
Prof. dr Natalia Erpyleva¹

Originalni naučni rad
UDK: 341.9(470+571)(438)

THE EVOLUTION OF CONFLICT REGULATION IN PRIVATE INTERNATIONAL LAW OF RUSSIA AND POLAND²

Abstract

The present article examines the evolution of conflict regulation in the private international law of Russia and Poland. The author identifies the concept, structure and types of conflict rules, stressing that the conflict of laws is the most important category of private international law. A detailed classification of the types of connecting factor formulas under which connecting factors of bilateral conflict rules are formed is undertaken. The detailed analysis of conflict rules contained in Russian and Polish legislation set forth mainly in the Civil Code of the Russian Federation and the Law of Poland “On Private International Law” is conducted with the help of the comparative and formal-logical methods of research. The author also scrutinizes different conflict rules contained in the Treaty between Russia and Poland on legal assistance and legal relations in civil and criminal matters. The author concludes that modern conflict regulation in Russia and Poland is in accordance with those trends in private international law, which can be seen through the prism of the international dimension.

Key words: Private International Law, conflict of laws rules, conflict regulation, connecting factor formulas, domestic legislation, international treaties.

¹ Professor, Head of the Department of Public and Private International Law, Faculty of Law, National Research University “The Higher School of Economics”, Moscow, Russia; e-mail: natasha.erpyleva@rambler.ru

² This research carried out in 2014-2015 was supported by grant (№14-01-0098) from “The National Research University ‘Higher School of Economics’ Academic Fund Program”.

*
* *

Traditionally, two methods of regulation are singled out in the science of private international law – conflict law and material law. The conflict law method dictates that, for the regulation of private law relations with foreign elements (international private relations), the question of which country's law must be applied should first be decided. This is possible only with the help of a conflict rule which contains specific criteria for choosing a national legal system depending on the connection of a concrete relation with the law of a particular state. The material law method excludes raising a conflict question concerning the choice of national law in so far as the essence of the legal relation is regulated by specially created material law rules unified in international treaties or by material law rules of direct operation contained in national law. In the foreign science of private international law, the material law method has been called the substantive regulation method.³

The choice of problem for this article resulted from recent significant changes in private international law in Russia and in Poland on the basis of the adoption of domestic normative acts; moreover, the form in which this development is taking place in Poland is substantially different from the form of development of private international law in Russia. It was thus all the more interesting to the author to analyze and point out such differences. The limitations of a single article indisputably do not allow the author to deal with all aspects of conflict law; therefore, the author has limited her investigation to an examination of only the main conflict rules contained in legislation of Russia and Poland, prefacing her account of such material with a theoretical discussion of the concept, nature and functions of conflict rules in private international law.

The most important category of private international law is the concept of conflict of laws. Historically, the conflict rules, which from the juridical-technical side constitute the most complex rules introduced into the domain of private international law, comprise the basis of private

³ On the concept, subject-matter and method of private international law in foreign science, see: A. Briggs, *The Conflict of Laws* (Clarendon Law Series). Oxford University Press, 2013; N. Hatzimihail, *Pre-classic Conflicts of Laws*, Cambridge University Press, 2014; R. Minor, *Conflict of Laws Or Private International Law* (1923). Ulan Press, 2012; C. Morse, D. McClean, Lord Collins of Mapesbury (eds.), *Dicey, Morris & Collins on the Conflict of Laws*. Sweet & Maxwell, 2012; P. Rogerson, J. Collier, *Collier's Conflict of Laws*. Cambridge University Press, 2013; J. Story, *Commentaries on the Conflict of Laws*. The Lawbook Exchange Ltd., 2010; J. Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard and to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*. TheClassics.us, 2013; J. Westlake, *A Treatise on Private International Law Or the Conflict of Laws* (1858). Kessinger Publishing, 2010.

international law. The aggregate of those rules applicable to the regulation of private law relations complicated by a foreign element constitutes conflict law.⁴ Although the content of private international law is by no means confined to conflict questions, conflict law is a complex and very important part of private international law. In translation from the Latin, the term “conflict” signifies a collision. When a legal relation is connected with more than one legal system potentially applicable to its regulation, a conflict or collision of laws is spoken of.

Conflict rules in private international law are rules of a special category, rules of a *renvoi* character. They have two peculiarities: in the first place, a conflict rule does not regulate directly the rights and duties of subjects of legal relations, but only contains a principle following which we can choose the law subject to application; second, the effect of legal regulation with the help of a conflict rule is achieved in aggregate with that material law rule to which it refers.⁵ The *renvoi* character of conflict rules signifies that in the text thereof there is no combination of hypothesis, disposition and sanction – integral components of other legal rules. Conflict rules include scope and connecting factor, and their operation always presupposes the presence of corresponding material law. In doctrinal writings, a conflict rule in most cases is traditionally considered as a rule of civil law. L.A. Lunts stressed that the conflict rule together with that material law rule to which it refers form a genuine rule of conduct for participants in civil turnover. The conflict rule, just as any other civil law rule, can have either an imperative or dispositive character.⁶ Such views are also held by other leading specialists in the field of private international law, for example, I.S. Pereterskii and S.B. Krylov. They believed that “a conflict rule regulates the settlement of a question,

