations with foreign participation".

Rubanov's approach does indeed solve many of the previously mentioned problems and, in my opinion, deserves serious consideration and wider application. This all the more so because, among other merits, it can be adapted to differentiate between the "foreign" and "international" nature of the described characteristic, and to attribute the latter to either a public field (e.g. international public service) or a private field (e.g. work for private transnational corporations) depending on the level at which the relations are established. The main disadvantage of calling the phenomenon an "employment relation having elements with foreign characteristics" is its complexity which almost destines it to remain known

i Funktzionirovaniya Mejdunatodnogo Chastnogo Prava [Foundations of Private International Law Building and Functioning]. PhD thesis. Irkutsk: IrkGU, 2006; Zvekov, V. P. 2004 *Mejdunarodnoe Chastnoe Pravo [Private International Law]*. Moscow: Jurist; Boguslavskiy M. M. 2002. *Mejdunarodnoe Chastnoe Pravo [Private International Law]*. Moscow: Jurist, 21; etc.

[24] Among the Russian private international law scholars the best description of this specifics is believed to be given by Luntz, along with the description of the aspects (or "structural elements") of such relations in which this element manifests itself. See Luntz, L. A. 1949. *Mejdunarodnoe Chastnoe Pravo [Private International Law]*. Moscow: Gosjurizdat, 9-14.

[25] Rubanov, A. A. 1984. *Teoreticheskie Osnovy Mejdunarodnogo Vzaimodejstviya Natzionalnyh Pravovyh System (Theoretical Foundations of International Interaction of National Legal Systems)*. Moscow: Nauka, 91-94.

[26] Kozlovsky, V. V. et al., eds.. 2000. *Trudovye Otnosheniya na Predpriyatiah s Inostrannym Uchastiem [Labour Relations at Enterprises with Foreign Participation]*. SPb: Sociologicheskoe obshchestvo im. M. M. Kovalevskogo.

to and used by a small group of scholars with a reasonable degree of understanding of the theoretical issues behind this naming.

Secondly, having a particular country as a reference point eliminates grounds for abstract consideration and generalization of the described phenomenon and its theorizing (making it nigh impossible without equally thorough consideration from all applicable reference points).

Unfortunately, those who use this wording almost never explain their choice nor critically assess other options. This leads us to conclude that wording which contains something "foreign" (no matter whether it is "element" or "participation") is acceptable only in national scholarship, which analyses the phenomenon from the position of a particular national legal system and legitimately sees anything outside its jurisdiction as "foreign". This approach is largely ineffective and irrelevant when describing the phenomenon from an entitative point of view and/or at a high level of theorization.

In the title of this paper I have used an alternative to the aforementioned wordings: a term which uses the word "transnational" instead of the problematic terms of "international" or "transborder" or something with "foreign element" or "foreign participation". This was done intentionally but was not meant to emphasize the flawlessness of the term. The word "transnational" sounds modern and allows a researcher or a practitioner to clearly distinguish this type of relation from anything existing on a truly international or supranational level. This term is also actively used in scholarly papers and books on transnational labour published in English[27]. At the same time, this term is almost non-existent in literature published in Russian, and when it is mentioned it is unaccompanied by any particular terminological explanations or

[27] Gunawardana S. J., and L. Mhando, 2014. "The Migration-Development Nexus, Women Workers and Transnational Employment Relations," in *The Oxford Handbook of Employment Relations*, eds. Wilkinson, A., Wood, J., Deeg, R. (Oxford: Oxford University Press); Fichter, M., and J. Sydow, 2009. "Organization and Regulation of Employment Relations in Transnational Production and Supply Networks. Ensuring Core Labor Standards through International Framework Agreements," Paper presented at the 15th World Congress of the International Industrial Relations Association (IIRA), Sidney, August 24-27, 2009. Track 4: Institutions, Processes and Outcomes. Available online: http://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Tue_W1_FICHTER.pdf [accessed 02.02.2014]; Rose, E. 2004. *Employment Relations*. FT Prentice Hall, Pearson Education Ltd, 223; Cherian, J. 1989. "Current Developments in Transnational Employment Rights." *Labor Law Journal 40*(5): 259-267; Forde, M. 1978. "Transnational Employment and Employment Protection," *Industrial Law Journal* 7-1: 228-238; etc.

comments.[28] Being quite a novelty for non-English languages, the naming seems to have struggled to enter non-English legal scholarship. It is also a bit of a tricky term due to the fact that it is closely associated with "transnational corporations" which are in no sense "representative employers" for transnational employment relations which have many other types of specific employers (e.g. a natural person with a *lex personalis* different from that of his/her employee(s), a national subsidiary of a foreign corporation, an international organization, etc.). Nonetheless, this term does seem to avoid the majority of problems mentioned above, being almost monosemic (at least in the context we are discussing here), understandable and simple. All this may explain its increasing usage, which has recently been observed in legal scholarship.

