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MODERN PROBLEMS OF INTERNATIONAL PRIVATE LAW

СУЧАСНІ ПРОБЛЕМИ МІЖНАРОДНОГО ПРИВАТНОГО ПРАВА

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This article reveals the conceptual problems of the development of private international law at the current stage. In connection with the fundamental reform of Ukrainian legislation in many different spheres of our existence, changes in private law are also taking place today, especially against the background of the acquisition of the EU candidacy. Any democratic state strives for cooperation, first of all, in the field of simplifying the mechanism for realizing the rights and freedoms of its citizens, as well as the observance of universal values.

The most pressing issue is that each state has its own legal system. Effective mechanisms for the implementation of material legal and conflict of laws norms have been formed. Most norms are codified transformation. The very name of the field – «private international law» and its legal nature – causes certain discussions. The main approaches to its definition are as follows: as a private legal branch of national law, as a component of international public law, or as supranational law.

The development of international private law is influenced by: a) internationalization of economic life; b) a sharp increase in population migration as a result of wars, various conflicts, political and national reasons, as well as for the purpose of employment and education; c) scientific and technical progress, which makes possible the transnational use of information data, achievements of science, technology and culture.

Private legal relations are not only property and personal non-property relations covered by civil law (property, intellectual property, obligations, including delict, inheritance), but also relations regulated by the rules of economic (commercial), family, labor and procedural law in their private law aspect.

Today there is a problem of competition between various international organizations. It needs an urgent solution by defining the goals and principles of work of each of them, or creating a single international organization for the unification of norms of private international law.

Rules of unification can potentially reduce opportunities for competition between legal systems. This reduces the variability of experiments on the way to solving this issue. Mutually agreed decisions and the conclusion of unifying agreements are the optimal way to improve legislation in the field of international private relations. The role of international organizations, which are engaged in the unification of norms of international private law, is of decisive importance for the internationalization of legal regulation.

Key words: international private law, unification of private law, subject of international private law, sources of international private law.

У цій статті розкриваються концептуальні проблеми розвитку міжнародного приватного права на сучасному етапі. У зв'язку з докорінним реформуванням законодавства України у багатьох різних сферах нашого буття, сьогодні відбуваються й зміни приватного права, особливо на тлі набуття кандидатства до ЄС. Будь-яка демократична держава прагне до співпраці, перш за все, у сфері спрощення механізму реалізації прав та свобод своїх громадян, а також дотримання загальнолюдських цінностей.

Найбільш гострим питанням є те, що кожна держава має свою власну правову систему. Сформовано ефективні механізми реалізації матеріально-правових та колізійних норм. Більшість норм є кодифікованими трансформацію. Викликає певні дискусії і сама назва галузі – «міжнародне приватне право» та її правової природи. Основні підходи щодо її визначення такі: як приватно-правової галузі національного права, як складової частини міжнародного публічного права чи як наднаціонального права.

На розвиток міжнародного приватного права впливають: а) інтернаціоналізація господарського життя; б) різке посилення міграції населення унаслідок воєн, різного роду конфліктів, політичних і національних причин, а також з метою працевлаштування, отримання освіти; в) науково-технічний прогрес, що робить можливим транснаціональне використання інформаційних даних, досягнень науки, техніки і культури.

Приватно-правові відносини – це не тільки майнові і особисті немайнові відносини, що охоплюються власне цивільним правом (власності, інтелектуальної власності, зобов'язальні, в тому числі деліктні, спадкові), але також відносини, в регульовані нормами господарського (комерційного), сімейного, трудового та процесуального права в їх приватно-правовому аспекті.

Сьогодні виникає проблема конкуренції різних міжнародних організацій. Вона потребує нагального вирішення шляхом визначення цілей та принципів роботи кожної з них, або ж створення єдиної міжнародної організації щодо уніфікації норм міжнародного приватного права.

Норми уніфікації потенційно можуть знижувати можливості для конкуренції між правовими системами. Це знижує варіативність експериментів на шляху до вирішення цього питання. Взаємоузгоджені рішення та укладення уніфікуючих договорів – це оптимальний шлях до удосконалення законодавства у сфері міжнародних приватних відносин. Роль міжнародних організацій, які займаються уніфікацією норм міжнародного приватного права, має визначальне значення для інтернаціоналізації правового регулювання.

Ключові слова: міжнародне приватне право, уніфікація приватного права, предмет міжнародного приватного права, джерела міжнародного приватного права.