⁴ См.: А.В. Асосков, *Основы коллизионного права*. М., 2012; А.В. Асосков, *Коллизионное регулирование договорных обязательств*. М., 2012; В.П. Звекон, *Коллизии законов в международном частном праве*. М., 2007 [See A.V. Asoskov, *Fundamental Principles of Conflict Law*. Moscow, 2012; A.V. Asoskov, *Conflict Regulation of Contractual Obligations*. Moscow, 2012; V.P. Zvekov, *Conflict of Laws in Private International Law*. Moscow, 2007]; M. George, A. Dickinson, *Statutes on the Conflict of Laws*. Hart Publishing, 2014; M. Harding, *Conflict of Laws*. Routledge, 2013; P. Hay, R. Weintraub, P. Borchers, *Conflict of Laws: Cases and Materials* (University Casebooks Series). Foundation Press, 2013; K. Lipstein, *Principles of the Conflict of Laws National and International*. Springer, 2012; L. Little, *Conflict of Laws: Cases, Materials, and Problems* (Aspen Casebooks Series). Aspen Publishers, 2013.

⁵ The concept of operation of a conflict legal rule in combination with a material legal rule was developed in detail in the works of the prominent Russian scholar, founder of the Russian science of private international law, Professor L.A. Lunts. См.: Л.А. Лунц, „О сущности коллизионной нормы“ // *ВИЮН. Ученые записки*. Вып. 9. М., 1959. С. 105-124. [See: L.A. Lunts, “Concerning the Essence of a Conflict Rule” // *Academic Papers*. Issue 9. Moscow, 1959. P. 105-124].

⁶ См.: Л.А. Лунц *Международное частное право*: В 3 т. М., 2002. С. 171-172. [See L.A. Lunts *Private International Law*: 3 vols. Moscow, 2002. P. 171-172].

not autonomously, but together with that source of law to which it refers”.⁷

M.M. Boguslavsky completely justifiably notes that “the conflict rule is a rule determining the law of which state must be applied to a respective legal relation. The conflict rule has a *renvoi* character; it only refers to material rules providing for resolving the respective question. In so far as the conflict rule is a rule of *renvoi* character, it is possible to utilize it only together with the material law rules to which it refers – rules of legislation deciding a question substantively”.⁸ In prerevolutionary doctrinal writings the idea was expressed that a conflict rule is not a rule of conduct for participants of civil turnover, and as a consequence, it is impossible to speak about its violation by the latter; rather, it is addressed to a court, to an administrative agency of the state. From this, a conclusion follows concerning the public law nature of conflict rules.⁹

Conflict rules constitute a special variety of rules of a *renvoi* character which choose the legal system to be applied, thereby effectuating a regulatory function. The specific quality of the legal nature of conflict rules has an influence in an important way on their structure. A conflict rule consists of two elements – scope and connecting factor. The scope points to the type of regulated legal relationship, but the connecting factor points to the law subject to application with the purpose of regulating the legal relationship complicated by the foreign element. Let us consider the following conflict rule as an example: “The inheritance relations are regulated by the law of that country where the testator had the last place of residence”. The scope of the given conflict rule points to the type of regulated legal relationship – this is an inheritance legal relationship, and the connecting factor points to the legal system subject to application for regulatory purposes. In the given case, this will be the legal system of the state on the territory of which the testator was domiciled at the moment of opening of an inheritance.

Conflict law rules can be contained in national legislation of a particular state and in international treaties. Both sources of conflict law find application in Russia and in Poland. The basic mass of conflict rules in private international law of Russia are contained in Section VI “Private International Law” (Articles 1186-1224) of Part Three of the Civil Code of the Russian Federation of 26 November 2001 as amended 5 May

⁷ И.С.Перетерский, С.Б. Крылов *Международное частное право*. М., 1959. С. 11. [I.S. Pereterskii, S.B. Krylov *Private International Law*. Moscow, 1959. P. 11].

⁸ М.М. Богуславский *Международное частное право: Учебник*. М., 2012. С. 89. [M.M. Boguslavsky *Private International Law: Textbook*. Moscow, 2012. P. 89].

⁹ См.: М.И. Брун *Введение в международное частное право*. Петроград, 1915. С. 61; 78; 79. [See M.I. Brun *Introduction to Private International Law*. Petrograd, 1915. P. 61, 78, 79].

2014¹⁰ (hereinafter: Russian Civil Code). In addition to civil legislation, conflict rules are contained in the Family Code of the Russian Federation of 29 December 1995, as amended of 4 November 2014¹¹, in particular in Section VII “Application of Family Legislation to Family Relations with the Participation of Foreign Citizens and Stateless Persons” (Articles 156-167); in the Merchant Shipping Code of the Russian Federation of 30 April 1999, as amended 29 November 2014,¹² which includes Chapter XXVI “Applicable Law” (Articles 414-427).

The principal body of conflict rules in private international law of Poland is contained in the Law of Poland “On Private International Law” of 4 February 2011, which came into force 16 May 2011¹³ (hereinafter: “Polish Law”). The Polish Law is a voluminous codified act consisting of 19 sections, including 81 articles and unifying conflict rules relating to the legal status of natural and juridical persons (Sections 2-3); conflict rules relating to representation, transactions, limitation of action (Sections 4-6); conflict rules relating to obligations (Section 7); conflict rules relating to an arbitration agreement (Section 8); conflict rules relating to the property rights (Section 9); conflict rules relating to the intellectual property rights (Section 10); conflict rules relating to family law (Sections 11-15); conflict rules relating to inheritance law (Section 16); conflict rules relating to other matters (Section 17).

