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Artículo Original

International Legal Regulation of Non-Contractual Obligations: Problems and Prospects for Development

Regulación jurídica internacional de las obligaciones extracontractuales: problemas y perspectivas de desarrollo

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Abstract

The article identifies the features of international legal regulation of non-contractual obligations in private international law. The author considers the international legal consolidation of non-contractual obligations gradually and focuses special attention on the differentiation of conflict of laws and substantive regulation of these relations. The features of the legal regulation of non-contractual obligations in the post-Soviet space are revealed. Analysis of international agreements of a regional nature allows us to conclude that it is necessary to revise and amend individual articles containing the legal regulation of non-contractual obligations. It is emphasized that at the international level tort obligations is mainly subject to legal regulation, while other legal relations of a non-contractual nature do not find proper legal regulation in international treaties. This approach in the context of modern globalization, the complication of integration processes that directly affect private law relations with a foreign element, certainly does not correspond to the interests of subjects of private law relations. Moreover, in the conditions of modern times, the absence of unified international legal norms in the regulation of international private law relations does not meet the requirements of the present. States and subjects of private law are increasingly turning to unified rules corresponding to some of their interests.

Keywords: international treaty, non-contractual obligations, collision method, substantive-legal method, international agreements.

Resumen

El artículo identifica las características de la regulación jurídica internacional de las obligaciones extracontractuales en el derecho internacional privado. El autor considera la consolidación jurídica internacional de las obligaciones extracontractuales de forma paulatina y centra especial atención en la diferenciación de los conflictos de leyes y la regulación sustantiva de estas relaciones. Se revelan las características de la regulación legal de las obligaciones extracontractuales en el espacio postsoviético. El análisis de los acuerdos internacionales de carácter regional nos permite concluir que es necesario revisar y modificar los artículos individuales que contienen la regulación legal de las obligaciones extracontractuales. Se enfatiza que a nivel internacional las obligaciones extracontractuales están sujetas principalmente a regulación legal, mientras que otras relaciones legales de naturaleza extracontractual no encuentran una regulación legal adecuada en los tratados internacionales. Este enfoque en el contexto de la globalización moderna, la complicación de los

procesos de integración que afectan directamente las relaciones del derecho privado con un elemento extranjero, ciertamente no corresponde a los intereses de los sujetos de las relaciones del derecho privado. Además, en las condiciones de los tiempos modernos, la ausencia de normas jurídicas internacionales unificadas en la regulación de las relaciones de derecho internacional privado no cumple con los requisitos del presente. Los Estados y los sujetos de derecho privado recurren cada vez más a reglas unificadas que corresponden a algunos de sus intereses.

Palabras clave: tratado internacional, obligaciones extracontractuales, método de colisión, método sustantivo-jurídico, acuerdos internacionales.

Introduction

Private international law applies to that section of the law that is administered by private citizens of different countries, or that involves the concept, control and compliance of rights in cases in which private citizens of different nations are both the person inheriting the right and the person on whom the responsibility rests. As is known, international treaties along with the norms of national law should also be classified as sources of private international law. The role of the latter is growing more and more in the conditions of our time. This circumstance is due to the complication of international communication, the intensive development of the private sector, which involve individuals and legal entities from different countries.

As I.I. Arsentieva notes, “one cannot speak today about the isolation of processes in different regions of the globe...” (Arsentieva & Klius, 2020). The development and widespread introduction of scientific and technological achievements in the manufacturing sector, the complication of international trade relations, both at the universal and regional levels, are evidence of the strengthening of integration processes in the world.
Given the above, the question of international legal regulation of relations that go beyond the legal field of one state and exist within two or more legal systems becomes relevant. Of course, we are talking about the international legal regulation of private law relations with a "foreign element".

In international law, the most successful is the unification of contract law. Today, it is relevant to talk about the unification of the rules governing non-contractual obligations. The need for the development of international rules in the legal regulation of non-contractual obligations is due to world integration and internationalization of economic activities.

