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# **THE EVOLUTION OF CONFLICT REGULATION IN PRIVATE INTERNATIONAL LAW OF RUSSIA AND POLAND**

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## **THE EVOLUTION OF CONFLICT REGULATION IN PRIVATE INTERNATIONAL LAW OF RUSSIA AND POLAND<sup>2</sup>**

The present article examines the evolution of conflict regulation in the private international law of Russia and Poland. The author identifies the concept, structure and types of conflict rules, stressing that the conflict of laws is the most important category of private international law. A detailed classification of the types of connecting factor formulas under which connecting factors of bilateral conflict rules are formed is undertaken. The detailed analysis of conflict rules contained in Russian and Polish legislation set forth mainly in the Civil Code of the Russian Federation and the Law of Poland “On Private International Law” is conducted with the help of the comparative and formal-logical methods of research. The author also scrutinizes different conflict rules contained in the Treaty between Russia and Poland on legal assistance and legal relations in civil and criminal matters. The author concludes that modern conflict regulation in Russia and Poland is in accordance with those trends in private international law, which can be seen through the prism of the international dimension.

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## Introduction

Traditionally, two methods of regulation are singled out in the science of private international law – conflict law and material law. The conflict law method dictates that, for the regulation of private law relations with foreign elements (international private relations), the question of which country's law must be applied should first be decided. This is possible only with the help of a conflict rule which contains specific criteria for choosing a national legal system depending on the connection of a concrete relation with the law of a particular state. The material law method excludes raising a conflict question concerning the choice of national law in so far as the essence of the legal relation is regulated by specially created material law rules unified in international treaties or by material law rules of direct operation contained in national law. In the foreign science of private international law, the material law method has been called the substantive regulation method.<sup>3</sup>

The conflict law method acts as the method defining the face of private international law, although the role and significance of the material law method is persistently growing. Historically, conflict rules comprising the basis of the conflict law method of regulation were formed in national law. The development of private international law in various states inevitably led to a unified understanding of the content of such rules and not infrequently to their direct unification or harmonization. National normative acts containing conflict rules are a good basis for the study of modern conflict law. It is precisely the comparison of the scope, content and types of such rules in various states that enables the fundamental trends underlying the development of modern conflict law to be determined. In this context, this article is dedicated to a comparative analysis of conflict regulation in the private international law of Russia and Poland.

The choice of problem for this article resulted from recent significant changes in private international law in Russia and in Poland on the basis of the adoption of domestic normative acts; moreover, the form in which this development is taking place in Poland is substantially different from

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<sup>3</sup> On the concept, subject-matter and method of private international law in foreign science, see: *Briggs A.* The Conflict of Laws (Clarendon Law Series). Oxford University Press, 2013; *Hatzimihail N.* Pre-classic Conflicts of Laws. Cambridge University Press, 2014; *Minor R.* Conflict of Laws Or Private International Law (1923). Ulan Press, 2012; *Morse C., McClean D., Lord Collins of Mapesbury (eds.)* Dicey, Morris & Collins on the Conflict of Laws. Sweet & Maxwell, 2012; *Rogerson P., Collier J.* Collier's Conflict of Laws. Cambridge University Press, 2013; *Story J.* Commentaries on the Conflict of Laws. The Lawbook Exchange Ltd., 2010; *Story J.* Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard and to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments. TheClassics.us, 2013; *Westlake J.* A Treatise on Private International Law Or the Conflict of Laws (1858). Kessinger Publishing, 2010.

the form of development of private international law in Russia. It was thus all the more interesting to the author to analyze and point out such differences. The limitations of a single article indisputably do not allow the author to deal with all aspects of conflict law; therefore, the author has limited her investigation to an examination of only the basic conflict links contained in legislation of Russia and Poland, prefacing her account of such material with a theoretical discussion of the concept, nature and functions of conflict rules in private international law.

### **1) Concept, Nature and Functions of Conflict Rules in Private International Law**

The most important category of private international law is the concept of conflict of laws. Historically, the conflict rules, which from the juridical-technical side constitute the most complex rules introduced into the domain of private international law, comprise the basis of private international law. The aggregate of those rules applicable to the regulation of private law relations complicated by a foreign element constitutes conflict law.<sup>4</sup> Although the content of private international law is by no means confined to conflict questions, conflict law is a complex and very important part of private international law. In translation from the Latin, the term “conflict” signifies a collision. When a legal relation is connected with more than one legal system potentially applicable to its regulation, a conflict or collision of laws is spoken of.