It is evident that Russia and Poland are classical examples of the attitude of states to national legislation as the source of conflict law. Whereas in Russia the conflict rules of private international law are dispersed in individual laws and have a clearly expressed branch focus, then Poland took the path of creating a single codifying act in the field of private international law containing the entire body of conflict rules independently of their branch characteristics. This is the basic, cardinal difference in the approaches of these two states to the forming of their national conflict law. International treaties are another source of

¹⁰ СЗ РФ. 2001. № 49. Ст. 4552; 2014. № 19. Ст. 2329. [Compendium of legislation of the Russian Federation. 2001. No. 49. Article 4552; 2014. No. 19 Article 2329]. A new version of Part III of the Russian Civil Code came into force on 1 July 2014.

¹¹ СЗ РФ. 1996. № 1. 2014. № 45. Ст. 6143. [Compendium of legislation of the Russian Federation. 1996. No. 1. 2014. No. 45. Article 6143]. A new version of the Family Code of the Russian Federation came into force on 1 January 2015.

¹² СЗ РФ. 1999. № 18. Ст. 2207; Рос. газ., 03 декабря 2014 г., № 275. [Compendium of legislation of the Russian Federation. 1999. No. 18. Article 2207; Rossiskaya Gazeta, 3 December 2014, No. 275]. A new version of the Code of Merchant Shipping of the Russian Federation came into force on 1 January 2015.

¹³ The text of this law translated into Russian by D.I. Zenkovich was published in the *Journal of Private International Law*. 2012. No. 2. P. 53-69. See also: T. Pajor “Introduction to the New Polish Act on Private International Law” // *Yearbook of Private International Law*. 2011. Vol. XIII. P. 381-388.

private international law of Russia and Poland containing conflict rules. Characteristically, a bilateral international treaty binds these states, the Warsaw Treaty between the Russian Federation and the Republic of Poland on Legal Assistance and Legal Relations on Civil and Criminal Matters of 16 September 1996¹⁴ (hereinafter: “Treaty between Russia and Poland”) which contains, *inter alia*, conflict rules of an international quality.

How are rules of international treaties, the participants of which include Russia, and the rules of national legislation correlated? In accordance with Article 15(4) of the Constitution of the Russian Federation of 12 December 1993, as amended 21 July 2014,¹⁵ international treaties of the Russian Federation are an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those provided by a law, then the rules of the international treaty are applied. In accordance with the Decree No. 5 of the Plenum of the Supreme Court of the Russian Federation “On the Application by Courts of General Jurisdiction of Generally-Recognized Principles and Rules of International Law and International Treaties of the Russian Federation” of 10 October 2003, as amended 5 March 2013,¹⁶ during the consideration of civil cases by a court, an international treaty of the Russian Federation which came into force and became binding upon Russia and the provisions of which do not require publication of domestic acts for their implementation and which are capable of giving rise to rights and duties for subjects of national law is directly applied (point 3). An incorrect application by a court of generally-recognized principles and rules of international law and international treaties of the Russian Federation can be grounds for vacating or changing the judicial act. The incorrect application of a rule of international law can occur when a rule of international law subject to application was not applied by a court or, the reverse, the court applied a rule of international law which was not subject to application or when an incorrect interpretation of a rule of international law was given by a court (point 9).

The foregoing means that in the presence of an international treaty containing conflict rules, they will be applied to regulate the respective legal relation and not the rules of the Russian Civil Code or the Polish Law; therefore, the rules of the Treaty between Russia and Poland will be applied exclusively to relations with a foreign element on the territory of Russia and Poland (in the case of subjects of private law of Russian

¹⁴ БМД. 2002. № 5. [Bulletin of International Treaties. 2002. No. 5]. This treaty came into force on 18 January 2002.

¹⁵ СЗ РФ. 2014. № 31. Ст. 4398. [Compendium of legislation of the Russian Federation. 2014. No. 31. Article 4398]. The new version of the Constitution of the Russian Federation came into force on 22 July 2014.

¹⁶ Бюллетень Верховного Суда РФ. 2003. № 12; 2013. № 5. [Bulletin of the Supreme Court of the Russian Federation. 2003. No.12; 2013. No.5].

or Polish nationality, other localization, for example, property or legal facts in the given states contemplating the simultaneous involvement of a Russian and Polish foreign element), and only in the case of their inadequacy will the rules of Russian or Polish conflict law be applied.

We now consider the main types of connecting factor formulas in Russian and Polish conflict law (by connecting factor formulas, we have in mind the connecting factor of a bilateral conflict rule; *i.e.* the rule containing the criteria for choosing the legal system subject to application and not indicating concretely which legal system must be applied). The scope of the present study does not allow for an analysis of all connecting factor formulas; therefore, we will focus on some of these containing the most important differences in private international law of Russia and Poland.

