«Clarifying Judicial Jurisdiction over Workplace Injury Claims against a State in the Former Soviet Union Countries»

by

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Abstract

The essay discusses judicial jurisdiction over workplace injury claims against a state in the former Soviet Union Countries. Claiming that such cases should be dismissed in foreign jurisdiction, the paper seeks explanation to different approach and different outcomes of workplace injury cases in the courts of the same countries. The essay begins with background information on particularities of unusual workplace injury cases which emerged in connection with important political event – collapse of the USSR. Relevant provisions of domestic and international law on judicial jurisdiction, their interpretation and application in Commonwealth of Independent States are discussed in this paper. Analyzing provisions and reasons of different decisions, the essay infers the implications from analysis in support of its main claim.
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Introduction

The echoes of the Union of Soviet Socialistic Republics' (USSR) 70-year existence are still present in different aspects of former Soviet Union countries’ activities and the lives of their population. With the dissolution of the USSR into separate states, some issues, which used to be matters of its domestic law, became matters of international law. Internal migration of the population and policies like re-delimitation of the member-states’ borders within the USSR, and rotational labor led to the emergence of complicated inter-state issues, where two or more independent countries were involved. Different approaches to such issues can lead to conflicts of law in proper succession rights and obligations of the USSR. This required the governments of the Commonwealth of Independent States (CIS) to make joint efforts to properly regulate common problems and coordinate further actions at the earliest stage of their independence.¹

Because of the so called “iron curtain” policy union countries of the USSR, these are current CIS countries, had been isolated for a significant period from international relations. Even during the period when the USSR was participating in international relations, the majority of CIS countries were represented as a member of USSR, but not a separate sovereign in the international arena. Thus, lack of experience in international relations made the task of regulation of the emerging inter-state issues more difficult. While the majority of these issues have been properly regulated, there are still ambiguities and inconsistencies in regulation of some issues in different countries.

In this essay, I will discuss one issue related to the judicial jurisdiction over reimbursement cases. In the context of this essay I will consider reimbursement cases in which damages are claimed from the state by a citizen of, or a person residing in, another state. Such cases primarily arose from labor relationships when an employee suffered an injury or a professional disease (a disease caused by conditions at the work place or specific features of a profession). Jurisdiction issue arises when harm to health is inflicted in one region and then injured worker moves to another and after the dissolution of the USSR those regions become different states.

¹ For example, according to Tihomirov in “Constitutional reforms in commonwealth countries” (p.3) the 2nd session of the Inter-Parliament Assembly of CIS countries was dedicated to common problems and constitutional development of CIS countries
There are also cases in which the employee moves to another state (after the dissolution of the USSR) and starts filing a claim for the injury he or she suffered in a foreign state. If, when the employee files the claim, the employer responsible for the reparation of damages to the plaintiff no longer exists, the state undertakes the responsibility to the employee for the rest of the reimbursement. A majority of employers ceased to exist after the independence of the former Soviet Union countries, because almost all enterprises and factories used to belong to the state in the command economy. This essay will also consider the cases arose from the injuries inflicted in Kazakhstan in early stage of its independence in the absence of a state insurance system. In such cases, the state also undertakes the obligations of the private employer, as a social protection measure.

States’ undertaking of such obligations provides to some degree of certainty in reimbursement of the unpaid damages. However such reimbursement does not happen as an automatic consequence of liquidation of the employee, but requires preliminary civil litigation according to domestic law. The former employee still bears the burden of proof before the court that responsibility of the employee for reimbursement was established prior to the liquidation, and by the time the employer ceased its responsibility before the employee had not been fully compensated to the plaintiff. Thus, foreign courts, once receive such claims, have to decide the questions of judicial jurisdiction and applicable law.

This research project will not discuss which country’s law, both substantial and procedural, should be applied to such cases. Rather, it will rather discuss which court should consider such cases. The questions of applicable law are regulated quite straightforwardly both by the general principles of law in the CIS countries and by various treaties as a rule of \textit{lex loci delictum} or, in other words, law of the country where the injury occurred.

Instead, this essay will focus on the question under which country’s judicial jurisdiction do such cases fall. The central claim of this essay is that workplace injury claims from the state (government) must be considered in the courts of the country where the injury took place.

\footnotesize{\begin{itemize}
\item[2] Art. 945(3) of the Civil Code of the Republic of Kazakhstan (Special Part)
\item[3] Wording of art. 945(3) of the Civil Code of the Republic of Kazakhstan (Special Part) and Normative Decree of the Supreme court of the RK # 4, dated Oct.28, 2005
\item[4] Art.3 of Civil Procedural Code of the RK, art.11 (4, 5) of Civil Procedural Code of RF
\end{itemize}}
Currently, mainly due to different understandings of the international treaties concerning the relationships of CIS countries in various fields, including the issue under consideration in this essay, the question of judicial jurisdiction is still in dispute. The Minsk Convention on the Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases establishes that the court of the State in the territory in which the action or circumstance took place, which serves as a base for making claim to get compensation, has jurisdiction to consider such cases. A plaintiff can also file a claim at the court of the State in the territory in which a defendant is residing. At the same time the Treaty on Mutual Recognition of the Rights for Compensation of the Damages to the Employees, Inflicted by Injury, Professional Disease or Other Harm to Health, Connected with Carrying of the Labor Obligations enable the person, who suffered damage, to a choice between the court of the state in the territory in which he or she is residing or the court of the State in the territory in which the action took place. Moreover, municipal civil litigation rules of most CIS countries also leave the choice of court to the plaintiff, because mostly the plaintiff in such cases is a disabled person. These different rules of the treaties between the CIS countries and general principle common to their domestic civil procedure raise questions regarding the jurisdiction of the courts for adjudicating such cases. The essay will mainly refer to the court practice between Kazakhstan and Russia, where the plaintiff, citizen and resident of Russia, claims his or her compensation in Russian courts for an injury that took place in the territory of Kazakhstan.

The first chapter of this essay will provide background information explaining the emergence of such cases in CIS countries, including Kazakhstan and the historical and socio-economic circumstances of their emergence.

The second chapter will be dedicated to sources of the public international and national law, their interpretation and application to the cases. The defendant’s status as a sovereign state, entitled to immunity, international treaties between CIS countries, other international and

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5 Art. 42 (3) of the Minsk Convention on the Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases

6 Art. 8 of the Treaty on Mutual Recognition of the Rights for Compensation of the Damages to the Employees, Inflicted by Injury, Professional Disease or Other Harm to Health, Connected with Carrying of the Labor Obligations

7 Art. 416 (2) of Civil Procedural Code of the RK; art 29(5) of Civil Procedural Code of the RF
national law provisions will be considered. Appropriate provisions of international treaties such as the Treaty On Mutual Recognition Of Rights For Compensation Of The Damages To The Employees, Inflicted By Injury, Professional Disease Or Other Harm To Health, Connected With Carrying Of The Labor Obligations (1994), Minsk (1993) and Kishinev (2002) Conventions On Legal Assistance And Legal Relationships In Civil, Family And Criminal Cases will be adduced.

In the third chapter I will analyze international and domestic norms and reasons of different decisions. I will try to infer implications from analysis of the sources described in the second part. In the conclusion, I will summarize the paper and its central claim with succinct description of the previous chapters.
Chapter 1

Background information

Before starting to discuss the issue of court jurisdiction over certain type of case, it seems necessary to know some information about the case. Providing some historical background, circumstances and legal regulation basis of the case will allow us to consider the issue of court jurisdiction over such a case within its background context.

As was mentioned before the category of similar cases, court jurisdiction over which this essay will discuss, arise within labor relationships. These are the cases when compensation of the harm inflicted within labor relationships was not paid by the liquidated employers' and was undertaken by the state.

Within labor relationships harm can be inflicted to health of the worker or to his or her life, as well. The case of inflicting harm to health of the worker includes either injury or professional disease which had long lasting consequences on labor capability, including disability. In this case the worker has the right to payments as long as he or she suffers the consequences of such injury or disease. It should be noted that such a right is strictly attached to the worker's personality and does not transfer to his or her family members.

In cases of harm to life of the worker, leading to his or her death, the members of the family, who were dependent on his or her income or became incapable to work within five years after workers death, are entitled to compensation for the loss of a wage-earner. Eligible family members are: deceased worker’s child (including those born after his or her death), one of the parents, wife or husband, any other member of family, looking after child, grandchild, or sibling of the deceased under 14 years old or even above that age but in need of external assistance according to assessment of medical bodies. These family members are provided compensation as long as they are incapable of working and providing themselves income due to labor incapacity or family duties of taking care. Minor children are eligible for social allowance until they reach majority age (18), but if they study for higher education, compensation will continue till they graduate or reach age of 23, whichever comes first. Family members of retirement age and permanently disabled members are entitled for compensation for the rest of
their lives. Those family members, providing care to children, grandchildren, siblings, can get compensation till they reach 14 years old or their physical condition improves.¹

The same time, dependent family members cannot claim the right to compensation when worker himself or herself had been recognized as a person who suffered from workplace injury. Even when such injured worker dies later, his or her right to compensation ceases with death, and does not transfer to family members². This difference between persons who suffered from workplace injury in case of workers death (family members) and in case of harm to the worker’s health (worker himself or herself) is crucial for compensation purposes.

In order to avoid too much repeating and to make short clear sentences, hereinafter I will to all these possible plaintiffs, regardless if they are a worker or his or her family members, will as “injured worker”. For the same purpose the term “place, where injury took place” will mean the locations for both cases of job accident and professional disease. In the case of job accident, the term will mean the location where the job accident occurred. In the case of professional diseases, the term refers to the place, where the worker carried job functions, which led to professional disease, regardless of where and when professional disease was discovered.

