TOURIST-CONSUMER PROTECTION IN MACAU SAR OF CHINA AS A WORLD TOURISM DESTINATION

Prof. Dan Wei[*]

ABSTRACT

Since the transfer of sovereignty to China in 1999, Macau Special Administrative Region (SAR) of China has become No.1 in profitability in global gambling destinations by gaming revenue as well as a tourism and leisure destination for millions of consumers worldwide. According to the World Tourism Organization, Macau ranked the 20th position in terms of the world's international tourist arrivals and ranked the 5th place in Asia and the Pacific in 2010. In 2011, Macau attracted 28 million tourists, among which 3 million were international visitors. Also in 2011 in terms of international tourism receipt, Macau was ranked 9th among other destinations in the world and ranked 2nd in Asia and the Pacific.

The expansion of tourism sector has led to more tourism disputes. The consumer protection in Macau is facing new challenges of inter-regional and international conflict of laws in the context of deeper regional integration and globalization. At the national level, under the formula of "one country, two systems", the mainland, Hong Kong, Macau and Taiwan have different legal systems and the whole China comprises three law families and four jurisdictions. Visitors from the other three jurisdictions accounted for approximately 90% of tourist arrivals in Macau and their tourism contracts took diversified and complex forms. Meanwhile, Macau has participated in a number of international tourism organizations aiming to develop more areas of cooperation on tourism trade and policies.

The paper examines the tourist-consumer protection laws and identifies the developments and characteristics of tourism disputes resolution in Macau. Since prevention of tourism disputes is always better than remedies, by drawing upon experiences of other models of tourist protection worldwide, the paper further presents appropriate solutions to the institutionalization of interregional and international cooperation for a more effective protection of tourist-consumers in Macau.

* Director of Institute for Advanced Legal Studies, University of Macau, China.

INTRODUCTION

China is the second fastest growing travel & tourism economy in the world and has the potential to become one of the world's great tourism economies – in terms of inbound, domestic and outbound travel. China has become the largest spender in international tourism globally in 2012.[1] At the same time, its Special Administrative Region of Macau (Macau SAR) ranks the 9th place among the world's fastest growing Travel & Tourism economies. The transformation of Macau from a sleepy Portuguese colony to mega world class tourism entertainment destination is staggering in its vision and scope.

Since the transfer of sovereignty to China in 1999, Macau SAR has become No.1 of profitability in global gambling destinations by gaming revenue as well as a tourism and leisure destination for millions of consumers worldwide. According to World Tourism Organization, Macau ranked the 20th position in terms of the world's international tourist arrivals and ranked the 5th place in Asia and the Pacific in 2010. Also in 2011 in terms of international tourism receipt, Macau ranked the 9th place among other destinations in the world and ranked the 2nd position in Asia and the Pacific. The total population of Macau as of 2012 was reported 578,000[2] and every year the total number of tourists that arrived in Macau was almost 40 times of its population. In 2012, Macau attracted more than 28 million tourists, among which more than 3 million were international visitors and nearly 25 million visitors came from other regions of China such as Mainland China, Hong Kong and Taiwan. In the last few years, Macau has benefited extraordinarily from the launch of the Individual Visitors Scheme (IVS) which has boosted visits from the mainland enormously. 57.7 per cent of the total of mainland visitors arrived in Macau in 2012 through the IVS scheme. Since 2009, the travel & tourism industry has maintained to

1 See a press release of World Tourism Organization UNWTO, available at http://media.unwto.org/en/press-release/2013-04-04/china-new-number-one-tourism-source-market-world.

2 See Macau profile in 2013, available at http://www.indexmundi.com/macau/demographics_profile.html.

represent 12 per cent of its total GDP.[3] In order to become a world class tourism entertainment destination, Macau needs to support the new tourism hardware (infrastructure and product) with professional world class software (quality tourism, service standards, employee education and training) that is necessary to deliver a well-rounded quality tourism experience.

The expansion of tourism sector in Macau has also led to more tourism-related consumer disputes. The consumer protection in Macau is facing new challenges of inter-regional and international conflict of laws in the context of deeper regional integration and globalization. On the one hand, Macau's tourists have taken diversified forms of tourism contracts. Some may celebrate complete package-tour contracts with travel agencies at their original domiciles, others might choose "free and easy tours package" which includes only air tickets and hotels, and still others tourists might prefer to have self-guided tours or "free walker schemes" through online booking and distance reservation by their own initiatives. Although the purposes of travelling to Macau remain different from one to another, the duration of stay of the great majority of tourists in Macau is relatively short, normally not exceeding two days. On the other hand, even though the visitors from other regions of China accounted for nearly 90 percent of tourist arrivals in Macau, there does not exist a uniform legal system among these regions. Under the formula of "one country, two systems", the whole China comprises three law families and four jurisdictions. Macau's legal system is based on the Portuguese model of Civil Law Family; while Hong Kong belongs to Common Law Family, Taiwan has a German tradition of Civil Law and the mainland China applies socialist law. In a single sovereign country with plural jurisdictions with distinct legal traditions, Macau has been placed to the forefront for the development of an effective tourist-consumer protection, not only to improve its own private law tools

3 See a report on statistics of tourism sector of Macau, which is available at: http://www.ccpitbj.org/web/static/articles/catalog_ff8080813909ead701392e21dd4d005e/article_ff8080813909ead70139701dbe0205f3/ff8080813909ead70139701dbe0205f3.html.

but also to seek regional and international cooperation to overcome the existing legal barriers of interregional and international conflict of laws.

