

Transformation of the Civil Legislation in the Russian Federation in the Context of the Accession to WTO: Main Focus Areas of Discourse

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Abstract: The article is devoted to the current state and the outlook for the development of the civil legislation in relation to the participation of the Russian Federation in the integration processes. Under the current conditions the particular importance of this issue is determined by occurrence of the unsolved problems related to Russia's admittance to the World Trade Organisation. The civil legislation being considerably amended while joining WTO shall comply with the WTO requirements and simultaneously protect the interests of the Russian manufacturers and providers of goods and services. However at this moment the necessary balance of interests has not been achieved. The author analyses the process of amending the civil legislation determined by the accession of the Russian Federation to WTO, points out at some unsolved problems, offers the ways to solve it.

Key words: Intellectual property right • Delivery of services • Representation • Power of attorney

INTRODUCTION

In the context of Russia's Accession to the World Trade Organisation (hereinafter referred to as WTO) the issue of the domestic economy modernization assumes a particular importance, since it is the unquestionable condition for the economic competitiveness. The essential component of the modernization is an effective legal regulation of its pursuance.

Accession of our country to the World Trade Organisation (Russia became a full-fledged member of WTO on 22nd August 2012) made actual various legal issues, which in turn determined the need for development of the domestic legislation in order to effectively fulfil the international obligations and simultaneously serve the interests of Russia.

In the context of the issue under consideration the stands of competent scientists are of an academic and practical interest. One of the important research focus areas in the context of Russia's integration into the World Trade Organisation is the disputes about the so called system issues, i.e. the issues of the Russian legislation's conformity with the rules and regulations of the whole WTO set of agreements. The current legal framework of

WTO includes about 60 main legal documents (agreements, arrangements, judgements, minutes) which provide the obligations of the member countries and which wording has not been still published in Russian in a country. Upon Russia's Accession to WTO one of the major problems is the inconsistency of the Russian civil legislation and legal precedents with the WTO rules. The participants in talks ask for unconditional fulfilment of the WTO regulations in this field. It is a standard requirement for all the acceding countries. In accordance with the conditions of the Article XVI of the Agreement Establishing the World Trade Organisation (WTO), the WTO member "shall ensure the compliance of its laws, rules and administrative procedures with the obligations under the WTO agreements". Thus, in Russia the statutes in force shall be revised and the current statutes shall be adopted which govern the relations in regard to the application of the WTO agreements. It should be noted that before the accession to WTO the legislation was considerably amended in many countries [1. p.101]. In presented article the trends in transformation of the civil legislation determined by the issues in focus noted above are analysed as an element of the legal discourse broached because of Russia's accession to WTO.

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Body: According to the international practice, most problems of the WTO members arise concerning the customs administration, standardization, certification and conformity validation, application of the sanitary and phytosanitary measures, measures of the currency regulation and currency control [2, p. 17]. However some problems unsolved in Russia relate to the civil legislation, predominantly concerning the protection of the intellectual property rights.

The most sensitive issues of the Russian civil legislation's conformity with the WTO law primarily associated with the trade-related aspects of the intellectual property, were solved during the preparation stage of the accession to WTO with adoption of the Part 4 of the Civil Code of the Russian Federation in 2006. It should be reminded that the work on the Part 4 of the Civil Code of the Russian Federation was crucially complicated by these particular issues of bringing the civil legislation to conformity with TRIPS, one of the key intellectual property agreements in the context of WTO. Now after the integration it might be sad that despite the huge work executed by working groups some technical aspects of conformity have not been settled, thus some regulations should be amended. Farther, let us consider the tasks given to the developers of the changes to the civil legislation while preparing the accession to WTO, its completing and the main problems associated with all the achievements being unsolved.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a part of the unified package of regulations (Agreement Establishing WTO with the multilateral trade agreements thereto), which shall be accepted by each country upon the accession to WTO. The TRIPS Agreement came into force on 1st January 1995 and was the first agreement on the intellectual property (hereinafter referred to as IP) within the international trade.