The cases of the injured workers emerged mostly but not restricted to during the existence of the USSR. Some of the injuries which make basis for similar cases could take place after the fall of the USSR, they will be described later.

Labor is known to play crucial role in a proletarian ideology of Marxism, where “working class” was supposed to be a leading class of the transition from capitalist type system to social-communist system.³ Employment and labor relationships were subject to strict state regulation throughout the large territory of the USSR. Different parts of the USSR’s territory had different needs for labor forces and some parts were less desirable for workers. One concern of the employment policy was to induce “new or established workers to move into, say, Siberia or the Far North where industrial needs have been growing... by bonus rates of pay, better food and

¹ Article 940 of Civil Code of the Republic of Kazakhstan (Special Part)
² Article 1044 of the Civil Code of the Republic of Kazakhstan (Special Part)
³ See Dan C. Heldman (1977) Trade Unions And Labor Relations In The U.S.S.R. p.17
housing..." Consequently, labor migration produced many workers with different places of work and residence. This was one of the main reasons for emergence of the cases with an extraterritorial reach on compensation of injury, which occurred at the job place.

Large industries, which were the main way to provide jobs, were mainly located in different peripheral parts of the U.S.S.R. The main industries located Kazakhstan's were mining, metal industries, some of which still function, where job accidents are most likely to occur and potentially dangerous for workers even nowadays.

There naturally arises a question about social insurance system in the USSR. Insuring the workers from accidents at the workplace is not a something developed only recently. Many people might be surprised at the very existence of such cases at all. Indeed, almost from the very beginning the USSR's existence, there functioned social insurance system, which can be seen in different documents. Thus, people who get injuries at workplace or whose professional diseases leads to their loss of labor capacity, were supposed to get insurance payments regardless of the further existence (functioning) of their employee. According to Yekovsky by the 1926 social insurance in the Soviet Union extended to all categories of hired labor, independent of nature and period of work, nature of payment or in which (state, individual, concession, etc.) enterprise their labor is employed... In respect to invalids with partial loss of their labor capacity (IV, V, VI groups) these get a pension to an extent of one-third, one-sixth, one tenth of their wages respectively if their capacity is the result of injury or trade illness... Persons having the right to receive pensions in the event of death of the wage-earning breadwinner (irrespective of wage earning status) are: minors or children incapable of labor, brothers and sisters of the deceased and incapacitated persons or parents caring for the children under eight years of age, or the husband or wife of the deceased.

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4 Dan C. Heldman (1977) ibid. p.27


6V. Yarotsky & N. Yekovsky ibid. p. 34, 37, 38
However, social insurance system of the USSR was operated by the state through trade unions. Yekovsky describes it as “the main distinction between organizational system of Soviet Insurance from bourgeois systems”, and further holds that “similar councils are organized under the P.C. for L. of the republic”.  

Consequently, the dissolution of the USSR entailed the collapse of its trade unions system. Majority of injured employees seem to have lost track of their payments till their settlement. For example, in Kazakhstan relevant provisions of civil legislation were enacted only in 1999 with adoption of Civil Code’s Particular part. This might be at least one of the reasons why the plaintiffs in workplace injury cases still emerge as if from nowhere in different former Soviet Union countries. Most of them file their claims after significant period of time after the injury occurred. Some of the plaintiffs can find out about their eligibility to claim such payments form their former co-workers or from other sources only recently. Some of them still might be unaware of this, which means there can be more such cases. Thus, the question of judicial jurisdiction over cases of injured workers is still of practical importance. This essay will be restricted to the cases of injured workers, where the injury occurred in Kazakhstan. As for the place of filing claim, in our cases the plaintiffs reside in Russia and ask for holding litigations in their domestic forum. There certainly exist similar cases in other former Soviet Union countries, but we think the same rules can be applied to other countries.

As was mentioned, there can be cases other than those where injury occurred during the existence of the USSR, which raise the same issue of judicial jurisdiction. The cases where injury occurred in independent Kazakhstan mainly involve domestic plaintiffs. Yet, in theory there is a possibility that such case could have extraterritorial extent, as well. These are the labor injuries, which took place after the fall of the USSR and before the introduction of new social insurance system.

As the most post-soviet countries, at the early stage of its independence Kazakhstan did not have a system of social insurance for job accidents. Only after 14 years of independence, that is, in July 1st, 2005 Kazakhstan introduced such system.  

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7 V. Yarotsky & N. Yekovsky *ibid.* p. 30, 31
8 See the Law of the Republic of Kazakhstan dated February 7, 2005 “On compulsory insurance of workers from accidents while accomplishing job tasks”
For a significant period of time, employees were to get their compensation payments monthly only as long as their employee or its successor existed and was financially capable of making such payments. In other words, injured employees’ compensation payments were to some extent dependent on their employers’ well-being. Not only amount of compensation, but also the further increases of these monthly payments are calculated on the basis of salary system and influenced by increase of salaries in employer organization.\(^9\)

It is obvious that liquidation of the employee makes impossible the month to month payment of compensation to the employer. There did not exist any organization or institution, which could undertake and continue such obligation. So, in the case the employer company filed for or its creditors or other persons with interest claim bankruptcy of such bankruptcy, the injured workers had to join its other creditors with their claims.\(^10\) Such vulnerability of the injured employees required provision of high degree of protection from the loss of their compensation payments in cases of their employer’s liquidation.

First of all, amount of due compensation payments had to be defined. Periodic compensation sums, which were be paid to the employee for lifelong period, had to be transformed into a one-time payment. Amount of one-time payments were calculated in accordance with bankruptcy rules, which still exist in bankruptcy legislation of Kazakhstan and remain in force. Depending on the age of the employee at the moment of bankruptcy, monthly payments are capitalised for different periods, but in any case not less than for ten years. The payments are multiplied to appropriate number of months till he or she is 70 years old, but not less than 120 months.\(^11\)

It must be admitted at this point, that restricting the payments by the age of 70 years and making them only one-time payment still cannot be equated to the protection of insured workers. But, at least such rules entitled the uncovered by insurance system employees to some compensation. When the injured employees turn 70 years old, they become eligible to monthly payments from the state budget as an additional social support measure.\(^12\)

\(^9\) Follows from article 938 (6) Civil Code of the RK (Special Part)

\(^10\) This can be inferred from art. 1945 (3) of Civil Code; art. 10, 71 and 75 of Bankruptcy Law of the RK

\(^11\) Art. 75 of the Law on Bankruptcy of the Republic of Kazakhstan January 21, 1997

\(^12\) Appropriate amendments to the article 945 of the Civil Code of the Republic of Kazakhstan were made in March, 2011
Due amount of sums to the injured workers of bankrupt organization calculated according to bankruptcy rules constitute claims of first priority. Even the obligations secured by mortgage (2\textsuperscript{nd} queue) are subject to the satisfaction after the payments of debts to the injured employees.\textsuperscript{13}

In some cases when the property of the bankrupted employee appears to be enough to pay out all one-time payments to the injured workers.\textsuperscript{14} Such procedure provides some degree of protection for injured workers in the case of their employer's bankruptcy. Fact of payment to the creditors of first queue is shown in the final document of bankruptcy procedure. In such circumstances, suits discussed in this essay should not arise at all.

However, despite such provisions about priority of injured workers' claims, the accumulated property of the bankrupt employer, in majority of the cases is not enough even for the first priority claims. In some cases they cover fully or part of due payments to the injured employers, in others they don't. According to general rule for unpaid claims and debts, in cases of insufficient capital they are deemed to be satisfied and creditors just lose them. Unlike other debts of the bankrupt organization, the debts before the employees, who suffered harm to their health or life at the job place, can be claimed from the State. When the compensation sums are paid partly, injured workers are entitled to claim from the governments the rest of payments. There also occasional bankruptcy cases when injured workers are given on their consent some property of the organization, like machinery or vehicle to cover whole or part of compensation sums. In those cases, bankruptcy documentations must be retrieved from archives and carefully studied to see for how much that property was assessed, what was the agreement with the workers, and other relevant information. If the bankrupt organization did not have any assets, whole compensation sum becomes state's obligation.

It must be noted, that such transition of obligation before the injured employees is not an ordinary succession. It is rather social protection measure in interests of injured workers. Yet, claims about compensation are not satisfied automatically, but subject to consideration by the court. According to the provisions of the Civil Code of the Republic of Kazakhstan, such protection policy is realised through litigation. Its provisions entitle the injured workers with

\textsuperscript{13} See art.75 (2 and 4) of Bankruptcy Law of the RK

\textsuperscript{14} Art. 87 of Law on Bankruptcy of the RK
right to claim payment, not unconditional payments. Exact wording of the Civil Code goes 
"..judged sums of reimbursement shall be paid by the state according to the legislation." 

As can be seen, rules for getting payment form the state are quite complicated for both plaintiffs 
and the state. In majority of the cases, the claimants participate in two court proceedings: first 
within bankruptcy procedure, second when claiming from the state unpaid compensation. 
Holding two separate court proceedings mainly at own expense is also costly for the state.

Such complicatedness of the procedures might be result of significant period of instability, 
which preceded fall of the USSR and continued in new former USSR countries. Unsatisfied 
claims of the most vulnerable groups of creditors of the bankruptcy organization were 
documented for later. Procedures for payment of such debts found regulation in national 
legislation later, after it was agreed on international level that each state in the territory of which 
the injury occurred is responsible provides payment of such injury claims. This could be the 
reason for establishing two stage compensation procedures, rather than providing payment for 
injured workers from state budget during the bankruptcy procedures.