At international level, Macau is a member of World Trade Organization (UNWTO), Pacific Asia Travel Association (PATA), International Congress & Convention Association (ICCA), Asia Pacific Economic Cooperation (APEC) Tourism Working Group and the Asian Association of Convention and Visitor Bureau (AACVB). At regional level, Macau has signed a number of Framework Cooperation Agreements with National Tourism Administration of China, with other provinces of Pan-Pearl River Delta (PRD), with Guangdong Province, with Hong Kong and with other cities nearby, to realize a collective objective in building an international tourist belt in Pan-PRD and turning it into the first "barrier-free" tourist zone in China.

Any tourist in Macau is also a consumer, who may need to seek protection from Macau's current legal framework, based on the classical principles of "*lex loci delicti*" and "*lex loci executiones*".

OVERVIEW OF CURRENT FRAMEWORK OF CONSUMER LAW IN MACAU

The legislative approach of Consumer Law in Macau can be described as the so-called "intermediary system" where a Consumer Protection Act containing fundamental principles and rules coexists with more specific laws. Civil Code and Commercial Code of Macau provide legal measures to some extent to ensure fairness in business-to-consumer relations (e.g., pre-contract regime, unfair competition); however, pure consumer law is not included in Civil Code or Commercial Code. One cannot find any definition of consumer contracts and consumer protection is not a part of the law of obligations. Tourism contract is not a typical contract in the Civil Code. The existing separate laws and regulations relating to consumer protection seem be short of systematization and coherence. To be able to benefit from a more balanced contractual protection, in Macau, the

consumer has to count on two more laws: Law No. 12/88/M of June 13 on Consumer Protection and Law No. 17/92/M of September 28 on General Contractual Clauses. According to the principle of *lex specialis derogate lege generalis*, these two pieces of law theoretically enjoy the priority of application in consumer contractual relations. The Law No. 12/88/M of June 13 on Consumer Protection recognizes that the consumer has the right to consciously reflect the decision of forming any contract. This provision can be understood as a potential device (or described more properly as a condition for further institutionalization) to allow "cooling-off period" for consumers before celebrating any contract. When examining the provisions relating to contract law in Civil Code and Commercial Code and those in Law of General Contractual Clauses, one can notice that Macau's legislator recognized that the importance of equilibrium between the contracting parties aiming at avoiding information asymmetries. Macau Law followed the Portuguese legal tradition which adopts the theory of "transaction costs": the uneven distribution of transaction costs due to informational asymmetries (regardless of business-to-consumer relations and business-to-business and even person-to-person relations) must be balanced by reviewing pre-formulated clause. Macau Law paid more attention to redress information disparities than restoring a more equal footing for the consumer during formation of contract. Macau Law does not forbid general clauses in the contract but to prevent abuse or misuse of them. It should be praised that the law focuses on "general conditions and terms" but not "standard contract" (contrato de adesão), since some pre-formulated terms imposed by one contracting party can become part of a contract, and this approach used by Macau legislator can be more favorable for consumer protection. The Law of General Contractual Clauses requests the party who drafted terms notify duly and timely all relevant information on contract terms to the other party, and the drafting party bears the burden of proof of such duties. In order to level out information asymmetries, the Law not only requires the legibility and accessibility of the terms, but also provides that terms must be easily noticeable, otherwise they shall be excluded from the

contract. The Law of General Contractual Clauses combines both absolutely nullity clauses and relatively nullity clauses (presumed abusive). Based on the blacklists, the clauses are considered null, void and non-existent. According to the grey-lists, the recipient party has to invoke the nullity of clauses or non-binding effect. In this case, the courts exercises the power to control ex officio to determine if exists any presumed abusive clause. It should be highlighted that the law contains also procedural provisions and confers the right to action to Consumer Council, professional associations and the Public Ministry (upon the request of any interested person) to prohibit or to recommend standard contract terms.

From a socio-economic perspective, Macau has been one of the most open economies in the world since the reversion to China in 1999 and the fundamental principles of "freedom of contract" and "private autonomy" enjoy a preeminent position. The legal doctrine still maintains the traditional ideology of legal rules on contract law. A consumer is not in a position of equal bargaining power and regulation for intervention is justified to achieve a substantive fairness and a social justice when one of the parties is deprived of his freedom of choice and expression of the self-determination, when one of the parties is able to exclude his liability in respect of a breach of the contract terms, when one of the parties in a transaction is not being informed with relevant and sufficient information by the other party and no adequate information is available due to market failures. Therefore, the "freedom of contract" and the "party autonomy" are not the best rules in consumer contracts. In addition to define the notion of "consumer" and the notion of "consumer contract", in the private law area, the main devices of consumer law are the imposition of the duty of information of the entrepreneur, the right of revocation of the consumer and the establishment of mandatory rules of law or contract regimes. So far, such law tools have not been granted and implemented in consumer law in Macau. In this sense, the provisions and the consumer's basic rights enshrined in the Law No. 12/88/M, of June 13 on Consumer Protection are very difficult to be effectuated. Some modern and new types of consumer

relations (for instance, sale of consumer goods, distance selling, package travel, e-commerce and credit card, etc.) have not been regulated yet in Macau and consumers have to depend on Civil Code and Commercial Code in concrete consumer relation. In case that a consumer understands standard terms in a way different from the entrepreneur's interpretations, it will be not easy for the consumer to defend his rights in judicial actions based on the available legal rules. For the time being, in many cases, the relationship between consumer law and civil code of Macau can be described as a relation of "passive-conflict", in other words, neither consumer law nor civil code is able to provide an effective protection for consumers. On the other hand, the legal consciousness of local consumers is still weak and the local community in general relied much on administrative tutelage in defending their interests (mainly through filing complaints at the Consumer Council). So far there is almost no information available about judicial decisions relating to consumer protection. As a matter of fact, many consumers brought small claims against the manufacturers, producers, retailers, salesmen or importers, however, the judicial decisions of the courts of the first instance in Macau (including the courts of small-claims) have never been published and some other disputes were settled by means of mediation and arbitration, of which the final decisions were kept confidential between the parties. Unfortunately, perhaps due to these facts and limitations, the consumer contract's relevance has not been given enough attention by the legal scholarship.