Objective

The article defines in private international law the characteristics of international legal enforcement of non-contractual obligations. The author progressively considers the unification of non-contractual obligations under international law and draws particular attention to the distinction between the conflict of laws and the substantive control of such ties.

Material and Methods

The methodological basis of the research consists of both general and special scientific methods. In particular, the method of comparative analysis helps to reveal the features of international legal regulation of non-contractual obligations that take place in certain international treaties, both regional and universal. The centre of comparative law is the act of contrasting one country's law with that of another. Very often, a foreign statute juxtaposed against a calculation of one's own statute is the basis for comparison. But the analogy can, of course, be broader: more than two laws, more than two laws, more than words in writing. The analysis of international treaties uses a combination of methods of historical and political science, international legal analysis. To achieve the objective of the study, in addition to general scientific methods, special scientific methods were used, in particular the formal-logical method, the method of comparative jurisprudence and legal modelling, generalization and comparison.

Results and Discussion

Both in the Russian Federation and in other post-Soviet countries in the process of legal regulation of international civil relations in general, and non-contractual obligations in particular, preference is given to the rules of international law. This is due to the fact that the application of international legal rules helps to overcome conflict problems. For example, in accordance with clause 11 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 158 dated July 9, 2013 "Review of judicial practice on certain issues related to the consideration of cases involving foreign persons by Arbitration courts" if the conflict of laws rules on determining

the applicable law is provided for by Federation, the arbitration court is guided by the rules of an international treaty (Asoskov, 2017; Koncheva, 2020).

International legal regulation of non-contractual obligations is carried out by international treaties containing unified conflict of laws or substantive rules. The process of unification in private international law is the activity of states to create the same, uniform norms. The need to unify the rules of private international law is *to overcome the main conflict of laws issue - the issue of applicable law.* In addition, the unification of substantive rules allows directly resolving a dispute between participants in private law relations by overcoming a conflict issue.

An analysis of international treaties regulating private legal relations allows us to conclude that today it is not possible to unify the norms of substantive law in all branches of private law. In this regard, the conflict-legal method prevails over the substantive legal one, and, accordingly, the overwhelming majority of international treaties contain conflict-of-law rules referring to the legal order of a particular state. Nevertheless, states "strive" to unify substantive law. Therefore, we believe that these methods of legal regulation represent a gradual development, improvement of methods of legal regulation in private international law.

We should recognize the importance of the unification of the norms of private law, since the collisional method of regulating private law relations contained in the legislation on the private international law of the absolute majority of states gives rise to many difficulties in practice.

As social relations that go beyond the legal regulation of a separate state develop and become complicated, it becomes necessary to develop certain standards to regulate them uniformly, which is entirely consistent with the interests of participants in private law relations. In fact, the process of unification of conflict of laws is the result of meeting the needs of both states, represented by law enforcement agencies, and direct participants in economic turnover. Moreover, international agreements in the field of private international law are important sources for states (Lauterpacht, 2002; Lebedeva, 2020; Nussbaum, 1942).

We should emphasize that unification is carried out by the conclusion of international agreements between states, both bilateral and multilateral. Such universal and regional agreements contribute to an increase in the number of unified norms (Cutler, 1999; Jankuv, 2019; Qureshi & Kumar, 2019).

Despite the referential nature of the unified conflict of laws rules, their presence in a certain way overcomes conflict problems by fixing conflict of law rule in them, extending their action to the states parties to this agreement. Clause 1, Article 42 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993, can serve as an example, which notes that the obligations to compensate for harm... are determined by the legislation of the Contracting Party in whose territory the action took place or any other circumstance that served as the basis for the claim for compensation for harm. In fact, in this case, the unified conflict of laws rules on tort obligations greatly simplifies the issue of finding the applicable legal order by virtue of its indication in the convention.

