

SCTMG 2023
International Scientific Conference «Social and Cultural Transformations in the Context of
Modern Globalism»

CUSTOMARY LAW STATUS TRANSFORMATION IN THE LAW
OF THE SEA

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Abstract

The article analyses the status of legal custom and changes in it as objectively established as a result of repeated revision of the rule of social behaviour, based on considerations of its expediency and usefulness, which is recognised by the state as a legalised form of law. The practical procedure for certifying the customs of commercial seaports differs significantly from the procedure approved by the legislation. In order to avoid unfair practice of certain economic entities in the port, which have no authority over their counterparties, try to use the customs of the ports to confer such authority on themselves, we propose to pay attention to the provision of the Federal Law. It provides for the establishment by the federal executive authority authorised by the Government of the Russian Federation of the General Rules of Navigation and Standing of Ships in Seaports, on the Approaches thereto and Mandatory Ordinances in the Seaport. The inclusion of the existing rules of conduct enshrined by customs into the normative act directly devoted to the rules of conduct in the seaport will abolish the lengthy, time-consuming and financially costly procedure of certification. The formulated conclusions can be applied for further research of commercial seaport customs within the framework of jurisprudence and other sciences by jurists and practitioners.

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Keywords: Commercial seaport customs, rules, social behaviour, time-consuming

1. Introduction

One of the oldest phenomena in the history of mankind is customary law. A comprehensive understanding of the historical process of the emergence of law is impossible without an in-depth study of legal customs, their genesis, methods of implementation and their place in the legal systems of various states at different stages of existence.

Although customary law can be called the primary source of rules of behaviour, the attention of the scientific community was drawn to it only in the early 19th century, not by jurists, but by historians and ethnologists. Legal scholars consider customary law as a historically valuable source, but in modern conditions it has little relevance. This attitude is undoubtedly due to the status of customary law in the legal systems of modern states, some of which do not recognise custom as a source of law at all.

The development of legal systems assigns a secondary role to custom, allowing its application only when there is a gap in the applicable law, and there is no agreement between the parties. It should be noted that international law, in particular maritime law, assigns a significant role to custom.

Currently, each commercial seaport has its own Code of Customs (e.g. Novorossiysk Commercial Seaport Code of Customs, Rostov Port Code of Customs, etc.). Moreover, the customs of the ports of one country will differ significantly due to the specific geographical location, specialisation of the port, scale of its activities and other factors.

2. Problem Statement

Each commercial seaport has its own Code of Customs (e.g. Code of Customs "Novorossiysk Commercial Seaport", Code of Customs of the Port of Livorno, Code of Customs of the Port of Piombino, etc.). Commercial customs define certain issues related to the distribution of rights of the shipper, consignee and carrier in the process of delivery of goods from the seller to the consignee. Banking customs provide rules for the settlement of payments for the carrier's services. The Code of Customs often contains provisions on a port operation mode, services provided by the port, rules of ship handling, guarantees, port dues, berthing of ships in the port, at the roadstead, at the quay. There are actions to compensate for damages in case of damage to the ship or port facilities, accounting of berthing time in the port, calculation of berthing time, shipowner's and port's liability, methods of cargo handling, priority of vehicle handling, ship's duties, procedure and conditions of cargo storage in the port warehouses and other conditions.

However, even at present there is ambiguity in understanding the essence of legal custom and its place in the system of sources of law, both in the Russian and other legal systems.

3. Research Questions

Scientific novelty of the research is determined by its relevance and is expressed in the fact that the planned theoretical, practical conclusions are an important addition to the knowledge in the field of theory and history of the state and law of both domestic and foreign countries, and in the field of maritime

private law. The formulated conclusions can be applied for further research of commercial seaport customs in the framework of jurisprudence and other sciences by jurists and practitioners.

Based on the above, the low degree of development of the theoretical basis, the need to clarify the role of customary law in the regulation of legal relations in the port, the needs of practice, determine the topic of this study and its relevance.

The object of the study is the legal status of customs of commercial seaports, the form of its consolidation and sanctioning in the conditions of globalisation in the modern period in the Russian Federation.

4. Purpose of the Study

The main objective of the study is to fill the gap existing in the domestic theoretical and legal science regarding the customs of commercial and maritime ports, their place, role, significance and authorisation procedure.

