

ISSUES OF CODIFICATION AND INSTITUTIONAL DEVELOPMENT OF CONFLICT OF LAWS IN THE REPUBLIC OF ARMENIA LEGISLATION

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The conflict of law rules regulate private legal relations across countries, in other words, when either the subject of the private legal relation is a foreign national, or the object is in a foreign country, or the legal fact occurred in a foreign country.² The presence of a foreign element renders the private relation into a private international relation that is concerned with the jurisdiction of more than one country. All the countries involved in private international dealings (which concern all the existing states without any exceptions) must prescribe conflict of law rules addressing those dealings.

The Republic of Armenia legislation also provides conflict of law rules which are established in Articles 1253-1293 of the RA Civil Code, Articles 141-152 of the RA Family Code, Articles 7-8 of the RA Labor Code. Conflict of law rules are provided in international bilateral and multi-party agreements signed by Armenia which are part of the RA legislation according to Article 6 of the RA Constitution. It is understood that the conflict of law rules, like the entire legislation, should not be studied in statics but in dynamics; these must change and develop alongside changes and developments in private dealing. Taking a critical look at the conflict of law rules set forth in the RA legislation from this aspect, it should be noted that there are separate issues which could be viewed in two dimensions: codification and legal-institutional matters regarding conflict of laws. In reality, we view issues relating to the legal-institutional matters regarding conflict of laws as an organic whole

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² Haykyants A., Private International Law, Textbook, YSU Press, Yerevan, 2010, pages 9-10.

for the sole purpose of formal scientific cognition in two dimensions to make sure that separate aspects are highlighted more distinctly.

1. Issues of codification of conflict of law rules. In the RA legislation, the conflict of law rules are codified in three sources: RA Civil Code, the RA Family Code, and the RA Labor Code. Armenia has inherited such codification from the Soviet system where the conflict of law rules were provided in separate laws³. In the soviet system, such an approach was justified because under a state monopoly and totalitarian rule the possibilities of development of private international dealing were highly limited, and the regulation of conflict of laws was treated accordingly. Immediately after the independence of Armenia, activities were aimed at regulation of private relations, development of a “new generation” of sources, therefore, it was difficult to rid of the fossilized legal approaches of soviet decades. Especially that in the first years of independence international private dealing was not that intensive either.

Presently, more than ever in the last two decades, Armenia is experiencing intensive private international dealing. The Armenian economy is being rapidly internationalized, foreign and joint companies are established, migration rates are very high, external tourism is activated, modern science and technology open up new opportunities for remote international contacts. At the same time, the huge amount of private international dealing cannot allow the RA rules of conflict of laws remain static. Moreover, the conflict of law rules applying to dealing itself should be rapidly modified to meet the modern needs. The first step towards the development of the conflict of law rules should be their consolidation in one source, *i.e.* consolidated codification is necessary. The tactics of regulation of conflict of laws requires not only multiple rules and provisions on conflict of laws but also certain combination and hierarchy put in place; only in this case will it be possible to judge the presence or absence of a system of provisions on the conflict of laws, mutual

³ Private International Law: Contemporary Issues, М. ТЕИС 1994, р. 315 [Международное частное право: современные проблемы. М. ТЕИС. 1994, С. 315].

relations and counteraction, contradictions or harmony.⁴

It should be noted at the very beginning that incorporation of conflict of law rules in the above mentioned codes of the Republic of Armenia is not justified, primarily due to the subject matter of regulation. For example, Article 1 of the RA Civil Code states that the civil legislation and other legal acts regulate relations among persons, whereas the conflict of law rules do not regulate private relations but look for and find the jurisdiction of the country that shall regulate the private relations. The ultimate goal of the conflict of law rules is the regulation of private relations but the conflict of law rules pave their way to that goal indirectly, not directly. Other regulations (criminal, administrative etc.) which, however, have their separate sources of codification indirectly address the private relations. The best international practice is to codify the conflict of law rules in a separate source which is entitled International Private Law in almost all the countries. Such laws exist in Austria, Germany, Switzerland, Poland, Hungary, Luxembourg, Turkey etc.⁵ Of the post-Soviet states, Georgia⁶ and Ukraine⁷ have adopted similar laws. By the way, in the Russian Federation the conflict of law rules are still provided by separate sources of law but the Russian legal circles have been considering the appropriateness of such an approach for a long time now. Still in the 1990s, there was confidence that Russia would adopt a separate private international law.⁸ It has not been adopted yet but we believe that it is a matter of time, and sooner or later the theory of private international law will choose this option.

