



**Features of the  
subject composition  
as a criterion for  
the systematization  
of treaties in the  
international  
private law**

## FEATURES OF THE SUBJECT COMPOSITION AS A CRITERION FOR THE SYSTEMATIZATION OF TREATIES IN THE INTERNATIONAL PRIVATE LAW

### CARACTERÍSTICAS DE LA COMPOSICIÓN TEMÁTICA COMO CRITERIO PARA LA SISTEMATIZACIÓN DE TRATADOS EN EL DERECHO PRIVADO INTERNACIONAL

#### ABSTRACT

This article is an attempt to study the system-forming criteria of civil law treaties complicated by a foreign element.

The common goal of establishing the treaties within the agreed system is the creation of a structure, the logical harmonization of agreements, schemes and a mechanism for the regulation of economically important relations of a transboundary nature. A competent system approach predetermines the primary achievement of the law-making goal - the organization of effective impact of modern legislation on the emerging legal relationships. It is the criterion of such systematization, correctly chosen and used, is the guarantee of the formation of an effective legal canvas. This study combines general and private-scientific methods of cognition, which include such as formal legal one, used in the analysis of regulatory legal acts and legal norms adopted to regulate legal relations in the field under consideration; logical and legal one, through which the content of legal norms is studied in relation to this problem under consideration; concrete-sociological one, used to analyze the documents and publicistic articles in the course of work; and historical method. It is concluded that the foreign element does not affect the substance of the transactions under consideration. However, a special status of the parties to the agreements causes the emergence of specific features of their legal regulation that allow using the subject composition of treaty relations of an international nature as a system-forming criterion of great importance, including from the point of view of law enforcement practice. Further doctrinal and practical study of such features is seen as important and theoretically interesting.

**KEYWORDS:** civil law, treaty, system of treaties, system-forming features, subjects of law, foreign element.

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#### RESUMEN

Este artículo es un intento de estudiar los criterios de formación de sistemas de los tratados de derecho civil complicados por un elemento extraño.

El objetivo común de establecer los tratados dentro del sistema acordado es la creación de una estructura, la armonización lógica de acuerdos, esquemas y un mecanismo para la regulación de relaciones de importancia económica de naturaleza transfronteriza. Un enfoque de sistema competente predetermina el logro principal del objetivo de elaboración de leyes: la organización del impacto efectivo de la legislación moderna sobre las relaciones jurídicas emergentes. Es el criterio de tal sistematización, correctamente elegido y utilizado, es la garantía de la formación de un lienzo legal efectivo. Este estudio combina métodos de cognición generales y privadocientíficos, que incluyen el legal formal, utilizado en el análisis de actos legales regulatorios y normas legales adoptadas para regular las relaciones legales en el campo bajo consideración; lógica y legal, a través de la cual se estudia el contenido de las normas legales en relación con este problema bajo consideración; concreto-sociológico, utilizado para analizar los documentos y artículos publicitarios en el curso del trabajo; y método histórico. Se concluye que el elemento extranjero no afecta el contenido de las transacciones consideradas. Sin embargo, un estatuto especial de las partes en los acuerdos provoca la aparición de características específicas de su regulación legal que permiten utilizar la composición temática de las relaciones convencionales de carácter internacional como criterio de formación de sistemas de gran importancia, incluso desde el punto de vista de la práctica de la aplicación de la ley. El estudio doctrinal y práctico adicional de tales características se considera importante y teóricamente interesante.

**PALABRAS CLAVE:** derecho civil, tratado, sistema de tratados, características de formación de sistemas, sujetos de derecho, elemento extranjero.

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 **DINARA ANVAROVNA MUSABIROVA**

 Kazan Federal University, Russian Federation

 [musabirovadinara@mail.ru](mailto:musabirovadinara@mail.ru)

 **MARIA VITALIEVNA KRIVENKOVA**

 Kazan Federal University, Russian Federation

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## 1. INTRODUCTION

The concept of “system” has an extremely wide range of application and various interpretations, due to the content that is attached to the described concept in relation to a specific object under consideration. Nevertheless, the main features of the system retain their significance in any definition.

For the purposes of the study made, the system of treaties will be understood as the aggregate of civil law treaties possessing intrasystem connection, its own structure, for which the object of regulation is common, the general principles of legal regulation, as well as the specific features inherent in this category of agreements, which allow attributing them into a separate group of contractual relations.