A POSSIBLE TOURIST ACT IN MACAU?

So far, there is no Tourism Law or any specific tourism regulation which aims to protect tourist-consumer rights in Macau. Recently, in Mainland China, the Tourism Law was adopted at the Second Session of the Standing Committee of the 12th National People's Congress of China on April 25, 2013, and shall come into force on October 1, 2013. The Tourism law in China applies to tours, vacations, recreations and other forms of tourism activities within the territory of China and the said forms of tourism

activities that are outbound but organized within the territory of China and the business activities providing relevant services for tourism activities. Taking into account that numerous outbound tourists' complaints are related to the frauds of travel agencies due to their offers of free-of-charge tours or even negative-charge tours, Article 35 of the Tourism Law specifies clearly that "travel agencies may not organize tourism activities at unreasonably low prices to lure tourists, and obtain kickbacks and other improper benefits through arranging shopping or separate charging tourism items". However, due to the principle of "one country, two systems", the Tourism Law of the mainland China will not be applied in the Special Administrative Region of Macau. Even though the Tourism Law regulates the activities of tourism operators including travel agencies organizing the touring group in the mainland China, it can hardly regulate their activities in the Special Administrative Region of Macau nor the activities of performance supports in Macau who have contractual relationship with the travel agencies in the mainland and assist them in the fulfillment of the obligations under the organized travel contract.

It is desirable that in the near future the legislator of Macau can also approve a tourism act which is able to perform in concert with the Tourism Law of the mainland China. This legislative project will be a pioneer cooperation under the principle of "One Country, Two Systems" and will make contribution to a creative solution for the conflicts of laws.

OVERVIEWS OF THE CONFLICT OF LAWS IN MACAU AND IN MAINLAND CHINA

4.1. Rules of Conflicts of Laws in Macau

At current stage, as far as the conflicts of laws of Macau about interregional or transnational obligational relations, Article 44 of Civil Code of Macau provides the following mandatory rules: "1. Non-contractual liability arising from unlawful act, risks or any lawful act is governed by the laws of the place where main acts (*lex lociactus*) cause injury; liability

arising from omission is governed by the laws of the place where the person liable should have acted. 2. If the laws of the place where the injury is caused consider the actor shall be responsible, but the laws of the place where an act was done do not consider as such, the first laws shall apply, provided that the actor shall be able to foresee the caused injury, in a place subject to that law, as a consequence of his act or omission. 3. If, however, the actor and the person aggrieved have the same habitual residence and occasionally stay abroad, the laws at the mutual habitual residence shall apply, without prejudice of the designated laws in the above items that should be applied indiscriminately to all people".

Under the Macau Civil Code, for infringements, the laws of the place of execution of infringement, the laws of the place where injury has, the laws at the mutual habitual residence of the infringer and the infringed may be applied on certain conditions. Wherever more than one law may apply, the legislator of Macau defines the criterion of the application of law paying special attention to protect the rights of the infringed.

4.2. Some Recent Developments of Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships and Implications for Macau

The Law on Choice of Law for Foreign-related Civil Relationships, which was adopted at the 17th session of the Standing Committee of the 11th National People's Congress on October 28, 2010, came into force on April 1, 2011. The Supreme Court of China promulgated on January 7, 2013 its first Judicial Interpretation on the Law of the on Choice of Law for Foreign-related Civil Relationships, according to the Article 19 this Judicial Interpretation will also apply for the application of laws in civil relationships related to Hong Kong and Macau.

Articles 3-5 and Articles 41-2 of the Law on Choice of Law for Foreign-related Civil Relationships are relevant for tourism-consumer disputes between the mainland China and Macau. Article 3 states a basic principle

"The parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law". Article 4 lists out if there are mandatory provisions on foreign-related civil relations in the laws of China, these mandatory provisions shall directly apply. Articles 5 further provides that if the application of foreign laws will damage the social public interests of the China, the laws of China shall apply. For contractual relations, Article 41 provides that "the parties concerned may choose the laws applicable to contracts by agreement. If the parties do not choose, the laws at the habitual residence of the party whose fulfilment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract shall apply". It should be noted that the Chinese legislator gave special attention to consumer contracts and Article 42 states that "The laws at the habitual residence of consumers shall apply to consumer contracts; If a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply".

It can be seen that under Chinese Law on Choice of Law for Foreign-related Civil Relationships, the parties of consumer contract are not allowed to choose the applicable law. Only the consumer is allowed to choose the applicable law and the applicable law to be chosen by the consumer must only be the laws at the locality of the provision of goods or services. To put into other words, for an inter-regional consumer dispute, the laws to be applied are the laws at the locality of the provision of goods or services chosen by a tourist consumer. If the tourist does not choose any applicable law, the laws at the habitual residence of the tourist will be applied. However, if an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services will apply.

