INTERPRETATION OF THE SUBJECT OF PRIVATE INTERNATIONAL LAW IN RUSSIAN DOCTRINE

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Abstract: Although the term "private international law" was introduced into the legal space back in the 19th century, there is no consolidated scientific definition of this legal entity in Russian and foreign doctrine. In the authors' opinion, the essence of private international law is manifested through its subject. The article presents and analyzes various views on the subject of private international law and formulates its own definition of private international law. **Methods:** General scientific methods of cognition such as comparative and systematic analysis, synthesis, historical analysis, and scientific research of legal entity "private international law and its subject" are used in the article. **The objective of the study:** To investigate the category of private international law, the private international law subject, and the features and criteria of the private international law subject. **Results:** The authors conclude that the subject of private international law includes not only private law relations, but also public legal relations linked to private relations. The authors also prove that private international law does not fit into the traditional understanding of the sectoral division of Russian law, as it regulates not one homogeneous group of public relations but several different groups of

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relations (civil, family, labor, corporate, procedural, etc.)..

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Introduction

Despite the existing interstate political and economic differences and the introduction of various sanctions against this or that state, and the number of foreign economic transactions between business entities is increasing every year, citizens of different states enter into marital relations, real estate is acquired in a foreign state. Thus, cross-border relations between foreign entities are becoming more dynamic. Undoubtedly, in these conditions, the role of private international law (PIL), designed to protect the violated rights of a subject in a foreign jurisdiction, is steadily increasing. The increasing role of PIL has been repeatedly noted by the United Nations in its policy documents.

To raise the importance of PIL, legal scientists in various countries pay great attention to the study and research of a conflict of laws. However, the question of what is PIL and what is its subject remains unsolved in the doctrine to this day. Section 6 of Part III of the Civil Code of the Russian Federation devoted to PIL also does not provide an answer to the questions raised. The content and breadth of these terms cause discussions on the pages of scientific publications.

The definition of the subject of PIL in the Russian legal doctrine creates various controversies, caused primarily by the dichotomy of PIL itself. On the one hand, PIL is a national private law. On the other hand, it is closely related to foreign law. In this case, the relevant question arises whether such law is a branch of Russian law or whether it is a different legal matter. The nature and essence of PIL can be outlined with certainty only by defining the subject of PIL.

Methods

During the research, the following methods were used: comparative and system analysis, synthesis, historical analysis, empirical method of cognition, scientific research of legal entity "PIL", as well as general scientific methods of cognition.

Results

The term "PIL" was first proposed by a U.S. Supreme Court Judge, Harvard Law School Professor J. Story and used as a synonym for the term "a conflict of laws" (Reitzel et al., 1994). However, in the countries of continental law, the term "PIL" became traditional and comparable to a conflict of laws only in the second half of the 19th century, i.e., these two concepts began to be used interchangeably, but until now, there is no unified position on PIL subject.

Currently, there is no consolidated interpretation of PIL subject in foreign doctrine. In France, for example, PIL is considered as a legal entity consisting of two parts: a conflict of laws and a conflict of jurisdictions. Besides, citizenship and the status of foreigners are also considered as part of PIL. In Germany, PIL covers only the choice of law, and the jurisdiction and recognition of a foreign judgment are subject to international civil proceedings. In the common law countries, according to Z.A. Sevryugina, the subject of a PIL includes the recognition and enforcement of foreign judicial (arbitration) decisions and rulings, as well as conflicts jurisdiction (Sevryugina, 2018).

In Russian legal doctrine, PIL also appeared in the 19th century. A great contribution to the definition of the subject of PIL was made by the Russian lawyer F.F. Martens, who in 1882 published his work entitled "Modern International Law of Civilized Peoples". However, the author wrote that PIL is an organic part of the territorial civil law of the country (Martens, 1996).