Conflict rules in private international law are rules of a special category, rules of a *renvoi* character. They have two peculiarities: in the first place, a conflict rule does not regulate directly the rights and duties of subjects of legal relations, but only contains a principle following which we can choose the law subject to application; second, the effect of legal regulation with the help of a conflict rule is achieved in aggregate with that material law rule to which it refers.<sup>5</sup> The *renvoi* character of conflict rules signifies that in the text thereof there is no combination of hypothesis, disposition and

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<sup>4</sup> See Asoskov A.V. Fundamental Principles of Conflict Law. Moscow, 2012; Asoskov A.V. Conflict Regulation of Contractual Obligations. Moscow, 2012; Zvekov V.P. Conflict of Laws in Private International Law. Moscow, 2007; George M., Dickinson A. Statutes on the Conflict of Laws. Hart Publishing, 2014; Harding Conflict of Laws. Routledge, 2013; Hay P., Weintraub R., Borchers P. Conflict of Laws: Cases and Materials (University Casebooks Series). Foundation Press, 2013; Lipstein K. Principles of the Conflict of Laws National and International. Springer, 2012; Little L. Conflict of Laws: Cases, Materials, and Problems (Aspen Casebooks Series). Aspen Publishers, 2013.

<sup>5</sup> The concept of operation of a conflict legal rule in combination with a material legal rule was developed in detail in the works of the prominent Russian scholar, founder of the Russian science of private international law, Professor L.A. Lunts. See: Lunts L.A. Concerning the Essence of a Conflict Rule // Academic Papers. Issue 9. Moscow, 1959. P. 105-124.

sanction – integral components of other legal rules. Conflict rules include scope and connecting factor, and their operation always presupposes the presence of corresponding material law.

As G.K. Dmitrieva writes, the conflict rule is a rule determining the law of which state should be applied to a given private law relation complicated by a foreign element.<sup>6</sup> In the opinion of V.P. Zvekov, the main difference between a conflict rule and other legal prescriptions is the overcoming of a conflict problem by means of determining the applicable law, *i.e.* the law subject to application by virtue of the directive of a conflict rule.<sup>7</sup> As indicated by I.V. Getman-Pavlova, a conflict rule is a rule of an abstract, *renvoi* character deciding the question of the law of which state should be applied for deciding the case. By their nature, conflict rules to a certain degree are similar to *renvoi* and blanket rules of national law. However, both *renvoi* and blanket rules refer to the legal system of a given state, concretely indicating the applicable legislative act or even a rule of law. *Renvoi* and blanket rules are technical instruments, methods of legal technique. Conflict rules have an immeasurably more abstract character. They provide for the possibility of application of national, foreign and international law.<sup>8</sup>

In doctrinal writings, a conflict rule in most cases is traditionally considered as a rule of civil law. L.A. Lunts stressed that the conflict rule together with that material law rule to which it refers form a genuine rule of conduct for participants in civil turnover. The conflict rule, just as any other civil law rule, can have either an imperative or dispositive character.<sup>9</sup> Such views are also held by other leading specialists in the field of private international law, for example, I.S. Pereterskii and S.B. Krylov. They believed that “a conflict rule regulates the settlement of a question, not autonomously, but together with that source of law to which it refers”.<sup>10</sup> M.M. Boguslavsky completely justifiably notes that “the conflict rule is a rule determining the law of which state must be applied to a respective legal relation. The conflict rule has a *renvoi* character; it only refers to material rules providing for resolving the respective question. In so far as the conflict rule is a rule of *renvoi* character, it is possible to utilize it only together with the material law rules to which it refers – rules of legislation deciding a question substantively”.<sup>11</sup>

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<sup>6</sup> See: Dmitrieva G.K. (ed.) Private International Law: Textbook. Moscow, 2013. P. 109. (author of the section – G.K. Dmitrieva).

<sup>7</sup> See Marysheva N.I. (ed.) Private International Law: Institutional Aid. Moscow, 2012. P. 53. (author of the section – V.P. Zvekov).

<sup>8</sup> See Getman-Pavlova I.V. Private International Law: Textbook for Holders of Master's Degree. Moscow, 2013. P. 123-124.

<sup>9</sup> See Lunts L.A. Private International Law: 3 vols. Moscow, 2002. P. 171-172.

<sup>10</sup> Pereterskii I.S., Krylov S.B. Private International Law. Moscow, 1959. P. 11.

<sup>11</sup> Boguslavsky M.M. Private International Law: Textbook. Moscow, 2012. P. 89.