Consolidated codification is also preferable in terms of practical use. It is easier for both law enforcement and private persons to deal with one consolidated source of law than several sources of law, especially if there might be contradictions or misinterpretations

⁴ *Ibid.*, (p. 31)

⁵ Международное частное право: современные проблемы, С. 314 [Private International Law: Contemporary Issues, 1994, page 314]

⁶ <http://pravo.hse.ru/intprilaw/doc/050301>

⁷ http://base.spinform.ru/show_doc.fwx?rgn=16954

⁸ Международное частное право: современные проблемы. М. ТЕИС. 1994 (Private International Law: Contemporary Issues, М. ТЕИС, 1994).

among these sources. In this regard, several systemic or codification issues in the RA legislation are brought below. Twelfth Section of the RA Civil Code, titled *International Private Law* is a pandect which has its general provisions set down in Articles 1253-1261 and special provisions set down in Articles 1262-1293. The General Provisions are: Determination of Legal Concepts; Clarification of the Content of Norms of Foreign Law; Application of the Law of a State with Multiple Legal Systems; Reciprocity Principle; Derogation on Public Order; Application of Imperative Norms; Invoking Foreign Law; Retorsions.

A look at the other two sources of law, the Family Code and the Labor Code, reveals the following:

- Part VII of the Family Code envisages only two of the above-mentioned general provisions, Ascertaining of the Norms of Foreign Family Law (Article 151) and Restriction of Application of Foreign Family Law (Article 152);

- The Labor Code does not even contain a special section for labor-related conflict of law regulations, while the two modest Articles 7 and 8 addressing regulation of conflict of law in international labor relations do not even mention the above mentioned provisions.

The answer to the question whether the general provisions on the conflict of law in international family and labor relations set forth in the Twelfth Section of the Civil Code are applicable could be found in Article 1(4) of the Civil Code, “Family, labor relations, relations pertaining to the use of natural resources and protection of the environment shall be regulated by civil legislation and other legal acts, unless otherwise provided for by family, labor, land, nature conservation and other special legislation [emphasis by author].” Since the Family Code and the Labor Code do not envisage the general provisions on conflict of law already known to us, we can suggest that the general provisions on conflict of law can be applied also in the event of regulation of conflict of law in international family and labor relations. We used and emphasized the phrase “we can suggest” because in this case one may only suggest but not

assert. We cannot assert because the phrase “unless otherwise provided for by family, labor, land, nature conservation and other special legislation” is used in Article 1(4) of the Civil Code and it does not stem directly from this that the clauses of the Civil Code shall apply unless otherwise provided; “unless otherwise provided” may mean that nothing else may be applied at all. This is also a possible option and an equally logical one, like the first interpretation. For example, Article 152 of the RA Labor Code on the restriction of application of foreign family law states: “The norms of foreign family law are not applied if such application contradicts to the legal system (public order) of the Republic of Armenia. In such cases the legislation of the Republic of Armenia is applied.” In regard to the derogation of public order, Article 1258(1) of the RA Civil Code states, “A norm of foreign law to be applied in accordance with Article 1253(1) of this Code shall not apply where the consequences of its application explicitly contradict the fundamentals of the legal system (public order) of the Republic of Armenia. In this case, the relevant norm of the law of the Republic of Armenia shall apply, as necessary.” Article 1258(2) states: “The refusal to apply a norm of foreign law may not be solely based on the circumstance that the legal, political or economic system of the relevant foreign state differs from the legal, political or economic system of the Republic of Armenia.” As we can notice, Article 152 of the Family Code does not envisage an imperative order unlike Article 1258(2) of the Civil Code. One may presume that the requirement set forth in Article 1258(2) of the Civil Code may be applied to international family relations in the event of derogation of public order or, vice versa, it may not be applied because if the RA Family Code does not envisaged that, this is what was intended – that such a provision is not applicable to international family relations, *i.e.* the RA Family Code “envisages not envisaging such a demand” [emphasized by the author].

Here is another example: the RA Labor Code does not mention whether *Lex voluntaris* may be applied to international labor relations.

