CONTENT AND FUNDAMENTAL PRINCIPLES OF PRIVATE INTERNATIONAL LAW

CONȚINUT ȘI PRINCIPII FUNDAMENTALE DE DREPT INTERNAȚIONAL PRIVAT

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ABSTRACT. *Private international law is such an effective branch of law that it regulates private law relations, property and related non-property, regardless of their subject area, aimed at meeting the needs of modern society that arise in the international space. Consequently, the subject of private international law are relations aimed at establishing the rule of law of two or more states, as a result of the established property and personal non-property rights and interests between individuals. The principles of International Private Law are recognized as generalized legal regulations governing various relations in the field of International Private Law.*

Key words**:** *needs of society, property and personal non-property rights, principles of private international law*

REZUMAT. *Dreptul internațional privat este o ramură de drept atât de eficientă încât reglementează relațiile de drept privat, proprietatea și non-proprietatea aferentă, indiferent de domeniul lor, având ca scop satisfacerea nevoilor societății moderne care apar în spațiul internațional. În consecință, subiectul dreptului internațional privat îl constituie relațiile care vizează instaurarea statului de drept a două sau mai multe state, ca urmare a drepturilor și intereselor patrimoniale și personale neproprietate stabilite între persoane fizice. Principiile Dreptului Internațional Privat sunt recunoscute ca reglementări juridice generalizate care reglementează diverse relații în domeniul Dreptului Internațional Privat.*

Cuvinte-cheie: *nevoile societății, proprietatea și drepturile personale neproprietate, principiile dreptului internațional privat*

Introduction: International relations are a set of interstate relations, state and non-state relations that develop between persons of different states. The streamlining of private law relations is the purpose of International Private Law. Looking into the history of private international law, it should be noted that the term private international law (private international law) belongs to the US Supreme Court Judge, Harvard Law School Professor Joseph Storey. In 1834, his book Commentary on the Conflict of Laws was published, where the term "private international law" was used for the first time along with the already existing and widely recognized term "conflict of law". Since the middle of the XIX century. the concept of "international private law" began to be used in the European legal doctrine (droit international prive, internationales Privatrecht), and already in Russian legal literature this term was introduced in 1865 by the Russian scientist N. P. Ivanov [11, p. 20]. The correctness of the interpretation of the term "private international law" still causes some controversy.

International private law - in the sense that it establishes legal relations between persons belonging to different states, legal relations that go beyond the framework of a separate legal system and require clarification which law applies to them"[21, p. 54].

The relations regulated by the International Private Law are international, as they have a transnational nature, i.e. outside the legal system of the state. Thus, private international law provides for the regulation of private law relations that arise in the field of international

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communication. Then the subject of regulation of private international law includes private law relations complicated by a foreign element, the manifestation of which is possible in three ways: 1) the subject of the legal relationship, it is a foreign person; 2) the object of the legal relationship, which is directly located abroad; 3) a legal fact that binds the legal relationship.

As regards the subject matter of private international law, there are the following views in the doctrine of law.

1. International private law as a branch of law and a branch of jurisprudence is an area of civil law relations in the broad sense of the word [19, p. 131].

2. The task of private international law is to determine the territory over which the rule of law extends, and thus private international law deals primarily with the application of the law in space [4, p. 67].

3. The most distinct feature that makes it possible to isolate social relations within the framework of private international law is their connection with the legal order of two or more states, as well as with the system of international law [1, p. 87].

International private law can be considered both in a broad and narrow sense: in a narrow sense, it is a set of rules that regulate civil law relations with a foreign element. “Given the opinion of Professor F. F. Martens, private international law in the narrow sense could be called international civil law, along with which there would be international family law, international labor law, international arbitration procedural law and others”[10, p. 43].

International private law in a broad sense is a set of rules that regulate international relations of a private law nature, whether civil, family, currency, labor, procedural). In the advantage of civil law relations and trade relations. Relations of a private law nature are family and marriage, labor, land, currency, customs, i.e. any property and related personal non-property relations between private subjects of law [9, p. 117].

It should be noted that the subject of legal regulation of private international law includes not only civil law relations, but also relations in the currency, financial, tax and customs spheres, and at this stage of development of the state, these issues are most significant [2, p. 54].

In accordance with Art. 1 of the Law of Romania No. 105 of 1992 “On International Private Law” [17] relations of International private law are civil, commercial, labor, civil procedure and other private law relations with a foreign element.