1. Personal Law of a Juridical Person (*lex societatis*)

The personal law of a juridical person encompasses a whole group of legal relations, including:

1. Status of the entity as a juridical person;
2. Organizational-legal form of a juridical person;
4. Requirements for naming of a juridical person;
5. Questions of foundation, reorganization and liquidation of a juridical person, including questions of legal succession;
6. Content of legal capacity of a juridical person;
7. Procedure for acquisition by a juridical person of civil rights and assuming civil duties;
8. Internal relations, including relations of a juridical person with its participants;
9. Legal capacity of a juridical person to be liable for its obligations;
10. Questions of responsibility of founders (or participants) of a juridical person for its obligations (Article 1202(2) of the Russian Civil Code).¹⁷

The sense of the given connecting factor formula is that the legal status of a juridical person is determined by the law of the state with which

¹⁷ A similar list of types of relations regulated by the personal law of a juridical person are contained in Article 17(3) of the Polish Law. The list of such types includes the following: 1) the foundation, merger, division, transformation and liquidation of a juridical person; 2) the legal status of a juridical person; 3) name and also firm name of a juridical person; 4) legal capacity of a juridical person; 5) competence and principle of functioning as well as designation and recalling of members of organs; 6) representation; 7) acquisition and loss of status of a participant or of membership and also rights and duties connected with them; 8) responsibility of the participants or members for obligations of a juridical person; 9) consequences of violation by the representative of a juridical person of a law, foundation act or charter.

the juridical person has state affiliation (nationality).¹⁸ The difficulty arises from the fact that the laws of various states regulate this question differently by virtue of a historical divergence in the formation of the criteria determining State affiliation (nationality) of a juridical person. The determination of nationality of a juridical person substantially influences the establishment of its affiliation to a concrete legal order – its own or foreign, which is its personal statute. Thus, the personal statute of a juridical person is established by means of determination of its state affiliation (nationality). Traditionally, the criteria of incorporation, localization, and place of conducting activity are applied.

The criterion of incorporation (the place of foundation) means that the nationality of that state on the territory of which the formalities of its foundation were fulfilled, where it is organized and registered, is recognized for a juridical person. The legislation of countries of the Anglo-Saxon system of law and a number of other states, including Russia, adheres to this criterion. In accordance with Article 1202(1) of the Russian Civil Code, the law of the country where the juridical person is founded is considered to be the personal law of the juridical person. In the case of a foreign entity which is not a juridical person in accordance with foreign law, the law of the country where that entity is founded (Article 1203 of the Russian Civil Code)¹⁹ is the personal law. An analogous criterion is used in the Treaty between Russia and Poland, in which it is indicated that legal capacity of a juridical person is determined by the legislation of the Contracting Party in accordance with which the juridical person was founded (Article 19 (2)).

The criterion of “localization” (the location of the administrative center) proposes that the nationality of that state on the territory of which the administrative organs of a juridical person are situated is deemed to be the nationality of the juridical person. This criterion is provided for in legislation of the Roman-German system of law, although the concept of “localization” is not interpreted in the same manner in the practice of various

¹⁸ See J.Borg-Barthet *The Governing Law of Companies in EU Law* (Studies in Private International Law Series). Hart Publishing, 2012; P.Paschalidis *Freedom of Establishment and Private International Law for Corporations* (Oxford Private International Law Series). Oxford University Press, 2012.

¹⁹ Despite the clear consolidation of the criterion of incorporation, an innovation is contained in the modern conflict law of Russia. In accordance with Article 1202(4) of the Russian Civil Code, if a juridical person founded abroad effectuates its entrepreneurial activity principally on the territory of the Russian Federation, its founders (participants) or other persons who have the right to give binding instructions to it or otherwise have the possibility to determine its activity, then Russian law or, if the creditor chooses, the personal law of such juridical person applies to the responsibility for obligations of the juridical person. Such a formulation speaks to the possibility of the subsidiary application of the criterion of place of conducting economic activity, which in its pure form provides that a juridical person has the nationality of the state on the territory of which it effectuates its business activity.

states. In some cases, by “localization” is meant “charter localization” (the location of administrative organs consolidated in foundation documents), and in other cases, the actual “localization” arising from the *de facto* location of the administrative center of a juridical person.

The Polish Law names the criterion of “localization” as the basic criterion for determining the nationality of foreign juridical persons. In accordance with Article 17(1), a juridical person is subject to the law of the country in which it is situated. However, if in accordance with the above indicated law, the law of the country on the basis of which the juridical person was founded is subject to application, the law of that country is applied (Article 17(2)). Thus, the Polish conflict rules contain the personal law of the juridical person based on the criterion of “localization” as the basic connecting factor, but as a subsidiary criterion – the criterion of incorporation. “Subsidiariness” is presented in the form of adoption by Polish Law of *renvoi* of foreign law.

2. Law of Autonomy of Will (*lex voluntatis*)

The law of autonomy of will determines the status of obligation, which provides that it is regulated by the law of that State which the parties of that obligation have chosen. The presence of a foreign element and the obligations character of the relations between the subjects results in the possibility for the parties to the contract to choose the material law to be subject to application.²⁰ The law of autonomy of will occupies a central place in all national systems of private international law, and all remaining connecting factors formulas are considered to have an auxiliary character to be used only in the absence of a choice of applicable law by the parties concluding the contract. Broad application of the law of autonomy of will in practice has led to a certain stability of its content, which nevertheless has been subject to various legal evaluations.

