



The principle of the closest connection as the basis of international private law

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ARTICLE INFO

Article history:

Received 10 august 2020

Received in revised form 20 august 2020

Accepted 25 august 2020

Available online
August 2020

Keywords:

International private law,
Principle of closest
connection
Collision binding
Collision norm.

ABSTRACT

The article analyzes the role of the principle of the closest connection principle in the regulation of relations of international private law character, the nature of this principle as both a collision principle and a collision binding. The scope of application of the closest connection principle is highlighted as a collision binding and as a trend observed today. The value of this principle in improving international private law and its role in law-making is revealed.

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Энг узвий алоқа тамойили халқаро хусусий ҳуқуқнинг асоси сифатида

АННОТАЦИЯ

Калит сўзлар:

Халқаро хусусий ҳуқуқ
Энг узвий алоқа тамойили
Коллизион боғловчи
Коллизион норма.

Мазкур мақолада халқаро хусусий ҳуқуқий муносабатларни тартибга солишда энг узвий алоқа тамойилининг ўрни, ушбу тамойилнинг ҳам коллизион боғловчи ҳам коллизион тамойил сифатидаги хусусияти таҳлил қилинган. Энг узвий алоқа тамойилининг коллизион боғловчи сифатида қўлланиш доираси ва бугунги кунда кузатилаётган тенденция ёритиб берилган. Халқаро хусусий ҳуқуқ қонунчилигини такомиллаштиришда ушбу тамойилнинг аҳамияти ва нормаларни шакллантиришдаги роли очиб берилган.

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Принцип наиболее тесной связи как основа международного частного права

АННОТАЦИЯ

Ключевые слова:

Международное частное право
Принцип наиболее тесной связи
Коллизионная привязка
Коллизионная норма.

В статье анализируется роль принципа наиболее тесной связи в регулировании международно-частноправовых отношений, природа этого принципа как коллизионная привязка, так и коллизионный принцип. Выделены сфера применения принципа наиболее тесной связи как коллизионная привязка и наблюдаемая на сегодняшний день тенденция. Раскрывается значение этого принципа в совершенствовании международного частного права и его роль в нормотворчестве.

INTRODUCTION

The possibility of wide, full and clear application of foreign law is recommended to be used in addition to the rules on party autonomy, mainly through other mechanisms, such as the formation of bilateral collision norms and the introduction of modern systems of collision bindings. The main principle of the formation of objective collision norms is the closest connection between the relevant international private law relations and the law of a particular state.

The doctrine considers the application of the flexible rule of closest connection in combination with specific collision norms as one of the achievements of modern international private law[1].

The terms "closest connection" and "proper law of the contract" were introduced in the second half of the 19th century by the English scientist J. Westlake, he re-evaluated his approach to resolving conflicts between laws by analyzing English case law. Previously, in a similar case, when a law that could have been chosen by a reasonable person was considered eligible, it was assumed that the dispute would be resolved by the judges based on the theory of the parties' purpose. According to the theory of J. Westlake, English judges in fact apply positive law, which is most closely related to the legal relationship of a dispute complicated by a foreign element. The creation of a competent rule of law is no longer associated with the preliminary goal of the parties, but is associated with the search for the country in which the bulk of the elements of the contract are collected[2].

DISCUSSION

According to V. Khoshimov, "... the criterion of "the closest connection" has two different essences - on the one hand, it can be used as a binding of a bilateral collision norm, and on the other, as a principle of forming of collision norms"[3]. In other words, all attachment formulas provided for in determining the personal statute, the statute of contractual and non-contractual obligations are an expression of the principle of the closest connection. Conflict legal regulation is designed to find the substantive legal norms of the rule of law, in which the connection of the legal relationship is very important. The legislative body, creating a collision norm (choosing one or another binding), trying to link legal relation with a certain legal order, establishes in it the criterion of "close connection".

Many scholars approach the category of "the closest connection" not as one of the branches of international private law - collision law, but as its general basis.

Proponents of this approach argue that in international private law there is a tendency to replace the collision method with some basic principles on the basis of which the court can find a competent legal order. One of these basic principles is the principle of close connection. Unlike typical collision norms, it does not refer to a specific legal system, but rather provides for the choice of applicable law based on an analysis of the substantive rules of various legal systems[4] .