In such type of cases, the civil litigation mainly takes fact finding character. Judges do not deal 
with conflicting rules or search of optimal balance between different values as they usually do. 
The cases are mainly of the similar character, and the right of the injured worker to payments 
from the state in the described situation is explicitly recognized in legislation. Indeed, in these 
cases litigation is not really about whether there is a right to get payments, but rather about 
establishing the facts that entail such right. For example, in some cases, the injured employee 
might not claim his or her compensation during bankruptcy procedure due to different reasons, 
like unawareness, temporary illness, or other. In such cases, even if the assets of the bankruptcy 
employer would be enough to pay compensations sums, they weren’t paid but were directed to 
pay for other claims of less priority. Thus, quite different facts need to be confirmed in such 
cases. Some of the facts, the courts have to ensure, are that: the worker did get injury with long 
lastling consequences while working for the ceased employer; he or she still was entitled to a 
monthly payment from the employer by the time bankruptcy occurred; he or she did not get the

15 Art. 945 (3) of the Civil Code of the RK (Special Part) emphasis added by me

16 plaintiffs in claims for personal injury are exempted from procedural fees according to article 541 (5) Tax Code 
of the Republic of Kazakhstan, cost of such proceeding are directed to state budget
whole sum or its part during the bankruptcy procedure from the cost of the accumulated capital; the worker did not get payments from the state before, other relevant facts.

The courts’ decision, which obliges the State to make appropriate payments, is necessary to get payments. This is required from all claimants regardless of whether they were injured during the Soviet Union or in the period before the introduction of the insurance system in Kazakhstan. The provisions of the civil code and law on bankruptcy are also relevant to all cases of reimbursement. Even though the injuries mostly took place long before the adoption and enforcement of the Civil Code’s Special Part (1999) those provisions are recognized to have retrospective reach to relationships, which took place in the past.

Such retrospective force is mainly due to the social importance of the injured workers cases for the significant part of population. As can be seen, the cases involve harm to such main human values as life and health of the people, which are recognized in the Constitution of Kazakhstan as main values of the state. Due to the involvement of human rights in such cases civil litigation law of Kazakhstan provides wider choice for the plaintiffs. The general rule for the civil litigation law requires plaintiffs to sue the respondents at the place of respondent’s domicile. But, plaintiffs in the cases of injured workers enjoy the choice of place of court proceedings. They can submit their claims at the place (administrative territorial unit) of their own domicile or at the location of authorized state body of the government. Similar provisions can be found in domestic laws of the CIS countries. Such similarity in the civil litigation rules of CIS countries is partly a result of the work of Inter-Parliamentary Assembly of CIS countries.

This feature of the cases of injured workers might and sometimes does result in wrongly assuming court jurisdiction over them at the place of plaintiffs domicile. In the cases with international reach such place is a foreign country. This is one of the reasons that plaintiffs file the cases against Kazakhstan in foreign courts and the foreign courts allow them to proceed.

17 Art. 1 of the Constitution of the Republic of Kazakhstan dated August 30, 1995
18 Art. of 416 (2) of Civil Procedural Code of the RK, art 28 & 29(5) of Civil Procedural Code of the RF
19 IPA was founded in March 27, 1992 in Almay city according to Treaty of the member states
Another reason for assuming foreign judicial jurisdiction over such cases might follow from the international treaties between CIS countries. Treaties establish explicitly that applicable law should be of the country where the injury took place. This provision might seem to entail judicial jurisdiction of that country, too. However, ambiguity in the text of the Treaty, which will be discussed in the next Part, results in different understanding of judicial jurisdiction.

In this regard, it is worth to differentiate two types of state’s undertaken obligation of the ceased employee depending on their nature. First, when the cases arise from labor relationships in the USSR. In this case, CIS countries, including Kazakhstan, undertook the obligations of the state as a successor of the USSR’s appropriate obligations due to the location of labor injuries.

Second type is the obligation of employers which arise from the labor relationship in independent Kazakhstan during the period insurance system’s absence. In such cases, compensations from the state for the work injuries resemble the social protection measure. This was done for the category of workers, who are vulnerable to loss of their sometimes only income. State undertakes obligations as for it failed to provide proper insurance system in the country for some period.

Neither the international treaties between CIS countries, nor domestic legislation of Kazakhstan differentiate these obligations. The Treaty explicitly states in its article 1 that its provisions apply to “enterprises, institutions and organizations (including organizations of the former USSR) despite their form of the property”. The Minsk and Kishinev Conventions are silent on this difference. Civil Code of the Republic of Kazakhstan establishes statute limitation rules do not apply, inter alia, to the claims on personal injury. Thus, in current practice the same provisions are generally understood as applicable to all cases of injured workers regardless the differences in nature of obligations before them.

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20 Art.42 (2) of Minsk Convention on the Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases; art.2 of Treaty on Mutual Recognition of the Rights for Compensation of the Damages to the Employees, Inflicted by Injury, Professional Disease or Other Harm to Health, Connected with Carrying of the Labor Obligations

21 Art. 187 (3) of the Civil Code of the Republic of Kazakhstan (General Part)
Provisions of the treaties and other factors supporting or rejecting the judicial jurisdiction of the country where the injury occurred, that is of Kazakhstan, or where the plaintiff files claim, that is Russia, will be discussed more thoroughly in the next part of this essay.
Chapter 2
Provisions of domestic and international law on judicial jurisdiction, their interpretation and application

This part will be dedicated to the provisions and principles of international and domestic law and their interpretation and application in practice. I will start with discussing the role and provisions of international treaties between CIS countries, which regulate jurisdiction of the courts over claims in workplace injury cases. Some provisions of Russian national legal system on role of international treaties and principles of international law, and rules on judicial jurisdiction will be considered as well. I will also provide a brief overview of established and emerging principles of international law and other relevant considerations. The state immunity principle and restrictions on state immunity, established in international documents and emerging under aegis of international human rights law, will be considered in the context of the cases at issue.

The international treaties regulating, inter alia, judicial jurisdiction over injury compensation cases are the Treaty on Mutual Recognition of the Rights for Compensation of the Damages to the Employees, Inflicted by Injury, Professional Disease or Other Harm to Health, Connected with Carrying of the Labor Obligations (Treaty), the Minsk Convention on the Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases (Minsk Convention), and the Kishinev Convention on the Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases. Majority of CIS countries, including Kazakhstan, joined and ratified these international documents. Russian Federation joined all three documents and ratified the Treaty and the Minsk Convention.

In Kazakhstan, as a unitary state, international treaties become after ratification a part of the domestic law and have priority over domestic statutes. The Constitution of the Russian Federation contains similar provision about the priorities of international treaties over federal

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1 See article 4 of the Constitution of the Republic of Kazakhstan, August 30, 1995
legislation. In addition to that, the Russian Constitution provides on federal level that generally recognized principles and provisions of international law form part of legal system.  

At the first sight the Treaty looks like the most appropriate international document for regulation of workplace injury claims filed in foreign countries. Unlike Conventions, which regulate cooperation between states in different spheres, sphere of regulation of the Treaty is specifically dedicated to workplace injury relationships with foreign elements. Article 1 of the Treaty states, that its provisions are applicable to "enterprises, institutions and organizations (including organizations of the former USSR) despite their form of the property". Further, article 8 provides,

the cases, considered in the Treaty, fall under jurisdiction of the courts of the state in the territory in which took place the action that serves as a ground for claiming compensation for injury. Alternatively, the court of the state, in the territory in which the person who has right to compensation of injury is residing, has jurisdiction in case the injured person chooses to file the claim in that State.

As can be seen the Treaty provisions are designed to accommodate the injured person's convenience and provide that such person can choose where to file his or her claim for compensation of damages from workplace injury. The same time, Article 1 does not include the cases, where the defendant is a state, as falling under the Treaty, but only indicates those cases where the defendant is an enterprise, institution or an organization. The articles 2 and 3 also point to the employer of the state, where the injury occurred, as a person responsible to the compensation of the damages according to the national legislation of the employer's state.

Article 7 of the Treaty does mention that the states have to provide protection to injured workers when it becomes necessary. "In case the responsible enterprise is liquidated and there is no successor, the state, in the territory in which the enterprise is liquidated, guarantees to the injured workers compensation according to national legislation". Thus, the Treaty provisions indicate explicit regulation of judicial jurisdiction over workplace injury claims and consent of the state to provide guarantee of injury compensation to the workers of liquidated employers. The same time, it remains silent on whether judicial jurisdiction under article 8 extends to the

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2 See article 15 (4) of the Constitution of the Russian Federation, December 12, 1993
cases with state as a defendant. This brings ambiguity into issue of judicial jurisdiction under the Treaty. Question to be considered is whether the cases, where a state becomes a defendant in workplace injury claims as a result of liquidation of a legal entity, are the cases “considered in the Treaty” in the meaning of the article 8.

Such ambiguity is open to, at least, two different interpretations. One interpretation is, that even when the defendant is a state, which is represented by the state agency empowered by government, the injured person can file the claim in the state where he or she is residing. Such reading is one of the main arguments on which the plaintiff’s filing the claim in foreign country base their submission about judicial jurisdiction of that country’s court. Another interpretation of judicial jurisdiction provisions of the Treaty is to exclude from article 8 the cases where the defendant is a state. To consider which construction of the provisions of the Treaty on judicial jurisdiction over workplace injury cases should prevail, we must thoroughly analyse each of them with help of relevant interpretation tools.

Conventional rules for interpretation of international treaties are can be found in Vienna Convention on the Law of Treaties in its articles 31, 32 and 33. As Romani suggests, this codification is a result of an effort of the International Law Commission “to limit the State’s discretion” in interpretation.\(^3\) Divergent interpretations of the Parties are suggested to be analysed in the light of this rules. The same time, when courts discover and apply the international treaties, their analysis is inevitably influenced by interpretive methods for interpretation of domestic legislative norms. Moreover, interpretive rules codified in Vienna Convention provide only principal aspects and do not seem to be sufficient as complete interpretive guidelines. For example, as Romani states, there is no “hierarchy among the elements, which make up the interpretation (the normal meaning of the terms, context objective and purpose)”.\(^4\) Thus, international interpretive rules are usually supplemented by domestic statutory interpretation rules.