There are also other wordings, which have been suggested for or used as a name for the discussed phenomenon,[29] but their occurrence in published works is scarce. It is clear that there is still no one single term, which satisfies everyone. However, the name "transnational employment relations" seems to be the most generally acceptable, at least in English and until we find something more unambiguous.

1.2. The Transnational Nature of the Employment Relation: A Legislative "Patchwork"

The discussion briefly outlined above is only relevant to doctrinal literature. Current Russian legislation and other regulative instruments interpret the phenomenon as either containing a "foreign element" or being of a "transborder nature".

The term "foreign element" can be found only in the legislative provisions establishing the choice of law rules and defining legal status of various "entities": persons, places, organizations, etc. We can, for instance, find it in article 414 of the Code of Merchant Shipping of the Russian Federation which stipulates the choice of law rules for cases "[...]

[28] Kiselev I. Ya. 1999. *Sravnitelnoe i Mejdunarodnoe Trudovoe Pravo [Comparative and International Labor Law]*. Moscow: Delo, 7.

[29] See: Petrova, E. A. 2005. "Kollizionnye principy v trudovyh pravootnoshenijah s inostrannym sub'ektom [Conflict of laws principles in employment relations with a foreign subject]," *Juridicheskij Mir* 3: 76-77; Kiselev, I. Ya. 2003. *op. cit.* 8-11; Andrianova, M. A. 2002. *Pravovoe Regulirovanie Trudovykh Otnosheniy s Uchastiem Inostrantzev v Sistseme Mejdunarodnogo Chastnogo i Trudovogo Prava Rossii [Legal Regulation of Employment Relations with Participation of Foreigners in the System of Private International and Labour Law of Russia]*. PhD Thesis. Moscow: MGIMO; etc.

with the participation of foreign citizens or foreign judicial persons or complicated by a foreign element". It is also used in Part III of the Civil Code of the Russian Federation in article 1186 regarding the choice of law rules applicable to civil relations with the participation of "foreign persons" or complicated by a "foreign element", and in article 1204 regarding governmental participation in civil relationships complicated by a "foreign element". It is also found in par. 2.1, 2.2 and 3 of the Conception of Development of the Civil Legislation of the Russian Federation[30] devoted to amendments of the choice of law rules in the Civil Code of the Russian Federation, which, in some cases (such as the resolution of employment disputes or the definition of the person authorized to receive the unpaid wages of a deceased employee, and so on) are applicable to transnational employment relations as well.

It is logical for the same approach to be employed by the Russian judicial system, traditionally sluggish in the accommodation of all relatively new concepts. Although the Russian courts rarely resort to the term "foreign element" in their decisions, the Informative Letter of the Presidium of the Supreme Court of the Russian Federation No. 10 of 25.12.1996, mentions this term as a key feature of the relationship in question between a Belorussian company and a Russian company concerning the recovery of damages arising from the payment of disability pension fees for an injured employee of the plaintiff (the Belorussian company) to the Social Protection Fund of the city of Grodno (in Belarus).[31] There are also other examples in Russian case law in which courts have used this concept in their arguments on the applicability of the rules of the choice of law.[32]

Unfortunately, Russian legislation on transnational employment relations has not evolved to the same level of theorization and abstraction as general choice of law legislation has. It currently demonstrates no awareness of a "transnational employment relation" (or anything similar) as a general concept, but addresses only specific examples (or categories)

[30] Approved by the Presidential Council on the codification and further improvement of civil legislation on 07.10.2009.

[31] Par. 9 of the Informative Letter of the Presidium of the Supreme Court of the Russian Federation No. 10 of 25.12.1996

[32] See Decision of the Supreme Court of the Russian Federation No. AKPI12-1558 of 23.01.2013 concerning the civil servants' accommodation subsidy volume in the case of foreign residential property ownership; Decision of the Supreme Court of Arbitration of the Russian Federation No. VAS-7777/2010 of 07.11.2011 concerning the recovery of damages arising from a transnational freightage issue, etc.

of such relations: employment relations with foreign citizens employed in the Russian federation, secondment and assignments abroad (to some extent), taxation in particular cases of transnational employment relations.