Subject of the TRIPS regulation is: the copyright and associated rights, trademarks and service marks, appellations of origin, inventions, industrial designs, selection achievements, semiconductor topographies, the confidential information, etc. The TRIPS Agreement is often called "the annex to the Berne and Paris Conventions", since on the one hand it is stipulated that the Agreement is compatible with these conventions and on the other hand the supplementary regulation is introduced (the time of protection increases, the protection of computer programs as the literary compositions is implemented, etc.).

In the researches done by the Russian legal scholars it was rightly stated that the following issues was important for Russia joining WTO:

Compliance with the TRIPS requirements. The TRIPS requirements are considered as the minimum standards which shall be provided by the WTO member country in its legislation for the protection of the IP rights.

The mandatory procedures for enforcement of the intellectual property rights.

Extending the scope of the mutual obligations concerning IP after the accession to WTO [3, P. 75].

As it has been already said, the major part of the TRIPS requirements was taken into account during the development of the Part 4 of the Civil Code of the Russian Federation. However after the adoption of the 4 Part within the working group to integrate Russia into WTO up to 2010 and including the agreeing of obligations undertaken by the Russian Federation in regard to the legislative control of rights to the results of the intellectual activity and the means of individualization associated with the integration into the World Trade Organisation was going on. More than hundred comments were made by the experts of the WTO member countries most of them were dropped during the talks [3, P. 75]. Some comments about the most substantive issues were incorporated by amendments to the Part 4 of the Civil Code. It concerns the Federal Law # 259-FZ dated 4th October 2010 "On making amendments to the Part Four of the Civil Code of the Russian Federation".

The amendments made by this Law and intended to bring the Russian legislation to conformity with the WTO requirements in regard to the intellectual property are about:

TRIPS includes the so called "three-stage test" which determines the permissible limits for establishing the restrictions of the exclusive rights. Restrictions of the exclusive rights: (1) are established in certain special circumstances; (2) shall be consistent with normal use of the IP item; (3) shall not unreasonably infringe on the legitimate interests of the rights holders. The restated P. 5 Article 1229 establishes the "three-stage test", i.e. reproduces the conditions for the restrictions of the exclusive rights, specified in the Art. 13, 17, 26 and 30 of the TRIPS Agreement.

The amendments to the Art. 1273 of the Civil Code of the Russian Federation are intended to capture the provision that the free reproduction is accepted if only required, it shall ensure the more precise compliance of the Art. 1273 of the Civil Code with the Art. 13 of the TRIPS Agreement.

The amendments to the Art. 1299 of the Civil Code of the Russian Federation excluded the possibility existed according to the earlier section for discharging the manufacturers of the hardware designed for eliminating the technical means of the copyright protection.

The amendments to the Art. 1483 of the Civil Code of the Russian Federation excluded the reference to the "domain name". Thus, since 2010 the refusal from the state registration of the trademark which is identical to the domain name the rights of which arose before the priority date is illegal. Such amendment was necessary because the TRIPS Agreement does not qualify the domain name as a protected object.

Altogether it should be noted that the amendments made are "the result of a certain compromise between the points of view given by the representatives of the countries with different public orders and serve to minimize possible misunderstanding and questions of the foreign rights holders which may arise while applying the regulations of the Part Four of the Civil Code of the Russian Federation" [4. P. 6].

TRIPS implementation. It is important that the TRIPS Agreement is not directly applicable. The WTO members shall put the TRIPS provisions into their legislation, however they are "free to determine the proper way to fulfil this Agreement's provisions within their legal systems and precedents" (Art. 1 of TRIPS). It means that upon a court trial the norms of the Party's national law will have a dominant role, although it will be considered in the context of its compliance with the TRIPS provisions [5, P. 24].