Methods for discovering the meaning of statutory provisions labelled in different terms can be found in different legal systems and countries. But the line of reasoning and argumentation,

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\(^3\) Carlos Fernandes de Casadevante y Romani (2007) *Sovereignty and Interpretation of International Norms*, p.44

\(^4\) C.F.C. Romani, *ibid.*, p.46
considerations underlying construction legal rules seem to be universal. In discussing the provisions of the Treaty in addition to rules from Vienne Convention, I will refer to interpretive rules as they are named and described by Sullivan. Her work is mainly dedicated to construction of statutes in Canadian courts, but also seems applicable to construction of international documents which become part of domestic law. When the states incorporate international documents into national legal system, rules of interpretation of legislation influence them too.

Noteworthy, that both Russia and Kazakhstan are countries with civil law legal system. So there is no concept of forum non convenience. When the courts consider the question of jurisdiction over certain case, they engage into construing the provisions of appropriate domestic and international (incorporated into domestic law) law and applying it to the facts of the case at trial. Once the jurisdiction is established on the basis of the provisions of law, the courts automatically consider the case on its merits. The judicial system of civil law countries does not have common law discretion not to exercise judicial jurisdiction. Thus, it would be right for one to expect that the courts unanimously consider or dismiss similar cases with similar set of facts. It is true that facts of the case can vary from each other and, thus entail different outcomes. But general context of the cases in respect of judicial jurisdiction are the same. Variances between the courts of one judicial system signal that the same provisions of national or international law are interpreted differently and this essay will discuss such interpretations. Not only provisions of international documents, but also purely domestic rules on judicial jurisdiction might be interpreted differently.

Interpretation, which enables plaintiff to file the claim against a state in foreign forum, seems to flow mainly from reading article 8 in its immediate context. When interpretation of the provision is based solely on immediate context of words, analysis is more likely to remain incomplete, and conclusion might appear superfluous. Article 8 of the Treaty, when read in isolation from the rest of the Treaty, looks like entitling all plaintiffs of workplace injury to file their claim in forum of their residence. It is true that it does not name specifically the defendants that can be sued in foreign forum. Neither does it make exception for the defendant states as they cannot be sued in foreign jurisdiction.

However, in order to properly discover meaning of the words, they must be read in their context. A well-established rule of construing the meaning of the words in their total context is not only applicable to all legal regimes, but also to all kinds of communication in general. What exactly
should be considered as a part of ‘context’ is not entirely clear. But such constituent of the context like “the text, including its preamble and annexes...” (31 (2) is explicitly stated in Vienne Convention as a rule of interpretation of international provision. Whole text of the act under consideration is also recognised in interpretation of the statutes as a unalienable part of the context, in which statutory provisions should be read. As was held in A.G. v. Prince Ernest Augustus of Hanover “… no one should profess to understand any part of a statute or any other document before he has read the whole of it.”

Other than that, the words “considered in the Treaty” in article 8 of the Treaty explicitly direct the reader to the rest of the text of the Treaty to find out what cases can be deemed as “considered in it”. Thus, according to the interpretive rules of Vienne Convention, rules for construction of the statutes, and phrasing of article 8 of the Treaty, cases, judicial jurisdiction over which is regulated in the Treaty, must be identified from analysis of its whole text.

The Treaty as a whole can be claimed to be open to interpretation which empowers the courts of the injured workers domicile to find jurisdiction over the injury cases against foreign states. Opponents of such reading might rely on the title and article 7 of the Treaty to argue that. As a rule, the title of an act captures the reader’s attention before the rest of the act and can influence perception of the whole text. The title informs us about the purpose and scope of the act, and can be relied on to establish them in interpretation. However, the titles alone cannot and should not be expected to identify full range of relationships regulated in the act and exceptions to them. Depending on object and purpose of the act, or the facts of the case it might be necessary to narrow the wide range of the relationships falling under the title, or on the contrary, the cases, which do not fit under the title, can be is subject to regulation of the act. For convenience of referring to it the title needs to be formulated with succinct words and avoiding cumbersome phrasings in a maximum short way. Absence of reference to the cases against states in the title of the Treaty cannot serve as evidence that the Treaty does not comprise regulation of such cases. Neither can such absence implicitly indicate that the Treaty regulates the cases against the states as well. We need to consider the rest of the text of the Treaty for such analysis.

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6 R. Sullivan, *ibid.*, p.367-77
Article 7 about the states' guarantee of compensation according to national legislation establishes one of obligation of the Treaty on the participating states. Guarantee of compensation involves wide range of relationships which cannot fall under regulation of article 8. Designing and enforcing schemes and procedures for protection of employees of liquidated employers, including introduction of efficient insurance system; establishing in national legislation rights and remedies for employees; identifying budget funds for such purposes and designing budget program; participation through representatives in court proceedings against state – these are main, but not all relationships and procedures, involved in state guarantee. As can be seen the state’s obligation under article 7, and court proceedings resulting from implementation of such obligation, cannot be considered as regulated by article 8.

Other than the rest of the text, international law forms the context in which the provisions should be read. Article 31 (3) c) of Vienne Convention provides that "any relevant rules of international law applicable in the relations between the parties" should be taken into account, together with the context.

The most important issue to be considered as a part of context seems to be "a customary international law norm – the rule of sovereign immunity". As such, rules on state immunity should be taken into account, even when they are not explicitly present in the text of the Treaty. Vienne Convention affirms in its preamble "that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

International law entitles a recognised state to immunity from the jurisdiction of the courts of other states. Rationale of this principle lies that all states being sovereign equals, one sovereign cannot exercise authority over another. As an essential feature of sovereignty and equality of the states, state immunity is recognized almost universally. The rule of *par in parem non habet imperium* is generally traced to the early nineteenth century case of *The Schooner Exchange v M'Faldon*. In that case the US Court dismissed the claim of individuals over the ship owned by France on immunity grounds. If personal immunity of diplomats and foreign sovereigns existed

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long before, *The Schooner* set immunity of ‘state’ as abstract entity.\(^9\) Being an important rule of international law, state immunity must be considered as a part of context in the cases involving a sovereign state as a defendant. Since the Treaty does not expressly address an issue of state immunity in its text, we must consider what can be implied from such silence.

As Sullivan maintains, “silence with respect to a matter does not necessarily amount to a gap... A gap is a “true” gap only if the legislature’s intention with respect to the matter cannot be established by necessary implication.”. She further states, that purpose of act “can be delineated with precision and the means contemplated for achieving such purpose.\(^{10}\) Nowhere in its text has the Treaty explicitly expressed intention of the parties to the Treaty to waive their immunity for the purposes of the Treaty. The same time, deference to state immunity presents a strong pattern in international law. Deviation from this well-established pattern normally requires express intention to do so. In the absence of such expression, it seems that implication is a compliance with principle of state immunity. Moreover, express provision of article 1 that all organizations fall under its regulation indicates deliberate silence regarding the states. In accordance with interpretive presumptions of implied exclusion when a provision specifically mentions certain issue but silent with respect to other comparable matter, such deliberate silence is presumed to reflect an intention to exclude not mentioned matter.\(^{11}\) Other than that, excluding the cases with a state as a defendant from regulation of the Treaty seems to better comply with international law. Since “interpretations that encourage compliance should be preferred over those that do not.”\(^{12}\), this outcome is more appropriate. If the judicial jurisdiction in article 8 of the Treaty were to apply to the cases where the defendant is a state, it should have been expressly stated so. Accordingly, the article 8 should not be read as restricting immunity of the states.

Thus, we arrive to interpretation of article 8 of the Treaty which does not include the proceedings where the defendant is a state. In such reading the provision of article 7 is seen as

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\(^{10}\) R. Sullivan, *ibid.*, p.183,185

\(^{11}\) R. Sullivan, *ibid.*, p.244

\(^{12}\) R. Sullivan, *ibid.*, p.196
Positing the state’s guarantee of the compensation as an international obligation, which must be implemented into national legislation.

Vienna Convention also rules that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” should also be taken into account together with the context (31 (3 b)). However, in the workplace injury cases the judicial practice of courts in CIS countries remains different. “Subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” is also mentioned in Vienna Convention as one of considerations to be taken into account. Conventions of CIS countries on assistance in different fields of law are not concluded for the interpretation or the application of the Treaty. Minsk Convention in fact precedes conclusion of the Treaty. Yet, they need to be examined as another conventional source of law regulating issue of jurisdiction.

The next international document, Minsk Convention, addresses the regulation of compensation of damages in its article 42. Unlike the Treaty which is limited to workplace injury compensations, the article 42 seems to be applicable to other cases of compensation of the damages. Minsk Convention also establishes that obligations to compensate the damages are regulated by legislation of the state in the territory in which took place the action that serves as a ground for claiming compensation for injury. In addition to that article 42 (2) provides that in case if a plaintiff and a defendant are the nationals of one state, legislation of that state applies to relationships on compensation of the damages.

In respect of the judicial jurisdiction article 42 (3) provides that

the court of the state, in the territory in which took place the action that serves as a ground for claiming compensation for injury, has jurisdiction over injury compensation cases. Injured person also can file the claim in the court of the state, in the territory in which the defendant has a domicile.

This provision of Minsk Convention seems to be applicable to all cases, regardless of who is the defendant in the case. Unlike the Treaty which defines in its article 1 that all types of

13 See Article 42 (1) of Minsk Convention
organizations fall under its regulation, Minsk Convention does not specify to whom it applies. Thus, it might be concluded that article 42 is also applicable to the cases where the defendant is a state.

