Principles of international law as source of regulating contractual relations complicated by foreign elements

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Abstract. This research is dedicated to the problem of essence and classification of international private law principles applicable to international private contracts. It studies existing doctrinal opinions towards systematization criteria of international private law principles including that in relation to other branches of law. The authors come to the conclusion on the essence and characteristics of those international private law principles that are applied to contractual relations complicated by a foreign element and that are reflected in the international practice. By subdividing the international private law principles by extent of relation to primary regulation methods (collision law and material law) and taking into account a close tie of this law branch with other branches, in particular, international public and civil law, given the goals of this research, the authors come to the conclusions that regulation of trans-border contractual relations correspond to the following principles: justice, good faith and rationality of participants of legal relations; autonomy of parties' will; the closest tie. The substantiation of the above gives quotes of international documents widely spread as lex mercatoria – UNIDROIT principles, principles of the European contractual law, and Hauge principles of law selection as applicable to international commercial contracts.

Keywords: international commercial contracts, autonomy of parties' will, principle of closest tie

1 Introduction

At the modern stage of social development, the legal science faces a lot of complicated issues concerning the basics of statuary regulation of individual private law institutes. A

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special place is occupied by regulation of contractual relations complicated by a foreign element.

Although the range of existing regulators in this area of social relations (including international level) is rather wide and diverse, and the institute of international commercial agreements (foreign trade transactions) can hardly be called understudied thanks to multiple treatises of Russian and foreign authors, modern social development trends give rise to new challenges and make reconsider the established doctrinal theses.

This must be extended to the regulation principles of contractual agreements complicated by a foreign element since their apparent evidence disappears when we try to give a clear definition and build a system.

2 Materials and methods

To form an idea of principles of legal regulation of contractual relations complicated by a foreign element intended to achieve the goal of this research when understood as systems of legal means to ensure respective statuary regulation, both aggregation method (collection of distributed facts and making up a puzzle) and casual method (detailed consideration of unique, rare, untypical phenomena that exist in the research field of the considered issue as a phenomena of socio-economic and legal activity) must be used.

Developing a unified approach to understanding and classification of statutory regulation principles of international commercial agreements is impossible without using an interpretative method to study the past with insufficient number of sources and with the sources that simplify or distort the phenomenon. A cross-border nature of this study explains the use of the comparative method given possible local, chronological and discursive comparisons.

3 Results

By distinguishing the international private law principles by at least the following criteria: interrelation with primary regulation methods and allied law branches, international public and civil (contractual) law, for the purposes of this research the authors can name the following principles directly related to the regulation of contractual relations complicated by a foreign element: principle of justice, good faith and rationality of participants of legal relations; autonomy of the parties' will; the closest tie.

4 Discussion

This circumstance is closely related with two fundamental problems of the international private law in general resulting in recurring discussions in the scientific world: defining its place in the legal system and internal system and understanding the principles (fundamentals) of this branch of law.

When finding the place of international private law in the legal system, the authors support a so-called intra-state concept justified in various times by such prominent scientists as I.S. Peretersky, L.A. Luntz, M.M. Boguslavsky, V.P. Zvekov, S.N. Lebedev, A.A. Rubanov and M.G. Rosenberg. According to this concept, the international private law acts as an independent branch of internal state law with original subject and methods of statuary regulation. Any branch of law has its internal content and system composed of sub-branches and institutes. In this manner, one of the institutes of the international private law is the institute of international commercial contracts that must be distinguished from its closest peer (in regulation subject and content) – the contractual law being a sub-branch of

civil law. Despite the independent nature of international private law and its national nature, its close tie with other law branches is undoubted, first of all, including international public law, primary because of the commonality of sources and principles.

As for international private law principles, this issue has no unity among the scientists in either technology applied or classification criteria and, therefore, building a generally recognized system.

Yu. Nefedov notes that the concepts of general principles of law, general principles of international law, generally acknowledged (mandatory) principles of international law, branch principles of international law are considered as close aurally and almost equal in meaning, but they have different content [1].

For the purposes of his research, we would agree with N. Oksyutchik who proposes to understand the principles of international private law as governing ideas functioning for internal approval and efficient operation of the entire system of international private law and direct regulation of private law relations complicated by a foreign element provided it has gaps and conflicts [2].

I. Sobolev distinguishes the concepts of fundamentals and branch principles of international private law as follows:

- principle of foreign law applicability in private law relations;
- principle of legal standing of foreign persons in private law relations;
- principles of Russian public order protection;
- principle of will autonomy;
- principle of the closest tie [3].

Some researchers supplement this list by other types of collision regulation principles. In his thesis research, Yu.M. Akimova substantiates another principle of territorial localization mediating the selection of the applicable law taking into account the link between legal relation and certain area using the only clearly formal criterion designated by the legislator [4]. However, it is hard to agree with this conclusion since we believe that the territorial localization used in most cases for immovable property is manifestation of the criteria of the closest link specific for this object of private law relations.