Issues of PIL in Russia have been attracting the attention of scholars at various stages of the development of Russian society for over 100 years. In the pre-revolutionary period, Russia was actively developing the science of civil law, and issues of PIL were considered in the general private law context. In the Soviet period, private law issues were developed much less. This was primarily due to the prevailing socialist ideology during this period, which did not approve of private property and criticism of "bourgeois" legal systems. Professor S.O. Raevich made a significant contribution to the development of PIL in the 20th century by publishing his monograph "On the current state of the Soviet literature on PIL", which pointed out that not imperialism as such was hostile to the USSR but only certain reactionary elements of it. The esteemed

professor spoke positively about the German court practice, which took the "right line" on certain disputes. This study, however, drew the strongest criticism of Soviet scholars, who pointed out that the scientist's simplistic approach to PIL in the anti-Marxist formulation of the question cannot be allowed for the Soviet readers, and there can be no excuse for it (Filippova, 2017). Therefore, in the Soviet period, there is a certain decrease in the study of PIL issues in Russian legal science.

Nevertheless, there was a conflict of rules in Soviet law, and the distinction between "internal" and "international" (between the Union republics) conflicts was traditional. They belonged to different spheres of law and were considered in different fields of jurisprudence. The differences in the composition and content of a conflict of rules themselves remained significant, for example, in the Foundations of Civil Law of 1991 (the rules of Article 8 on the application of the civil legislation of one Union Republic in another Union Republic and Section VII on the legal capacity of foreign citizens and legal entities and the application of the civil laws of foreign states and international treaties), and in the Foundations of Legislation of the Union of Soviet Socialist Republics and Union Republics on Marriage and Family of 1968 (rules of article 7 on the legislation of the Union of Soviet Socialist Republics and the Union republics on marriage and family, application of the legislation of the Union republics on marriage and family and section V on the application of the Soviet legislation on marriage and family to foreign citizens and stateless persons, application of the laws on marriage and family of foreign states and international treaties). In the 1991 Foundations, however, the content of "internal" and "international" conflicts of rules (Article 8 and Section VII) was brought closer together. Following the dissolution of the USSR, conflicts of the laws of the former Union Republics, which had become independent states, became "international" in nature and constituted a field of PIL.

Only after 1992 scientific works dedicated to the study of PIL started to appear in the Russian press. Thus, the doctrine of PIL in Russia has formed only at the current stage of development. PIL in Russia has emerged due to the objective existence in the world of about two hundred legal systems, each of which establishes "its own" norms to

regulate the same social relations. At the same time, ignoring foreign law and subordinating relations only to the law of the state where the dispute is resolved cannot ensure an objective legal regulation. PIL primarily regulates relations by defining competent law, namely, the law of the state, which must be applied in a specific case where relations are complicated by a foreign element.

Nowadays, PIL in Russia is considered in several aspects: as a branch of law; as a system of norms; as a branch of legal science (jurisprudence); as a comparative field of law based on a conflict of rules, and as an independent legal entity. However, despite the diversification of terminology, as a rule, all researchers agree that PIL has its own independent subject, object, sources, and methods of legal regulation. According to N.Y. Erpyleva: "PIL is a polysystemic complex combining the norms of national legislation and international treaties and customs that regulate property and personal non-property relations complicated by a foreign element" (Erpyleva, 2004). Thus, the author quite rightly notes that PIL is not a branch of law but some other legal entity with its own sources of law.

Considering the different ideas about the subject of PIL in science, some researchers, for example, I.P. Blishchenko, L.N. Galenskaya, and S.A. Malinina, express their opinion about attributing PIL to the civil law branch as its part. Other scholars, among them: S.B. Krylov, S.A. Golunsky, M.S. Strogovich, A.M. Ladyzhensky, and F.I. Kozhevnikov consider PIL as one of the branches of international law. The literature also expresses an opinion on the polysystemic structure of PIL.

In the textbook edited by B.M. Gongalo, PIL is postulated as a system of norms regulating civil, family, and labor relations complicated by a foreign element (Alekseev, Alekseeva, Belyaev, 2018). First, if we follow this logic, PIL does not fit into the traditional understanding of the sectoral division of Russian law, since it regulates not one homogeneous group of social relations but several different groups of relations (civil, family, labor, corporate, procedural, etc.). Second, according to the Russian law doctrine, the branch of law is a system of norms regulating a homogeneous group of social relations, and therefore, from the point of view of formal logic, the statement that PIL is a branch of Russian law. However, in case

of conflicts in the legal regulation of relations complicated by a foreign element, Russian courts have the right to apply the provisions of foreign law, and in this case, it is hardly possible to agree that PIL is a branch of Russian law, because the conflict links refer us to foreign law.