At the same time the term "transborder", also found in Russian legislation and international treaties of the Russian Federation, relates mostly to "transactional" issues: transfers, transportation, air pollution, commercial transactions, etc. For example, this term is mentioned in article 12 of Federal law No. 152-FZ of 27.07.2006, "On Personal Data", and in Chapter III of the Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data[33] concerning transborder data transmission. Both of these provisions are fully applicable to the personal data of employees that an employer may gather in regard to their employment. The same term is mentioned in the Rules on the Criteria of Labelling Markets as Transborder[34] setting the rules concerning breaches of the antimonopoly provisions of articles 12 and 15 of the Agreement on Unitary Principles and Rules of Competition[35] including those in the field of services and others. On an international level the most common approach is to adhere to the Civil Code choice of law provisions. The most relevant international instrument in this sense is the Decision of the Council of Heads of the CIS Governments, "On Interstates Program of Innovative Cooperation of the CIS Member States"[36], which touches upon issues of transnational intellectual property (and contains the concept of a "foreign element" in Direction 2.2 of the Decision).

2. Taxonomic Issues: Varieties of "Transnational Employment Relations"

Thus far, it seems that no single common classification or systematization of transnational employment relations has been suggested either in labour law or in private international law scholarship. Most classifications suggested in various studies are constructed ad-hoc on the basis of empirical data with little to no abstraction and little effort to develop a comprehensive, integral and consistent typology.

[33] Council of Europe, 1981, signed by the Russian Federation in 2001 and ratified in 2013.

[34] Approved by Decision No. 29 of the Supreme Eurasian Economic Council of 19.12.2012.

[35] Signed by Russia, Belarus and Kazakhstan on 09.12.2010.

[36] Adopted on 18.10.2011.

When dealing with transnational employment relations, private international law scholars do not actually bother to classify them. Instead, they describe the choice of law rules as applicable to a "typical" transnational employment relation and to several so-called "special situations" (which in some way differ from the "typical" one).[37]

Dealing with the phenomenon more closely, labour law scholars have at least presented some classifications. Thus, for example, in Japanese labour law scholarship[38] we find a "geographical" ("territorial") approach with a country-based reference point (Japan) which distinguishes three main categories, some of which are further divided into subcategories:

- "international employment relations within Japan" comprising (a) relations involving foreign workers and (b) relations involving foreign-affiliated companies;[39]
- "international employment relations outside Japan" comprising (a) relations in regard to the transfer of employees to foreign branches and subsidiaries and (b) relations in regard to employees on business trips abroad;[40]
- [relations regarding the] "transnational movement of the workforce" comprising no subcategories.[41]

Soviet scholarship seems to be not interested in the systemic study of transnational employment relations. The phenomenon was of rare occurrence then and so were the papers, which addressed specific issues in this field and did not present much effort in typology development.

Post-Soviet labour law scholarship inspired by the spurt in foreign relations of the new states, which had emerged on the former Soviet territory, produced at least two more or less consistent typologies. It is interesting to mention that both of them also have a "geographical" ("territorial") nature and a country-based reference point.

The first typology was suggested by A. S. Dovgert in a textbook, which was released almost immediately after the Soviet system had

[37] See Merrett, L. *op. cit.*, 259-310; Morgenstern, F. *op. cit.*, 33-22.

[38] Yamakawa, R. 1996. "The Road Becoming More Traveled: The International Dimension of Japanese Labor Law. *Japan Labor Bulletin.* 35-09 [electronic resource]. URL: http://www.jil.go.jp/english/archives/bulletin/year/1996/vol35-09/05.htm (accessed 3 February 2014).

[39] We can see that this subdivision is based on the specifics of subjects (parties) of the relationship.

[40] We can see that this subdivision is based on the specifics of the object (place where the work is to be performed) of this relationship.

[41] Here the category in general again represents the specifics of the subjects (parties) of the relationship.

collapsed and several new states had emerged on the post-Soviet area. This typology reflects a transitional point in the development of the regional labour law scholarship, which was trying hard to find relevant terms and rules for the new economic reality. In that context professor Dovgert differentiated the following four types (categories) of "employment relations with a foreign element":

- work of local citizens for foreign employers on the territory of the former USSR and abroad;
- secondment of "our citizens" to work abroad;
- work for enterprises which are legal persons according to national law but are owned by "foreign capital" and included "into the orbit of transnational corporations";
- work of foreigners in the former USSR on various bases.[42]

We can see that Dovgert's typology bears obvious signs of the deficiency in empirical data, relevant terminology and experience in systematization of phenomena having transnational nature. This typology seems to be inspired by the spurt in foreign relations of the new post-Soviet states, but this time-specificity have made it short-lived and inapplicable in a context of a more developed economy. Now it has been almost forgotten and seldom cited in modern research.