Despite the existence of various approaches to identifying the nature and place of the law of autonomy of will in the legal system of a state,²¹ the legislation of virtually all states consolidates it as a determinative

²⁰ The new version of Section VI of Part Three of the Russian Civil Code substantially broadens the principle of autonomy of will to extend this not only to contractual but also non-contractual obligations. Thus, in accordance with Article 1223¹(1), unless otherwise provided by a law, after the performance of an action or the ensuing of another circumstance entailing the causing of harm or unjust enrichment, the parties can choose in accordance with an agreement between them the law applicable to the obligation arising as a consequence of the harm caused or as a consequence of unjust enrichment. The law chosen by the parties is applied without prejudice to the rights of third persons.

²¹ Autonomy of will is considered either as a connecting factor formula or as a principle of contract law or as a principle of private international law as a whole.

principle in the regulation of contractual relations complicated by a foreign element. In accordance with Russian legislation, parties to a contract may when concluding a contract or subsequently choose in accordance with an agreement between them the law which is applicable to their rights and duties in accordance with that contract. The agreement of the parties concerning the choice of applicable law must be expressed directly or must definitely arise from the conditions of the contract or the aggregate of circumstances of the matter.²² The choice by the parties of applicable law made after conclusion of a contract has retroactive force from the moment of conclusion of the contract and is considered to be valid, but without prejudice to the rights of third persons or the validity of transactions from the point of view of requirements related to its form (Article 1210(1)-(3) of the Russian Civil Code).²³ In accordance with the Treaty between Russia and Poland, contractual obligations are determined by legislation of the state which was chosen by the parties (Article 36(1)).

Polish Law contains a rather broad approach to the application of the law of autonomy of will, including it in Section I “General Provisions” of the Polish Law. In the cases provided by it, choice of the applicable law is possible. The choice of law must be clear or definitely follow from the circumstances of the transaction, excluding situations when provided otherwise by rules sanctioning the possibility of choice of law. The choice of law made after the legal relations have arisen must not violate the rights of third persons (Article 4(1)-(3)).²⁴ Thus, an obligation arising from a

²² In accordance with Point 13 of the Information Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, No. 158 “Survey of the Practice of Consideration by Courts of Cases with Participation of Foreign Persons” of 9 July 2013, an agreement on applicable law is considered reached if the parties to a disputed legal relation during substantiation of their demands and objections (for example, in a petition to sue and in the reply to it) refer to the same applicable law. Such a conclusion of the Supreme Arbitrazh Court of the Russian Federation was fully supported by subsequent court practice. See, e.g., Decree of the Federal Arbitrazh Court of the North-West District of 16 April 2014 in Case No. A56-6655/2013.

²³ The possibility of choosing an applicable law after the conclusion of a contract was confirmed in a Decree of 25 December 2013 of the Federal Arbitrazh Court of the Urals District in Case No. A60-16231/2013, where it states that parties of a contract have the right, guided by the principle of freedom of contract, to conclude an agreement regarding the law applicable to their legal relations of obligation both during conclusion of the contract and subsequently in a supplemental agreement. The Federal Arbitrazh Court of the Moscow District in the Decree of 19 May 2014 in Case No. A40-31270/2007 specially explained the following: Article 1210(3) of the Russian Civil Code provides that the choice by parties of applicable law made after conclusion of the contract has retroactive force and is considered valid, without prejudice to rights of third persons, from the moment of conclusion of the contract. Thus, Russian conflict regulation permits change of law applicable to a contract and such change will have retroactive force unless this prejudices the rights of third persons.

²⁴ The Polish Law gives the possibility of realizing the autonomous will to parties of a contract, including arbitration agreements and marriage contracts, to participants of non-contractual obligations, to subjects of unilateral transactions, to subjects of family and inheritance relations.

unilateral transaction is subject to the law chosen by the party concluding such transaction (Article 32(1)). An arbitration agreement is subject to the law chosen by the parties (Article 39(1)). A marriage property agreement is subject to the law chosen by the parties (Article 52(2)).

An interesting formulation is contained in Article 64(1), in accordance with which the testator in a will or other disposition in case of death has the right to subject inheritance questions to his national law, the law of the place of his residence or the law of the place of his usual sojourn at the moment of conclusion of such expression of will or at the moment of his death. In case of the absence of a choice of law with respect to inheritance, the national law of the testator at the moment of his death applies. This article of the Polish Law contains an alternative conflict rule having a single scope and several connecting factors. The alternative conflict rule allows the realization of the autonomous will of the testator but only within the framework of the alternatives prescribed by law. The “alternativeness” serves in this example as a form of realization of the law of autonomy of will, which by virtue of this acquires a rigid character.

Russian legislation also contains a rigid form of law of autonomy of will in the form of an alternative conflict rule allowing the choice of law applicable to non-contractual obligations. In accordance with Article 1221(1) of the Russian Civil Code, the victim can choose to apply the following law to a demand concerning compensation for harm caused as a result of defects of goods, work or services: 1) the law of the country where the seller or manufacturer of a good or other causer of harm has a place of residence or principal place of activity; 2) the law of the country where the victim has a place of residence or principal place of activity; 3) the law of the country where work was fulfilled or services were rendered or the law of the country where a good was acquired. However, the possibility to realize autonomy of will, even in rigid form, applicable to inheritance relations is not provided for by Russian legislation.