The Kishinev Convention’s provisions about prescriptive and judicial jurisdiction over the claims of compensation of damages are exactly similar to provisions of Minsk Convention [art. 45]. Thus, while all three international documents basically concur on substantially applicable law, in judicial jurisdiction issue the provisions of the Treaty are potentially capable of being interpreted differently from the relevant provisions of the Conventions.

The next relevant source of law is procedural law of the Russian Federation. It should be noted that the legal systems of the Kazakhstan and Russian Federation have similar approaches and features in sphere of civil and civil procedural law. Other than common history, such similarity is a result of joint efforts of the CIS countries through Inter-Parliamentary Assembly. Due to similarities in the workplace injury cases there is no dispute about substantive or procedural nature of particular issues as can be in some countries. So decision on jurisdiction does not affect applicable rules of the workplace injury disputes in principle. Nevertheless, considering procedural law might be perceptive as a part of the law influencing the court’s decision. As a rule, the procedural law of the litigations, whether with or without foreign elements, is always domestic procedural law of the forum. Even when the applicable law of the tort is known beforehand as a foreign law, the procedural law is the law of the forum. Besides considering judicial jurisdiction is decided by forum law of the country where the suit is filed. When applying test for jurisdiction the courts mainly rely on domestic law, including international law to the extent it forms part of domestic law. Thus, we should look at the procedural law of Russian Federation.

Following the constitutional provision about priority of international law, civil procedural legislation of the Russian Federation provides that if the international treaties of the Russian Federation have different provision than procedural legislation, the courts apply rules of the

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14 For example, in Somers v. Fournier (2002), 60 O.R. (3d) 225 (C.A.) at para. 9 (i), (iii). In Barry Glaspell Private International Law 2013 cases and legislation, vol.1, p. 51 the court had to consider if costs and pre-judgement interest, “cap” on non-pecuniary general damages are procedural or substantive in nature in order to decide which law to apply to these matter.
international treaty in deciding the civil case.\textsuperscript{15} Civil procedural code also provides that according to federal law or international treaty the court shall apply to the cases provisions of foreign law.\textsuperscript{16}

The persons with claims on compensation of damages are given wider choice of the place to file their claims, as an exception from the general rule about filing the suit at the place of the defendant’s residence. Article 29 (5) entitles such plaintiffs to file the suit between at the place of own (the plaintiff’s) residence or at the place where the damages were inflicted (\textit{lex loci delictum}). In respect of international personal injury cases procedural rules establish jurisdiction of domestic courts over the personal injury cases where the plaintiff has domicile in their territory regardless of the defendant.\textsuperscript{17}

The same time, code recognizes that the cases where the defendant is a foreign state or international organization have procedural particularities. Article 401 (1) provides that

In Russian Federation suing foreign state, involving foreign state into litigation as a defendant or third person, arresting the property in the territory of Russian Federation that belongs to foreign state, and taking other measures in respect of such property to secure the claim, directing enforcement of court’s decision to such property are admissible only with consent of competent state bodies of that state, unless otherwise stipulated by international treaty of Russian Federation or federal law.

The provision indicates recognition of immunity of the foreign states from judicial jurisdiction.

In the workplace injury cases against the states the courts should apply to the question of jurisdiction the provision on state immunity even if the plaintiff is a resident of Russia. Priority of the immunity rule over the rule about jurisdiction focused on the plaintiff can be inferred from the interpretive principle of coherence which requires to construe the statute “so that there

\textsuperscript{15} Art. 11 (4) of Civil Procedural Code of the RF
\textsuperscript{16} Art. 11 (5) of Civil Procedural Code of the RF
\textsuperscript{17} Art. 402(2,3)Civil Procedural Code of the RF
may be no repugnancy or inconsistency between its portions." Coherent reading of those two provisions for application to our cases requires narrowing the scope of the provision focusing on the plaintiff to the cases where the defendant is a private person. Such reading also can be strengthened in reliance on international principles and norms, which must inform process of application of legal provisions to international cases.

As was mentioned before, the Constitution of the Russian Federation states that generally recognized principles and provisions of international law form part of legal system of Russian Federation. Constitution does not clarify which principles and provisions of international law can be considered as generally recognised and, consequently, part of Russian legal system. We already considered principle of state immunity as a context of the Treaty provisions. It might be also insightful to discuss some established and emerging rules of international law on restrictions to state immunity. Such discussions will be restricted to those grounds, which might be relevant for our cases.

While widely accepted as a principle of international law, immunity is not considered as absolute shield for all activities of the state and its officials, but it is subject to certain restrictions. The restrictive state immunity theory mostly developed in the second half of the twentieth century. In the 1950 Austrian case of Dralle v Republic of Czechoslovakia the Court examined the practice of different countries and famously stated that

\[\text{[t]his survey shows that today it can no longer be said that jurisprudence generally recognises the principle of exemption of foreign States in so far as concerns claims of a private character... States engage in commercial activities and enter into competition with their own nationals and foreigners. Accordingly, the classic doctrine of immunity has lost its meaning and \textit{ratione cessante}, can no longer be recognized as a rule of international law.}\]

Thus, restrictive approach is mainly justified by limiting immunity only to those acts, which are exercised by state as a sovereign, but not as an ordinary civil body entering into private relationships. Restrictions to state immunity rapidly developed and found its reflection in main

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18 L'Heureux-Dube J. in 2747-3174 Quebec Inc. v. Quebec, as cited in R. Sullivan, \textit{ibid.}, p. 224

19 Alebeek, R. Van, \textit{ibid.}, p.16
international documents. The European Convention on State Immunity 1972 (EU Convention), which had been for long the only multilateral instrument, adopts a restrictive approach to state immunity. So does the United Nations Convention on Jurisdictional Immunities of States and their Property (UN Convention).

Some exceptions to state immunity established both in EU and UN Conventions can be relied on by foreign courts in considering workplace injury cases, are express consent by international agreement to submit to jurisdiction of the foreign court and involvement of employment issues. Commercial activity exception, although broad in scope, does not apply to our workplace injury cases. Originally activities of the employees might have had commercial character. But undertaking of their obligations by the state does not flow from or arise in connection with commercial activity of the state.

Both UN and EU Conventions provide that a State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case by international agreement. This rule send us back to main international agreements concluded between CIS countries: the Treaty, Minsk and Kishinev Conventions. Among them, only the Treaty has provision, which is understood in some workplace injury cases as restricting immunity of foreign state from judicial jurisdiction. As was considered before, when the relevant provision is read in light of the Treaty as a whole it does not seem to apply to governments of the states. Thus, it remains unclear if cases at issue can be said to have been consented by international agreement.

Another ground for restriction of state immunity is provided for proceedings related to employment contract. Article 11 (1) of UN Convention states that

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the

\[\text{Art. 7 (1) (a) of UN Convention, art. 2 (2) of EU Convention}\]

\[\text{Art. 11 of UN Convention, art.5 of EU Convention}\]
State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

Article 5 (1) of EU Convention also contains similar provision. The cases discussed in this essay do not fall under these provisions of UN and EU Conventions. There was no contract of employment between Kazakhstan and an individual and the work was entirely performed in the territory of Kazakhstan.

Neither do our cases qualify under personal injuries, provided in article 12 of UN Convention. It states,

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

As was described in part 1 of this paper, majority of the injuries, which the claims are connected with, occurred in different organizations of former Soviet Union. In addition, obligations of those organizations are undertaken by Kazakhstan exactly because they were located in its territory. Consequently, injuries also took place in the territory of Kazakhstan, not Russia.

Personal injuries as a restriction to state immunity in the text of UN Convention indicate influence of international human rights law for reconsidering state immunity. Considering immunity in light of international human rights might reveal another ground for refusal of state immunity. International human rights law raises questions on how and if the state immunity rules should be modified to give full effect to protection of human rights.

It is known that international human rights law rapidly developed in comparatively short period of time. Early international humanitarian law initially emerged in connection with armed conflicts, and applied only in times of war and interstate conflicts. A state’s treatment of its own nationals was mainly a matter of domestic jurisdiction of that state. This changed after World War II, when human rights gained a prominent position in the Charter of the UN. In the context
of UN there were also adopted non-binding (the 1948 Universal Declaration of Human Rights, GA resolutions, etc.) and binding instruments (the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights) on protection of human rights. Actions violating human rights (crimes against humanity, torture, slavery, racial discrimination,..) were recognized peremptory norms of international law.

Even though international human rights law mainly tries to prevent criminal actions violating human rights, in recent years, there were some attempts to challenge the immunity of the states in civil action brought abroad. As Alebeek discusses when plaintiffs sue states abroad, in order to avoid state immunity defence they “tried to... squeeze their cases in the terms of territorial tort exception or the commercial act exception..., but also argued on principle that there is no immunity for human rights violation”. Thus, state immunity appears to be open to challenges on the ground of high international value of human rights even in civil litigations. But such challenge is available when the claim at issue is connected with violation of peremptory norms of international law by the defendant state.

For the claims, which do not arise in connection with breach of fundamental rights by or in that state, arguments for challenging immunity of the foreign state and filing the suit in different forum might be based on right to fair proceeding. Article 6.1 of the European Convention on Human Rights provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article falls under jurisdiction of European Court of Human Rights (ECHR), but protection of individual rights against state immunity in this article shows emergence of more challenges to state immunity in official international document. However decisions of ECHR in McElhinney v Ireland, Fogarty v UK and Al-Adsani v United Kingdom, where the applicants argued against

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23 For example, civil action of Bouzari et al. v. Islamic Republic of Iran; Attorney General of Canada et al., Intervenors (2004)

24 Alebeek, R. Van, *ibid.*, p.310-11
state immunity, were made in favor of immunity. In view of ECHR state immunity remains important principle of international law and that applying Convention’s provision for protection of human rights must be “in harmony with other rules of international law of which it forms part”. 25

Criticism of state immunity on the ground that it violates right to fair trial and access to court can be found in scholarly literature as well. For example, Pahr argued that rule of state immunity “allows foreign states the advantage of their own courts while private individuals bear the burden of litigation in an unfamiliar legal system and language contrary to the normal jurisdiction rules”. 26 In the context of the workplace injury cases, referring the plaintiffs to Kazakhstan’s courts is not disadvantageous for the plaintiff. In this cases the forum of the state, where the workplace injuries occurred, seems to better suit aim of deciding the cases properly. Such considerations as law applicable to disputes on workplace injury, procedural easiness for foreign plaintiffs, and familiarity of the plaintiffs with law of Kazakhstan indicate that referring cases to Kazakhstan’s judicial system is a proper decision for workplace injury cases with place of injury in Kazakhstan. This does not create an obstacle preventing the plaintiff from exercising his or her right of access to court and fair trial but simply provides that the case is considered in the appropriate forum.