It is appraisable that for the first time, Chinese legislator has set out clearly rules on the conflicts of laws of consumer contract. Nevertheless,

due to the complexity of tourism activities and the vulnerability of tourist, there is still much room for improvement. First, there is an increasing trend to include mandatory rules in the conflict law regime for consumer contracts. Mandatory rules should not be derogated, changed or restricted by contracts. Article 42 of Chinese Law on Choice of Law does not confirm that applying the law of consumer's residence is a mandatory rule on the one hand, nor specifies how party autonomy can be limited in consumer contract. Many consumer contracts are standard contracts in which tourist consumer is not well aware which law can provide best protection of his/her interests. Secondly, under the current provisions, tourists in the mainland have only one choice of application of laws: the laws at the locality of the provision of goods or services. It is quite often in outbound tourism activities travel agencies and the performance supporters (or local operators) are not always at the same place of one single jurisdiction. Thirdly, nowadays, more and more tourists are active consumers who travel to foreign countries or other regions to purchase goods and to enjoy services. Active consumer who travels to foreign territories and enters into contracts while abroad is generally exempt from the special choice of law rule for consumer contracts. It might not be necessarily the best solution to protect the tourists' interests by applying the laws at the habitual residence of consumers, in particular, when the substantive rules of the countries or regions of destination (*lex loci delicti, lex loci executiones*) offer better protection than the laws at the habitual residence of consumers.

Perhaps, in responding to the above-mentioned challenges, it is appropriate to develop a more equitable rules of private international law in light of the Sofia Statement on the Development of International Principles on Consumer Protection adopted by the International Law Association, in particular, "It is desirable to develop standards and to apply rules of private international law what would entitle consumers to take advantage of the most favourable consumer protection".

INNOVATIVE MEASURES ADOPTED BY MACAU TO BETTER PROTECT TOURIST-CONSUMER

5.1. Ex ante protection

In recent years, Macau has launched a number of innovative approaches aiming to provide better protection of tourist-consumer's rights.

Starting from 2001, the Consumer Council of Macau (CCM) has created a scheme called "certificated shops". In order to obtain a "Certified Shop" emblem, business operators must not have had any complaints filed against within the previous year. To maintain the membership, qualified shops must agree to abide by the code of conduct set out by CCM, which includes items such as offering after-sales service, providing accurate information about products and services, providing security with regard to transactions and providing dispute resolution services, namely to submit the disputes to the Consumer Arbitration Centre within 14 days of receipt of the complaints and to provide repair, replacement or refund.[4] Meanwhile, CCM has also established an "information-sharing" mechanism with various local governmental departments such as Macau Economic Services,[5] Macau Customs Services[6] and Macau Public Security Police to combat illegal actions which violate the rights of consumer. More importantly, CCM has signed quite a number of Cooperation Framework Agreements for Consumer Rights with Consumer's Associations in different regions of mainland China aiming to facilitate tourists' dispute settlements. One of the innovations in these Cooperation Framework Agreements is that a tourist can submit a complaint either to CCM while being in Macau or to

4 http://www.consumersinternational.org/our-members/member-activity/2012/07/macau.

5 Macau Economic Services is the authority to assist in the drafting and implementation of policies governing intellectual property and to supervise the full adherence to the legal precepts governing the manufacture of products in Macau, as well as not only the performance of economic activities and other operations subject to licensing, but also those of their relevant operators and companies. See http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_DSE_MD&locale=en_US.

6 The main responsibilities of Macau Customs Services include to prevent, combat and suppress commercial fraud and to protect intellectual property rights.

the Consumer Association of his/her domicile, then the case will be jointly handled and resolved by CCM and the relevant Consumer Association in the mainland.

As far as the tourism authorities, National Tourism Administration of China and Macau Government Tourist Office have issued a notice on Key Points of Contracts between Travel Agencies and Tour Operators Handling Mainland Tour Groups to Macau, which sets forth the responsibilities and obligations of travel agencies in both territories when providing services to tourists in Macau. In addition, according to the UNWTO, Macau's Tourism Crisis Management Office (GGCT) is a best practice example of crisis preparedness for the tourism industry. Tourism Crisis Management Office was established as a strategic coordination committee in 2007 to aid both Macau residents abroad and visitors to Macau in order to better improve the handling of emergencies for the travel and tourism sector.[7] Macau Association of Travel Services has entered into cooperation agreements with other counterparts in the mainland China to strengthen the self-discipline of travel industries and to launch inter-city operation, namely joining hands to enforce market order, establishing an inter-regional tourist integrity system, and joining forces to combat unfair competition practices such as "zero tour fee" and "negative tour fee", as well as other unscrupulous practices undermining consumer rights.

5.2. Ex post protection

According to the United Nation Guidelines for Consumer Protection as expanded in 1999 (paragraphs 32 and 33), "governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible… Governments should encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary

7 http://asiapacific.unwto.org/en/news/2012-10-24/Macau-s-tourism-crisis-management-office-example-tourism-best-practice.

mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers."

Compared with other consumers in general, tourists require a dispute settlement mechanism which allows them to resolve the disputes in shortest time, with least money, through the simplest procedures.

In Macau, a tourist can submit informal complaints either to Macau Government Tourist Office through a 24 hours Tourism Hotline or to Consumer Council of Macau. Alternatively, a tourist can rely on the Arbitration Center for Consumer Disputes of CCM if the amount in controversy is within MOP50.000,00 patacas. In general, CCM promotes conciliation at first and then applies arbitration for dispute settlements. As a last resort, in order to exercise the consumer's right, a tourist can even bring a lawsuit before the Courts of Small-Claims (Tribunal of Minor Civil Case)[8] where the subject matter amount does not exceed MOP50,000.00 patacas and special procedures will be applied. A pre-pleading mediation system has been introduced and no normal appeal will be allowed.