5. Research Methods

The normative-legal base of the conducted research consists of the provisions of normative-legal acts of the state bodies of the Russian Federation. These are the Code of Merchant Shipping of the Russian Federation, the Federal Law "On Sea Ports in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation". They include the Rules for Interpretation of Incoterms-2010, Regulations "On the Procedure of Certification of Customs of Sea Ports in the Russian Federation by the Chamber of Commerce and Industry of the Russian Federation", as well as the Code of Customs of Commercial Sea Ports of the Russian Federation.

In the process of research, we used general scientific and special methods of cognition, based on the principles of objectivity and historicism, continuity and systematic scientific analysis. They are generally accepted in legal science, namely the methods of structural and functional analysis, a formal-legal method, a specific-historical method, a method of comparative law.

6. Findings

The main part of customary norms is systematised and codified; accordingly, customary law does not die out, only the form of fixing the rules of conduct changes, and customary norms in their origin are equated with the dictates of the state.

Interaction between States on the unification of maritime legislation is impossible without the participation of international organisations, which rationalise the legal regulation of maritime transport legal relations, in particular, through the issuance of legal acts.

International maritime customs and customs of commercial seaports still play an important role in the regulation of legal relations in transport, applied in the presence of a gap in the current legislation, despite the ongoing processes of digitalisation of the maritime transport industry (Brikota et al., 2018; Baburina & Kuznetsova, 2020). The Code of Merchant Shipping of the Russian Federation by agreement of the parties, as well as in cases of incompleteness of the applicable law in determining the type of

accident, determining the amount of general accident losses and their distribution, allows the application of international merchant shipping customs.

So, in international law, especially in maritime law (Lantseva & Kulikovskaya, 2022), legal custom continues to occupy a significant niche in the regulation of legal relations. Most of the maritime customs were enshrined in international treaties. In 1936, the International Chamber of Commerce issued the Code of International Rules for the Interpretation of Commercial Terms, called "Incoterms" (International Commercial Terms), currently in force in the 2010 edition. The York-Antwerp General Accident Rules, which set out the usual practice for the allocation of losses between shipowner and cargo owner, adopted by the non-governmental International Maritime Committee, are widely used in maritime law. The customs of commercial seaports are united into one Code of Commercial Seaport Customs.

Each vessel during its stay in a foreign port is obliged to comply with the laws and regulations, as well as the orders of the authorities of the coastal state, including the customs of commercial seaports. On the territory of the Russian Federation alone, there are 67 ports. There is no objective possibility to pass on customs and unwritten laws from father to son, from generation to generation, as in the distant past. Therefore, the question of enshrining the existing customs in the legislation arises more and more often.

On the one hand, the moment a legal custom is enshrined in legislation; it loses its status and becomes a legal norm. On the other hand, the consolidation of customs simplifies their enforcement, makes it possible to familiarise oneself with the legal norm reflected in the custom. All this should ultimately lead to a reduction in the number of disputes.

Let us turn to foreign experience of fixing the customs of commercial seaports. For example, the Italian ports of Livorno, Piombino and Portoferraio, as well as Russian ports, have Codes of Customs. However, unlike the codes of customs of Russian ports, the codes of customs of Italian ports do not duplicate each other and do not contain prescriptions of normative acts in force on the territory of the country. For example, the Code of Customs of Piombino port contains only 7 articles.

Let us pay attention to the historical experience of consolidation of maritime customs on the territory of Russia. The study of maritime trade customs in pre-revolutionary Russia was fragmentary and faced a number of difficulties. Due to the fact that customs were applied when the interests of the participants of trade turnover clashed in court, when the custom substantiated their claims, only customs reflected in court decisions were available for study. However, not all of the applied customs surfaced in court disputes. Professor D. Meyer in his article "Legal research on the commercial life of Odessa" cited the maritime customs that became known to him, applied in the port of Odessa (Meyer, 1955). In the XVIII century, count P.I. Shuvalov was given to the White Sea fisheries. The count began his possession by asking the Mezen seafarers to inform him about the laws, which were known to every industrialist of the north and concerned the conditions of artisanal sea fisheries, division of production, transport of cargoes and assistance to those who perished at sea. The document presented by the Pomorians was transcribed in Arkhangelsk by the scientist of the Russian Academy of Sciences, N.Y. Ozertsovsky, after which it became the property of the Russian public under the name of the Maritime Statute of the White Sea (Badigin, 1956). The customs of the Novorossiysk seaport began to develop simultaneously with its creation in the XIX century (Simonova, 2022).

