CHARACTERISTICS OF CONFLICTS OF LAWS IN SPECIAL CIRCUMSTANCES

Laura Magdalena TROCAN
Ph.d. Lecturer
University „Constantin Brâncuşi" of Târgu-Jiu
Faculty of International Relations, Law and Administrative Sciences
laura.trocan@gmail.com

Abstract:
Law conflicts are, undoubtedly, the most important field of private international law, being as a matter of fact a specific institution for this branch of law, because only foreign elements private law relations, regulated by it may be governed by two or more law systems. The complexity of the situations that can cause law conflicts has allowed to reveal the fact that along with their common criteria of classification (depending on laws enforcement in space and time, depending the relevant law system for regulating the foreign juridical relation) other criteria can also be identified, namely that given by special circumstances that could cause such conflicts, as well as on the level the law conflict may appear. Therefore, depending on the various circumstances that could cause a conflict of laws in the case of states succession, the conflicts of laws in the case of not recognized state and interpersonal conflicts, and depending on the level where a conflict of laws may appear, we have actual conflicts, occurring between the two different law systems, and apparent conflicts, between the laws belonging to the same law system, the case of conflicts between regions or federal conflicts. Starting from these considerations, this study proposes an analysis of the most important aspects regarding conflicts of law identified according to the aforementioned criteria.
***Key words**: extraneity element, conflicts of laws, conflicts between regions, interpersonal conflicts, states succession, exequatur*

The conflict of laws [1] is undoubtedly, the most important field of private international law, being that circumstance in which the extraneity element juridical relation can be applied two or more law systems belonging to different states.

The cause for the occurrence of the law conflicts consists of differences between law systems of various states. The conflict usually occurs between the court of law assigned for the solution of the litigation and foreign law. Any of these laws is liable of governing that juridical relation, and therefore they are in conflict and notified court has to choose the law to be enforced. The conflict of laws is a notion specific to private international law, because it appears only in the juridical relations regulated by this branch of law [2].

From the juridical definition of the conflict of laws the following essential elements of this institution result as follows: the conflict of laws does not imply any kind of conflict of sovereignties, between the Romanian state and the foreign one, to which the extraneity element is connected, because the Romanian judge "obeys" only to the law of its country, and he conflict of laws is solved by conflicting regulations, which, for this judge, is always the Romanian one (internal or included in an international convention Romania is a part of), on the other hand, the juridical relation including an extraneity element is liable of

being given two or more different law systems because through the mechanism of conflicting regulation, it is applied only one law system, namely the one indicated by conflicting regulation, as a *lex causae* – system that can belong to the Romanian forum or to a foreign one. Also, the conflict of laws occurs between the law systems of different states. Therefore, the phrase "conflict of laws", the notion of law has to be included in the meaning of a "system of law", belonging to a certain state [3].

Conflict of laws may occur only in the relations of private law, because only in these relations, the Romanian court may enforce a foreign law, the explanation being in the fact that only in these juridical relations the parties are juridically equal which draws the equality of law systems to which they belong, and between equal law systems the problem occurs which of them shall apply to that juridical relation.

The complexity of circumstances that could cause the occurrence of law conflicts has allowed the revealing of the fact that along with common classification criteria (depending on laws enforcement in space, depending on laws enforcement in time, depending on the relevant law system for regulating the extraneity element juridical relation) we can also identify other criteria like the one given by certain special circumstances that could cause conflicts of laws, as well as the level where conflicts of laws may occur. Therefore, depending on various situations that can cause a conflict of laws, conflicts of laws can be identified in the case of states succession, conflicts of laws in the case of not recognized state and interpersonal conflicts and depending on the level where a conflict of laws may appear, we have actual conflicts, occurring between the two different law systems, and apparent conflicts, between the laws belonging to the same law system, the case of conflicts between regions or federal conflicts.

Conflicts of laws in the case of states succession. The matter of succession in international law occurs anytime, transformations occur within international community. Hypotheses where states succession matters occur are various: merging of two or more states (e.g. the merge of the two Germany states in 1990), a state dismemberment (former USSR in 1991) into more states [4], secession [5], when a part of a state detaches itself and forms a new state etc. [6]. Because every state territory is the framework where a juridical system materializes its attributes, in the case of territorial alterations, the following problems occur: what happens with the juridical regulations that used to apply before the alteration and which shall be the juridical regulations that shall govern that territory as well as the population on that territory from the moment of the transformation. From the point of view of private international law, related to this aspect, in the case of a state disappearance, to which the Romanian conflict regulations refers to, between the moment the juridical relation occurs and the litigation, the matter is whether the judge from a third country (the Romanian one) shall enforce the law of the state that stopped existing or that of the successor state in a given litigation. In this circumstance, the doctrine makes the following distinction: - if the foreign state was abolished by compulsion, we take into consideration a solution based on the idea of protection of legitimate interests of persons directly affected by the abusive change of sovereignty; -is a state was abolished through volunteer merge with a another state, transitory law regulations from the two states unification treaty shall apply, and mainly, it has to consider the inter-temporal dispositions from the foreign law system (which Romanian conflict regulation refers to), and not the ones established by the forum law (Romanian) [7].