The term "international" has different meanings in "international law" and "PIL". The first case refers to inter-state public law, where the subjects are sovereign States entering into international relations. In the second case, the term covers private law relations, the actual content of which extends beyond a single country, becoming transnational and natural to international life. However, it should be understood that such specific legal entities as international criminal law, by their nature, are more drawn to public international law but have their own specificity (Uporov, 2018).

Relations in the field of PIL are characterized by two features: the field of regulation and the presence of a foreign element. The field of regulation covers civil law, labor law, family, bankrupt, procedural, and other legal relations. All these relations are based on the principle of non ultra petita and have a private interest.

Describing PIL, the following features should be highlighted:

– as a rule, regulates private law relations complicated by a foreign element;

– these relations are not homogeneous but belong to different branches of law;

– has its own subject of regulation;

– is aimed at resolving a conflict of interests in the applicable law;

– in some cases, the relationship may be of a public legal nature.

Based on the above-mentioned, it is possible to define the essence of PIL, which is a comparative field of law consisting of substantive and procedural conflict of rules, international treaties, and customs and has its own individual subject.

Two definitions of the PIL subject have been formed in Russian science: narrow and broad. Representatives of a broad interpretation of PIL subject believe that the subject includes, in addition to civil law institutes (e.g., sales, transportation, etc.), institutes of other branches of law

(family, labor, procedural, etc.). The concept of a narrow interpretation of the PIL subject implies that only civil law institutions are included.

The definition of the subject of PIL should emphasize property and related non-property relationships involving entities and individuals as subjects not only of national law but also of transnational law, rather than relations arising between states.

The subject of PIL, as a legal relationship, has four features.

I. It is based on private law relations. However, as an exception, there may also be a public law relationship related to the determination of the court's jurisdiction and the application of a public policy clause (Svirin, Mokhov, 2018).

II. Such relations are cross-border (international).

III. There is a relationship between legal relations and the law of a foreign state.

IV. There is a certain foreign element in the legal relation.

In science and practice, it is common to distinguish three groups of foreign elements that serve as a prerequisite for attributing a legal relation to a PIL area, but there may be more such elements.

The first element is the subject of legal relations (subjects of different states are participants of legal relations). The subject is understood as a foreign individual or legal entity or international organization. For example, a foreign citizen entering into a marriage with a citizen of the Russian Federation or being a victim of a legal relationship in a conflict; or a foreign legal entity as a party to a transaction with a Russian legal entity, etc.

The second element is the object of legal relations (the object of the dispute is in a foreign state, and in case of a dispute over property located in Russia between foreign entities).

The object is property, other object located in a foreign country, for example, real estate in Spain, which is owned by a Russian citizen or a trademark registered in the Netherlands, etc.

The object of PIL also includes legal relations, all participants of which belong to the same state, if the objects (e.g. inherited property) of legal relations are outside the Russian jurisdiction.

The third element is a specific legal fact when it creates, changes, or

terminates legal relations in Russia, but the fact itself took place in the territory of a foreign country. The third element of the subject of PIL may appear, for example, after the death of the testator or a tort, etc., if these legal facts have arisen in a foreign country.

A legal fact as the third element of PIL object is any action, event, etc., that took place in a foreign country, e.g., marriage in Germany, the opening of inheritance in Switzerland, etc. It is also possible to combine elements in one legal relationship: the marriage of a Russian citizen in Poland with a Latvian citizen, etc.

It seems obvious that any of these elements of the subject matter of PIL, being international itself, does not change the private legal nature of the relationship as a whole.

In most cases, international private relations take place with the participation of a foreign person (relations between subjects of law of different states).