Here a question arises: if it is not foreseen, it means that Article 1253(2) or Article 1284(1) of the RA Civil Code can be applied and application of *Lex voluntaris* is permitted, or on the contrary, it should be considered that if it is not foreseen, one should assume that *Lex voluntaris* is not acceptable in respect to conflict of laws in international labor relationships. This and other similar examples bring us to the conclusion that no misunderstandings shall occur if a consolidated codification is conducted by RA legislation: in case of codification by one source, at least similar problems would be brought to a minimum.⁹

Unambiguously, it should be stated that the adoption of the RA Law on “Private international law”, implementation of consolidated codification of conflict of law is a necessity and imperative of time given the current reality of the Republic of Armenia.

2. Institutional issues of conflict of laws. In case of RA conflict of law norms and institutions, there are a number of institutional issues, the existence of which evidence some circumstances: either doctrine requirements were strongly disregarded, or the movements in public-state life were strongly disregarded. Here are some examples on the stated aspects.

Article 1253(1) of RA Civil Code establishes: “The law applicable by the court to civil law relations involving the participation of foreign citizens, including individual entrepreneurs, foreign legal persons and organizations not considered as legal persons in accordance with foreign law, stateless persons, as well as in cases when the object of civil rights is located abroad shall be determined on the basis of this Code, other laws of the Republic of Armenia, international treaties of the Republic of Armenia and international customary practices recognized by the Republic of Armenia.” Here the legislator established the subject of conflict of law norms, namely those private relationships, which are encumbered by foreign component. In private international law doctrine “foreign component”¹⁰ means that either the subject of

⁹ *Ibid.* p. 317.

¹⁰ http://www.cisg.ru/content/download/ipr_ua_rus.pdf

private legal relation is a foreign person, or the object of private legal relation is located in foreign state, or the legal fact took place in foreign state. In Article 1253(1) of the RA Civil Code the legislator committed doctrinal omission not stating anything about legal fact.

Article 1256 of the RA Civil Code: “In cases when the law of a state in which multiple legal systems are in effect, and it is impossible to determine the legal system [note of the author: including ours] to be applied, the legal system with which the given relation is most closely connected shall apply.” Here, the legislator for application of law foresees application of *Lex causae* in case of a state with several legal systems, “when ... it is impossible to determine the legal system to be applied”. And it is not clear, how is the impossibility to determine the applicable legal system established, and under the law of which state the impossibility should be established. Here the non-consistent tendency of the doctrine can be noticed. As evidences the private international law doctrine, in case of application of the law of the state with several legal systems that state’s national legislation should determine especially which of the several legal systems should be applied for regulation of the relationships, and only in case of impossibility to determine by the national legislation of that state the court may apply *Lex causae*¹¹.

Article 1267 of the RA Civil Code established that “A foreign citizen or a stateless person shall be declared as having no or limited active legal capacity by the law of the Republic of Armenia.”¹² The RA legislator did not take into consideration the circumstance that the foreign citizen or stateless person can be recognized as not having active legal capacity or having limited active legal capacity under the Republic of Armenia law only in the Republic of Armenia, whereas in case of current formulation of the effective norm, we come across to real doctrinal nonsense.

Article 1289 of the RA Civil Code establishes: “Obligations arising due to causing damage shall be governed by the law of the

¹¹<http://pravo.hse.ru/intprilaw/doc/050301>.

http://www.cisg.ru/content/download/ipr_ua_rus.pdf

¹² Similar approach is also displayed in Article 1269 of the RA Civil Code.

state where the action or the circumstance that has served as a ground for the claim on compensation for damage occurred, unless otherwise provided for by the agreement of the parties [note of the author: ours].” As shown by comparative study of legislative approaches of different states, in delictual obligations it is not proper to leave the choice of applicable law to the autonomous will of the parties¹³ since it may cause damage to the interests of aggrieved who has already suffered because of the caused damage. In contrary, the choice of applicable law in case of delictual obligations should depend on the discretion of the aggrieved, who should decide within the law of which state the most complete and fair compensation of the damage can be ensured.