In prerevolutionary doctrinal writings the idea was expressed that a conflict rule is not a rule of conduct for participants of civil turnover, and as a consequence, it is impossible to speak about its violation by the latter; rather, it is addressed to a court, to an administrative agency of the state. From this, a conclusion follows concerning the public law nature of conflict rules.<sup>12</sup> As L.P. Anufrieva justifiably stressed, the legal nature of conflict rules consists precisely in the fact that elements of public law and private law are combined in them harmoniously in substantial measure bringing about its specific character. The public law effect of the conflict rule has in fact a secondary, derivative character. In essence, the conflict rule as such sanctions the application of foreign law within the limits of a concrete national jurisdiction. This sanctioning has its own international legal basis: “international comity” in previous centuries or the principle of cooperation as a generally recognized rule of public international law in the modern world. Conflict rules reflect, on one hand, the existence of differences and the variety of legal orders of states and, on the other hand – the interaction of national legal systems of states.<sup>13</sup>

Conflict rules constitute a special variety of rules of a *renvoi* character which **choose the legal system to be applied, thereby effectuating a regulatory function**. In this context, according to V.L. Tolstykh, the most important distinctiveness of the operation of conflict rules is reduced to the following:

1) A conflict rule consists of a special legal method, the use of which leads to the creation of a rule of national law by means of use of rules of foreign law. A conflict rule is not a rule of law; it does not contain rules of conduct which could be considered autonomous from rules of conduct consolidated in rules of foreign law. Just as any other reference, a conflict rule effectuates the “adoption” of a rule of another social norm into a legal system. **The regulating function of a rule of conflict law** thus is manifested only jointly with rules of foreign law.

2) The mechanism and boundaries for turning to rules of foreign law, just as the mechanism and boundaries for turning to other social norms, is determined by national law. The principal burden in determining the limits of the operation of rules of foreign law and the legal force of the rules of national law constructed on their basis falls on the conflict rule. The conflict rule fulfils in relation to rules of

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<sup>12</sup> See Brun M.I. Introduction to Private International Law. Petrograd, 1915. P. 61, 78, 79.

<sup>13</sup> See Anufrieva L.P. Private International Law: Textbook. Vol. 1: General Part. Moscow, 2000. P. 173.

foreign law three interconnected functions: 1) it determines the subject-matter of regulation of rules of foreign law; 2) it determines the criteria on the basis of which the choice of rules of the law of a concrete state occurs; 3) it imparts legal force to rules of foreign law, allowing them to operate within the framework of the national legal order. **A foreign rule has the character of being “legal” only on the territory of the foreign state**; however, its legal force within the framework of the national legal order is created by the national conflict rule.

3) As a result of the reference to a rule of foreign law, a borrowing of its **rational element** occurs, *i.e.* the very rule of conduct. The **imperative element** of the rule of foreign law to which reference is made is created with the help of national legal means. The national legislator expresses his will in the application of a rule of foreign law in the reference to a conflict rule. Namely, it imparts to the rule of foreign law a regulatory character allowing it to operate within the framework of the national legal order. Its interaction with other rules of the national system of law is a consequence of the reference to a rule of foreign law. The “inclusion” of a rule of foreign law in the national legal order, as the process, logically consists of two stages. First stage is the analysis of the foreign rule; recognition of its having the character of a legal rule in the event of its effectiveness, *i.e.* the presence of rational imperative element. The second stage is the transfer to the national legal order of the “rational element” of the rule of foreign law. When having recourse to the foreign rule, an interaction of **all three elements of the rule of conduct (hypothesis, disposition and sanctions) occurs**.<sup>14</sup>

The above-cited discussion by V.L. Tolstykh concerning the mechanism of operation of conflict rules as rules of a *renvoi* character is consistent in reasoning and eloquent in exposition. Nevertheless, one question remains unclear. In the opinion of the author, conflict rules are not legal rules, and foreign law is not a legal system but merely a normative complex of rules of a social character. During the interaction of a conflict rule and a rational element of a foreign legal rule (the rule of conduct consolidated in such rule), a formation of a national legal rule occurs. The question is: how is the legal phenomenon (the rule of national law) formed during the interaction of two non-legal phenomena (the conflict rule and the rule of foreign law). The point is that any phenomenon of reality bears the stamp of generic indicia and such indicia cannot be taken from nowhere. The only way out of this logical trap is to recognize the generic quality of the legal phenomenon both for the conflict rule and the rule of foreign