As S.N. Lebedev points out, a foreign element is necessarily present in relations governed by PIL (Abdullin, Artemeva, Afanasev, 2011). A similar position is also taken by N.I. Marysheva, who considers private legal relations arising in the conditions of international life, including civil legal relations proper, as well as family and labor relations regulated with the use of private law categories as the subject of PIL (Borisov, Vlasova, Doronina, 2018).

It should be noted here that Russian researchers of PIL do not pay attention to the fact that the subject of PIL includes another group of conflicts of laws — procedural relations, which are not subject to private law. For example, in the case of cross-border bankruptcy, which is certainly part of PIL, substantive and procedural relations arise.

The international doctrine also contains different points of view on this issue. For example, the documents of UNCITRAL Working Group V dealing with insolvency law noted that not all states provide for a procedural component as part of public policy. In this regard, the draft of UNCITRAL Model Law on recognition and enforcement of judgments in insolvency proceedings includes fundamental principles relating to fair process requirements (Recognition and Enforcement of Judgements in Insolvency Proceedings: Draft Model Law, 2017).

Based on the traditional division of the law into private and public law, it should be assumed that civil law should be considered only as an integral part of PIL.

It should also be noted that the structure of private law is not the same in different countries. In the Russian private law system, it is common practice to distinguish such branches as family, labor, and other branches besides civil law. Their common features, defined as belonging to private law, are:

– private individuals as subjects of relations;

– private interest as the content of the relationship (Ivanchak, 2014).

In the literature, there is a view that PIL is also a branch of private law. We will allow ourselves to disagree with this view on the following considerations. First, any branch of law is a system of rules of law, whereas PIL has no system of rules and the court only has to make a conflict of laws link to a contested legal relationship. Second, private international relations were governed not only by private law but also by public law, for example, when choosing a jurisdiction.

The legal definition of the subject of PIL is set out in Article 1186 of the Civil Code of the Russian Federation. This article regulates the procedure for defining the law applicable to civil law relations involving foreign citizens, foreign legal entities, or civil law relations complicated by another foreign element, including cases where the object of civil rights is abroad.

From this definition, we can conclude that the Civil Code of the Russian Federation provides for civil law relations complicated by a foreign element as a PIL subject. Thus, the legislator has given a narrow interpretation to the PIL subject, which contradicts the legislation of other branches of law (labor, inheritance, civil procedure, etc.), which also contains the rules governing a conflict of relations.

In the legal definition, participation in relations of foreign citizens or foreign legal entities (subject composition) is indicated as a foreign element.

An interesting point is the absence of a direct reference in the law to such a category of the foreign element as a legal fact. However, the wording of Article 1186 of the Civil Code of the Russian Federation provides for an open

list of foreign elements and, consequently, civil law relations may be complicated by other foreign elements not listed directly in the mentioned norm of law.

This point of view is fixed in the positions of the Supreme Court of the Russian Federation, according to which the commission beyond the action or the occurrence of an event (legal fact) causing the emergence, change, or termination of civil law relations may also be considered as a foreign element (The Resolution of the Plenum of the Supreme Court of the Russian Federation № 24, 2019).

Besides, according to Article 1 of the United Nations Convention on contracts for the international sale of goods (concluded in Vienna on April 11, 1980), the place of business is not determined by the nationality of the person (nationality of the individual or the place of establishment of the legal entity), i.e. by the presence of a foreign element in the form of a legal entity, but by the place where a party to the contract of sale conducts business regularly or, if there is no such element, by the place of residence of the individual (United Nations Convention on Contracts for the International Sale of Goods, 1980).

The Convention on the contract for the international carriage of goods by road (concluded at Geneva on May 19, 1956) states that it applies to any contract for the carriage of goods by road for remuneration by means of transport where the place of loading of the goods and the place of delivery specified in the contract are situated in the territory of two different countries, at least one of which is a party to the Convention (Convention on The Contract for The International Carriage of Goods by Road (CMR), 1956). The application of the convention is not dependent on the residence and nationality of the contracting parties.