Undoubtedly, the perfect way of regulating private-law relations, including non-contractual obligations, in the conditions of modernity are substantive rules. We must agree with N.I. Marysheva is that the substantive method makes it possible to regulate the behaviour of the parties by establishing direct rights and obligations (Marysheva, 2016). Creation of uniform substantive rules, identical in their content, allows overcoming the stage of the conflict, the stage of the choice of law (Dmitrieva, 1993). Indeed, substantive legal norms resolve the dispute on the merits, establishing specific rights and obligations for the parties to the legal relationship. However, we should note that in comparison with the unified conflict of laws rules, the unification of the substantive rules is at the stage of formation. The latter, in our opinion, is due to the fact that specific national regulation of certain spheres of municipal, private partnership avoids establishing uniform rules at the international level.

With regard to non-contractual obligations, the unification of both conflicts of laws and substantive rules should be highlighted. However, unlike contractual obligations, the unification of non-contractual legal relations as the conflict of laws, and even substantive rules, does not seem perfect, due to the lack of legal regulation of other types of non-contractual legal relations. We shall consider some unified international documents in this area.

The doctrine of private international law makes attempts to classify international treaties according to the method of legal regulation of non-contractual obligations. In particular, Kh.D. Pirtskhalava carries out a classification of conventions containing substantive norms in the field of tort in the areas of regulation. The author highlights the

aeronautical conventions (Convention "On Damage Caused by Foreign Aircraft to Third Parties on the Surface" 1952 (Rome Convention 1952); maritime conventions (Brussels Convention "On the Unification of Certain Rules Relating to Collisions of Ships on the High Seas" 1910; transport conventions (European Agreement "On the International Carriage of Dangerous Goods" 1957); nuclear conventions (Convention on the Liability of Operators of Nuclear Ships 1962) (Kramer, 2008). According to the author, such a classification makes it possible to find substantive rules governing tort legal relations in private international law. We believe that the range of international agreements included in this classification is unilateral since they only regulate tort legal relations, i.e. non-contractual obligations to cause harm. Other types of non-contractual cross-border obligations are not covered by this classification.

At the international level, in the field of non-contractual obligations, there are many international treaties containing substantive rules. However, the presence of these agreements does not give grounds to speak of comprehensive legal regulation of non-contractual cross-border obligations due to their unilateral orientation, namely the legal regulation of tort legal relations. For the science of private international law, a universal classification is important, which applies both to tort and to other types of non-contractual obligations.
Based on the foregoing, we believe that international legal acts in non-contractual obligations should be classified according to the method of legal regulation into contracts containing unified conflict of laws rules and contracts containing substantive rules.

We believe that such a classification reflects the current realities of international regulation of non-contractual obligations. Since international treaties regulate non-contractual obligations through either conflict of laws, rules or material rules. As V.A. Nosov truly notes, the absence of a scientifically grounded classification leads to difficulties in resolving many specific issues in legislative and law enforcement practice" (Dickinson, 2010; Scott, 2009; Troshchenko, 2020; Zhang, 2009).

Based on our classification of international treaties in the legal regulation of non-contractual obligations, we will consider the sources of these obligations at the regional and universal levels.

The 1971 Hague Convention on the Law Applicable to Road Traffic Accidents establishes a uniform conflict of laws principles. In particular, it points to the applicable law and order to civil non-contractual liability arising from road accidents. Article 3 of this international act establishes the traditional binding of conflicts to tort legal relations - *lex loci delicti commissii* - the applicable legal order is the law of the state on the territory of which the road traffic accident takes place. It seems interesting to deviate from the well-established rigid collision principle - *lex loci delicti commissii* in favour of more liberal collision bindings. The Convention establishes that in certain cases the law of the state the legal relationship has a closer connection with is subject to application Such an approach naturally corresponds to the interests of the participants in the legal relationship and is necessary for convenience in law enforcement practice. As for the autonomy of the will of the parties, the 1971 Hague Convention does not provide for the application of this conflict of laws principle (de Vareilles-Sommières, 2019). In this matter, we believe it necessary to agree with the opinion of Pascal de Vareilles-Sommières about the specific nature of autonomy of will in relation to non-contractual obligations, since the concept of party autonomy is most often associated with contracts, rather than with offences (de Vareilles-Sommières, 2019). The Rome II Regulation also does not contain the principle of autonomy of will on matters relating to safety rules. In this case, a spontaneous choice of law is out of the question (Van Calster, 2016).