Law of Ukraine No. 2709-IV of June 23, 2005 “On Private International Law”[18].applies to private law relations that, through at least one of their elements, are connected with one or more legal orders other than the Ukrainian legal order. According to Art. 1 of this law, private law relations are relations that are based on the principles of legal equality, free will, property independence, the subjects of which are individuals and legal entities.

The most realistic codifications of Private International Law determine its scope through: the competence of local courts in the international sphere (Section 2, Art. 2 Law of Belgium of July 16, 2004 "On the Code of Private International Law"[14]), applicable law to private law relations with an international element (part (2) art. 1 Code of Private International Law of Bulgaria 42/17. 2005 [8]), regarding the provisions of foreign law relevant to the case in question (par. (2) art. 2 of Law No. 5718 of November 27, 2007 “On the Turkish Code of 2007 on Private International Law and International Civil Procedure”[13]), determination of the legal order in the event of the presence of circumstances of the case that are related to the law of a foreign state, and, accordingly, the application of the rules of procedural law in the proceedings on this case (Article 1 of the 1998 Law of Georgia on Private International Law) [15]).

Thus, defining the subject of private international law, we come to the following conclusions:

1. The legislative base of a number of states fixes the concept of a broad understanding of the essence of private international law;

2. A characteristic and constitutive feature of private law relations is their subject composition, namely, relations arise between individuals, and are built on the principles of legal freedom, equality between participants in relations, expression of will, and property independence);

3. Relations between individuals are the subject of private international law, regardless of their scope;

4. The subject matter of private international law includes issues of applicable law, as well as issues of a procedural nature.

It should be noted that M. I. Brun was the first to introduce the concept of "foreign element" into legal circulation [3, p. 176], however, it is impossible to note an unambiguous definition of this concept, since it causes quite a bit of controversy.

1. Note that a foreign element is not an element of a legal relationship, it would be more correct to speak of foreign characteristics combined into two groups related to two structural elements of the relationship - participants and activities. The participant (subject) acting as an element of the legal relationship, and not his citizenship; the object of the legal relationship is not the location of the thing itself, but the thing, for a legal fact that took place on the territory of a certain state, there is no place in the structure of the legal relationship [22, p. 89].

2. The very definition of a foreign element is used in private international law to establish in law those legal relations in respect of which both non-domestic and foreign law can be applied. The foreign element, expressing in the most abstract form the originality of transnational private law relations, creates a connection between the relation and foreign law [20, p. 43].

The concept of "foreign element" can be fixed in various ways. Based on paragraph (2) h (1) Art. 1 of the Law of Ukraine No. 2709-IV of June 23, 2005 "On Private International Law"[18] it is established that: "A foreign element is a sign that characterizes private law relations that are regulated by this Law and manifest themselves in one or more of the following forms: at least one participant in legal relations is a foreigner, a stateless person or a foreign legal entity; the object of legal relations is located on the territory of a foreign state; a legal fact that affects the emergence, change or termination of legal relations has taken place or is taking place on the territory of a foreign state.

According to the Civil Code of the Republic of Moldova No. 1107-XV of 06.06.2002 [6], namely, Book V, Section I, General Provisions on Private International Law, para. (1) and para. (2) Art. 2576 provides: "The law applicable to private law relations complicated by a foreign element is determined on the basis of international treaties, one of the parties of which is the Republic of Moldova, this book, the laws of the Republic of Moldova and international rules recognized in the Republic of Moldova. If it is impossible to determine in accordance with paragraph (1) the law to be applied, the law of the state with which the private law relationship, complicated by a foreign element, is most closely connected, shall apply.

Regarding the legislation of the Russian Federation, namely the Civil Code of the Russian Federation No. 14-FZ of 01/26/1996 [7] according to paragraph (1) Art. 1186 of the Civil Code of the Russian Federation "The law applicable to civil law relations with the participation of foreign citizens or foreign legal entities or civil law relations complicated by another foreign element, including in cases where the object of civil rights is located abroad, is determined on the basis of international treaties of the Russian Federation, this Code, other laws (paragraph 2 of Article 3) and customs recognized in the Russian Federation". However, the presence of a foreign element in a legal relationship can take on many forms, which makes it difficult to classify them.