Article 1292 of the RA Civil Code establishes the following: “1. The law of the state where the testator had the last place of residence shall apply to succession, unless the testator has designated in the will the law of the state of which he or she is a citizen. 2. The ability of a person to make and revoke a will, as well as the form of a will and of the act on its revocation shall be determined by the law of the state where the testator had his or her place of residence at the moment of making the will or drawing the act on its revocation. However, failure to observe the form shall not serve as a ground for declaring the will or the act on its revocation as invalid, where the will or the act on its revocation meets the legal requirements of the place of drawing thereof or the legal requirements of the Republic of Armenia.” Article 1293 of the RA Civil Code establishes the following: “The succession of immovable property shall be determined by the law of the state where the property is located.” As a result of the combination of the two articles directed to conflict of law regulation of succession relationships, it is not clear whether the testator can chose the law of his or her citizenship in the will drawn up in relation to a real estate, or only *Lex rei sitae* law, that is the law of the place where the real estate is located, is applicable in case of

¹³ http://www.cisg.ru/content/download/ipr_ua_rus.pdf,
<http://pravo.hse.ru/intprilaw/doc/050301>, <http://pravo.hse.ru/intprilaw/doc/041101>,
<http://pravo.hse.ru/intprilaw/doc/042901>

inheritance of real estate on the basis of a will.

Now, let us refer to those issues of RA conflict of law, which relate to the lack of consistent reflection of changes in public-state sector.

Article 1262(1) of RA Civil Code establishes that “[w]here a person has citizenship of two or more states, his or her personal law shall be the law of the state with which that person is most closely connected”. Article 1262 of the RA Civil Code does not separately refer to the category of RA dual citizens, in this way regarding the RA dual citizens as the dual citizens of other states and displaying corresponding legal approach towards them. Such approach is not anyhow justified; it was necessary to display a differentiated approach. And it is based on the following reasons.

The amendments of November 27, 2005 to the Republic of Armenia Constitution served as a basis for the new state-legal status. One of the core demonstrations of those amendments was the introduction of dual citizenship. The amended RA Constitution foresees that “Rights and responsibilities of persons holding dual citizenship shall be prescribed by law.” On the basis of that constitutional provision, the RA Law “On the citizenship of the Republic of Armenia” adopted on October 23, 1995 was supplemented by a provision under the RA Law adopted on February 26, 2007, namely Article 13.1 was added, which states the following:

a) A person holding the citizenship of more than one state shall be deemed to be a dual citizen;

b) A person holding the citizenship of another state (countries) in addition to the citizenship of the Republic of Armenia shall be deemed to be a dual citizen of the Republic of Armenia;

c) For the Republic of Armenia, a dual citizen of the Republic of Armenia shall be recognized only as a citizen of the Republic of Armenia;

d) A dual citizen of the Republic of Armenia shall have all the rights provided for a citizen of the Republic of Armenia and shall bear all the responsibilities and liability provided for a citizen of the Republic of Armenia, except for the cases provided for by the international treaties and law of the Republic of Armenia.

In Armenia, in the conditions of introduction of dual citizenship

institution we come across to a very serious legal problem if in the Republic of Armenia our dual citizens' civil-legal status also is made dependent on the principle of the law of a closer connection. And the law with the closest connection may be as the law of the Republic of Armenia, as the law of any other state, with which our dual citizen may have a close connection (by virtue of the place of residence, place of property or the most valuable part thereof, language of thinking, nationality and other circumstances). In case of such approach to the issue, we violate the provision of Article 13.1 of the RA Law "On the citizenship of the Republic of Armenia", that "[f]or the Republic of Armenia, a dual citizen of the Republic of Armenia shall be recognized only as a citizen of the Republic of Armenia". Due to this aspect the RA citizen and the RA dual citizen are put in an unequal condition. It is true that in case the principle of the law of closer connection is applied towards the RA dual citizen, there is a possibility that the RA law will be selected for application towards him or her, and in that case, virtually, the inequality identified by us will disappear; however, the selection of the RA law under the principle of the law of closer connection is one of the possible options and not the only one. Thus we cannot be satisfied with only that possibility and legislatively maintain a not desired situation. Especially, we would like to record that at legislative introduction of the dual citizenship institute, it was not taken into account the requirements of the RA conflict of law requirements, in the RA legal system an unbalanced condition was created, as public-legal regulation does not efficiently complement private-legal regulation.

Which are the ways for resolution of the issue? It must be noted that such situations are not new, there is a well-developed practice in the world, which should be studied and adopted. The researches show that countries such as Hungary¹⁴, Austria¹⁵, Russia¹⁶, Latvia¹⁷,

¹⁴ International Private Law: Foreign legislation/condition and research. Edited. A.N.Zhiltsov, A.I.Muranov / STATUTE. M. 2001, page 231.

¹⁵ Ibid, page 159.

¹⁶ Dmitriev G.K. Comments to Civil Code of Russian Federation, Part three, Section "International Private Law". NORMA, M. 2002, pages 88-89.