CONCLUDING REMARKS AND SOME THOUGHTS FOR THE CHALLENGES AHEAD

The empirical case study of Macau's tourist consumer protection has well illustrated the challenges of a sound development of international consumer protection in the area of tourism as follows:

Firstly, there is an increasing need to expand the scope of legal protection for tourist as consumer. Traditionally, many legal provisions which have been elaborated to protect a cross-border consumer belong largely to the scope of private international law, in particular, in the areas of torts and contracts. Tourists who are unfamiliar with languages, cultures, the structures of transactions and even the laws themselves of a country of destination need special protection. However, the existing legal institutions

8 For reference, see mainly Article 1285 of Civil Procedure Code of Macau and Administrative Regulation No. 34/2004.

(including Rome Convention and the Rome I Regulation) are far from being attuned to accommodate the tourists' rights, especially, those of active consumers. There is a need to create special rules of conflict of laws to protect tourists as consumers within the scope of private international law. Moreover, taking into account of the complexity of tourism activities and fast changing of technologies and international markets for mass tourism, more rules of public international law (such as international competition law, international administrative law and international humanitarian law) are equally important to contribute a more comprehensive protection of tourists' rights.

Secondly, in order to achieve an effective protection of tourist consumer, a future trend is to emphasize more on the intervention of public powers, judicial administrative organs and consumer's associations. The legitimate intervention of competent authorities and consumer groups can make good contributions in building a sound mechanism of consumer protection and in redressing the inequality between a consumer and business operator in terms of information and bargaining power.

Finally, since prevention of tourism disputes is always better than remedies, regional and international cooperation are more necessary than ever. Taking the references of the EU and the Mercosur, it is desirable to rely on the multilateral forum to create a global consensus on the standards of tourist protection, to overcome the existing blocks of jurisdictions and to create eventually a global "barrier-free" tourist area.[9]

9 See Marques, Claudia Lima, "Towards a Global Approach to Protect Foreign Tourists: Building Governance through a New Cooperation Net in Consumer and Tourist Issues", *The Global Financial Crisis and the Need for Consumer Regulation: New Developments on International Protection of Consumers, Committee on International Protection of Consumers ILA*, edited by Claudia Lima Marques, Diego P. Fernández Arroyo, Iain Ramsay and Gail Pearson, 2012, ASADIP, BRASILCON, UFGRS, Porto Alegre/ Asunción, OrquestraEditora.

EUROPEANIZATION OF THE POLISH LAW - CONSIDERATIONS ASSOCIATED WITH THE ADOPTION OF THE DIRECTIVE ON ADR IN CONSUMER DISPUTES

Dr Ewelina Cała-Wacinkiewicz and Dr Daniel Wacinkiewicz***

ABSTRACT

The adapted aim of this study is general characteristics and formal possibilities of the impact of the European Union law on the Polish law, which can be defined by way of great simplification as "Europeanization" of the latter. This, among its many dimensions (Europeanization of: administration, research, education, politics, language), also has a legal dimension, particularly interesting to us. This paper will therefore focus only on the EU law and its impact on the Polish law, as well as on the legal basis for the implementation of EU legislation onto the ground of the domestic legal order.

To illustrate the Europeanization processes running in this way we shall use the description of the status of a consumer and legal solutions aimed at strengthening his position in relation to entrepreneurs. Justification for so defined choice is twofold. Firstly, it is a representative example (in terms of adaptation of national legal systems to the standards of the European Union), and secondly, one relating to issues of particularly major importance for the functioning of the single European market. Said assumptions correspond to Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR). Its analysis will form an essential objective of considerations for which analyses outlined earlier are of introductory and subsidiary importance.

INTRODUCTION

It is a truism to say that the impact of international organizations on the states forming them is multi-faceted. However, it is necessary to be able to

* Assistant Professor, Department of International Law, Faculty of Law & Administration, University of Szczecin, Poland.

** Assistant Professor, Department of Public Economic Law, Faculty of Law & Administration University of Szczecin, Poland.

demonstrate that one of its manifestations is the impact of the law of these international law actors on national law. This effect is often of a far-reaching nature, causing the need for a change aiming at adjusting the national law to the standards created by international organizations. Depending on the legal status of the organization, the object of their activity, as well as the nature of the adopted resolutions,[1] said impact can be limited e.g. to a certain range of cases (as is the case of NATO).It may also extend to almost all state legislation, a perfect illustration of which is legislative activities of the European Union.[2] It is an organization in which the integration of states is so advanced that some want to prove its federal character.[3] Such a far-reaching degree of integration - which is a result of over 60 years of strengthening of the cooperation - (initially only) economic, and later also political – had to be based on a common mechanism of standardisation. As a result, at the basis of creation of today's European Union lay the need to harmonize national legal orders. The law thus became a fundamental instrument for adaptation and standardization of national legal orders often significantly different from one another. This need has extended to both: the relations between an international organization and its member states (horizontal approach), but partly also to the relations between states (vertical approach) forming it.

Taking this into account, the adapted aim of this study is general characteristics and formal possibilities of the impact of the European

1 For this on the ground of a national doctrine of the subject, *See for example*: Jerzy Menkes, AndrzejWasilkowski, Organizacjemiędzynarodowe. Prawoinstytucjonalne (Warszawa 2006); Natalia Buchowska, *Uchwałyorganizacjimiędzynarodowych w polskimporządkuprawnych – zarysproblematyki*, *in* [2]Prawowobecwyzwańwspółczesno ści, (Paweł Wiliński ed., Poznań 2005); Krzyszt of Skubiszewski, Uchwałyprawotwó rczeorganizacjimiędzynarodowych (Poznań 1965).

2 For its legal nature, *see:*EwelinaCała-Wacinkiewicz, Charakterprawny UniiEuropejskiej w świetleprawamiędzynarodowego (Warszawa 2007).