International private law is designed to regulate those relations that develop between individuals who are subject to the laws of various states, in addition, to eliminate the conflicts that have arisen and create unique approaches for regulating private law relations. Hence the main specificity of private international law, which consists in the establishment and application within the framework of the law and without going beyond the national legal system of those rules of law that are in force and applied in other states. The possibility of subordinating a legal relationship to the law of two or more states is the basis for recognizing the international nature of such a legal relationship [12, p. 65].

As a rule, the legal system is divided into public and private law, however, such a division is conditional. For example, in public law, elements of private law can be found, for example, the

rules of land law, which regulate the rights of individuals in the event that they acquire a land plot. Most of the public rules with private law effect are the rules of administrative law [19, p. 137].

The well-known branches of private law, and these are, as a rule: labor law, family law, are a collection of both private law and public law prescriptions. If we turn to labor law, then the termination of an employment contract, caused at the initiative of the administration, or the imposition of any disciplinary sanction are of a public law nature. Regarding the rules governing family relations, whether it is marriage with a foreign citizen, or the establishment of the place of residence of the spouses, they will also be of a public law nature. Business law and banking law are no exception, because their peculiarity lies in the regulation of non-powerful relations arising between private subjects of law, as a result of the resolution of both property and personal non-property interests.

The presence of a foreign element makes it possible to connect private law relations with other legal systems. The legal connection of a relationship with the legal order of two or more states is a consequence of the presence of a foreign element in private law relations [9, p. 121].

The presence of a foreign element in a legal relationship does not yet form a connection with foreign law. It is necessary to have some specific circumstance with which the rules of law of several states associate the emergence, change or termination of a legal relationship [20, p. 48].

The legal fact is the circumstance that is inherent in the essence of this legal relationship. The significance of a legal fact in private international law is significant because it arises within the legal order of a foreign state [1, p. 89]. It is important to note that the relationship that appears between the foreign element and the subject himself is special when the foreign element does not appear from the personal status of the subject himself, but as a consequence of the presence of a subjective right abroad. The very legal connection between the legal orders of several states is revealed in the analysis of the legal fact produced by the court in order to establish the applicable law.

In our opinion, the pressing modern problem is the problem of private law relations that can be traced on the Internet, where there is information communication that is of a private law nature, where, on the one hand, the user, he is also the consumer of the information resource and the direct creator of this information resource, where each of the listed elements may refer to a foreign country, as The network of the Internet space has both an international and a very global character.

Each branch of law has both general and special principles, and private international law is no exception. These principles do not have the form of “generally accepted international law as in the case of the basic principles of public international law”, we are talking about general or similar principles (rules) of private international law of specific states [12, p. 68].

The principles of International Private Law are recognized as generalized legal regulations governing various relations in the field of International Private Law. It should be noted that the content of the principles of private international law is interpreted in different ways. According to P. Kalensky, the principles of International Private Law are “certain permanent rules arising from the requirement for a rational settlement of the most typical cases (especially in the field of conflict of laws)” and established by the principles of International Public Law. The significance of these principles lies in the fact that they represent "an attempt to generalize the settlement of conflict law precedents, to strengthen the tendency to formulate certain fundamental rules» [12, p. 69].

The main principles of private international law P. Kalensky identifies such “principles of conflict of laws as the principle of free choice by the parties of the rights to be applied; the principle of locus regit formam actus, applied to the conditional requirements of legal acts; the principle of legis rei sitae applied in conflict of laws regarding rights in rem to immovable and movable things» [11, p. 43].

The general principles of private international law are equated with the significance of the general principles operating in public international law. For example, the main principle of private international law should include the obligation of states to apply the law of a foreign state in individual cases. Often in the legal literature, the opinion was expressed that the principles of

private international law should be considered the principles recognized in international law (the principles of ius cogens). There is no doubt that the principles and norms of international law establish the operation of International Private Law, but this does not mean that the principles of International Public Law are the basis of the general principles of International Private Law as a branch of law.

Of course, the principles of international law can operate in the national legal system (the duty of states to take into account international legal standards in the legislative process, to correct national legal regulations in connection with the fulfillment of prescribed international obligations). We are talking about imperatives that follow from the generally recognized principles and norms of international law (the principle of pacta sunt servanda), which "provide a legal link between the national legal system of a particular state and international law» [1, p. 92].

For example, the principle of sovereign equality of states acts as a principle of private international law, namely: the prohibition of interference in the internal affairs of any state, while, without excluding equally, the observance of both one's own right and the rights of others, because no state it is allowed, within its competence, to create legal prescriptions that would at least somehow affect the sovereign rights of other states.