¹⁷ International Private Law: Foreign legislation/condition and research. Edited. A.N.Zhiltsov, A.I.Muranov / STATUTE. M. 2001 page 400.

Lichtenstein¹⁸, Poland¹⁹, and Romania²⁰ have clear legal regulatory mechanisms in relation with similar cases. For example, Article 9 of the Austrian Federal Act on International Private Law establishes that “[t]he private law of natural person is the law of the state to which that person belongs to. In case along with foreign citizenship natural person has also Austrian citizenship, the latter shall be decisive. In case the natural person has citizenships of several countries and does not have Austrian citizenship, his or her private law is the law of the state, with which the person is most closely connected”. As the example of Austria shows, in case the dual citizen has a citizenship of a specific country, it is regarded by that state as its citizen, and the other citizenship of the person is disregarded, and legislatively private law is regarded as private citizenship law.

Along with the amendments to the RA Law “On the citizenship of the Republic of Armenia”, it was also necessary to make relevant supplements to Article 1262 of the Civil Code as follows: “The personal law of the person having dual citizenship, who also has the citizenship of the Republic of Armenia, is the law of the Republic of Armenia.” As a result of this supplement, the Republic of Armenia would fully meet the public-legal requirement that “the person having dual citizenship of the Republic of Armenia will be considered only as the citizen of the Republic of Armenia”.

Article 1289 of the Civil Code referring to regulation of conflict of laws of the obligations deriving as a result of causing damages, defines common collision norms without distinction (*Lex loci delicti*, *Lex voluntaris*) against all the liabilities caused by damage. This is not justified, in particular in the context of all the activities undertaken at the level of the UN, focused on a more effective protection of the consumers’ rights, and these efforts are not reflected in the RA legislation in terms of the choice of the law. It is known that in 1999 the United Nations Guidelines for Consumer

¹⁸ Ibid, page 407.

¹⁹ Ibid, page 469.

²⁰ Ibid, page 494.

Protection²¹ were adopted, the Article 32 of which defines that the Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. So what kind of examples can be exemplary and educational for us? Here we can mention about the Russian approach. Thus, taking into consideration the current international requirements of the trade turnover, the legislative power of Russia has identified a collision volume, which refers to the liabilities deriving from the damage caused as a result of defects of the product (activities, services). According to the Article 1221 of RF Civil Code, the choice of the law of the country applied to these obligations shall be left to the discretion of the complainant, who can select any of the following options:

- the law of the country where the seller or the producer of the given product (activity, service) has residence or address,
- the law of the country where the complainant has residence or address,
- the law of the country, where the product was purchased, the service was delivered or the activities were carried out.

The rules of the mentioned article are applied also to those cases when the damage is caused as a result of providing wrong or incomplete information about the product (activity, service).

If the complainant does not chose any law of any country, the law to be applied shall be chosen according to the rules established by Article 1219 of the RF Civil Code, *i.e. Lex loci delicti* principle shall be applied.

An approach similar to the Russian legislative approach is applied also in the Ukraine Law on Private International Law²².

Being limited with the illustrated examples, I would like to sum up and tell that the conflict of laws seemed to be provided by the RA legislation to the extent that the Twelfth Section of the RA Civil

²¹ <http://www.un.org/ru/ecosoc/docs/1999/r1999-7.pdf>

²² http://www.cisg.ru/content/download/ipr_ua_rus.pdf

Code was not amended or supplemented since it was adopted, Part 7 of the RA Family Code was not amended or supplemented either except for Article 150 (supplemented on February 8, 2011). While conflict of laws is the mirror of private international circulation, they reflect the processes of social life, and when they do not reflect them properly, they reflect the attitude of the state and the society to those norms, which is not adequate in our case.

In the introduction of the 2012-2016 Strategic Program of the RA Legal and Judicial Reforms it is noted that the reforms only in one direction can make no sense or be ineffective if related reforms are not carried out in other relevant areas. So the planned reforms should have systematic approach in all the directions in parallel, in particular a number of material laws should be adopted or improved based on the revised RA Constitution and international best practice.

Identification of the problems related to integrated codification of conflict of laws, as well as institutional issues of the Republic of Armenia, also this modest analysis and recommendations are fully in line with the main issues specified in the 2012-2016 Strategic Program of the RA Legal and Judicial Reforms and can be useful for the development and improvement of the national legislation.