3 And so, as an example, as believed by A. Pliakos, the structure of the Union corresponds most to the concept of a federal state. *See more:*AsterisPliakos, *La nature juridique de L`UnionEuropéenne*, 29(2) Revue Trimestrielle de DroitEuropéen 187, 189 (1993). It may, as highlighted by A. von Bogdandy, be defined by the conceptual network of *Supra*-governmental federalism. See: Amin von Bogdandy, *Supra*nationalerFörderalismusalsIdee und WirklichkeiteinerneuenHerrschaftsform. Zur Gestalt der Europäischen Union nach Amsterdam, 61 (Baden – Baden 1999).

Union law on the Polish law, which can be defined by way of great simplification as "Europeanization" of the latter. This, among its many dimensions (Europeanization of: administration, research, education, politics, language), also has a legal dimension, particularly interesting to us.[4] The legal dimension of Europeanization, as stressed by K. Wach, means the convergence of the national law with the union law. Its result is, on the one hand, the transposing of the union law into the national legal order, and on the other hand, direct applicability of the EU law in Member States.[5]

This observation is additionally accompanied by an assumption according to which the process of Europeanization - for the purposes of these analyses - will be limited only to the law of the European Union (Europeanization in the narrow sense). Thus we leave outside the scope of analysis the law-making activity of regional organizations other than the European Union – e.g. the Council of Europe. However, this does not detract from its important role in the process of Europeanization. The impact of this organization on its member states - as in the case of the European Union - is significant, and this is so even due to the establishment of the European Court of Human Rights based in Strasbourg as the authority controlling the observance of rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950.[6] Only to flag up now, non-compliance with the provisions of this international agreement may result in Member States being held accountable both by other countries, as well as by natural and legal persons. If the Court recognises infringement thereof, it may award financial compensation, which is certainly a far-reaching sanction for failure to comply with international obligations that have become part of national legal orders.

4 More broadly on the subject of said dimensions: Krzysztof Wach, *Wymiaryeuropeizacji i jejkontekst*, 852 Zeszytynaukowe Uniwersytetu Ekonomicznego w Krakowie 29, 33 (2011).

5 Krzysztof Wach, *Supra note* 5, at 36.

6 Journal of Laws of 1993, No. 61, item 284 as amended (Pl).

This paper will therefore focus only on the EU law and its impact on the Polish law, as well as on the legal basis for the implementation of EU legislation onto the ground of the domestic legal order.

To illustrate the Europeanization processes running in this way we shall use the description of the status of a consumer and legal solutions aimed at strengthening his position in relation to entrepreneurs. Justification for so defined choice is twofold. Firstly, it is a representative example (in terms of adaptation of national legal systems to the standards of the European Union), and secondly, one relating to issues of particularly major importance for the functioning of the single European market. Said assumptions correspond to Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)**.**[7] Its analysis will form an essential objective of considerations for which analyses outlined earlier are of introductory and subsidiary importance.

The description of the formal aspect of the Europeanization[8] of the Polish law can be preceded by an ascertainment that the so-called "adjustment"[9] of legal systems, falling within the scope of meaning of this concept, in broad terms will mean transferring legal institutions that have developed on the

7 2013 O.J. (165), 63.

8 The concept of "Europeanization" is a concept fairly well developed on the doctrinal ground both in Poland and in the world. *See, for example*: Europeizacjaprawakrajowego: wpływintegracjieuropejskiejnaklasycznedziedzinyprawakrajowego, (CezaryMik ed., Toruń 2000); Europeizacjaprawapolskiego - wybraneaspekty, (BeataBieńkowska&Dariu szSzafrański eds., Warszawa 2007); Johan P. Olsen, *The Many Faces of Europeanization*, 40(5) Journal of Common Market Studies 921 (2002); The Politics of Europeanization, (Kevin Featherstone& Claudio M. Radaelli eds., Oxford 2003); Hellen Wallace, *Europeanization and Globalization: Complementary or Contradictory Trends,* 5(3) New Political Economy 369 (2000); Claudio M. Radaelli, *Europeanisation: Solution or problem?,*8(16) European Integration online Papers 1 (2004); Frank Schimmelfennig, *Europeanization beyond Europe,* 4(3) Living Reviews in European Governance 4 (2009); Trine Flockhart, *Europeanization or EU-ization? The Transfer of European Norms across Time and Space*, 48(4) Journal of Common Market Studies 787 (2010).

9 The term adopted after: Anna Gąsior-Niemiec, *Pojęcieeuropeizacji. Wybraneproblemyteoretyczne i metodologiczne (część 1),* 2 Polityka i Społeczeństwo 73, 74 (2005).

western European continent onto the ground of the Polish law.[10] In turn, in narrow terms – transferring legal institutions developed by the European Union as the "Europeanization is linked foremost to the organizational and administrative power of the European Union".[11]

One needs to bear in mind though that the legal dimension of Europeanization, being the subject of these analysis, will also be subject to further processes of "adjusting", going over to the grounds of various fields of law such as criminal, civil, administrative, and economic, and finally the law of the protection of competition and consumers.

The impact of the legislation of international organizations on the Polish law would not be possible were it not for the provisions of the Constitution of the Republic of Poland of 2 April 1997[12] - the most important act in the Polish legal order. Formally, they allow the validity and application of EU law. The provisions, which will be described later in the paper, are of a general nature and deal with international organizations in general - thus referring to the European Union indirectly.

As already noted, as an international organization, the European Union affects the whole state legislation due to the advancement of integration processes taking place within it. Their consequence is, inter alia, the dual legal system of this organization, which is formed by the so-called primary and secondary legislation.