At the same time, a rule containing the possibility of choosing applicable law in non-contractual obligations is an absolute innovation of Russian conflict law. In accordance with Article 1223¹(1)-(2) of the Russian Civil Code, unless it arises otherwise from a law, after the performance of an action or arising of another obligation entailing the causing of harm or unjust enrichment, the parties may choose by agreement between them the law applicable to the obligation arising as a consequence of the causing of harm or as a consequence of unjust enrichment. The law chosen by the parties is applied without prejudice to the rights of third persons. If at the moment of performance of the action or arising of another obligation entailing the causing of harm or unjust enrichment, all obligations relating to the essence of the relations of the parties are connected only with one

country, choice by the parties of the law of the other country cannot affect the mandatory rules of law of that country with which all the obligations relating to the essence of the relations of the parties are connected.

With respect to Polish conflict law, in the question of choice of applicable law in relation to separate types of obligations, it contains a direct reference to rules of European private international law, and in particular to the Regulations of the European Union, among which the following have paramount significance: Regulation EC No. 593/2008 “On the Law Applicable to Contractual Obligations” of 17 June 2008²⁵ (“Rome I Regulation”) (Article 28 of the Polish Law) and Regulation EC No. 864/2007 “On the Law Applicable to Non-Contractual Obligations” of 11 July 2007²⁶ (“Rome II Regulation”) (Article 33 of the Polish Law). In accordance with Rome I Regulation, a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties²⁷ (Article 3(1)-(2)).

The law chosen by the parties to a contract is considered the applicable law and regulates the following questions:

1. Interpretation of the contract;
2. Rights and duties of the parties to the contract;
3. Performance of the contract;
4. Consequences of failure to perform or improper performance of the contract;
5. Termination of the contract;
6. Consequences of invalidity of the contract (Article 1215(1) of the Russian Civil Code).

The law of autonomy of will found expression in the Treaty between Russia and Poland. In accordance with Article 36(1), contractual obligations are determined by the legislation of the state which is chosen by the parties. In accordance with Article 44(1), the parties to a labor contract can themselves choose the legislation regulating their labor

²⁵ OJ L 177, 04.07.2008, p. 6-16.

²⁶ OJ L 199, 31.7.2007, p. 40-49.

²⁷ See U.Magnus, P.Mankowsky (eds.) “Rome I Regulation” (*European Commentaries on Private International Law Series*. Sellier European Law Publishers, 2013.

relations. Thus, the parties to contractual obligations may choose the applicable law in their discretion. The Treaty between Russia and Poland says nothing about the provision regarding public policy and about the evasion of mandatory rules of legislation which would be applicable if the parties of the contractual obligations did not choose applicable law. This means that in case a dispute arises, the jurisdictional institution must address these questions to the national legislation of that state, *i.e.* the Russian Civil Code or the Polish Law.

3. Law of the Closest Connection (*lex connectionis fermitatis*)

The law with which a legal relation is most closely connected is an additional connecting factor formula in comparison with the law of autonomy of will and regulates a group of contractual legal relations. Historically, this connecting factor formula has appeared in the Anglo-Saxon system of law relatively recently; however, it has already received consolidation in European private law, in particular at first in the 1980 Rome Convention concerning the law applicable to contractual obligations and then in Rome I Regulation. In accordance with the latter, if the applicable law cannot be determined on the basis of Article 4(1)-(2), then the contract is regulated by the law of the country with which it is most closely connected (Article 4(4)). The closest connection of the contract and applicable law is determined by a whole series of factors specific for the particular contract. Thus, for a contract of international carriage of freight these factors may be the location of the principal commercial enterprise of the carrier, or the place of shipment of the goods. If the subject-matter of the contract is a property right with respect to immovable property, then the place where the immovable property is situated has the closest connection with the contractual obligation.

At the outset of the twentieth century the Russian science of private international law stressed the significance of a close connection regulating the legal relation with the legal system of a certain state. Thus, B.E. Nolde wrote that “any conflict rule is the answer to the question of which of various civil material laws from different places applies to a particular category of legal relations including international (or inter-regional) elements; the answer is given by recognition of the binding force of those laws with which a particular category of legal relations by one of its own international (or inter-regional) elements in the view of the particular conflict system is most closely connected”²⁸.

²⁸ Б.Э. Нольде *Очерк международного частного права // Ф.Лист Международное право в систематическом изложении.* Юрьев, 1909. С. 470. [B.E. Nolde *Outline of Private International Law // In: F. List Private International Law in Systematic Exposition.* Yuriev, 1909. P. 470].

M.I. Brun suggested that “the choice between different-place laws of material character, in the event of the conflict thereof, assumes not only an assessment of the content of these laws (the social purpose thereof), but also to strengthen the links. The content of laws of material character is assessed so that a specific legislator may say whether he can allow the operation of a foreign law, whether any links have formed of a legal relation with a foreign element to his material legislation; a further assessment is essential in order to outline the conflict rule itself – towards which of the two pieces of legislation the legal relation is more closely tied”.²⁹

When considering the question concerning the link of “the most closely connected” as an important factor of a general character, it is possible to refer to it as a concept of characteristic performance, embodied in Article 4(3) of Rome I Regulation. In accordance with this rule, if the contract does not fall under the operation of Article 4(1) or if the elements of the contract fall under operation of several sub-points (a)-(h) of Article 4(1), then the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly most closely connected with a country other than indicated in Article 4(1)-(2), the law of that other country shall apply (Article 4(3)).