A similar provision is contained in the Convention for the unification of certain rules for international carriage by air (concluded at Montreal on May 28, 1999), according to which international carriage in the sense of the Convention is defined as any carriage in which, according to the definition of the parties, the place of departure and the place of destination, regardless of whether there is an interruption of carriage or an overload, is located either in the territory of two states parties to that Convention or in the territory of the same state party to that Convention if the agreed stoppage

is provided for in the territory of another state, even if that state is not a state party to the Convention (Convention for the Unification of Certain Rules for International Carriage by Air, 1999).

Thus, the conventions relating to the subject of PIL may be applied to a contract of international carriage to which Russian individuals and legal entities are parties (consignor or passenger and carrier).

It should also be understood that the rules for defining the law applicable to the status of an individual and specific relations are different (Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation № 17972/13, 2014).

PIL is separate from public international law in its subject.

It is also suggested in the literature that the main subject of PIL is spatial legal conflicts, which are subdivided (from the point of view of PIL) into conflicts of laws of different states (international) and conflicts of laws of national entities (members of a federation) of the same state (internal, inter-regional). The study of the question of whether the solution of spatial legal conflicts — international and national — is subject to the same common principles, or each type of conflict corresponds to special rules of their regulation, allows concluding that the different approaches of states to the problem (Borisov, Vlasova, Doronina, 2018). To our mind, a conflict of rules is not a subject but an object of PIL.

The Russian doctrine points out the resolution of the problem of conflicts between Russian law and the law of another state, to which a foreign element is bound, as a key feature of the subject of PIL in the Russian doctrine, since the same issues may be regulated differently in these legal systems. Accordingly, a conflict of rules adopted by this state, which ultimately determine whether national or foreign law should apply in this case, is concerned with the resolution of such problems (Abdullin, Artemeva, Afanasev, 2011).

The peculiarity of the subject of PIL is also characterized by its source, i.e., the existence of a conflict of rules having its specific meaning and structure. The sublimation of this thesis is that PIL is, in fact, a conflict of laws.

The term "conflict" (collision) of laws used to characterize the regulation of a PIL subject complicated by a foreign element is conditional. In fact, "collision" is prevented and

overcome by legal means known to PIL. Unlike tax, customs, currency, and other public legal relations, regulation of which, as a rule, excludes recourse to foreign law, the very existence of private legal relations complicated by a foreign element is impossible without recognition and application to them — in certain cases and certain boundaries — of foreign law. At the same time, it should be noted that, in law enforcement practice, there are cases where foreign public law rules have been applied (e.g., cases provided for in several international treaties). Besides, the boundaries separating private law from public law are not always sufficiently clear.

The emergence, change, and termination of relations constituting the subject of PIL are characterized by features that explain the originality of their legal regulation and the settlement of disputes that arise. In their most general form, such features are outlined in Article 1186 of the Civil Code of the Russian Federation, which defines the law to be applied to civil law relations involving foreign persons or civil law relations complicated by another foreign element.

The greatest difficulty is the actual content of private legal relations that fall within the scope of certain international treaties, such as: United Nations Convention on contracts for the international sale of goods (1980), UNIDROIT Convention on international financial leasing (1988), Warsaw Convention for the unification of certain rules relating to international carriage by air (1929), which define the concepts of international sale of goods, international financial leasing, and international carriage by air.

The presence of a foreign element in international life in a particular legal relation makes it necessary to raise a conflict question: which country is subject to this relation — the country of the ship, the country to which the foreign element belongs, or, finally, the law of a third country (for example, in case of submission of the contract by the parties to such law)?

Several foreign acts (e.g. Article 13 of the Swiss PIL act) lay down the rule that the application of a foreign law rule cannot be denied simply because it is defined as public law (Federal law on private international law of the Swiss Confederation, 1987). This rule is also cited in the Model Civil Code

for CIS countries (respectively, in the Model-based Civil Codes of some CIS countries).

The resolution of a conflict of laws issue leads to the identification of the law to be applied to the contested relationship or, as is often said, the applicable law. The legal rules that determine which country's law is to be applied to the relationship in question are called a conflict of rules. It should be noted that the very history of PIL began with the birth of conflicts of rules and, in some countries, PIL is still considered a conflict of laws.