According to V.Ya.Kisil, in "the closest connection" concept, the issue is "about a reference substantive norm, which implies finding other collision norm in resolving conflict issues and, actually, as a means of judicial lawmaking"[5].

Indeed, the application of the principle in practice consists of two stages. At the first stage, the law enforcement officer refers to the law of the essence of the transaction (*lex causae*), and at the second stage, the applicant finds the applicable substantive law through this collision formula, taking into account aspects of a particular legal relationship.

The modern codification process became the next step in the development of the category of "closest connection". Of the new codes of international private law, only Mongolian law does not regulate this principle. The basic idea of the legal nature of the principle of the closest connection is reflected in the general provisions of most laws. The laws of Belgium, Bulgaria, Macedonia and the Netherlands have separate articles on this principle. One of these articles is the "Principle of the Closest Connection" (Article 2 of the Bulgarian Code), the other is the "Clause of Exceptions" (Article 19 of the Belgian Code, Article 3 of the Macedonian Law). The modern concept of "the closest connection" as the basic principle of constructing of the collision norms is more clearly formulated by the Bulgarian legislator.

According to article 2 of the Bulgarian Code, private legal relations with an international element are governed by the law of the country with which they are most closely connected, and all the rules contained in the code regarding the determination of the applicable law reflect this principle.

Thus, the main functions of the principle of "the closest connection" are, firstly, the formation of a collision norm binding that determines the rule of law, which is most closely related to the legal relationship, and, secondly, play as a flexible collision norm binding in the applicable collision norm. According to A.V. Asoskova, the difference between the first and second functions of the closest connection is only in one case - in the transition of an important aspect of the problem from the legislative branch to the law enforcement branch in resolving the conflict[6].

In the transition from the legislative to the law enforcement side, the question arises about the criteria for determining the content of the closest connection, that is, the criteria by which the law enforcement officer determines the law of the country with which the relationship is most closely connected.

Modern codifications contain a list of objective criteria for the closest connection. Article 44 of the Law of Ukraine contains a more detailed list, which determines the party performing the decisive execution in 26 types of contracts. Macedonian law, oppositely, separately interprets the sign of close connection with a certain legal order only for the contract of carriage (Article 22 (3)), Taiwanese law for the contract for immovable property (§ 20). In article 4 of Rome I, this list consists of six items.

The approach to the application of the principle of proper law of contract in international treaty law is traditional, and in this case the principle of party autonomy is

the main one, and as for the principle of the closest connection is considered as subsidiary conflict of laws rule. This connection is explained by the concept of "characteristic performance". It is assumed that the party carrying out the characteristic performance whose place of residence, habitual residence, location of governing bodies or the place of main economic activity is located in the country whose legislation is related to the content of the contract (Article 1190 of the Civil Code of the Republic of Uzbekistan, Article 1211 of the Civil Code of the Russian Federation, Article 1.37 (4) of the Civil Code of Lithuania, Article 33 (2) of the Estonian Law, Article 94 of the Belgian Code, Article 32 (3) of the Law of Ukraine, Article 22 (2) of the Macedonian Law., Article 24 (4) of the Code Turkey, § 6 Chinese law, § 20 Taiwan law).

Specific presumptions are widespread for certain types of transactions, including:

country of location of immovable property - in relation to an agreement on this property (Article 1190 (2) of the Civil Code of the Republic of Uzbekistan, Article 1.37 (4) of the Civil Code of the Republic of Lithuania, Article 1213 (1) of the Civil Code of the Russian Federation, Article 33 (5) of the Law of Estonia). , Article 94 of the Bulgarian Code, Article 44 (2) of the Law of Ukraine, Article 20 of the Taiwan Law, Article 4 (1) of the Rome I);

the country in which the auction, tender is held or the exchange is located - in relation to a contract concluded at an auction, by competition or on a stock exchange (Article 1190 (2) of the Civil Code of the Republic of Uzbekistan, Article 1.37 (8) of the Civil Code of the Republic of Lithuania, Article 1211 (4) of the Civil Code of the Russian Federation),, Art. 44 (2) of the Law of Ukraine, art. 4 (1) Roman Rules I);