As was mentioned before, all three main international treaties between CIS countries indicate that law of the place, where the injury took place, applies to the cases on compensation of injuries. Proper application of provisions regulating workplace injury compensation requires from the courts some expertise in civil law, bankruptcy law and relevant normative decrees of Supreme Court of the Republic of Kazakhstan. It is true that foreign courts are capable of applying to the merits of the case law of another state. However, as was discussed in part 1 of this essay, considering workplace injury cases involve specific rules of domestic legislation. Some degree of awareness about historical events and their influence on workplace injury relationships is also necessary. The documents confirming the claims of the plaintiff or calculation of the compensation sum might vary significantly depending on the facts of each

25 Alebeek, R. Van, *ibid.*, p.385
case. In absence of certain documents, it is speedy for the courts of Kazakhstan to request and get any information from state archives, other courts or state agencies of Kazakhstan, which might be relevant for considering the case at trial. Lack of proper information might sometimes be disadvantageous for a plaintiff, even when a foreign court decides case in favor of a plaintiff. For example, in absence of information on size of salary of injured worker, the foreign court might calculate sum of compensation on the basis of average salary for that profession in Kazakhstan. But, average salary in the region where the injury occurred might be and usually is higher than average salary due to higher risks or cost of life. Thus, a plaintiff might get fewer compensation sums as compared to what he or she would get, if a case was considered and decided in Kazakhstan.

When it comes to enforcement of foreign court decisions courts of the place of enforcement do not check if the foreign court properly decided the case on its merits. Consequently neither plaintiff, nor defendant can check whether foreign court correctly applied the law or if compensation sums were calculated properly. Enforcement of foreign court decisions in Kazakhstan are the same as for decisions of domestic courts, which makes it even more important to correctly decide jurisdiction issue at the earlier stages. This paper will not discuss enforcement issues, but rather is limited to question whether the CIS countries’ have and should they exercise jurisdiction over workplace injury cases against another CIS country.

Other than that, holding proceedings in Kazakhstan does not necessarily cause inconveniences for the plaintiffs. Civil procedures of Kazakhstan allow the courts to consider the cases in the absence of any party, including plaintiff. Some procedural particularities of considering such cases are in interest of the plaintiffs. For example, to provide speediness of such cases it is prohibited to exceed seven working days to prepare the case to consideration. In absence of necessity to consider issue of judicial jurisdiction the courts can start considering dispute substantially, which also makes the resolving the case faster. Articles 236 (2) and 327 (4)) of the Civil Procedural code provide that decisions on injury compensation cases against the state are subject to immediate enforcement (no later than within three months after decision gains force).

27 Art. 6 (5) of the Law of the RK On Enforcement Procedures and the Status of Court Enforcers
28 Art. 187 (5) of Civil Procedural Code of the RK
29 Art. 167 of Civil Procedural Code of the RK
Meanwhile enforcement of foreign courts’ decisions is more time consuming because of the interstate delivery and preliminary procedures.

Plaintiffs from CIS countries, especially from Russia, usually do not encounter language difficulties in Kazakhstan proceedings. They have good command of the Russian language and can submit their claims and get the court’s decision in Russian language, since it is an official language in Kazakhstan. In case the plaintiff does speak neither Russian, nor Kazakh, article 14 of Civil Procedural Code allows the plaintiffs to use the translator’s services for free and get the court’s decision in their language. Thus, the proceedings in Kazakhstan are not burdensome for the plaintiffs, as can be criticised by opponents of granting immunity to the state in foreign proceedings.

There are other considerations, which should, in my opinion, be taken into account when considering judicial jurisdiction over the workplace injury cases. One is nature of relationship on compensation of workplace injury by state. It was mentioned above, the article 1 of the Treaty states that it applies to enterprises, institutions and organizations ‘despite their form of the property’. The words ‘despite their forms of the property’ in article 1 indicate that state owned types of organizations also fall under regulation of the Treaty. At this point we should differentiate between obligations of the state before the employee as a successor of employer, and undertaking by state the obligations of ceased employer to guarantee social protection to employees in case of economic disruptions.

In order to engage into commercial activity or to carry certain strategic functions the government can establish or empower state agencies, heads of administrative territorial units (oblast, region, etc.) to establish legal entities. As a general rule about legal capacity of legal entities (legal persons) their rights and obligations are separate from those of their establishers or participants. But the legal entities established by state in the form of institution or fiscal enterprise have particularities in respect of their obligations. Civil legislation of Kazakhstan provides that if the state institution or state enterprise fiscal enterprise does not have enough funding to fulfill their obligation, the government or relevant local executive body is responsible
for fulfillment of obligations.\textsuperscript{31} In this order even though one party is represented by state the relationship keeps feature of private relationships. The obligation before the creditors of the state institution or state fiscal enterprise, including creditors with claims caused by workplace injuries, transfer to the state because of the direct connection between the state and the liquidated organization. However the obligation of the state before employees with workplace injury, considered in this essay, do not result from such direct connection.

In our cases private relationships between employee and employer adopt public character when state emerges at one side as a protector of social justice for employees. The state undertakes this obligation of insolvent employer, who ceased its existence, as protection of such highest values of the society as human’s life and health, which are established in the Constitution. Initially compensation of workplace injury results from employment relationship. Once injury occurs, the relationship falls under regulation of both labor and civil legislation. When the employer, whose workers have workplace injury, stops its activity as a legal person, bankruptcy procedures start applying. As was described in part 1 the bankruptcy procedures aim, inter alia, to ensure that the injured workers get their compensation in the first place. When the assets of the bankruptcy employer are not enough to pay workplace injury compensations, or the injured worker did not claim compensations sum during bankruptcy, state comes into play for goals of social justice. Consequently, further relationship adopts social protective nature and the state undertakes the obligation of the ceased employer to provide social protection to one of the disadvantageous groups of population. This nature of the state’s obligation shows that the cases about fulfilment of such obligation should be considered in jurisdiction of the state, which provides such social protection.

Other than that, considering cases in Kazakhstan courts allows to preclude possible frauds and schemes at the expense of the injured workers or abuse of the budget funds. For example, naïve and incautious injured workers might to give powers of attorney to indecent people with too wide powers on their behalf. Unfortunately, there had been attempts by indecent representatives to appropriate the money from the cases by using the powers of attorney which allowed them to have compensation sums transferred by the defendant into their own account. Because of such attempts when the representatives present the injured workers at the court, the courts might take

\textsuperscript{31} Art. 44 (1) of Civil Code of the RK (General Part)
some precaution measures in interest of injured workers. At enforcement process of the court
decisions with the participation of the representative, the state agencies also can take measures
to ensure that injured workers get their money. Such caution measures are not available for the
foreign court decisions with representatives.

There also might be attempts by impostors, indecent injured workers or heirs of injured worker
to file ungrounded claims, or more compensation than provided by law. There was a case when
the injured worker filed his claim twice in different courts in different regions and got two
decisions in favor of plaintiff. Since the vast majority of similar cases are decided by
Kazakhstan’s courts, the judicial system has relevant information to preclude double deciding or
double enforcement of the decision on the case with same plaintiff on same subject of dispute.
Thus, there not only legal, but also common sense considerations, supporting judicial
jurisdiction of Kazakhstan’s court over the workplace injury cases with place of injury in
Kazakhstan.

We discussed in this chapter some international and domestic law principles and provisions and
how they could apply to the workplace injury cases filed abroad. In the next chapter I will turn
to analysis of discussed rules and principles, and the reasons for the variances in considering
jurisdiction issue.
Chapter 3

Analysis of provisions and reasons of different decisions, implications from analysis

Unique circumstances of the workplace injury cases against a state in former Soviet Union countries involves different considerations to be taken into account. Rules and principles of international and domestic law, possible impact of international human rights law and other relevant considerations might be discussed in order to decide if they favor or are against finding jurisdiction, or granting the foreign state immunity in such cases. In this part I will try to analyse and weigh main considerations, and attempt to understand and reveal the reasons for different decisions in similar cases with same set of facts.

Constitution of Russian Federation attributes international law and international treaties of Russian Federation more weight than provisions of domestic legislation. Three international treaties between CIS countries, which we discussed above, form important source of law to regulate the judicial jurisdiction over workplace injury cases. The provisions of the Conventions provide for the judicial jurisdiction of the place where the injury occurred or where the defendant resides, which both comply with claim of this essay. But, the provision of the Treaty entails variances in Russian courts in practice. We argued that interpretation of the Treaty, which establishes judicial jurisdiction over the cases against foreign state and restricts state immunity, is faulty and inconsistent with both domestic legal scheme and international law. Yet, the Treaty remains the main source of international law to which the plaintiffs refer when file their claims abroad. The court decisions, which find jurisdiction over cases against the state, also mainly rely on the provisions of the Treaty. Thus, we should consider weight of the Treaty as compared to the Conventions and other sources of law.