EU primary law means classic international agreements. It is to them that the provisions of Art. 87 of the Constitution apply, placing ratified international agreements among universally binding sources of the Polish law. Furthermore, such agreements will be directly[13] applicable, having - it

10 *Cf.:* Zbigniew Leoński, *Wprowadzenie, in* Europeizacja prawa administracyjnego, 13 (Wrocław 2005).

11 John Borneman and Nick Fowler, *Europeanization*, 26 Annual Review of Anthropology 487, 488 (1997).

12 Journal of Laws of 1997, No. 78, item 483 (Pl).

13 An interesting approach in the context of the European Union law to direct application of this law was introduced by the European Court of Justice in Administration of State Finance v. Simmenthal SpA. In its view this means that the provisions of this law

should be stressed - precedence over an act in the event of a collision with it (Art. 91 para. 1 and 2 of the Constitution). The result is that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community adopted on 13 December 2007,[14] constituting the foundation of today's European Union, will enjoy on the ground of Polish law the so-called precedence over an act, referred to as "the principle of the primacy of international agreements." It gives it a special position and rank in the legal system.

Things are slightly different when it comes to secondary legislation. Here (being aware of a certain simplification) one should mention - as its forms of a binding nature - directives, regulations and decisions. A catalogue of these acts does not bear too much significance from the point of view of the Polish Constitution. It has already been stated that the applicability of the law of international organizations stems from its provisions. According to Art.91 para. 3 of the Constitution, if it results from an act constituting an international organisation, the law applied by it is applied directly, also having precedence in the event of a collision with laws. The provisions in question thus give the possibility of applying secondary legislation of the European Union - in constitutional terms understood as the law of an international organization.

The discussed provisions of the Polish Constitution fully correspond to the previously cited way of understanding the processes of Europeanization. They provide for the possibility of direct application of, for example, directives as acts of EU secondary legislation, opening in a sense the national legal order to its Europeanization. Hence rather obvious seems a view that the above outlined formal aspect of this phenomenon has its own normative dimension, expressed by the provisions of the Constitution as the basic law.

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have full power uniformly in all Member States. The directly applicable laws are the source of rights and obligations for all those that are concerned. See: Case 106/77, AmministrazionedelleFinanzedelloStato v SimmenthalSpA., 1978 E.C.R*00629.*

14 Journal of Laws of 2009, No. 203, item 1569 (Pl).

DIRECTIVE ON CONSUMER ADR

The European Union law affects many aspects of public life. As emphasized above, from the point of view of citizens most noticeable are changes in those areas of law that affect them directly.[15]

Such an area of life is certainly consumer law as not only are we all consumers, but above all, provisions covered by the scope of this field form an important part of EU law. Through its regulations, and secondary legislation in particular,[16] the Polish law has changed (and is still changing).[17] Therefore, at the outset already it is worth highlighting that major changes in the law of competition and consumer protection occurred in Poland under the influence of EU legal achievements, referred to as *acquis communautaire*. Already during its membership in the European Communities (since 1992), and then in the European Union, Poland began the process of harmonizing its legislation with EU regulations.

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15 BeataBieńkowska&DariuszSzafrański, *Wprowadzenie, in*EUROPEIZACJAPRAWAPOLSKIEGO – WYBRANEASPEKTY, VII (BeataBieńkowska&DariuszSzafrański eds., Warszawa 2007).

16 Only as a way of signalling, See: Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L 271), 0016.; Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts, 2009 O.J. (L 33), 10.; Commission Delegated Regulation (EU) No 1155/2013 of 21 August 2013 Amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the Provision of Food Information to Consumers as Regards Information on the Absence or Reduced Presence of Gluten in Food, 2013 O.J. (L 306) 7.;Commission Implementing Regulation (EU) No 828/2014 of 30 July 2014 on the Requirements for the Provision of Information to Consumers on the Absence or Reduced Presence of Gluten in Food, 2014 O.J. (L 228), 5.;Commission Decision of 14 September 2009 Setting up a European Consumer Consultative Group, 2009 O.J. (L 244), 21.;Commission Implementing Decision of 24 January 2013 Adopting Guidelines for the Implementation of Specific Conditions for Health Claims Laid Down in Article 10 of Regulation (EC) No 1924/2006 of the European Parliament and of the Council, 2013O.J. (L 22), 25.

17 The issues of consumer rights gained particular importance with the moment of introduction in Poland in 1989 of political changes introducing principles of the market economy in place of the former so-called centrally planned economy, characteristic of socialist countries of this part of Europe. The first law relating directly to these issues was passed already after regime transformations in Poland, dated 24 February 1990 and was devoted to counteracting monopolistic practices, Journal of Laws of 1997, No. 49, item 318 as amended (Pl).

The main impact on these regulations has been and is to this day held by secondary legislation, particularly directives. It is them that should be assigned the status of legislation by which Europeanization of the Polish law is carried out most fully, not only in the area of consumer and competition protection, but also, evaluating the overall process, from the perspective of other branches of the law. This is due to their nature, since by binding Member States of the European Union as regards the aim they grant them the freedom to choose methods and forms of its implementation.[18] What is particularly important is the fact that states have an obligation to adapt their legislation to the provisions of the Directive within the deadlines specified in directives.

The above assumptions concerning directives in general are apparent in the Directive on consumer ADR which is the subject of this study. Its transposition into a domestic legal order has been determined by the provisions of Art. 25, which imposed on Member States an obligation to bring into force statutory, executive and administrative provisions necessary to implement said Directive – no later than 9 July 2015.