place of main business - in relation to contracts entered into in the framework of commercial or professional activities (Article 33 (2) of the Estonian Law, Article 94 of the Bulgarian Code, Article 24 (4) of the Turkish Code);

the main place where activities are carried out or the results of the contract are created - in relation to an agreement on joint activities, performance of work, simple partnership, construction contract, design and survey work contract (Art. 1190 (2) of the Civil Code of the Republic of Uzbekistan;), Article (5), Part 2 of Article 25 of the Law of Azerbaijan, part 2 of Article 44 of the Law of Ukraine);

the place of main economic activity of the carrier (place of residence or stay), if the place of departure and destination is also in the same country, the place of loading, unloading or economic activity of the sender (Article 1.37 (4) of the Civil Code of Lithuania, Article 33(5) of the Estonian Law, Article 94 of the Bulgarian Code, Article 22 (3) of the Macedonian Law, Article 29 (2) of the Turkish Code);

the main place of economic activity, place of sale or location of the insured risk - in relation to the insurance contract (Article 1.37 (6) of the Civil Code of Lithuania, Article 45 (2) of the Estonian Law);

permanent place of residence of the testator - in relation to the will and its revocation (Article 1197 of the Civil Code of the Republic of Uzbekistan, Article 84 of the Belgian Code).

The principle of the closest connection, like the principle of party autonomy, allows for the "splitting" of the contract statute. If any of the individual parts of the contract are closely related to another country, the law of that country applies to that part. This rule was assigned by two codifications from the 1980 Rome Convention - the Estonian and

Bulgarian codifications (Articles 33 (1), 45 (2), (3) of Estonian law, Article 94 (1) of the Bulgarian Code).

At the present stage, there is a tendency to indicate special conditions for the application of this principle to legal relations that are not subject to international treaty law. This conflict basis, in addition to contractual relations, is subject to special issues of the personal statute, the statute of non-contractual obligations, family, property, inheritance relations, relations related to intellectual property.

Today, most legislative acts mention the principle of the closest connection in defining the personal law of a bipartide, including the right to regulate issues of his citizenship and civil legal capacity. The criteria for close connection are his place of residence, habitual residence or place of main business (for example, article 3 (2) of the Belgian Code, article 1.16 (3) of the Lithuanian Football Code, article 48 (3) of the Bulgarian Code). 16 (2) of the Law of Ukraine, § 19 of the Law of China, § 2 of the Law of Taiwan, 2 (2) of the Law of Poland). Article 48 (6) of the Bulgarian Code, using the criterion of "close connection", establishes the personal law of a stateless person and a refugee who has no permanent residence in any country.

In more detail, the application of the principle of closest connection is regulated in the framework of non-contractual obligations. Within the framework of family law, this conflict of laws principle regulates such institutions as personal relations between spouses, general or only property consequences of marriage, engagement, divorce, adoption of children by spouses, blood relations, relations between parents and children. The relevant provisions of the law provide for the subsidiary application of the close relationship criteria (Articles 1.24 (2), 1.27 (2) of the Civil Code of Lithuania, Article 38 (1) of the South Korean Law, Article 57 (4), 58 (3), 60 of the Estonian Law). (1), Article 63, Article 62 (2), Article 67 of the Belgian Code, Article 79 of the Bulgarian Code, Articles 60 (1), 61 (3), 63, 66 of the Law of Ukraine, Article 45, 47, 48, 50 of the Law of Taiwan, Articles 51 (2) of the Polish law).

Recently, there is a tendency to use the criterion of close connection as one of the possible approaches to resolving issues of international civil process.

The procedural law of Azerbaijan is governed by the principle of determining the legal status of a bipatriide, and according to Article 441 (2) of the Civil Procedure Code, "the procedural rights and legal capacity of a foreign citizen with more than one citizenship are determined by the legislation of the country with which he is most closely associated".