The practice of certification of collections of seaport customs by the Chamber of Commerce and Industry took place in Russian ports during the Soviet period. Along with the formation of the Russian Federation, they decided to follow a similar approach to the certification of seaport customs. However, the established procedure does not remove the problem of their application.

Art. 3 of the Federal Law "On Sea Ports in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation" states that commercial seaport customs are rules of behaviour that have developed and are widely used in the provision of services in the seaport and are not provided for by the legislation of the Russian Federation. The Chamber of Commerce and Industry of the Russian Federation testifies the customs of seaports in accordance with paragraph 3 of Article 15 of the Law of the Russian Federation "On Chambers of Commerce and Industry in the Russian Federation". The Regulation "On the procedure for certification of seaport customs in the Russian Federation by the Chamber of Commerce and Industry of the Russian Federation" provides for the following procedure for certification of seaport customs.

The Chamber of Commerce and Industry of the Russian Federation (hereinafter referred to as CCI RF) shall receive an application signed by the captain of the relevant seaport or a person substituting him (Abramyan & Golubkina, 2019). The text of the seaport customs, a written opinion of the territorial chamber of commerce and industry, in whose territory the relevant seaport is located, as well as written opinions of organisations that apply these customs in practice or are directly related to them (shipowners, their agents, forwarders, etc.), justifying the expediency of certification of seaport customs. CCI RF charges a fee for certification of seaport customs.

The CCI RF sets the following requirements for registered customs:

- i. customs must not contradict current legislation, as well as generally recognised principles and norms of international law and international treaties of the Russian Federation;
- ii. customs must be definite and sustainable;
- iii. customs should be broadly applicable to the provision of services in the port.

The applications are reviewed by a standing working group established by the CCI of the Russian Federation for expert examination and approval of seaport customs submitted for certification. It consists of representatives of the CCI RF, representatives of the Ministry of Transport of the Russian Federation and other interested organisations (unions, associations of shipowners, forwarders, ship agents, etc.), as well as representatives of other federal executive authorities.

Direct certification of seaport customs is carried out by the Chamber of Commerce and Industry of the Russian Federation by issuing to the applicant a certificate of registration of the relevant custom. The original text of the seaport custom with the assigned registration number and the stamp of the Chamber of Commerce and Industry of the Russian Federation on its registration shall be returned to the applicant. The texts of certified seaport customs are published in CCI RF publications and posted on the official web-page of the CCI RF.

The Federal Law was adopted in 2007, the Regulation "On the Procedure for Certification by the Chamber of Commerce and Industry of the Russian Federation of the Customs of Seaports in the Russian Federation" was initiated in 2009. However, by October 2010, the customs of none of the ports of the Russian Federation had been submitted to the Chamber of Commerce and Industry of the Russian

Federation for consideration. In October 2010, in Novorossiysk, an enlarged meeting of the Chamber of Commerce and Industry of the Russian Federation, the Maritime Arbitration Commission under the Chamber of Commerce and Industry of the Russian Federation and the Association of Chambers of Commerce and Industry of Port Cities with representatives of territorial chambers of commerce and industry and seaport business was held. The topic was "Practice of Certification of Seaport Customs in the Russian Federation". The participants of the meeting attributed this situation to the fact that the very principle of formation of seaport customs is not clear. At the meeting of the interdepartmental working group on examination and certification of seaport customs on 25 November 2010, Igor Zharinov made a report in which he proposed the following procedure for formation and certification of customs of the Novorossiysk seaport.

The Novorossiysk Seaport Business Commission of the Novorossiysk Chamber of Commerce and Industry, consisting of representatives of all marine terminal operators and leading freight forwarding, agency and surveying companies doing business at the port, compiles a compendium of seaport customs. The editorial review of the compiled text is carried out by the Editorial Board formed from representatives of the marine terminal operators. When the text was edited and signed by all heads of marine terminal operators, it reminded a text of the compilation of customs and was handed over to the seaport Harbour Master for review, signing and subsequent submission for certification to the Chamber of Commerce and Industry of the Russian Federation. The Novorossiysk Chamber of Commerce and Industry will be responsible for publishing and distributing the certified compendium of Novorossiysk seaport customs.