The concept of characteristic performance is expressed in modern Russian legislation, which is, undoubtedly, an innovation and a step forward towards the unification of national conflict law and its harmonization with European private law. Moreover, the law of the closest connection is becoming the main, most important conflict link with respect to contractual obligations after the law of autonomy of will. In accordance with Article 1211 of the Russian Civil Code, in the absence of agreement of the parties on the law applicable to a contract, the law of the country where the place of residence or principal place of activity of the party who is effectuating the performance having decisive significance for the essence of the contract at the moment of concluding the contract is situated shall apply. The party which effectuates the performance having decisive significance for the essence of the contract is recognized as the party, in particular, which is the seller – in a contract of purchase-and-sale; donor – in a contract of donation; contractor – in a contract of services; financial agent – in a contract of factoring, etc. (Article 1211(1)-(2) of the Russian Civil Code).

The Polish Law incorporating rules of European private international law into the Polish legal system by means of direct reference to the Regulations of the EC also proposes application of the principle of the

²⁹ М.И. Брун *Публичный порядок в международном частном праве*. Петроград, 1916. С. 56. [M.I. Brun *Public Order in Private International Law*. Petrograd, 1916. P. 56].

closest connection to the mandatory relationships of the contracting parties because the Rome I Regulation, especially, and Rome II Regulation, in particular, rely precisely on this principle. The Polish Law directly provides that in relation to unilateral transactions, in the absence of a choice of law, the obligation from the unilateral transaction is subject to the law of that country in which the person carrying out the unilateral transaction has a usual place of sojourn or location. If from the circumstances it follows that the obligation is closely connected with the law of another country, the law of that country is applied (Article 32(2)). Moreover, the Polish Law contains a very interesting article consolidating the general rule of application of the law most closely connected in private relations complicated by a foreign element. In accordance with Article 67, in the absence of an indication of applicable law in the present law, special rules in force in the Republic of Poland, ratified international treaties and the law of the European Union in relation to the operation of the present law, the law of the country with which the relation is most closely connected should be applied.³⁰ Thus, the law most closely connected is considered by Polish conflict law as the general conflict link.

In accordance with the Treaty between Russia and Poland, if the parties did not choose the applicable legislation, the legislation of the Contracting Party on the territory of which the party lives, is founded or has a location, that is effectuating performance having decisive significance for the content of such contract shall apply (Article 36(1)). From the foregoing, it is possible to draw the general conclusion that conflict links which have formed over the centuries and perceived by numerous national legal systems (for example, *lex venditoris* – with respect to contracts of purchase-and-sale; *lex rei sitae* – with respect to contracts connected with immoveable property; *lex cartae* – with respect to obligations arising from securities; *lex loci originis* – with respect to obligations connected with circulation of cultural valuables; *lex loci concursus* – with respect to obligations connected with bankruptcy; *lex loci laboris* – with respect to labor obligations; *lex loci celebrationis* – with respect to marriage obligations), act as indicators for the identification of the contract most closely connected with a legal system, whereas the very process of such identification is fully dependent on the discretion of a jurisdictional institution – court or arbitration.

³⁰ In accordance with Article 1 of the Polish Law, it determines the law applicable to private law relations connected with more than one country.

4. Law of the Place of Commission of a Delict (*lex loci delicti commissi*)

The law of the place of commission of a delict regulates the legal obligation of a non-contractual character, underlying the arising of which is the legal fact of causing damage to the person or property³¹. This connecting factor formula signifies that the law of that state on the territory of which a delict was committed is applicable to delictual relations. The most complex question in connection with application of the given connecting factor formula is the question concerning what place is to be considered the place of the commission of a delict – the place of effectuation of the harmful action or the place of manifestation of the harmful consequences? The answer is given differently in the law-application practice of various states. Countries of the Anglo-Saxon system of law traditionally understood the place of commission of the delict as the place of effectuation of the harmful action, whereas the countries of the Roman-German system of law understand this to be the place of manifestation of the causing of damage.

However, at present, these provisions have undergone changes in connection with development of European private law and adoption of Rome II Regulation. In accordance with the latter the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.³² However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other

³¹ См.: В.П. Звекон *Обязательства вследствие причинения вреда в коллизионном праве*. М., 2007; Е. Кабатова „Модернизация коллизионного регулирования деликтов“ // *Хозяйство и право*. 2004. № 1; Х.Д. Пирцхалава „К вопросу о понятии и классификации внедоговорных трансграничных обязательств в международном частном праве РФ“ // *Актуальные проблемы российского права*. 2012. № 3. [See V.P. Zvekov *Obligations as a Consequence of Causing Harm in Conflict Law*. Moscow, 2007; E. Kabatova “Modernization of Conflict Regulation of Delict” // *Economy and Law*. 2004. No. 1; Kh.D. Pirtskhalava “The Question Concerning the Concept and Classification of Non-Contractual Cross-Border Obligations in Private International Law of the Russian Federation” // *Actual Problems of Russian Law*. 2012. No. 3].