Conflicts of laws in the case of not-recognized state. Referring to the enforcement of foreign law, the problem arose whether the laws of a state not recognized by the state the court judging the enforcement of the foreign law belongs to, can be considered and whether they can produce conflicts of laws.

Starting from the hypothesis that the recognition of state or government has a constitutive character, for a while foreign law was refused, if it belonged to not recognized state. Such a solution was especially supported by French doctrine, it shows that "the sole juridical criterion" of integrating a state in the international community is *de jure* recognition of that state by France [8]. Despite the fact that, in time, there have been cases where some countries refused to enforce the laws of a non-recognized state, the current generally admitted solution is that the laws of a non-recognized state by the for state can cause conflicts of laws with the following arguments: foreign state recognition by the for state has declarative character and not constitutive one [9], if the laws of non-recognized laws did not apply, then the previous ones should be applied, which may lead to uneven circumstances for the parties, namely when referring to private law relations, it would be unfair that persons' rights be decreased or abolished for the reason that they belong to a non-recognized state.

On the other hand, no state is allowed to appreciate the legitimacy of another state, and a judge cannot be allowed to do this either or enforce the laws of another state because they are not recognized by the forum country. This means that a judge is allowed to appreciate the legitimacy of a foreign state, which is not admissible [10]. At the same time, according to public international law, every people can chose the form of administration it considers the most adequate for it. To condition the enforcement of a state law to its recognition means interference in its internal affairs, so that we can say that a state cannot recognize another state or cannot establish diplomatic relations to it, but it cannot disobey its legislative activity, which is a form of sovereignty, independence and sovereign equality of states. [11]

The conflict between state laws with more legislative systems. The state laws with more legislative systems, namely between the laws of state members of a federation (USA) or between the laws of provinces or regions of a state (Great Britain), also called conflicts between regions are internal conflicts [12], and shall be solved according to conflict regulations issued in those states.

The conflicts of laws between provinces have some features which significantly differentiate them from the actual conflicts of laws from more points of view: conflicts between provinces do not bring problems related to sovereignty, because they appear within the same state, the extraneity element within these conflicts is only apparent [13] (this is why, juridical resolutions given in a federal state are executed in another member state of the federation without exequatur), the frequency of conflicts between provinces is more reduced that the one of actual conflicts of laws, because the possibility of adopting uniform laws (private international law and material law) within the same state is bigger. Also, if conflicts between provinces occur, they can be solved in the internal framework of the same state, within the jurisdiction, by supreme courts of justice, which are basically unique. The resolution rules for actual conflicts of laws are not always the same with the ones enforceable for solving conflicts of laws between provinces. therefore, for example, if the physical person's status is subordinated to national law, at the level of actual conflict of laws, in the conflict between provinces the connection point in this matter can only be the domicile (citizenship is common for all individuals in all regions or provinces of the state). Public order exception, which can be found in the actual conflict of laws, is less probable in the conflicts between member states of the federation and does not practically exist in conflicts between provinces. Re-reference is not possible between the states of the federation. Still, a second degree re-reference case can occur. Therefore, when Romanian conflict regulation refers to the law of a federal state, as a law of citizenship, if there is no federal law regarding personal status, but only laws of the federation states, the connection point, citizenship, has to be changed with the residence, which operates a forced sending

forward (second degree re-reference), to the state law of the federation that causes personal status. Conflicts between provinces are not the object of private international law [14].

Interpersonal conflict [15]. Similar to conflicts between provinces, interpersonal conflicts can occur within the same state having the source of ethnic or confessional differences between social groups [16]. Therefore, there are cases when in the same state, various groups of individuals are subordinated to different laws – possibly to special jurisdictions – depending on their belonging to a certain religion.

Such conflicts especially occur in the matter of real estate laws in those systems of law where religion has juridical effects, like in the mosaic, Muslim, Hindus laws etc[17]. Therefore, in certain states there are both religious courts and civil courts with the competence of solving litigations between persons belonging to the same cult or having different religions. Therefore, in Israel, Rabbinic Law Courts have the competence to solve only divorces between mosaic religion parties, residing in Israel, civil courts existing for the other cases [18]. The specialty literature shows that the solution of these conflicts is made according to the pattern of solving the actual conflict of laws. Interpersonal conflicts are important for the Romanian private international law when the Romanian conflict regulation refers to the law of such a state, for regulating personal status, we have to see to which religion the person belongs, in order to establish what law to apply for the trial. On the other hand, when the problem of executing a decision sentenced by a foreign confessional court in Romania occurs, the Romanian exequatur court has to verify also the competence of this court in compliance with the law of the state it has been sentenced in [19].