It should be noted that now a variety of problematic provisions of the Civil Code of the Russian Federation results from the talks conducted by Russia and devoted to its accession to WTO. The officials easily lost their ground and did not understand which economic results of any legal innovations would be. In this case we faced the defect of the legislation concerning the exhaustion more than the defect of this explanation. The principle of the international exhaustion of the intellectual property rights is valid nearly worldwide. Put it otherwise if in any country of the world any product was put into the civil circulation then you as a consumer could buy it there and freely bring it in your country. That is a parallel import: not only the rights holder, but also any other person could be engaged in it, if the goods were put into the civil circulation with the consent of the rights holder in every country of the world [6, p.17].

In case you went somewhere and bought a product, but the manufacturer had not decided yet if he would put it on the Russian market (such situation often arises concerning cars), then its delivery to Russia is the violation of the right of the trademark holder. Such attitude is maintained by the Civil Code of the Russian Federation, as it follows from the implications of the rule of the Art. 1487. It seems that this rule was developed by the legislative officer without reference to the provisions of the Art. 10 of the Civil Code of the Russian Federation, which warrants to deny the protection of the civil law used unscrupulously for the market monopolization infringing the rights of the consumer who shall have a possibility to pick every product in the world, not only the one admitted to the Russian market by the trademark holder. It is necessary to reconcile this inconsistency by the direct reference to the priority of the Art. 10 of the Civil Code of the Russian Federation in the law. This problem could be also solved as follows: by excluding the phrase "in the territory of Russian Federation" from the Art. 1487 of the Civil Code of the Russian Federation. Thus, the product rightfully put into the civil circulation in the territory of each country shall be immediately fallen under the category for which the exhaustion is applicable.

However such amending the legislation will indicate Russia's desire to protect its own interests rather than its intent to comply with the obligations, promised by it in the context of WTO concerning the protection of the intellectual property right.

The experts also state that after granting the WTO member status by Russia its constituent entities gained the right to enter the international service markets, especially subscription services, in consideration with those obligations assumed by the relevant WTO members. Such obligations could be more favourable for the Russian constituent entities than that regime with applied to the Russian persons before Russia's accession to WTO. What is the scope of these obligations and if it is actually favourable for the Russian persons - it is a separate complex issue which is legal and economic in nature.

Thus, upon the accession to WTO the Russian Federation admits the following service types and terms:

Paragraph 2 Art. I «Scope and Field of Definition» GATS provides: "For the purposes of this Agreement the trade in services is understood as the delivery of services:

- From the territory of one Member to the territory of any other Member;

- In the territory of one Member to the consumer of any other Member's services;
- By the provider of one Member's services by the commercial representation in the territory of any other Member;
- By the provider of one Member's services because of the presence of the Member's individuals in the territory of any other Member".

As we can see, GATS covers all the ways of the international service rendering, all those options that could be applied during the service rendering by the individuals from one WTO member to the individuals from the other WTO member.

Then it is explained in details (using the examples from various service sectors in particular), what is exactly understood as the specified four ways of delivery, the features of the certain ways of delivery are noted in the context of GATS.

"The first service category includes the cross-border actions of the service delivery by post or using the electronic communication (including telephone, e-mail, Skype, television communication (telemedicine), etc.), i.e. the information for the potential foreign consumer. There is a free active service delivery in the terms of the European community law.

The second category includes the offer of services to the foreign consumers, who move themselves to make use of a service (tourists, for example). It is a free passive service delivery according to the European community law [7. p.305].

The third category includes the offer of services to the consumer by the continuous presence and gaining the legal identity or the certain independence, if it is enough. The service is offered by the commercial representation. In this case the service provider could establish an enterprise according to the law of the country of residence; he could just open a branch of his enterprise or even confine himself to the conclusion of a required contract with a commercial agent, facilitators or representatives in the country of the service delivery.

The last category includes the ways of the service delivery by the personal relocation of the service provider outwards the home country. Such relocation could be temporary (repairmen, accountants, legal experts) or permanent (regular representatives). In this case the service is rendered in the personal attendance of the individual - the foreigner" [8, P.21].