Discussion

The subject of PIL is a complex one because, in addition to private law, we believe that it can be governed by procedural law, which is already part of public law. We may refer to the section of PIL such as international civil procedure as evidence. The subject of international civil procedure is the relations arising in connection with the consideration by state courts of cases involving foreign persons, in particular: 1) the procedural situation of foreign persons, organizations, foreign states, and interstate organizations in civil and arbitration proceedings; 2) international jurisdiction in cases involving a foreign element, as well as problems arising from the consideration of such cases; 3) the enforcement of foreign judgments and foreign court orders; 4) the procedure for applying foreign law.

G.Y. Fedoseeva defined the range of issues that make up the content of the international civil process:

- procedural rights and obligations of foreign persons (foreign citizens, stateless persons, foreign legal entities, organizations that are not legal entities according to foreign legislation);

- identification of international jurisdiction;

- procedure and ways of execution of court orders;

- recognition and execution of foreign court decisions (Fedoseeva, 2007).

V.P. Zvekov noted that the area of the international civil procedure consists of special issues of court proceedings in civil cases, as well as special issues related to the implementation by a notary and some other bodies for the protection of personal property and non-property rights of participants in the international civil exchange. The international civil process traditionally also includes

international commercial arbitration, the importance of which for the stable functioning of trade has increased significantly in recent decades (Zvekov, 1999).

However, there are other judgments in the doctrine about the features of the subject of international civil procedure law as an integral part of PIL. Thus, I. V. Getman-Pavlova considers the features of the subject PIL to be the following: 1) international jurisdiction of civil cases; 2) civil and procedural situation of foreign individuals (physical and legal), a foreign state, and international organizations; 3) court evidence in cases with a foreign element; 4) establishment of the content of the applicable foreign law; 5) execution of foreign court orders; 6) recognition and enforcement of foreign judgments; 7) notarial acts related to the protection of rights and interests of participants in international civil circulation; 8) cross-border bankruptcy; 9) hearing civil cases through arbitration; 10) enforcement of foreign arbitral awards.

Thus, it can be stated that in Russia, despite the term "private", the subject of PIL covers in some cases public law relations (e.g., choice of jurisdiction, public policy clause).

Another relevant feature of PIL is how its subject is regulated. The method of legal regulation in the doctrine is understood as a set of means and ways in which the law influences public relations by regulating them. In our view, PIL has a unique conflict of laws method of regulation, but it is combined with substantive and procedural law methods.

International private law owes its origin and further development to the method of a conflict of laws. A conflict can be overcome by using the conflict of laws rules, which indicate which law is to be applied in a particular case. Consequently, the conflict rule itself is a reference to substantive or procedural rules, it does not resolve the dispute essentially. There is a settlement of already directly disputable substantive legal relationship only by means of a substantive legal method.

Conclusion

As a result of the research and analysis of the regulatory framework, jurisprudence, and doctrinal sources, the following conclusions can be drawn:

1. The subject of PIL includes, in addition to private legal relations,

public legal relations (procedural, tax, and customs) as these branches also operate in civil law categories and are aimed at satisfying private interests.

2. The legal nature of PIL at the present stage is complex, so it is impossible to put PIL in the framework of both internal (national) and international public law. PIL is a completely independent legal entity — a branch of law that has its own subject of legal regulation, different from the branches of law. The nature of the subject of regulation, first of all, allows speaking about the specificity and autonomy of PIL.

3. The subject of PIL can be defined as international private and public law relations, which cover civil, family, labor, corporate, procedural, tax, and customs relations. Such legal relations acquire an international character when a so-called "foreign element" appears in their content.

4. The subject of PIL is complex in its content because, in addition to private law, it can be regulated by the rules of procedural (public) law. The section of PIL, such as international civil procedure, may be referred to as evidence. Thus, procedural relations, being an integral part of the subject of PIL, determine conflicts jurisdiction, i.e. jurisdiction plus foreign litigation.

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