A theoretically grounded system of treaties is necessary in order to clarify certain contractual relations and develop not just legal regulation, but to give it such properties that reflect an adequate relationship between these contractual structures, the absence of contradictions between the functioning of various structures in this field.

Any systematization is based on a certain criterion. V.N. Blotsky [1; p. 439] has some point in this aspect of the rights, pointing out that if any specific feature of objective legal matter is reflected in the legal establishment and substantially corrects the elements of legal mechanism, thus predetermining a “fateful” nature for such a feature, it can be analyzed as a systemic property.

Therefore, when determining the legally significant characteristics, one should proceed from the principle of an open circle of considered circumstances. It is necessary to analyze any feature as a systemic one, if it affects the legal regulation. At the same time,

it does not really matter which of the obligation features is characterized by it [2; p. 47].

## 2. METHODS

The systemic approach assumes that a certain set (in our case - civil law treaties), connected by special interrelations, should be considered to be a “system”. The system features are determined not only by the characteristics of individual elements and by those traits that are caused by the interaction of individual elements, therefore, if we describe the system of private international law (PIL) treaties, it will be not just a set of individual treaties, but also the basic properties and principles that are laid in the system of regulation of public relations, being developed in the presence of a foreign element. It is these general rules and principles that are not deducible from the content of individual treaties; they are manifested only in their system-forming aggregate.

Another important feature of the system is its structuredness, that is, the possibility of describing the system through the establishment of its structure, in which all elements and parts are interrelated and interconnected, both with each other and with the environment or law, if we consider this feature in the context of the system of treaties.

The most substantive study of the aspects of the systematization of civil law agreements is considered to be the work of Yu.V. Romanets [3; p. 144]. According to the position of this author, “the classification of treaties on their systemic features has a definite regulatory and legal significance, since it allows forming a legal system that has not only scientific, but also practical value” [3; p. 144].

In our case, we believe that the main system-forming factor is not so much the presence of a foreign element in the relevant contractual structure, but rather the appearance of this element.

Of course, we should consider the PIL essence here. It is called international because the relations regulated by it are not domestic, but international, they are complicated by a foreign element. It is called private because the subject of regulation is represented by the private, non-public relations. The foreign element of a civil legal relationship can be ex-

pressed in three options: a foreign subject, a foreign object or a foreign legal fact.

The division of civil law agreements into groups, depending on their direction, is the leading, generally accepted, and, moreover, actually established division of treaties in the Civil Code of the Russian Federation. The correct and important treaty division on their direction plays an important role in their regulation. However, considering it within the framework of an application to the practical needs of the system of treaties complicated by a foreign element, it is important to note that it does not affect the object under consideration. Therefore, such differences are not of great importance for clarifying the specifics of the system of treaties in the PIL - the regulatory regulation does not reflect the specifics of material and conflict norms in such emerging relations on the basis of their orientation.

### 3. RESULTS AND DISCUSSION

The criteria for the formation of a system of civil law treaties are represented by the signs of social relations significant for the law. The foreign element does not affect the essence of the transaction under consideration, it remains a private-legal relationship of an international nature. But its presence is a legal form of relations that arise between the elements of a private legal relationship and various national legal systems. Thus, these relations are regulated not from the position of establishing the rights and obligations of the relationship participants, but from the position of determining the applicable law.

Therefore, the system of treaties in the PIL is characterized by the following system-forming features: the need to take into account foreign legislation and international law, special regulatory role of the treaty, special conflict regulation over the material one, complicated order of conclusion and some others.

The system is also internally differentiated into several groups.

The notion of a contractual relationship complicated by a foreign element covers the treaties with different subject matter (within and outside of business activities, as well as with the participation of the subjects with a special public status of activity - the public and legal entities). However, the complica-

tions associated with the individual groups of subject in private relations, generate a special conflict-legal regulation, contained not only in the Russian legislation, but also in the legislation of foreign countries and the international legal acts.

### 4. SUMMARY

When determining the legally significant characteristics, one should proceed from the principle of an open circle of considered circumstances. It is necessary to analyze any feature as a system one, if it affects the legal regulation.

When assuming certain conditionality of differentiation of certain types of treaties, which is often explained only by the convenience of regulatory regulation of the relevant legal relations, we note that this approach to everything else largely corresponds to the law enforcement needs. The leading principle of direction does not affect the conflict-legal regulation of such contractual structures.