Another researcher R.M. Khodykin distinguishes the principle of unifying collision norms and notes that it is internally aligned, ensures an integer link between the concepts and elements and it directs the process of creating and interpretation of collision norms [5]. The author states that this is not a principle of collision regulation but rather of the content of collision norms that are construed as specific, relatively stable basis for creating, functioning and development of collision norms. This understanding of the principle of unifying collision norms would narrow the interpretation of international private law principles to functional support of formation of collision norms.

There is another point of view consistently supported by professor L.P. Anufruyeva according to which the international private law principles and regulation principles of international commercial agreement should include the concepts of the national regime, international politeness, highest favor and mutuality that are common, since intended to end-to-end regulation, e.g., they penetrate all or many types of social relations [6]. These principles continue the traditions of the soviet legal science and are considered jointly with the international private law principles such as the principle of sovereignty, inadmissibility of discrimination, etc., which underlines the above thesis about inter-relation of these two law branches.

Let us refer to classification of international private law principles to be able to distinguish those that meet the goal of this research: regulation of contractual legal relations complicated by a private law element; and being international in nature.

One of the most obvious criteria for classifying the international private law principles is their origin described in the thesis of R. Kolobov: the author states the existence of

principles of international-legal and national origin [7]. R. Kolobov makes a conclusion that the principles composing the first group are only resulted from the international public law principles which cannot be accepted, as the authors believe, given the above postulate on the independence of the international private law as a branch of law. The mutual relation of the international private law with other law branches, in particular, international public and civil (contractual in terms of this research) law. The contact point of these law branches is common law principles, which must be described below.

It is obvious that the division of international private law principles are very often divided by the scientific community into general and special, where general ones are those that ensure functioning of the international private law as an integral part of any legal system, and special ones are those intended to ensure specific mechanisms and methods in this law branch. However, as applicable to this classification, there are controversial views as to how the principles must be grouped by these criteria.

N. Oksyutchk proposes to establish the following common principles:

1) principle of ex-territorial use of national law;

2) principle of ensuring balance between protection of state interests and implementation of rights and legal interests of international private law subjects;

3) principle of providing certain legal statuses to foreign subjects;

4) principle of combining international and national statuary regulation;

5) principle of good faith and rationality of participants of legal relations;

6) principle of will autonomy;

7) principle of using procedural norms of the court country [8].

I. Getman-Pavlova understands common law principles as traditional legal postulates being the basis of the global legal system and believes that the primary (common) principles of international private law can be “common principles typical of civilized nations” as defined in Clause C, Article 38, Statute of the UN International Court of Justice dated June 26, 1945, by supplementing them with other examples such as: one cannot transfer another person more rights than one has; principles of justice and good faith; principles of no abuse of rights and protection of acquired rights; burden of evidence is borne by defendant; special law has priority over common law; pacta sunt servanda [9].

Reconciling with the fact that the Russian doctrine has no unified opinion towards systemization of international private law principles, G. Dmitriyeva highlights such primary principles as sovereign equality of states, protection of national legal order, and the closest tie [10].

Another important criteria of classification of international private law principles must be distinguished, which is expressed in the specific nature of legal regulation methods, namely: dividing by those that mediate the collision law regulation and those that correspond to the material law method [11].

5 Conclusion

Let us resort to documented examples illustrating the above theses. Let us note that the principles of international commercial contracts are primarily implemented on the international level as lex mercatoria, for example, the Principles of International Commercial Contract UNIDROIT [12] and the Principles of European Contractual Law [13].

In the first case, the principles of contractual freedom, permissive rule, good faith and equality of contractual parties are reflected in Chapter 1 General and in individual articles of the following chapters (for example, Article 3.10). Despite that many norms do not formally name these provisions as principles, their content leaves no doubts that they represent regulation principles of international commercial contracts.

This is true for characterizing the contents of the Principles of European Contractual Law that, in addition to the above principles of contractual freedom, permissive rule, good faith and equality of contractual parties, include the principle of rationality (see for example Article Contractual Freedom, Article 1:201: Good faith and Fair Business Practice, Article 1:302: Rationality, etc.).

The most shining example of adopting the principles of collision regulation of international commercial contracts is the Hague Principles of Law Selection applicable to international commercial contracts (the Hague Principles) [14]. Although this agreement is not mandatory and represents another example of lex mercatoria, general provisions of collision regulation of international commercial contacts that can be perceived as model prefect common trends in selecting the applicable law in the considered field. It should be noted that the preamble expressly sets out that it describes the principles concerning law selection in international commercial contracts and they confirm the principle of parties' autonomy. However, the Hague Principles adopt this principle and basis and describe all trifles related with the expression of parties' will in selecting a competent legal order and do not describe cases when such selection has not been made. In other words, the document is intended exclusively to regulation of the will autonomy principle but not the principle of the closest tie.

There are substantial similarities in the treatment of the validity, enforceability and interpretation of international choice-of-law provisions in different national legal systems. In particular, the separability and presumptive validity of such provisions are almost universally recognized in all developed legal systems. As a consequence, these rules are properly considered as having the status of general principles of international law [15].

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