All civilized nations strive for cooperation in various fields, in particular, in the field of private international law. Because interaction in various spheres of private life is an important priority in the foreign policy of every democratic country that strives to simplify the realization of the rights and freedoms of its citizens.

The main problem is that most states have already formed a system of material legal and conflict of law norms. These systems are different in different states. Quite often, these norms are codified in special legal acts, which also greatly complicates their transformation.

Today, there are quite a lot of issues and problems in the field of private international law that attract attention. In this article, we will consider the most important of them and try to give our vision of their solution.

The first issue that attracts attention when approaching the study of private international law is the very use of the term «private international law», as well as its meaning. The term «private international law» first appeared in scientific literature in the 19th century, despite its widespread use, it is controversial, since there is no single definition of it in domestic or foreign publications until now.

In particular, domestic legal science expresses different approaches to understanding the nature of private international law: as a private-law branch of national law, as a component of public international law, or as a supranational legal entity [1, p. 27–33].

Even the very name «private international law» is quite conditional, since this field is not strictly «international» in the literal sense, as it does not regulate relations between nations; is not exclusively private law, because it includes a number of provisions of public law (for example, a clause on public order); is not a law in the full sense, since the conflict of law norms that form the basis of private international law do not establish the rights and obligations of the subjects of the relevant relations, but only determine the legal order according to which certain legal relations must be regulated [1, p. 7].

Despite the indicated contradictions of a scientific nature, the very emergence of this branch of law is an objective phenomenon, its development is influenced by the conditions of modern reality. In particular, such as: a) internationalization of economic life; b) a sharp increase in population migration as a result of wars, various conflicts, political and national reasons, as well as for the purpose of employment and education; c) scientific and technical progress, which makes possible the transnational use of information data, achievements of science, technology and culture.

At the same time, the specificity and at the same time the task of international private law is that in the presence of different national legal systems and the preservation of differences in the legal systems of different states, it is necessary to determine which state's law is applicable in the relations of such international communication.

Historically, international private law arose as a system of conflicting norms, which determine the norms of which state should regulate certain legal relations, and it is precisely in this capacity that it is perceived by the lawyers of a number of states.

Therefore, it should be taken into account that the generally accepted vision of private international law is «different» in different states: its subject, methods of regulation, system, etc.

The private legal nature of relations regulated by international private law means that their participants are not subordinate to each other, none of them acts as a subject of power. On the other hand, each of these participants, participating in these relations, acts in their own «private» and not in public or public interests.

The latter makes it possible to distinguish between relations regulated by international private law and international public law in the same way as Roman lawyers at one time distinguished between «private» and «public» law. First of all, the participants of such relations are physical and legal entities of different states, but states can also participate in such relations, but as a «non-powerful» subject.

Private legal relations are not only property and personal non-property relations covered by civil law (property, intellectual property, obligations, including delict, inheritance), but also relations regulated by the rules of economic (commercial), family, labor and procedural law in their private law aspect. All this is included in the subject of legal regulation of private international law. After all, for example, procedural relations with the participation of a foreign element, which in domestic literature are traditionally included in the course of international private law, can hardly be considered as private law in their essence. In general, it will be wrong to limit the subject of private international law exclusively to relations covered by civil law [2, p. 9–12].

The international nature of relations regulated by international private law is due to the presence of a «foreign element» in their composition. The foreign element of these legal relations may appear, in particular, in the fact that:

a) foreign entities participate in them;

b) the object of such legal relations is property located abroad;

c) they are related to a legal fact that took place abroad.

In real life, there may be situations when a «foreign, element» is not present separately in any of the specified species, but in one or another combination of the specified elements. However, in order for such relations to acquire an international character, the presence of just one of these elements is sufficient.

Second of the most important issues that must be paid attention to when studying such a field as international private law is the issue of unification of the norms of this field of law at the national and international level. As E. M. Gramatsky rightly observes, integration processes in international private law are manifested in the interaction of: firstly, international and national law; secondly, national legal systems among themselves; thirdly, the elements of the same order that make up the national legal system (internal legal interaction) [3, p. 127].

Undoubtedly, the dominant trend of modern development International private law is considered to strengthen such a phenomenon as unification of law [4, p. 26]. At the same time, many organizations were created that take care of issues of unification of international private law, in particular, the Hague Conference on Private International Law, World Trade Organization, Association for the Unification of Private Law, UNCITRAL, etc. These organizations make significant efforts to unification of legal regulation of private law relations, complicated by a foreign element.