In turn, the subject composition of contractual relations is of great importance in the national legal relations, being developed in different states. Despite the principle of equality of the parties proclaimed in Art. 1 of the Civil Code of the Russian Federation, it is important to take into account the specific status of a person participating in the legal relationship for the formation of special rules of legal regulation, especially when it arises a contractual legal relationship of an international nature in order to comply with the principle of fairness in legal relations. Based on the analysis of the provisions of Russian civil legislation, the laws of certain foreign countries, as well as international acts, it is the specificity of the subject composition that determines the application of certain conflict rules. We believe that such a complex differentiating criterion allows us dividing all civil-law treaties of an international nature into four groups: treaties between the individual persons, agreements involving consumer, foreign trade transactions and treaties involving public subjects.

The principle of autonomy of will, which is inherent in the contractual relations, has been substantially adjusted concerning treaties involving consumers in the international space. This is due to the fact that the consumer is a weaker party in the contractual

relationships than the entrepreneur. Legal regulation of relationships complicated by a foreign element should provide a certain balance of interests and protect a less powerful participant in these relationships. At the same time, the focus on maximum protection of the consumer's rights is manifested in the sphere of PIL not only and not so much due to the special norms of substantive law, but rather by fixing a special procedure for determining the law applicable to these contractual legal relationships [4; p. 18].

According to the Russian legislation, the application of the principle of autonomy of will of the parties when concluding a treaty involving the consumer should not affect the protection of his rights and legitimate interests. Even if the applicable law is determined by agreeing the wills of the parties to this legal relationship, the legislator restricts the application of the chosen legal system in a situation where the mandatory provisions of the consumer's country of residence give him special legal protection. Such an approach of the legislator can be fully explained by the fact that the consumer, as a rule, does not have special legal knowledge.

Foreign scientists repeatedly paid their attention to the specifics of legal regulation of consumer contracts, in particular, to the difficulties of the consumer's access to the administration of justice in a foreign state [5; p. 225], to the problems of compensation for damage caused to the consumer [6; p. 125].

Similar conflict-legal regulation is contained in the legislation of foreign countries. So, according to the Austrian Law of 1979 on PIL, the law of the consumer's country of residence is applicable to the treaties involving the consumer in the absence of parties on the applicable law, if it provides the consumer with a special legal protection.

Taking into account the fact that the Regulation No. 593/2008 of the European Parliament and the Council of the European Union "On the Law Subject to Application to the Treaty Obligations ("Rome I")" has been in effect in the European Union countries since 2009, [7] it should also be noted a fixation of a similar approach to regulation of the consumer treaties in this document. The fact that the approach to consumer treaties adopted earlier in the Rome Convention of 1980 was

accepted within the framework of this Regulation, was repeatedly subjected to analysis in the scientific literature [8; p. 91], [9; p. 52].

Although the latest changes have established an additional guarantee of protection of the consumers' right with their participation in legal relations with a foreign element in electronic space, at the same time the existing practice clearly demonstrates the need to modify the approaches and methods of legal regulation of distance trade, especially on the Internet. In this regard, in our opinion, we should pay attention to the following areas of legislation development and the ways to resolve legal problems arising in the implementation of remote commercial activities.

The possibility of separating business contracts of an international nature into a separate category is also fully justified by the distinctive feature of modern business relations, namely, the expansion and development of trade and investment ties complicated by a foreign element. Such internationalization of virtually all spheres of public life in recent decades has given impetus to the enrichment of test factors regulating private law relations complicated by a foreign element. It is a question of the so-called replacement (or addition) of a "rigid" test factor (*lex loci delicti commissi*) to a more "flexible" one, to which many lawyers attribute the autonomy of the will of the parties, the application of the state's law with which the relationship is most intimately connected, and etc. At the moment, the autonomy of the will, as the fundamental conflict principle, has received the greatest recognition. However, the lack of uniformity of its application leads to asymmetry in the ways the parties express their will, in determining the applicable law, as well as in the meaning of mandatory rules of law [10; p. 437]. The possibility of applying the above Regulation Rome I to business transactions of an international nature, as emphasized in the scientific literature [11; p. 172], is not unambiguous, which once again underlines the specifics of this treaty precisely from the point of view of conflict-legal regulation.

The more free regulation of entrepreneurs' activity is associated with their special status - the status of a professional who should take into account all possible risks and choose their own behavior when participating in relations complicated by a foreign element.