The influence of the criterion of close connection on the definition of international jurisdiction is more significant. Its essence is set out in paragraph 12 of the preamble of the Brussels I Regulation: "In addition to the criteria for the place of residence of the respondent, alternative grounds of jurisdiction must be considered to ensure the proper administration of justice based on the relationship between the case and the court". The criterion of close connection in matters of jurisdiction is stipulated by the legislation of Russia, Belgium and Korea on international private law.

This principle is not provided for by the legislation of the Republic of Uzbekistan that regulates procedural relations with the participation of foreign individuals (CPC and EPC). According to A.A.Mamaev, this principle of establishing international judicial jurisdiction makes it possible to exclude alternative jurisdiction from the list of strict grounds. However detailed and perfect this list might be, it will always be incomplete. Civil proceedings are objectively developing, new relations arise in its sphere, disputes arise

from these relations that are considered in state courts, and procedural law in most cases does not have time to legally consolidate the relevant international judicial jurisdiction over such disputes[7].

Agreeing in the views of A.A. Mamaev, it should be noted that with an increase in the number of international civil legal relations, delimitation by clearly defining the list of cases related to the jurisdiction of national courts creates certain gaps. While the conflicting norms governing the jurisdiction of national courts are determined on the basis of the principle of the closest connection, it is advisable to supplement this list with the rule such as “in other cases when the dispute is closely related to the territory of the Republic of Uzbekistan”.

Also, the principle of closest connection also performs a number of other functions that are not characteristic of simple collision norms. On the one hand, it acts as an "exclusion clause" (Article 3 of the Macedonian Law, Article 20 of the Preamble to the Rome I Regulation, Articles 14 and 18 of the Preamble to the Rome II Regulation). Clausula reflects the following approach, i.e., if it is known from the circumstances of the case that the legal relationship has little connection with the legal order chosen in accordance with the legislative rules, another law with the closest connection applies (§8 South Korean law, section 19(1) of the Code Belgium, Article 2 of the Code of Bulgaria, Article 4(3) of the Law of Ukraine).

The legislation on international private law has fully formed the rule on the application of the concept of "the closest connection" in the law of interlocal and interpersonal conflict of law. As a rule, a country with several legal systems itself determines the procedure for choosing a competent legal system.

If this is not provided for by domestic law, the legal system that is most closely related to the legal relationship is applied (Article 6 of the Law of Azerbaijan, Article 1.10 (6) of the Civil Code of the Lithuania, Article 1188 of the FC of the Russian Federation, Article 3 (3) of the Law of South Korea). -§, Article 3 of the Estonian Law, Article 17 (2) of the Belgian Code, Article 41 of the Bulgarian Code, Article 15 of the Law of Ukraine, Article 14 (2) of the Law of Macedonia, Article 2 (5) of the Turkish Code, § 5 of the Law of Taiwan, article 9 of the Law of Poland). Article 1166 of the Civil Code of the Republic of Uzbekistan states that only the first rule, that is, when the law of a country in which there are several territorial or other legal systems are applicable, the legal system is applied in accordance with the law of this country, but the question remains open - the law of which country will be applicable if such rule is not provided by domestic legislation. The best solution is to fill this gap with the principle of the closest connection.

The concept of the “closest connection” is important when it is not possible to establish competent law based on traditional conflict of laws rules

(Article 1158, part 3 of the Civil Code of the Republic of Uzbekistan, Article 1186 (3) of the Criminal Code of the Russian Federation, Article 4 (2) of the Law of Ukraine, Article 2 of the Law of China, Article 10 (1) of the Law of Poland, Article 67)). This circumstance arises when interlocal and interpersonal collisions are eliminated, in the absence of collision rules on certain aspects of relations related to the legal status of an individual, contractual (Article 25 (3) of the Law of Azerbaijan, Article 1211 (5) of the Civil Code of the Russian Federation, Article 94 (4) Bulgarian Code, "Rome I"). 4 (4) of the Rules), tort (Article 99 (1) Belgian Code, Article 1.43 (2) of the Civil Code of Lithuania) and family law (Article 38 (1) of the South Korean Law, Article 79 of the Bulgarian Code). Article 1.27 (2)

of the FC Lithuania, Articles 57 (4), 58 (3), 60 (1), 63 (1) of the Estonian law, Article 62 (2) of the Belgium Code, Ukraine 60 (1), 61 (3), 63 Law, § 45, 47, 48, 50 Law of Taiwan, 57 (2) Law of Poland) relations. One of these rules is enshrined in article 62 (2) of the Belgian Code, which states that “in the event of a conflict between different kinship relations arising from the operation of the law, the law of the country most closely related to the case between all known legal regimes applies”.