Vienna Convention on the Law of Treaties regulates, inter alia, how the disputes between provisions of international treaties should be handled. Articles 11-15 of Vienna Convention

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1 Art. 15 (4) of Constitution of the RF
consider means of expressing consent to be bound by a treaty. All three treaties between CIS countries are subject to ratification in both Kazakhstan and Russia. Kazakhstan has ratified all three, while Russia has ratified the Treaty and the Minsk Convention. The Kishinev Convention remains signed, but not ratified in Russia. In accordance with article 30 (4) (b) of Vienna Convention when parties to the later treaty do not include all the parties to the earlier one as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. Consequently, the Kishinev convention does not directly apply for mutual rights and obligations between Kazakhstan and Russia.

Article 30 (2, 3) of Vienne Convention establishes

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

In our case, the Treaty and the Minsk Convention do not exactly relate to the same subject matter. Subject matter of the Minsk Convention is much broader than the Treaty's, and covers cooperation in different fields of law. Even the provision regarding the judicial jurisdiction is wider in scope. Words "injury compensation cases" indicate that the injuries in the meaning of the Convention are not restricted to those inflicted on workplace, but also different cases, e.g. motor-vehicle accident. The Treaty, on the contrary, is concluded for specific purpose of regulating issues of compensation to the employees for injuries inflicted in connection with labor functions. But both of them contain provision on judicial jurisdiction over the cases on compensation of injuries when the plaintiff and defendant are from different countries. Assuming, without admitting, that the provision of the Treaty is in conflict with the provision of the Minsk Convention, we can try to apply article 30 of Vienne Convention to weigh conflicting provisions.
The Minsk Convention was concluded earlier in January, 22, 1993, and conclusion of the Treaty followed in September 9, 1994. The treaty does not contain provision specifying that “it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty”. Consequently, if we apply article 30 (2) of Vienna Convention, the provision of Minsk Convention would apply “only to the extent that its provisions are compatible with” the provision of the Treaty. Thus, among three, the Treaty appears to be the main document prevailing over other two conventions. However, attributing such prevalence to provisions of the Treaty with their literal interpretation does not seem appropriate in the cases against foreign state. Provisions of two Conventions on judicial jurisdiction reveal consistent approach in favor of the defendant’s residence country or the country where the injury occurred. Even though Kishinev Convention was not ratified by Russia, its provision can inform us about intention of CIS countries about which country’s judicial jurisdiction is to apply in personal injury cases. Consequently, the courts should not just formally weigh those three international conventions and attribute more weight to the Treaty in the cases against foreign state. None of them explicitly say if the cases, regulated in them, comprise or exclude the cases where the defendant is a state. The fact that these important international documents leave unaddressed judicial jurisdiction over possible cases against a state seems to be one of the main reasons for inconsistency in the courts. The Treaty clearly provides for claimants possibility to choose own forum without specifying if such choice is also available against defendant states. The same time, Vienna Convention’s preamble states “that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”. Customary international law rules are another important source of international law for regulation of judicial jurisdiction over the cases with foreign elements. Unlike conventional obligations of the states, customary international law obligations require the states to adhere to them as members of international community.

Even not expressly provided in the text of the Treaty, state immunity forms unalienable part of customary international law which must inform application of international norms. State immunity is an important principle of international law, but can be restricted, inter alia, by international treaties. The main international documents on state immunity – UN and EU Conventions require consent to any restriction on state immunity to be expressly stated in international treaties. However, in case of the Treaty, it cannot be said that state’s consent to exercise of jurisdiction by foreign court is reflected expressly enough. In “widespread and
consistent state practice accepted as law" most countries' domestic courts are reluctant to assume jurisdiction over foreign state, unless there is clear intention to waive state immunity. For example, in USA v. Friedland court stated that "any waiver of immunity must be clear and unequivocal; it cannot be presumed". In our cases there is no express or clear consent of the state to restriction of its immunity. Thus, main claim of this essay accords with customary international law rules.

The same time, unlike in common law countries, courts in civil law countries heavily rely on the text of written international documents, rather than on state practice. Existence of state immunity principle in international law, as can be observed from state practice or in scholarly publications does not by itself constitute source of law. To be considered and weighed with provisions of statutes or international treaties even such self-evident principles as state immunity must be reflected in a written form in statutes or be found in the text of international treaties. State immunity principle is specifically regulated by EU and UN Conventions, but Russia is not a party to any of them. Russia signed UN Convention on state immunity in 2006, but has not ratified it yet. This lack of ratification could be one of the reasons for different approaches of the Russian courts to state immunity in cases with similar set of facts. However, this does not seem to be the only reason. Even if Russia had ratified UN Convention, it might not have necessarily changed the application by Russian courts the provisions of the Treaty on judicial jurisdiction. State immunity rules are already established in different acts of domestic legislation in Russia. In addition, article 26 of UN Conventions provides that

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

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3 United States of America v. Friedland (1999), 46 O.R. (3d) 321, as presented in B. Glaspell ibid., p. 129

Some scholars even claim that Russia is among the countries following the doctrine of absolute state immunity.\(^5\) Reason of different decisions seems to lie in absence of state immunity rules not in legal system of Russia, but in the text of the Treaty. The Treaty does not contain any reference to state immunity. Neither does civil procedural code indicate how state immunity principle should be considered and weighed in personal injury cases against state. Civil procedural rules of both Kazakhstan and Russia contain, along with the state immunity rules, provisions establishing jurisdiction of domestic courts over the personal injury cases where the plaintiff has domicile in their territory.\(^6\) As part 2 of this paper argued when being applied to specific cases these provisions must be analysed and construed as a parts of larger coherent legislative scheme. The courts also should bear in mind the state immunity rules and its restriction in current international law. However, assumption of jurisdiction by Russian courts, and recognition and enforcement of foreign judgements by Kazakhstan courts in some workplace injury cases against a state show focus only on plaintiff. For example, decision of Sverdlovsk region court of Irkutsk oblast\(^7\) obliging Ministry of labor and social protection of the Republic of Kazakhstan to make one-time payment in favor of Maizhivov A.V.\(^8\) solely relies on domestic procedural rules, which are designed to accommodate the victims of personal injuries. In some other court decisions we can see reliance on article 8 of the Treaty. Regardless of whether the decisions rely on the Treaty or domestic procedural rules, they fail to address state immunity issue or appropriateness of foreign forum for considering the case. Simply ignoring legal rules which do not concur with the rules on which the courts rely in assuming jurisdiction raises doubts about proper discovery and application of law by the court. Certainly, there could be other reasons, which influence decisions of the courts to assume and exercise jurisdiction. Indeed, the courts might decide that loss of plaintiffs (severe harm to health or even death)

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\(^5\) For example, see Alebeek, R. Van, \textit{ibid.}, p.20; Ernest K. Bankas (2005) \textit{The State Immunity Controversy in International Law. Private suits against Sovereign States in Domestic Courts}, p. 27

\(^6\) See art. 402 (3) 4) of Civil Procedural Code of the RF; art. 416 (2) 4) of Civil Procedural Code of the RK

\(^7\) Oblast is a type of administrative division in some countries of the former Soviet Union (Belarus, Bulgaria, Kazakhstan, Kyrgyzstan, Russia, Ukraine). The word "oblast" is a loanword in English, but it is nevertheless often translated as "area", "zone", "province", or "region". The last translation may lead to confusion, because the subdivision of "oblast" is called "raion" which is translated as "region" or "district", depending on the context.

from web site of academic dictionaries and encyclopedias http://en.academic.ru/dic.nsf/enwiki/123875

\(^8\) Decision of Sverdlovsk region court of Irkutsk oblast obliging Ministry of labor and social protection of the Republic of Kazakhstan to make compensation payment in favor of M. Aleksandr Vladimirovich in amount of 202623.06 rubles, dated June 22, 2006
overrides all other considerations, or they might be aware of previous similar decisions and decide to follow them. The courts might have considered state immunity issue, and found certain restrictions to immunity. But, those considerations cannot be found in any part of their decisions. In official decisions, which are sent to the defendants for enforcement, the courts argument their exercise of jurisdiction only by the Treaty or domestic procedural rules, or by both.

The same time, refusal to assume jurisdiction over the cases against a state also might be result of incomplete analysis. Indeed, decision of Kalinin region court of Chuvash Republic stayed the proceedings launched by Evdokimov G.E. relying solely on the provisions of the Minsk Convention. It stated that the injury occurred and the defendant is located in Kazakhstan, hence the courts of Russian Federation do not have jurisdiction to decide the dispute. Even though result in the case is consistent with the main claim of this paper, reasoning of the court in arriving to this decision also ignores some relevant issues. For example, the decision does not explain why the Treaty does not apply to the case, neither does it address state immunity rules. The considerations and reasoning in deciding jurisdiction should not be one-sided, but take into account all aspects of these cases. Another source of problem with differences in deciding jurisdiction must be the particularities of the workplace injury cases, discussed in this paper.

As was discussed in previous parts, the cases consist of unique set of facts. Their historical background and conditions of emergence in post-soviet space, features relating to private and public character of the cases, all show how many issues are involved in them. Those considerations should be taken into account in considering the issue of whether to grant or refuse to grant state immunity. Other than that, in respect of article 8 of the Treaty, the cases against the states might present “unanticipated situation”, which would explain why jurisdiction over them is not expressly dealt with in the text. At the moment of conclusion of the Treaty, obligation of the states to undertake unpaid injury compensations was not established in national legislation. For example, in Kazakhstan, the relevant provisions were established in 1999 with adoption of Civil Code’s Special Part. In such case, use of courts’ expertise, considering

9 Decision of Kalinin region court of Chuvash Republic of RF which stays the suit by Evdokimov G.E. against Ministry of labor and social protection of the Republic of Kazakhstan, dated July 14, 2011 # 2-2-2011

10 R. Sullivan, ibid., p. 186
scholarship publications and relying on international norms seems to become even more important.