Unification of law means that the same norms of different countries are established by concluding an international treaty, which stipulates that each country is obliged to maintain its domestic legislation in accordance with the norms of the treaty. The main feature of legal unification is that it takes place in two legal systems – in international law (by concluding an international agreement) and in domestic law (by implementing the provisions of the agreement into domestic law). On the other hand, unification can be called national cooperation with the aim of creating a single international mechanism for regulating relations for the common interests of these countries.

The unification of law is considered a type of law-making process that takes place mainly within the framework of international organizations. Its results are most noticeable in the field of private international law, since only this branch of national law covers the interests of two or more states. Its main results are the development of unified conflict of laws norms and unified material norms.

Unification of law, according to a number of scientists, is the process of bringing the current law to a single system, eliminating differences and providing uniformity to the legal regulation of similar or similar types of social relations in different countries [5, p. 27].

Unification of norms governing private law relations complicated by a foreign element occurs at two levels: universal and regional. An example of regional unification on the American continent is the Inter-American Convention on the Law Applicable to International Treaties of 1994, the Inter-American Convention on International Commercial Arbitration (Panama Convention) of 1975, etc.

The European Commission constantly develops and adopts conventions aimed at regulating private law relations complicated by a foreign element, such as the Brussels Convention on State Immunity of 1972, the European Convention on Adoption of 2008. The EU countries demonstrated the most successful example of the unification of international private law at the regional and international levels. The Hague Plan, adopted by the European Council on November 5, 2004, initiated the unification of conflict-of-law rules of the European Union.

At the universal level, the activities of the Hague Conference on Private International Law and the International

Institute for the Unification of Private Law (UNIDROIT) are mainly devoted to the development of unified conflict of law rules. The WTO, UNCITRAL and the International Chamber of Commerce are mainly involved in the unification of international trade law. The Hague Conference on Private International Law was established in 1893. To date, more than 40 conventions, which are traditionally called the «Hague Conventions», have already been formulated and adopted. On the example of the history of the Hague Conference on International Private Law, it can be observed that the process of unification is a series of ups and downs. Undoubtedly, the unification has undergone periods of oblivion, as well as widespread ideas that it will be possible to unify a significant part of the national legal systems in the shortest possible time. Meanwhile, without exaggerating or underestimating the possibility of creating the same norms of national law, it should be noted that the gradual accumulation of experience in unification allows both to improve its forms and to expand the subject area [6, p. 247].

The general goal of codification activity is the adoption of a codification act aimed at improving the form and content of legislation. At the same time, codified acts ensure the clarity, stability and efficiency of the functioning and development of a certain branch of legislation. For effective codification, it is important to take into account the closeness of individual branches of legislation when regulating homogeneous social relations. That is why the adoption of the relevant act must be coordinated with other codified acts and legal norms regulating related relations. That is, the unification of norms of international private law plays an extremely important role for its codification.

From the problem of the expediency of the unification of certain areas of law arises the question of how it should be resolved. Today, the generation of the new political economy is increasingly expressing fear as to how well-used methods and institutions involved in the creation of unified law, including unified law, are suitable for the creation of such legal instruments.

In recent years, there has been a «competitive struggle» between international organizations for primacy in the development of the most urgent problems related to the regulation of issues of international private law, and the efforts of international organizations to popularize their own developments, generalization and publication of the practice of their application are manifested. In this regard, we consider it necessary to focus on this problem and stop «dragging» the blanket between different organizations. For this, it would be expedient either to define clear goals and principles of work of each of them, or to create something like the Supreme Coordination Council for the unification of norms of private international law. Draft normative acts would be submitted to it for their coordination and approval.

According to our opinion, attention should be paid to the fact that unifying norms can reduce opportunities for competition between legal systems, which in turn limits the space for innovation and experimentation on the way to a better solution of a legal issue. The need for uniform regulation forces states to seek and find mutually agreed solutions and conclude unifying treaties [6, p. 248]. The role of international organizations engaged in the unification of norms of private international law, in particular, the Hague Conference on Private International Law, is of decisive importance for the internationalization of legal regulation.

Finally, I would like to note that the main problems of the modern stage of the development of international private law lie in the very legal nature of this branch of law, its subject matter and the method of legal regulation of these relations. Solving these issues is complicated by a certain layering of different legal systems, as well as their interaction with the law of international organizations, as well as international legal norms, both general and special.

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