The dominant concept regarding the nature of the general principles of law is nothing more than the basic legal rules that are used in the application of real legal norms, in establishing the rights and obligations of a particular subject of law, these are traditional postulates, a kind of legal technique developed back in the praetor law of ancient Rome. This is the correct vector of the entire legal system, the basis of the foundations of not only international law, which is the basis of the legal culture of our society, a compass in the fundamentals of law.

The general principles of PIL are the principle of pacta sunt servanda (contracts must be respected), the principles of justice and good conscience. Article 38 of the Statute of the International Court of Justice establishes its duty through the foundations of international law, but does not limit the right of the Court to decide a case in equity and good conscience (ex aequo et bono), if the parties so agree. The duty of the International Court of Justice to decide disputes aequo et bono presupposes the application of general principles of law. With regard to the activities of arbitration courts, which are obliged to follow the rules aequo et bono when considering disputes from international commercial contracts, presumes the application, again, of the general principles of law [11, p. 46].

Among the general principles of law used in private international law are: the principle of justice, the principle of good conscience, the principle of protection of acquired rights, the principle of the burden of proof, which is assigned to the plaintiff, the principle of non-abuse of law, etc. General principles of law should be distinguished from generally recognized principles, used in modern international public law.

With regard to the special principles of International Private Law, it can be noted that they act as certain rules of conduct, general rules of International Private Law, involved in national law. I would like to note the specificity of the principles of private international law in comparison with other principles of other subsystems in the following: on the one hand, it is they that connect national legal systems to each other, but on the other hand, they connect international and national law.

Let us focus on the paramount and special principle of private international law - the autonomy of the will of the parties, which is the basis of property and related non-property legal relations arising between individuals (for example, the principle of freedom of contract, which represents the freedom to conclude various types of contractual structures, within the framework of the law and designed to regulate social relations that meet the needs of society) [23, p. 22].

International private law currently involves the maximum use of the independence of the desires of the parties from anything.

The next special principle of private international law is the principle of the closest connection, which establishes the beginning of the legal regulation of private relations that are associated with a foreign legal order. It is this principle that has a basic meaning in the regulation of

international private relations, as well as in determining the ratio of both conflict and substantive regulation. Concerning conflict bindings, it should be noted that they depict the principle of the closest connection between a legal relationship burdened with a foreign element and the established legal system. For example, relations with the circulation of things are most interconnected with the right of the place where the thing is located. This objective connection is reflected in the conflict principle lex rei sitae [12, p. 72].

The principle of the closest connection, acting as the main principle of Private International Law, is enshrined in the Code of Private International Law of Bulgaria 42/17 of 2005[8], namely in Art. 2: "Private law relations with an international element are governed by the law of the state with which they have the closest connection. The provisions contained in the Code regarding the determination of the applicable law express this principle. If the applicable law cannot be determined on the basis of the provisions of the Code, the law of the state with which this relation, by virtue of other criteria, has the closest connection, shall apply.

In the Law of Poland "On International Private Law" dated 04.02.2011 [16], namely in Art. 67 provides: "In the absence of an indication of the applicable law in this law, special rules, international treaties in force in the Republic of Poland and the law of the European Union, the law of the country with which the relation is most closely connected shall apply to the relation falling within the scope of this law". The next principle is the principle of granting certain regimes - national, special (preferential or negative), most favored nation treatment. National and special regimes are mainly granted to foreign individuals; most favored nation treatment for foreign legal entities [11, p. 48]. Preferential (preferential treatment) is provided to both legal entities and individuals. The legal status of foreigners is based on the principle of basic most favored nation treatment. The legal content of this principle is based on the provision on the territory of the state of absolutely equal rights to every foreign person in a specific area of his activity on the basis of a concluded international treaty.

A significant role in private international law is given to the principle of reciprocity, which consists in granting persons of a foreign state rights or an established legal regime on the basis that persons of the country providing them will enjoy the same rights or legal regime in this foreign state. National legislation acts as a source of reciprocity. Reciprocity in the activities carried out by the law enforcement agencies of the two states is expressed in the following ways:

- law enforcement authorities of one state record that no actions were taken in a friendly country that would indicate a rejection of reciprocity;
- the national law enforcement authority in the resolution lists the actions of a foreign state, stating reciprocity between these parties.

Of essential importance for International Private Law is the division of reciprocity into the following two types: material reciprocity and conflict reciprocity. Problems related to conflict reciprocity should be attributed to conflict law, and as for material reciprocity, it is divided into two types: actually material and formal reciprocity.