According to the PIL doctrine, the state can also participate in the international legal relations in two different ways: as a sovereign, a carrier of public authority (*jure imperii*) and as an economic entity, a carrier of private interest (*jure gestionis*). In some cases, the relations involving the state obligatory by their nature can arise from the international treaties for public purposes and have a legal nature that essentially distinguishes them from civil ones, as well as distinguishes the subject under consideration from the legal status of other persons. We can talk about the existence of private-legal relationships only if the public-legal entity participates in the economic activities. However, in this case, one should also remember the features of concluding such agreements (despite the absence of special test factors in the Civil Code of the Russian Federation), as well as the specifics of the immunities granted to the state, established in the legislation of the Russian Federation and the international agreements.

## 5. CONCLUSIONS

The central category of all private law is a treaty that appears to us as an instrument for mediating the external manifestation of the subject of civil law influence, vested with a specific legal form of expression. This category defines and consolidates the essence of a relationship aimed at satisfying the interests of the subjects.

The systemic nature of the treaties that mediate civilized relationships is derived from the systemic nature of law, which includes these models as an organic part.

The analysis of conflict rules of Section VI of the Civil Code of the Russian Federation ("Private International Law"), the laws of certain foreign countries, as well as international legal acts testifies to the summary of a special attention of the legislator to the subjective composition of relations complicated by a foreign element. We believe that such a complex (though it is called "secondary" in the literature [3, p. 84]) differentiating criterion - the subjective composition of relations - allows us dividing all civil-law treaties in the PIL into four groups: treaties between the individual persons, agreements involving the consumer, foreign trade transactions and treaties involving public subjects.

Until recently, most researchers considered it unpromising to study the probabilities of a substantive legal unification of the regulatory regulation of the status of organizations due to the fundamental differences inherent in the corporate law of diverse countries. Meanwhile, the experience of recent years, and, above all, the development of the European Union's common law, demonstrates that the statement of such a request of reality is not only possible, but also necessary. Consideration of the issue of raising the level of legislation quality in a certain sphere depends on its doctrinal justification, which implies unity, absence of collisions and gaps in legal regulation, as well as provides legislative economy.

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## BIBLIOGRAPHY

1. Blotsky V.N. The System of Corporate Treaties as a Relationship Regulation between the Parties / V.N. Blotsky // *Theory and Practice of Social Development*. – 2014. – No. 2. – P 439 - 441.
2. Ershov O.G. In Search for the Criterion of the Formation of a System of Civil Law Treaties / O.G. Ershov // *Scientific Bulletin of the Omsk Academy of the Ministry of Internal Affairs of Russia*. – 2015. – No. 1 (56). – P. 40 – 52.
3. Romanets Yu.V. The System of Treaties in the Civil Law of Russia: Monograph / Yu.V. Romanets. – 2nd Edition, Edited and Amended. – M., Norma, Infra-M., 2013. – P. 144.
4. Kirillovych A.A. Protection of Consumer Rights: Issues of Legal Regulation. M.: Delovoy Dvor, 2012. 304 p.
5. Zheng Sophia Tang. Private International Law in Consumer Contracts: A European Perspective // *Journal of Private International Law Vol. 6*, Iss. 1, 2010. P. 225.
6. Zheng Sophia Tang. Consumer Collective Redress in European Private International Law // *Journal of Private International Law Vol. 7*, Iss. 1, 2011. Pp. 101 - 147.
7. Regulation No. 593/2008 of the European Parliament and the Council of the European Union “On the Law Subject to Application to the Treaty Obligations (“Rome I)”. URL: <http://eur-lex.europa.eu/>
8. Francisco J Garcimartin Alferez. The Rome I Regulation: Exceptions to the Rule on Consumer Contracts and Financial Instruments // *Journal of Private International Law Vol. 5*, Iss. 1, 2009. Pp. 85 – 103.
9. Hartley, Trevor C. Choice of law regarding the voluntary assignment of contractual obligations under the Rome I regulation // *International and Comparative Law Quarterly*, 2011, Vol. 60(1). pp. 29-56.
10. María Mercedes Albornoz & Nuria González Martín. Towards the uniform application of party autonomy for choice of law in international commercial contracts // *Journal of Private International Law Vol. 12*, Iss. 3, 2016. Pp. 437 – 465.
11. Burcu Yüksel. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union // *Journal of Private International Law Vol. 7*, Iss. 1, 2011. Pp. 149 - 178.