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<sup>14</sup> See Tolstykh V.L. Rules of Foreign Law in Private International Law of the Russian Federation. St. Petersburg, 2006. P. 90-103.

law. Everything in that case becomes obvious and logically well-founded – two legal phenomenon gives birth to a third.<sup>15</sup>

As mentioned earlier, the specific quality of the legal nature of conflict rules has an influence in an important way on their structure. A conflict rule consists of **two elements** – scope and connecting factor. **The scope** points to the type of regulated legal relationship, but **the connecting factor** points to the law subject to application with the purpose of regulating the legal relationship complicated by the foreign element. Let us consider the following conflict rule as an example: “The inheritance relations are regulated by the law of that country where the testator had the last place of residence”. The scope of the given conflict rule points to the type of regulated legal relationship—this is an inheritance legal relationship, and the connecting factor points to the legal system subject to application for regulatory purposes. In the given case, this will be the legal system of the state on the territory of which the testator was domiciled at the moment of opening of an inheritance.

The question concerning the status of private legal relations complicated by a foreign element is an important question closely connected with the concept of a conflict rule. As V.P. Zvekov wrote, **a statute is a competent legal order to which a conflict rule refers and which regulates a certain type of relations**. It has become the tradition to explain the regulatory characteristic of the conflict rule by referring to the fact that the conflict rule together with the material law prescription to which it relates form a single rule of conduct for participants of the private law relation. It is understood that we are not talking about a Russian-foreign legal provision, but rather about a construction revealing the meaning of the regulatory function of a conflict prescription formed on the basis of the statute of the respective relations. Both the scope and the connecting factor of the conflict rule become operative in this mechanism. **The scope determines the type of statute (or the static of the statute), the sphere of its operation, and the connecting factor determines the content of the statute rule (or the dynamic of the statute).**

Conflict rules are the basis for the statute, for its formation. As already mentioned, both structural elements of conflict rules, the scope and connecting factor, participate in the formation of the statute. The scope of conflict rules establishes the type and group of relations subject to the statute, the sphere of

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<sup>15</sup> See *Baiborosh N.S.* The Classic types of Conflict Connecting Factors // *Belorussian Journal of International Law and International Relations*. 2011. No. 4.



its operation as well as the list of questions decided by it; and with the help of the connecting factor of that same rule, the material law of the country deemed to be applicable, *i.e.* the content of the statute, is established. The higher the level of differentiation of the scope of conflict rules and of specialization of their connecting factors, the fuller, more multi-faceted the identification of the sphere of operation of the statute and the narrower, more fixed, its boundaries.<sup>16</sup>

In conclusion, it is necessary to stress again that the specific character of the conflict rule is that, while not regulating directly rights and duties of parties to a legal relation, it only permits the choice of material law subject to application. As has been vividly stressed in western doctrinal writings, “the function of private international law is considered fulfilled when the legal system subject to application is chosen. Rules of private international law do presuppose the direct settlement of a disputed question and in this sense it is possible to say that conflict law is reminiscent of an information bureau at a railroad station where a passenger can learn which platform his train is departing from”.<sup>17</sup>

Conflict law rules can be contained in national legislation of a particular state and in international treaties. Both sources of conflict law find application in Russia and in Poland. The basic mass of conflict rules in private international law of Russia are contained in Section VI “Private International Law” (Articles 1186-1224) of Part Three of the Civil Code of the Russian Federation of 26 November 2001 as amended 5 May 2014<sup>18</sup> (hereinafter: Russian Civil Code). In addition to civil legislation, conflict rules are contained in the Family Code of the Russian Federation of 29 December 1995, as amended of 4 November 2014<sup>19</sup>, in particular in Section VII “Application of Family Legislation to Family Relations with the Participation of Foreign Citizens and Stateless Persons” (Articles 156-167); in the Merchant Shipping Code of the Russian Federation of 30 April 1999, as amended 29 November 2014,<sup>20</sup> which includes Chapter XXVI “Applicable Law” (Articles 414-427).

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<sup>16</sup> See Zvekov V.P. Conflict Law and the Statute of Private Legal Relations Complicated by a Foreign Element // Journal of Foreign Legislation and Comparative Jurisprudence. 2007. No. P. 29.

<sup>17</sup> North P., Fawcett J. Cheshire and North's Private International Law. London, 1992. P. 8.

<sup>18</sup> Compendium of legislation of the Russian Federation. 2001. No. 49. Article 4552; 2014. No. 19 Article 2329. A new version of Part III of the Civil Code of the Russian Federation came into force on 1 July 2014.