Another—and a more well-known—typology has been suggested by Professor I.Ya. Kiselev about a decade ago. He divided transnational employment relations (or, to use his wording, "international labour") into five categories:

- work of Russian citizens abroad for Russian employers;
- work of Russian citizens for international organizations;
- labour migration of Russian citizens abroad (external labour migration);
- work of Russian citizens in their motherland for foreign firms or international organizations;
- work of the foreign citizens and stateless persons in Russia for employing organizations or natural persons.[43]

We can see that these all are empirical systematizations of the various types of transnational employment relations found in particular economic realities. However, the main value of these typologies is their degree of

[42] Dovgert, A. S. 1992. *op. cit.*, 5.
[43] Kiselev, I. Ya. 2003. *op. cit.*, 8.

similarity[44], which may allow for speculation as to whether an integral unified typology can be developed in this field.

Now that transnational employment relations are abundant and diverse and legal scholarship has, to some extent, familiarized itself with the phenomenon, we can attempt to apply a more systematic approach. Although a vivid exchange of viewpoints on this issue has not yet been initiated, I would suggest beginning the discussion with the typology of transnational employment relations which I have devised on the basis of the classic and well-developed concept of a "legal relation(ship)".

Private international law scholarship holds that a legal relationship consists of several "structural elements": (1) subjects (participating parties); (2) an object (a "matter of the relation") and juridical facts (facts which affect the relation in various ways, including engendering, changing or terminating them).[45] At the same time, when speaking of any transnational relations, the majority of scholars agree that the core feature of this type of relation is that their elements belong to two or more national legal orders (national legal regimes or jurisdictions), thus hypothetically implying a conflict of laws.[46]

Relying upon this general rule, I suggest, at least until a more consistent typology is introduced, dividing transnational employment relations according to the principle of whether the "transnationality" relates to one or more national legal orders ("degree of transnationality").

Thus, we get two distinct categories of transnational employment relations:

[44] Indeed, the subcategories of Yamakawa's first category correspond to, although do not exactly coincides with, the fourth and partly the first and the third Dovgert's categories respectively and Kiselev's last two categories, etc.
[45] First mentioned in Luntz, L. A. 1949. *op. cit.*; see also: Marchenko, M. N. 2007. *Problemy Obshhej Teorii Gosudarstva i Prava. Vol. 2. Pravo [Problems of General Theory of State and Law. T. 2. Law]* Moscow: Prospekt, 602; Golovistikova, A. N., and Ju. A. Dmitriev. 2005. *Problemy Teorii Gosudarstva i Prava [Problems of Theory of State and Law]*. Moscow: Eksmo, 516.
[46] See: Stone, P. 2010. *EU Private International Law*. Cheltenham: Edward Elgar Publishing, 3; O'Brien, J. 1999. *Conflicts of Laws*. London, Sydney: Cavendish Publishing; Story, J. 1834. *Commentaries on the Conflict of Laws, Foreign and Domestic: in regard to Contracts, Rights and Remedies and Especially in regard to Marriages, Divorces, Wills, Successions, and Judgments*. Boston: Hilliard, Gray and Co.; see also in Russian: Pereterskiy, I. S. 1924. *Ocherki Mejdunarodnogo Chastnogo Prava RSFSR [Essays in Private International Law of the RSFSR]*. Moscow: Gosudarstvennoe Izdatelstvo, 9-19; Luntz, L. A. 1949. *op. cit.*; Kiselev, I. Ya. 2003. *op. cit.*; Erpylyova, N. Yu. 2005. *op. cit.*

- "simple", in which no more than two national legal orders are involved;
- "complex", in which more than two national legal orders are involved.

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

A complex transnational employment relation may be represented by a situation when the above mentioned Chinese citizen signs the same employment contract within the territory of Spain but with a US employer.