In this way, a signal copy of the compilation "Customs of the Novorossiysk Seaport" was formed, which was repeatedly returned to the Novorossiysk Chamber of Commerce and Industry for revision by the working group under the Chamber of Commerce and Industry of the Russian Federation for expert examination and approval of the seaport customs. It is not quite clear why the working group at the Chamber of Commerce and Industry of the Russian Federation interacts with the territorial chamber of commerce and industry to form the text of the compilation of customs. Although, in accordance with article 3 of the Regulations "On the Procedure for Certification by the Chamber of Commerce and Industry of the Russian Federation of the Customs of Seaports in the Russian Federation", the text of the compilation of customs must be submitted for certification by the Harbour Master or a person replacing him. The territorial chamber of commerce and industry only gives an opinion on the already formed text of the compendium. Organisations applying these customs in practice or directly related to them (shipowners, their agents, forwarders, etc.) should also only provide written opinions substantiating the expediency of certification of seaport customs on the already formed text of the compendium, but not its original text.

Therefore, there is a return to the vicious practice, when individual port business entities, who do not have any authority over their counterparties, attempt to use port customs to confer such authority on themselves.

7. Conclusion

Taking into account foreign and domestic historical experience, we propose to extract from the texts of the Collections of Customs the provisions stipulating directly the customs of certain ports and

certify them. Since most of the content of the Collections of Customs in Russia is a recitation of the normative-legal acts in force in the territory of the state. We propose to include directly customary norms into the Collections of mandatory regulations in the seaport. The text of the Federal Law "On Sea Ports in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation" already contains a solution to the problem of formation of compilations of seaport customs. Art. 13 of the Federal Law "On Seaports in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation" provides for the establishment by the federal executive authority, authorised by the Government of the Russian Federation of the General Rules of Navigation and Mooring of Ships in Seaports and on the Approaches thereto and Art. 14 of the said Law provides for the development of Mandatory Ordinances in the seaport reflecting the peculiarities of a certain seaport. The Seaport Mandatory Ordinances contain the rules for ships entering and leaving the seaport, rules for the mooring of ships in the seaport, information on the technical capacity of the seaport to receive ships, etc. Mandatory regulations at the seaport cannot but reflect the customs of the relevant seaport, which are the rules of behaviour that have developed and are widely applied in the course of rendering services at the seaport. Also Article 17 of the Federal Law "On Sea Ports in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation" provides for the issuance by the federal executive body in the field of transport of Rules for the provision of services at the seaport. These are namely the Rules for the provision of cargo handling services at the seaport and the Rules for the provision of other services usually provided at the seaport. If the compilations of seaport customs are favourable, they will in any case just duplicate the provisions of the above-mentioned decrees and rules.

An alternative way of solving the above problem is to codify the customary norms applicable to all Russian commercial seaports.

Both proposed solutions imply that customary norms lose their legal status. Obviously, this position is acceptable because, firstly, it achieves the set objectives. Namely, it simplifies the enforcement of customary norms. And secondly, it corresponds to the international tendency to enshrine customs in normative legal acts.

References

- Abramyan, C. K. K., & Golubkina, K. V. (2019). Interdepartmental interaction of water transport management bodies of the Russian Federation. *Marine Intelligent Technol.*, 1-2(43), 82–85.
- Baburina, O. N., & Kuznetsova, G. V. (2020). Prospects for digitalisation of international shipping. *Marine Intelligent Technol.*, 4-4(50), 67–72. <https://doi.org/10.37220/MIT.2020.50.4.099>
- Badigin, K. (1956). *On the Student Seas*. State Publ. House of Geograph. Literat.
- Brikota, T. B., Delenyan, B. A., Ksenz, M. V., & Fedorova, N. B. (2018). Prospects for the development of sea transport of the Russian Federation in world trade. *Europ. Res. Studies J.*, 21, 823–832. <https://doi.org/10.35808/ersj/1333>
- Lantseva, B. Y., & Kulikovskaya, I. S. (2022). Towards the Evolution of International Legal Norms on the Protection of the Marine Environment. *Quest. hist.*, 7-1, 150–154. <https://doi.org/10.31166/VoprosyIstorii202207Statyi07>
- Meyer, D. (1955). *Juridical Collection*. Mysly.
- Simonova, O. V. (2022). The History of the Establishment of the Novorossiysk Sea Port in the 19th Century: Just the Facts. *Quest. hist.*, 12-1, 66–69. <https://doi.org/10.31166/VoprosyIstorii202212Statyi23>