³² Thus, modern conflict regulation in European private international law effectuated a transition from a connecting factor formula of *lex loci delicti commissi* (law of the place of commission of the delict) to the form of connecting factor formula *lex loci damni* (the law of the place of causing of the harm).

than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question (Article 4).³³

At present Russian legislation uses a rather specific approach to this question. The law of the country where the activity or other circumstance took place which served as the grounds for the demand for compensation of harm applies to obligations arising as a consequence of the causing of harm. When as a result of such an action or other circumstance the harm occurred in another country, the law of the other country can be applied if the causer of harm foresaw or could have foreseen the occurrence of harm in that country (Article 1219(1) of the Russian Civil Code). If the parties to an obligation arising as a consequence of the causing of harm have a place of residence or principal place of activity in the same country, the law of that country applies. If the parties to the given obligation have a residence or principal place of activity in different countries, but they are citizens or juridical persons of the same country, the law of that country applies (Article 1219(2) of the Russian Civil Code).

Polish legislation on the question of conflict regulation of non-contractual obligations incorporates the rules of Rome II Regulation, directly referring to them in Article 33 of the Polish Law. In accordance with the Treaty between Russia and Poland, obligations arising as a consequence of the causing of harm (as a consequence of impermissible actions) are determined by legislation of the Contracting Party on the territory of which the circumstance which is the grounds for the claim for compensation for harm took place. If the plaintiff and defendant are citizens of one of the Contracting Parties, the legislation of that Contracting Party is applied.

The following is determined on the basis of the law which is applicable to obligations arising as a consequence of the causing of harm:

1. Capacity of a person to bear responsibility for harm caused;
2. Placing of responsibility for harm on a person who is not the causer of harm;
3. Grounds of liability;
4. Grounds of limitation of liability and relief therefrom;
5. Means of compensation of harm;

³³ См.: А.В. Банковский „Новый этап унификации международного частного права ЕС: Рим II” // *Журнал международного частного права*. 2006. № 3 [See A. V. Bankovskii “The New Stage of Unification of Private International Law of the EC: Rome II” // *Journal of Private International Law*. 2006. No. 3]; U. Magnus, P. Mankowsky (eds.) *Rome II Regulation (European Commentaries on Private International Law Series)*. Sellier European Law Publishers, 2013.

6. Extent and amount of compensation of harm (Article 1220 of the Russian Civil Code).

In conclusion, it should be stressed that modern conflict law in Russia and Poland is developing in accordance with the basic developmental trends of private international law, following its logic and using its instruments. The basic types of connecting factor formulas formed over the period of a hundred years have found expression in Russian and Polish legislation. The essential peculiarity of the structure of conflict law in Poland is determined by the circumstance that Poland is a member of the European Union and by virtue of this is obliged to apply on its territory the acts of European private law. Therefore, questions of conflict regulation of contractual and non-contractual obligations are relegated to the competence of Rome I Regulation and of Rome II Regulation. Moreover, Russian conflict law is oriented towards the best forms of legislative application of connecting factor formulas and thus is not at all inferior to the quality of foreign conflict law. With respect to domestic sources of private international law in Russia, the author remains convinced of the necessity to adopt a single codified act in the field of Russian private international law in the form of either a law or a code. In this context, the Law of Poland “On Private International Law”, analyzed in this article, is a good example for Russian legislation.

Prof. dr Natalia Erpyleva

Rukovodilac Odeljenja za Međunarodno javno i privatno pravo

Nacionalni istraživački Univerzitet "Viša ekonomska škola"

Moskva, Rusija

EVOLUCIJA REGULISANJA SUKOBNA ZAKONA U MEĐUNARODNOM PRIVATNOM PRAVU RUSIJE I POLJSKE

Rezime

U ovom članku se analizira evolucija regulisanja sukoba zakona u međunarodnom privatnom pravu Rusije i Poljske. Autor identifikuje koncept, strukturu i vrste pravila sukoba zakona, naglašavajući da je sukob zakona najvažnija kategorija međunarodnog privatnog prava. Detaljna klasifikacija tipova formula tačaka vezivanja pod kojima se formiraju i povezujući faktori bilateralnih pravila sukoba zakona bitna je zbog njihove pravilne primene. Detaljna analiza pravila sukoba zakona sadržanih u ruskom i poljskom zakonodavstvu navedenih, uglavnom, u Građanskom zakoniku Ruske Federacije i Zakonu o međunarodnom privatnom pravu Poljske se sprovodi uz pomoć uporednih i formalno-logičkih metoda istraživanja. Autor, takođe, razmatra različita pravila o sukobu zakona sadržanih u Ugovoru između Rusije i Poljske o pravnoj pomoći i pravnim odnosima u građanskim i krivičnim stvarima. Autor zaključuje da je savremeno regulisanje sukoba zakona u Rusiji i Poljskoj u skladu sa trendovima u međunarodnom privatnom pravu, što je vidljivo i preko međunarodne dimenzije.

Ključne reči: Međunarodno privatno pravo, pravila sukoba zakona, regulisanje sukoba, formule tačaka vezivanja, domaće zakonodavstvo, međunarodni sporazumi.