As we could see, some WTO regulations do not comply with the regulations of the Civil Code of the Russian Federation on the service rendering order and the related regulations on the representation, commercial representation and the associated agency relationships, the settlement and registration of all the specified relationships and in terms.

The definition of the «commercial representation» is given in the Art. XXVIII "Definitions" of GATS without an exhaustive list of forms:

"...(d) "commercial representation" means any form of the business or professional organization, including by

- (I) establishment, acquisition or use of the legal identity or
- (II) establishing or use of the subsidiary or representative office in the member's territory for the service delivery".

In the context of GATS the registration of a person as an individual entrepreneur in Russia or gaining the status required for the professional activity (of a lawyer for example) shall be deemed the establishment of the commercial representation in Russia.

The commercial representation could be also established by the conclusion of a required contract with a commercial agent, a facilitator or a representative in the country of the service rendering who shall act on behalf of the service provider.

"The commercial representation of the legal identity in the territory of a foreign country...could be direct - by the separate subdivisions of the legal identity established in the territory of a relevant country or indirect by the associated enterprises, individuals and legal identities which act as the commercial agents. A commercial agent is...a person who in his own name or on behalf of the representee and in his favour conducts the activities on the conclusion of civil law contract for the performance of works (service rendering). The activity of insurance agents could exemplify the commercial agency" [8].

One could draw an analogy with the concept of the "permanent representation" used in the international contracts for the avoidance of the double taxation: if in one country a person is not an agent of an independent status and conducts the activities on behalf of another country and is entitled and usually exercises the powers for conclusion of the contracts on behalf of another

person, then for the tax purposes the second person is generally deemed to have the permanent representation in the first country.

There is an option to cross the third way of the service rendering by the forth one: the commercial representation of a foreign person in some country could require the simultaneous presence of the staff members of such person in its territory [9].

The mentioned crossing is important for a foreign entrepreneur or a lawyer who decided to register himself/ to establish the private legal practice in Russia: the commercial representation in Russia could be simultaneously established by them in the form of the appropriate registration and the presence of the foreign person in Russia for the service rendering may occur if a foreign entrepreneur/ a lawyer shall deliver it in the territory of Russia. Thus a significant work on amending the civil legislation intended for the regulatory capture of the mentioned forms, ways and crossings and the associated terms in it should be executed.

The above mentioned problems are adjoined by the problem arising upon the completion of the powers of attorney in the name of foreign organizations and individuals who being outside the country here participate in administrative, arbitration court trials, engaging in controversies on property and administration, etc. Sometimes one should act immediately because of the extraordinary events (withdrawal of shares, illegal takeover and accident). A notarized power of attorney translated and apostilled is necessary to stand for a foreign client in our competent authorities and courts. The client hardly ever manages to draw up a document less than 7-10 working days. Add the time for transfer, translation and notarisation thereto - so you have wasted a chance. In the West the lawyer's statement of being entitled to act for his client is taken on trust. The simple application of appointment for the attorney made by a person with a lawyer ID card and a membership in the Professional Corporation is quite enough to be admitted to a trial. It is unlikely that such liberal regulation will fit in the domestic practice. But even now the issue of what document shall reassert the lawyer's power to participate in the case reviewed in the Arbitration Court, a warrant or a power of attorney, could be determined. For this purpose in the context of the Civil Code's revision it is necessary to permit the certification of the powers of attorney given to a lawyer and a legal expert, the employee of the law firm by the head of the legal practice or the law firm. The argument that the manager of a legal

aid agency, the managing partner of a lawyer's office are unlikely to have less competent knowledge of the client's identification and the validation of his powers than the hospital chief executive or the Investigation Cell Duty officer is fair [10].

In connection therewith it is offered to add P. 3 Art. 185 of the Civil Code of the Russian Federation «To the notarized power of attorney are set equal» as follows - P. 5 the powers of attorney, given to a lawyer or a legal expert, the employee of the law firm and certified by the head of the legal practice or the law firm.

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