References

[1]. The term „conflict of laws" was used for the first time by U. Huber (Dutch School of statuses – 18th centuries), who named his manual: *De conflictu legum diversarum in diversis imperiis*. In the circumstances of the era, authors expressed the opinion that judges, facing a foreign element, had to decide, in a lack of texts, which of the laws in conflict could be enforced. (I. Chelaru, Gh. Gheorghiu, *Private International Law*, Lumina Lex Press, Bucharest, 2007, p. 5).

[2]. Ibidem, p. 6.

[3]. D. Al. Sitaru, *Private International Law*, Actami Press, Bucharest, 1997, p. 8-10.

[4]. V. Neagoe, I. R. Tomescu, *Geopolitică și strategii de securitate,* Ed. Universității Naționale de Apărare "Carol I", București, 2005.

[5]. I. R. Tomescu, *Instituții și organizații internaționale,* Ed. Academica Brâncuși, Tg-Jiu, 2011.

[6]. I. Anghel, *International Law Subjects*, Lumina Lex Press, Bucharest, 1998, p. 271.

[7]. D. Al. Sitaru, op. cit., p. 40.

[8]. O. Ungureanu, C. Jugastru, *Private International Law Manual*, All Beck Press, Bucharest, 1999, p. 67-68. French judges was allowed to enforce only the laws of the states integrated in the international community, thus avoiding to contradict with its government, by non-enforcing the laws from a state that France had not recognized. Nonetheless, in France too, there was a change regarding this matter, which was supported by the French Court of Cassation, which in Scherbatoff/Stroganoff affair, re-discussing the motivation of the resolution given first by the Sena Court of Law stated that the lack of recognition of the foreign government by France does not allow the French judge to question the private laws issued by this government, before its recognition, if those laws are valid where it exercises it authority. (Y. Loussouarn, P. Bourel, Pascal de Vareilles-Sommieres, *Droit international prive*, Dalloz, Paris, 2004).

[9]. International law does not provide an obligation of states to admit new states appearing on the international scene, but it is a faculty or a law of state, whose exercise shall be decided by it. Recognition is a declarative act and not a constitutive one, in the meaning that this act establishes the existence of a new state, which exists as an effect of its creation and not as a result of the recognition act.(D. Popescu, A. Năstase, *Public International Law*, Casa de Presă și Editură „Șansa", Bucharest, 1997, p. 78-79). The failure to recognize a state by another does not mean its

inexistence and of the lawful order existing independently of any outside attitude. The laws of such a state are enforced and have to be considered. (I. Chelaru, Gh.Gheorghiu, op.cit., p. 6-8);

[10]. Ibidem, p. 8.

[11]. I. Filipescu, A. Filipescu, *Private International Law*, Actami Press, Bucharest, 2002, p. 50.

[12]. Modern applications of this type of conflict consider the effects within federal states, in USA especially, because every state of the federation has its own legislative system and thus its own conflict regulations. Therefore, along with the conflict occurred between the law of an American state and a foreign law, there is another American private international law, consisting exclusively of internal conflicts occurred between the laws of the states making the union. The European space provides a recent image of conflicts between provinces close to conflicts specific to federal states even if the European Union cannot be identified as a federal state yet. Classic conflicts arising from legislative differences between member state and trying to be more limited due to the European convention for unification of the private international law, the Convention in Rome for contracts law, or the Convention in Brussels are completed by those arising from the differences between national provisions issued for transposing directives and other communitarian regulations. (Y. Loussouarn, P. Bourel, Pascal de Vareilles-Sommieres, op.cit., p. 125)

[13]. P. Mazer, V. Heuze, *Droit international prive*, Montchristien, Paris, 2004, p. 68.

[14]. O. Ungureanu, C. Jugastru, op.cit., p. 69

[15]. For naming the interpersonal conflict, the term inter-ethnic conflict is also used, along with interracial conflict or inter-confessional conflict. (Y. Loussouarn, P. Bourel, Pascal de Vareilles-Sommieres, op.cit., p. 125).

[16]. O.Ungureanu, C.Jugastru, op.cit., p. 69-70.

[17]. Juridical systems in most countries in Africa located south from Sahara were a typical image for this type of interpersonal conflict for a long time. The access of these states to independence has not always drawn the unification of enforceable law in the field of private law. Within the new national juridical orders more laws continued to coexist regulating the same matter and enforceable to different status citizens, which caused the occurrence of interpersonal conflicts. (Y. Loussouarn, P. Bourel, Pascal de Vareilles-Sommieres, op.cit., p. 129)

[18]. I. Chelaru, Gh.Gheorghiu, op. cit., p. 8.

[19]. D. Al. Sitaru, op. cit., p. 42.