Some facts and international norms might point to judicial jurisdiction of the country where the plaintiff resides, while others favor granting the defendant state immunity. When all considerations are properly weighed, most of them seem to indicate necessity to dismiss cases due to absence of jurisdiction or immunity of the foreign state. However, if judges do not analyze all relevant facts, even when they decide to grant immunity to the defendant state, their analysis seems to remain incomplete.

These two sources of problem, the ambiguity of the text of the Treaty and the complicated nature of the cases themselves, lead us to another major problem caused by the limitedness of courts’ activity in application of law. As a rule, the role of judicial system in civil law countries is restricted to discovering the law to carry justice, rather than “making” the law. Such a restriction can lead in its worst forms to a misunderstanding of the court’s role and restricting it to the automatic application of the legal provisions. An analysis of the overlapping provisions, a reliance on scholarly authorities can be seen as substituting the law with own preferences or other materials, which do not form the source of law, or as attempt of judicial power to usurp legislative or, sometimes executive powers. Thus, any ambiguity in the Treaty and an unusual set of facts seem to puzzle the judges of civil law countries, which “look up to the authority of the codified system for shaping their laws”.

However, in the field of international law, it seems like judges should be able to avail themselves instructive materials other than the texts of statues and international treaties to consider the issue before them. It is true that “written rules provide the interpreter with the advantage that the task of interpretation has been supplied with a point of reference which has been pre-established by the parts: the text”. Besides, in civil law countries domestic legal provisions usually regulate explicitly and thoroughly, and the same time can be applied to various possible situations in certain fields of domestic legal system. Such extent of determination of the legal norms is common to majority of legal systems. As Romani describes,

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11 Ernest K. Bankas, *ibid.*, p.25
12 C.F.C. Romani, *ibid.*, p. 37
such degree of determination is due to “both to the hierarchy of the norms and to the centralising of the essential function of interpretation in the hands of the Judge”. At international level interpretation of international provisions is a more complicated. Complexities partly arise from vagueness of phrasing in international conventions and involvement of sovereigns. As a rule, in international agreement, as “both the result and the instrument of international cooperation”, states do not strive for clarity in the text. On the contrary, “the more general the terms in which the obligations are couched, the easier it will be to reach an agreement on the text”. So when it comes to application of international norms, there can be controversies and misinterpretations. As can be seen from the texts of three international treaties, the provisions in international law might need analysis, further development and change of content within certain range depending on the situation. In order to mitigate adverse consequences of drafting the texts in vague language, states should apply them cautiously, taking into account considerations other than text of the agreement.

Thus, in the field of international law, the courts of civil law countries also should, when necessary, go beyond codified texts of conventions and domestic legislation to resolve the issue at trial in compliance with international law. As was mentioned, involvement of sovereigns with own legal structures makes interpretation of international provisions complicated activity. Our suggestion about necessity to admit other sources of international law in civil law countries might seem as attempt to impose on them external rules. Indeed, scope and authority of international law depends to some extent on domestic legal system of each country and the role domestic system attributes to it. As Dupuy describes international-legal order “within it, in principle, each subject has the competence, to interpret the meaning and scope of the rights and obligations he has by virtue of the international norms”. However, it is in the interest of international community and important for international law that the state’s application of international conventions is not divergent from expectations of other counterparts. Codification of interpretation rules in Vienne Convention indicates an attempt of international community,

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13 C.F.C. Romani, ibid., p. 5
14 C.F.C. Romani, ibid., p.4
15 Dupuy, P.M. Droit international public, Dalloz, Paris 1992, p. 218 cited in C.F.C. Romani, ibid., p.4
represented by international institutions, to restrict discretion of the sovereign states' to modify for own convenience meaning and application of international treaties.

Other than that, international law by its virtue cannot be confined only to the texts of international treaties. Many international norms found reflection in the texts of the conventions when their existence is long established by practice. International court of justice for example, in their activity can rely on the sources other than international conventions. Such sources are international practice, the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations, and principle ex aequo et bono are also form the source of law. As a member of international community, sovereign states should also pay due deference to these sources in interpretation and application of their international treaties. Unilateral rejection of other external sources of law can undermine stable development international law in that very legal system. Especially, in the case of CIS countries which are relatively young as independents states in international arena. Being open minded to external sources in considering international disputes can be insightful for development of their domestic legal system. Such open-mindedness of the court could help to interpret and apply international legal provisions in consistent way even when the texts of international conventions are ambiguous or the cases at trial consist of unusual set of facts. Such consistency in resolving similar cases seems to be important condition for development of international private law.

Thus, in order to properly apply the international and domestic legal rules to international cases the courts in CIS countries should be open to all sources of international law. Ability of international norms, principles and presumptions, which exist beyond the texts of the conventions, to inform and influence application of international treaties should be admitted and accepted. Proper weighing, analyzing sources of international law in the workplace injury cases would, in our opinion, lead to dismissal of such cases on basis of either absence of jurisdiction, granting foreign state immunity, or refusal to exercise jurisdiction as an inappropriate forum.

Conclusion

In this essay we discussed international workplace injury cases against the states in CIS countries. Discussed cases arise mostly out of employment relationships of the organizations of former USSR. In theory some cases could also arise from employment relationships in the early independence period when there did not exist social security system. In both cases the states become defendants as a commitment to their international obligation arising out of the Treaty, and also as a matter of social protection policy to mitigate adverse effects of economic disruptions. The Treaty, which was concluded in 1994, establishes that the states parties guarantee to injured workers compensation of their injuries. This international convention obligation concurs with the constitutional values of Kazakhstan which are further detailed in national legislation. International and domestic norms unanimously establish that the disputes are regulated substantially by the national legislation of the state where the labor relationships and injury took place. In Kazakhstan these obligations are regulated by several legislative and other regulatory acts with own particularities in respect of establishing the facts and calculating due sums. Substantially applicable law of the disputes favors holding the litigation in the same jurisdiction. There also other considerations that point to necessity of holding the litigations in the same state, which is defendant in workplace injury case.

First of all, appropriate discovery, interpretation and application of the provisions of the Treaty on judicial jurisdiction, we argued, require restriction its scope to the cases where the defendant is not a state. Improper application of the Treaty seems to lie in the core of problem with diversity of decisions in similar cases. Use of interpretive rules codified in Vienna Convention, supplemented by rules for interpretation of statutes, leads us to stay of the cases against the state with deferral to judicial jurisdiction of the defendant state.

Next, considering relevant provisions of other international agreements of CIS countries along with relevant international and national sources of law, and discussing other considerations we suggested that most of them support main claim of this essay. Such conventional grounds for restriction of state immunity such as commercial activity and employment relationships appeared to be inapplicable to the cases. Consent of the state in international agreement to waive its immunity was discussed more thoroughly as the most disputable issue in these cases. Relying
on international practice and having studied wording of the Treaty, we suggested that in our cases such waiver was not expressed beyond any doubts, thus should not be just presumed.

We also considered international human rights law as a new emerging ground to restriction of state immunity. We argued that the rights of the plaintiffs are not compromised in any way and they do not experience unfairness their claims are considered in the place of injury. The character of the obligations of the state, which makes it a defendant in these injury cases, shows that it is of public policy nature, rather than private dispute. The obligation of the state does not emerge as a direct transition (succession) of private obligations of former employees, it is rather a last resort for social support of injured workers by budget funds. This consideration also should be taken into account as favoring the litigation in the forum of the defendant state.

Discussing these sources and considerations also allowed us to reveal possible reasons for variances in application of norms to the same set of facts within one judicial system. The paper stated that these reasons could be ambiguity in the texts of agreements, unusual character of the relationships between a defendant state and a plaintiff, unwillingness of civil law countries’ courts to recognize sources of international law other than texts of international agreements. Despite these complexities, the courts should create and follow one approach in the same type of the cases.

We advocated that the cases have common background, same features and they consist of similar set of facts. Consequently, there should be certain degree of predictability for their outcome. Applying the legal rules should be consistent and promote stability and order in the sphere of international law. One can claim that in the sphere of international law, order is not the only value, and that fairness to the participants to the litigation should be taken into account. The similar cases do not necessarily have to be decided with the same outcome. However, in these cases variances seem to be result of incomplete analysis of the legal provisions. Failure of judicial system to discover and apply legal rules in consistent proper way undermines the stability of and deference to whole legal system.

One might question practical importance of studying these cases, which probably remain just a part of history in future. The cases emerged in distant past – mostly during USSR era and some in transition period to independence as a result of disruption of social insurance system of USSR or absence of such system in young countries. They are reasonably expected to end as time
passes. Indeed, partly due to natural causes, in recent years in Kazakhstan there are less and less cases against the state, especially with the plaintiffs filing the cases in the state of their domicile. Thus, discussing these cases might seem like just theoretical recourse to the past, instead of focusing on future. However, this research, we believe, does not only show how CIS countries deal with negative effects of collapse of USSR to lives of ordinary people. This research also can be useful in future practice. Discussions in this paper might be insightful and of practical importance for development of international law field in post-soviet space.

The cases present kind of an exercise in the field of international law due to their complexities. Studying the cases informed us about international conventional activity, interpretation and application of the international norms, their operation within domestic legal systems of CIS countries. The texts of CIS countries' agreements, similar provisions of domestic legislations show their commitment to cooperation in search for solution of common problems. The same time, the way the texts of their international treaties are crafted and how they are read and applied in practice shows there remain some problems not only between states, but also within the courts of the same state. This study allowed us to make suggestions about those problems, the reasons, the difficulties and obstacles for development of international law in these countries. Implications from this inquiry should be taken into account and dealt with in further international activities of and with CIS countries. It might be useful for future promotion of their engagement into world community through international agreements, for providing stable, consistent legal environment for such engagement.
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