To make the relationship more complex we could add that the contract is signed in regard to a position in, for example, a Russian subsidiary of the US employer with regular business trips to Kazakhstan and India as an integral condition of this assignment. In general, it is initially impossible to say whether the relation produces a genuine conflict of laws and if it does, which of the national legal orders shall be applied to which element or aspect of the relationship. It is usually necessary to go deep into the international and national choice of law rules applicable to the particular case and its respective aspects, as well as into the relevant substantive law norms.

Apropos, it seems evident that the suggested typology does not have any specific "employment" or "labour" meaning and can be effectively applied to other kinds of transnational relations as well. It can, for instance, be used to classify transnational family relations, relations concerning transnational financial transactions, etc. The question of whether this and other relevant typologies have already been introduced in other branches of law and whether they can be borrowed from there and applied in the classification of transnational employment relations, may become a subject of further research.

3. The Place of Legal Norms Regulating the Phenomenon between (or within) other Branches of Law

In Russia the place of the legal norms which regulate transnational employment relations is perceived slightly differently in doctrinal literature and in legislation. Russian doctrinal writings present three approaches, according to which the phenomenon is perceived as (1) either a particular institution (an area or so-called "sub-branch") of private

international law,[47] or (2) one of the basic institutions of the so-called "private international labour law" (or "private international employment law", which actually sounds the same in Russian),[48] or (3) an institution of both labour and private international branches of law.[49]

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

Despite this rather clear and obvious attribution, the law reflects it only to some extent and only in a few countries. Thus, the norms governing various aspects of transnational employment relations on an international level can be found in treaties concerning not only employment issues, but also those relating to education, tax and several other matters. However, when it comes to national legislation, there is a wide variation between countries. For instance, in the Russian regulative context the norms on transnational employment relations (or more precisely, on some of the aspects of some of their categories) can be found mostly in legislation on private international, employment and administrative law.

The level of corporate internal regulations demonstrates a more consistent approach as the relevant norms are for the most part divided between regulations on various aspects of regular (non-transnational) employment relations (i.e. concerning wages, benefits and compensations, leaves, business trips, and so on.)

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[47] Erpylyova N. Yu. 2012. *op. cit.*, 435-436; Boguslavskiy M. M. 2002. *op. cit*, 34.
[48] Zvekov, V. P. 2004. *op. cit.*, 519-542.
[49] Andrianova, M. A. 2006. Aspekt trudovyh otnoshenij v mezhdunarodnom chastnom prave. O nekotoryh voprosah kollizionnogo metoda regulirovanija trudovyh otnoshenij s uchastiem inostrancev [Aspects of employment relations in private international law. On some questions of conflict of laws method of regulation of employment relations with the participation of foreigners), in *Aktualnye Pproblemy Mezhdunarodnogo Chastnogo i Grazhdanskogo Prava*. Moscow: Statut, 9-10; Bekyashev, D. K. 2008. *Mezhdunarodnoe Trudovoe Pravo [International Labor Law]*. Moscow: Prospekt, 8-9; Zvekov V. P. *op. cit.* From 519 on.

If a national legislator approaches the task of the development of the regulations in the field, it may be advisable to choose a particular branch of law for the norms governing transnational employment relations.

Taking into account the active spread of the question around the globe and its continuing complication, the most advisable approach would be to enact a separate legislative act devoted specifically to the regulation of various types (categories) of transnational employment relations and containing blanket norms that lead to other relevant acts of legislation.

4. Conclusion

Transnational employment relations have developed to the point where particular generalization and systematization can be effectuated in order to make legislative amendments possible in the very near future. The author has shown that inconsistency in the terminology and taxonomy of this phenomenon may complicate the process of its systematization and further study, as well as attempts to regulate its legislation. This has been done from a comparative point of view on the basis of scholarship in both Russian and English.

The study has also revealed that scholars differ in their approaches to the classification of the types of the phenomenon and in the results they come to when supporting their systematizations with empirical data. The resulting typologies, made with little theorization, thus show inconsistency and lack integrity. This predetermines their inapplicability in the regulation of such a constantly developing phenomenon as transnational employment relations due to the lack of understanding of the particular elements which form the relation and can then be studied more closely and developed according to the growing variety of manifestations of the phenomenon.

There is also a problem regarding the relevant legal norms. Both scholars and legislators differ in their idea about which branches of law such norms should be attributed to and which principles shall be considered prevailing in the regulation of the phenomenon.

We can conclude that the time has come to pay closer and more serious attention to "transnational employment relations". This study has revealed that this widespread and constantly developing issue requires a consistent doctrinal and legislative approach.

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