The criterion of “the closest connection” can be decisive when choosing one of the alternative collision norms. For example, in accordance with Article 1.24 of the Civil Code of Lithuania, the main collision norm binding for a marriage contract is the common place of residence of the parties to the contract. If the spouses live in different countries, the legal consequences of this agreement are determined by one of the three proposed legislation, which is the most closely connected. This could be the place of the contract, the primary residence of one of the parties, or the law of citizenship. A similar approach is enshrined in Section 28 of Taiwan Law, which sets out the law to be applied to tort relations arising from illegal acts through the media.

In addition to the above cases, the principle of close connection ensures that the most favorable legal regime is selected for the vulnerable party. In modern national legislation, this rule applies to the relationship between parents and children, as well as to the issue of adoption. For example, article 66 of Ukrainian legislation states: “The rights and obligations of parents and children are determined by the child's personal law or the right that is closely connected to the relationship, and if it is more favorable for the child”. Another case is set out in article 67 of the Belgian Code, which states that “Belgian law applies only if the judge considers that the application of the foreign law is detrimental to the best interests of the adopted child, and the adopted child and the adoptive parent have a clearly close relationship with Belgium”.

It should be noted that the principle of close connection is used in some cases when assessing collision legal concepts. The legislator refers to this method when interpreting the personal law of an individual. For example, according to § 4 of Taiwanese law, if a party has more than one domicile or seat, its personal law is the right of its domicile or seat with which it is most closely connected. Article 3 (2) of the Belgian Code, however, establishes that the citizenship of a bipatriote is the nationality of the country with which a person has the closest connection, especially given his usual place of residence.

It can be noted that at the present stage, the principle of the closest connection is applied as a universal legal structure with a high degree of unification.

In addition to conflicts of law issues (determination of applicable law, provision of “flexible” legal regulation using “protective clauses”, interpretation of law, etc.), it includes issues of international civil procedure (determination of international jurisdiction, legal capacity of a foreign citizen)). The category of “close connection” can help limit party autonomy only in exceptional cases through the use of protective clauses.

The study of modern codifications, in particular the Bulgarian Code, is the basis for emphasizing that this principle not only falls within the scope of collision regulation, but also reflects the general basis of international private law in general. Being one of the most flexible principles of the applicable law, this principle provides the law enforcement officer with: 1) identification of the element of legal relations in which the connection of the rule of law is of decisive importance (criterion of organic communication); 2) the formation of

a conflict of laws rule that allows to determine the applicable law taking into account the specific circumstances of the case; 3) sets the task of finding applicable substantive rules.

CONCLUSION

As a result of the analysis, the principle of the closest connection showed, first of all, that international private law is associated with a private law nature and has a common basis for any branch of private law. The principle of the closest connection is intended to determine the significant manifestation of the feature, as the connection of regulated relations with several legal orders. This legal structure allows for the adaptation of the requirement of legal certainty and individual approach to the fair settlement of international private law disputes (Article 14 of the Preamble of the Rome II Rules, Article 16 of the Preamble of the Rome I Rules, Preamble of the Brussels I Rules). 11, p. 12). Thus, while the party autonomy principle eliminates the conflict of laws and jurisdictions based on the will of the parties in exercising their rights, the principle of the closest connection performs this function on the basis of the will of the law enforcement officer, limited by the principle of legal certainty.

Today, when the issue of improving civil legislation is on the agenda, improving the norms of international private law, which is part of the codification system of civil law branch, the use of the principle of the closest connection with the reflection of all the tasks of this principle serves to protect the rights of participants in a private law relationship at a high level, to prevent the emergence of "lame" relations and possible legal gaps in the context of the increasing development of international civil turnover.

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