Material reciprocity implies granting to foreign persons the same rights and powers that national persons use in the corresponding foreign state. Formal reciprocity involves granting to foreign persons the full range of rights and powers arising from local legislation, which consists in the fact that foreign persons in a neighboring state are also granted those rights that these persons do not enjoy in their country, however, foreign persons are not entitled to insist on granting the rights that they have in their own country, in case the granting of these rights is not prescribed by the legislation of this foreign state. The provision of material reciprocity is characteristic of inheritance law, industrial property law, and copyright law.

The principle of international comity (comitas gentium) is the oldest institution of private international law, which served as the fundamental basis for the application of foreign law. International comity is nothing more than an international custom (a rule of conduct that states follow without recognizing it as legally binding) [1, p. 96]. The show of international courtesy does not involve such actions and does not require reciprocity, without regarding the refusal itself as an unfriendly act.

I would like to draw attention to the fact that the very concept of international courtesy is not used in international treaties, an international legal custom, not presented in the form of a legal norm, but used in law enforcement practice. In the absence of an international agreement on the provision of legal assistance, the state can count on assistance through reciprocity in the manner of international courtesy, but in the event that another state is denied legal assistance, without good reason, such a refusal will mean a violation of the principle of international courtesy .

The concept of "international courtesy" is interconnected with such a concept as "reciprocity", but it cannot be argued that they are identical. Reciprocity is the norm of both international legal custom and the norm of national law, however, it is realistic to establish international courtesy as reciprocity that is not fixed in an agreement or law.

The principle of non-discrimination is of no small importance in private international law. Discrimination is an unlawful violation or even restriction of both the legal rights and legitimate interests of foreign persons located on the territory of another state. This principle means that persons residing in one state should not be placed in a worse frame than persons in another state. Any state has the right to demand that another state create the same conditions for its national persons as for persons of other states, i.e. equal conditions for all.

Such a principle as the principle of non-discrimination proceeds from the sovereign equality of states, while not requiring contractual consolidation. Note that the principle of non-discrimination is the back side of the principle of granting certain regimes, since It is one thing if national legislation establishes general rules on granting national treatment to foreign citizens in the field of civil legal capacity, and another thing is the groundless exclusion from the scope of this rule of citizens of a particular state, while this will be regarded as discrimination.

The right to retort. Retortions are nothing more than retaliatory and restrictive actions of the state, lawfully applied against another state in the event that both the legitimate rights and interests of individuals and legal entities of another state are violated on the territory of this state. Such measures are a kind of response to an unfriendly act of individuals in a certain area of international communication and not aimed against the state as a whole, but aimed at the abolition of discrimination, as well as the application of the principle of reciprocity between states. The lawful use of retortions should not be described as a violation of the principle of non-discrimination. The use of retortions is fixed in the legislation of a number of states, for example, in the legislation of the Republic of Moldova, namely in Art. 2584 of Book V of the Civil Code of the Republic of Moldova, the following is fixed: “The Government of the Republic of Moldova may establish retaliatory restrictions (retortions) in relation to the property and personal non-property rights of citizens and legal entities of those states in which there are special restrictions on the property and personal non-property rights of citizens and legal entities of the Republic Moldova". Regarding the legislation of the Republic of Armenia, Art. 1261 of the Civil Code of the Republic of Armenia No. 3P-239 dated 28.07.1998 [5] established: “reciprocal restrictions (retortions) in relation to the property and personal non-property rights of citizens and legal entities of those states in which there are special restrictions on the property and personal non-property rights of citizens and legal entities of the Republic of Armenia”.

Conclusions:

- International private law is such an effective branch of law that it regulates private law relations, property and related non-property nature, regardless of their subject area, aimed at meeting the needs of modern society that arise in the international space. Consequently, the subject of private international law are relations aimed at establishing the rule of law of two or more states, as a result of the existing property and personal non-property rights and interests between private individuals (non-sovereign entities).

- The principles of International Private Law are recognized as generalized legal regulations governing various relations in the field of International Private Law.

- Among the general principles of law used in International Private Law are the following: the principle of justice, the principle of good conscience, the principle of protection of acquired rights,

the principle of the burden of proof, which is assigned to the plaintiff, the principle of non-abuse of law, etc. General principles of law should be distinguished from generally recognized principles used in modern public international law.

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