The 1973 Hague Convention on Liability for Harm Caused by Goods seems interesting in terms of consolidating unified conflict of laws principles in relation to tort relations. The provisions of this Convention do not apply to contractual relationships (Durham, 1974). Article 4 establishes several possible options for action and, accordingly, the definition of a suitable conflict of laws principle: the applicable law will be the law of the country where the victim is located in this state is at the same time the place of the main activity of the manufacturer of the goods that caused the harm or the place of its acquisition by the victim. In the absence of such a match, the applicable law and order should be considered the usual place of residence of the victim, or the delinquent - the place of the main business, or the product in this country was purchased by the consumer. If the specified matches are absent, then the legal order of the state where the person responsible for the product is active will be applied. But if the injured party demands to apply *lex loci delicti commissi*, then the specified conflict of laws rule does not apply.

The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea contains substantive rules. In particular, it

enshrines certain rights and obligations for the parties to the legal relationship: the owner of the vessel is responsible for damage caused during the carriage of hazardous and noxious substances by sea from the moment they arrive on the vessel until the moment they are terminated on any part of the vessel.

Regarding the legal regulation of non-contractual obligations, there is a number of agreements of a regional nature, containing mainly a conflict-of-law method of regulating non-contractual obligations. The latter include: the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, 1993; Agreement on the procedure for resolving disputes related to the implementation of economic activities in 1992, concluded in Kiev; EU Regulation "On the Law Applicable to Non-Contractual Obligations" ("Rome II") 2007 and others. Both the 1993 Convention and the 1992 Agreement contain conflict-of-law regulation of tort. Perhaps an exception in this aspect is the EU Regulation "Rome II" 2007, which contains special conflict of laws links not only to tort legal relations but also to other non-contractual relations (Ahern & Binchy, 2009).

Conclusion

Similar to international treaties, acts of a regional nature within the framework of the post-Soviet space contain legal regulation of tort only. Due to this factor, the choice of some legal order in the regulation of other types of non-contractual obligations at the regional level is impossible due to the absence of unified conflict of laws rules, which indicates a non-comprehensive approach to the unification of norms governing non-contractual obligations. That is, in essence, when obligations arise either from unjust enrichment or from shortcomings of goods, works and services, the parties, as well as the law enforcement body, due to the absence of international agreements, refer to national legislation. The latter, as you know, does not correspond to both the interests of the parties and the international processes of unification and even more so the processes of harmonization of law.

Thus, based on the foregoing, we can conclude that the international legal regulation of non-contractual obligations should be classified according to the method of legal regulation of the rules contained therein into conflict legal and substantive methods. The analysis of international treaties shows that at the international level, the conflict of laws method of regulating the obligations under consideration prevails. In addition, both in regional and in universal international acts of legal regulation, relations from causing harm are mainly subject to. But, as you know, the range of non-contractual obligations is much wider and is not limited to torts only.

In the post-Soviet space, there are some international treaties on legal assistance, which, among other things, also contain unified conflict of laws rules in the field of tort. These acts of a regional nature do not contain legal regulation of other types of non-contractual obligations. As a rule, these agreements enshrine conflict of laws rules that address the question of the applicable law and order in the obligations from causing harm, and the conflict of laws is reduced to the application of the law of the state where the action or other circumstance took place that served as the basis for the claim for compensation for harm. For example, Article 11 of the Agreement "On the procedure for resolving disputes related to the implementation of economic activities" establishes the traditional conflict of laws in the sphere of tort - *lex loci delicti commissi* (the principle of the place where the delict was committed). The 1993 Convention on Legal Assistance in Civil, Family and Criminal Cases (Article 42) also contains the conflict of law regulation of exclusively tort legal relations. The convention of the same name, the Convention on Legal Assistance in Civil, Family and Criminal Cases, 2002 (Article 45 "Compensation for Harm") is limited by the legal regulation of tort legal relations

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