At the core of the adoption of this act (and designation of the relatively short implementation period) lay the recognition of the need for action in EU countries, aiming to ensure effective functioning of the system of alternative - in relation to common courts of law - methods of resolving disputes concerning consumers. The need for this type of action arose from a critical assessment of both the existing legal solutions and the practice of their application.

The search for an alternative to the common judiciary - not only costly from the point of view of states, but also not always fully available (if only

18 Their status is defined by the provisions of Art. 288 of the Treaty on the Functioning of the European Union in the version established by the previously cited Treaty of Lisbon. In addition, the European Court of Justice in its case law has determined the character of directives numerous times. *For example, see*: Case 148/78, Criminal proceedings against TullioRatti, 1979 E.C.R. *01629;*Case 8/81, Ursula Becker v FinanzamtMünster-Innenstadt. 1982 E.C.R. *00053;*Case C-271/91, M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority, 1993 E.C.R. *I-04367*.

because of the numerous court fees and costs imposed on natural and legal persons) - prompted the European Union to put pressure on extra-judicial (out-of-court) consumer dispute resolution. The process of changes of Polish legislation put into motion by the ADR Directive seeks to achieve objectives expressed in it. An important role in terms of developing the concept of implementation of the provisions of the ADR Directive fell on a key - in the Polish political system - body: the President of the Office of Competition and Consumer Protection.

This is reflected in Information containing a description of the implementation variants of Art. 5 of the Directive in question,[19] annexed to his letter of 9 April 2014. In accordance with its content, "activities of various bodies settling disputes in a way alternative to court litigation is an important complement and relief for the common judiciary and should be developed as it provides consumers with more complete access to a broadly understood administration of justice. Such a tool gives them an opportunity for a quick and inexpensive resolution of disputes arising from transactions commonly concluded in everyday life".

Given that the ADR system in Poland is based on two basic forms (arbitration mainly in consumer cases and mediation) and is not greatly developed, provisions of the Directive in question definitely have a significant character. Its goal is not only an extension, but also strengthening and giving greater effectiveness to the ADR system applicable to domestic and cross-border transactions. This is to serve - in accordance with Art. 1 of the Directive – the achievement of a high level of consumer protection and thereby contributing to the proper functioning of the internal market by providing consumers with the possibility of voluntary filing of complaints against traders to entities offering independent, impartial, transparent, effective, quick and fair methods of alternative dispute resolution.

19 The Office of Competition and Consumer Protection, www.*uokik.gov.pl/download.php?id=1138, (last visited August 30, 2014).*

The Directive - making a preliminary assessment of its provisions - quite generally defines the responsibilities assigned to Member States, leaving them freedom in the shaping of the ADR system. The most important duties are those concerning:

1. facilitating consumer access to ADR proceedings and providing opportunities to bring disputes before this method of dealing with them (Art. 5 of the Directive),
2. ensuring that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial (Art. 6 of the Directive),
3. ensuring transparency of functioning of ADR (Art. 7 of the Directive),
4. ensuring effectiveness of ADR (Art. 8 of the Directive),
5. ensuring fair treatment of parties (Art. 9 of the Directive),
6. ensuring voluntariness of proceedings (Art. 10 of the Directive),
7. ensuring legality of proceedings (Art. 11 of the Directive),

In the context of provisions of the ADR Directive it should be noted that in Poland the process of implementing its provisions has not yet been completed. And although appropriate legislation has not adopted, one can safely assume that Poland, conducting the implementation of the provisions of the Directive into a domestic legal order, has chosen the so-called mixed variant. This means that the ADR system will be based on both "business and public entities". The adoption of this model seems to be the golden mean which gives wide possibilities to consumers pursuing claims arising from violations of their rights. The ADR system - which is the intention of the Directive – being a viable alternative to the common judiciary, based on the cooperation of business and public entities, will form a coherent and functional structure. Given that the corresponding target must be achieved in other European Union countries, it can be assumed that the actual protection of consumer rights will gain a level of security higher than before.

This level becomes particularly important in the face of noticeable internationalization of social life, expressed even in the increase in the number of cross-border transactions. Standardization of legal provisions in Member States will therefore result in an increase in consumers' sense of security in the conducted trade transactions. This in turn will translate into the implementation of free movement of goods and capital, and thus the implementation of fundamental freedoms of the single internal market in the European Union.

SUMMARY

The analysis conducted in this paper showed beyond any doubt that the increase in real consumer protection results mainly thanks to the implementation of the EU legal acquis on the ground of domestic legal orders. The Europeanization of the Polish law thus taking place through legislative activities of this international organization is of fundamental importance. It is reflected in a number of dimensions. And therefore:

1. In the context of the genesis of legal regulations serving the protection of consumers' rights in Poland, one can clearly state that the laws dedicated to this social group would not be as prevalent had it not been for the fact of "forcing" by the European Union of certain legal regulations on their Member States. It is to this international organization that Poland owes its present shape and normative scope of regulations making up the consumer protection law.

2. As already signalled, the process of Europeanization through the provisions of the ADR Directive has been launched in Poland and the search for an appropriate and optimal model of implementation of the provisions of the ADR Directive shows that Poland is not indifferent to its course of development. The directory of changes imposed by the scope of provisions of the Directive in question, of fairly fundamental importance, will certainly result in the strengthening of the role and importance of methods of alternative resolution of consumer disputes.

Because the process of Europeanization in this area is not complete yet, we cannot make a univocal assessment of its progress. But certainly, not only will the ADR Directive bring about change on the line of the European Union and its Member States, but it will also affect Member States in their mutual relations. This in turn will result in the fact that when concluding trade transactions in other EU countries we will feel safe as consumers.