<sup>19</sup> Compendium of legislation of the Russian Federation. 1996. No. 1. 2014. No. 45. Article 6143. A new version of the Family Code of the Russian Federation came into force on 1 January 2015.

<sup>20</sup> Compendium of legislation of the Russian Federation. 1999. No. 18. Article 2207; Rossiskaya Gazeta, 3 December 2014, No. 275. A new version of the Code of Merchant Shipping of the Russian Federation came into force on 1 January 2015.

The principal body of conflict rules in private international law of Poland is contained in the Law of Poland “On Private International Law” of 4 February 2011, which came into force 16 May 2011<sup>21</sup> (hereinafter: “Polish Law”). The Polish Law is a voluminous codified act consisting of 19 sections, including 81 articles and unifying conflict rules relating to the legal status of natural and juridical persons (Sections 2-3); conflict rules relating to representation, transactions, limitation of action (Sections 4-6); conflict rules relating to obligations (Section 7); conflict rules relating to an arbitration agreement (Section 8); conflict rules relating to the property rights (Section 9); conflict rules relating to the intellectual property rights (Section 10); conflict rules relating to family law (Sections 11-15); conflict rules relating to inheritance law (Section 16); conflict rules relating to other matters (Section 17).

It is evident that Russia and Poland are classical examples of the attitude of states to national legislation as the source of conflict law. Whereas in Russia the conflict rules of private international law are dispersed in individual laws and have a clearly expressed branch focus, then Poland took the path of creating a single codifying act in the field of private international law containing the entire body of conflict rules independently of their branch characteristics. This is the basic, cardinal difference in the approaches of these two states to the forming of their national conflict law. International treaties are another source of private international law of Russia and Poland containing conflict rules. Characteristically, a bilateral international treaty binds these states, the Warsaw Treaty between the Russian Federation and the Republic of Poland on Legal Assistance and Legal Relations on Civil and Criminal Matters of 16 September 1996<sup>22</sup> (hereinafter: “Treaty between Russia and Poland”) which contains, *inter alia*, conflict rules of an international quality.

How are rules of international treaties, the participants of which include Russia, and the rules of national legislation correlated? In accordance with Article 15(4) of the Constitution of the Russian Federation of 12 December 1993, as amended 21 July 2014,<sup>23</sup> international treaties of the Russian Federation are an integral part of its legal system. If an international treaty of the Russian Federation

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<sup>21</sup> The text of this law translated into Russian by D.I. Zenkovich was published in the Journal of Private International Law. 2012. No. 2. P. 53-69. See also: Pajor T. Introduction to the New Polish Act on Private International Law // Yearbook of Private International Law. 2011. Vol. XIII. P. 381-388.

<sup>22</sup> Bulletin of International Treaties. 2002. No. 5. This treaty came into force on 18 January 2002.

<sup>23</sup> Compendium of legislation of the Russian Federation. 2014. No. 31. Article 4398. The new version of the Constitution of the Russian Federation came into force on 22 July 2014.

establishes rules other than those provided by a law, then the rules of the international treaty are applied. In accordance with an explanation of the Supreme Court of the Russian Federation given in Decree No. 8 of the Plenum of the Supreme Court of the Russian Federation “On Certain Questions of Application by Courts of the Constitution of the Russian Federation During the Effectuation of Justice” of 31 October 1995, as amended 16 April 2013,<sup>24</sup> by virtue of Article 5(3) of the Federal Law of the Russian Federation “On International Treaties of the Russian Federation” the provisions of officially published treaties of the Russian Federation not requiring the publication of domestic acts for implementation operate directly in the Russian Federation. In other cases, a corresponding domestic legal act adopted for the implementation of the provisions of an international treaty of the Russian Federation must be applied together with that international treaty (point 5).

In accordance with the Decree No. 5 of the Plenum of the Supreme Court of the Russian Federation “On the Application by Courts of General Jurisdiction of Generally-Recognized Principles and Rules of International Law and International Treaties of the Russian Federation” of 10 October 2003, as amended 5 March 2013,<sup>25</sup> during the consideration of civil cases by a court, an international treaty of the Russian Federation which came into force and became binding upon Russia and the provisions of which do not require publication of domestic acts for their implementation and which are capable of giving rise to rights and duties for subjects of national law is directly applied (point 3). An incorrect application by a court of generally-recognized principles and rules of international law and international treaties of the Russian Federation can be grounds for vacating or changing the judicial act. The incorrect application of a rule of international law can occur when a rule of international law subject to application was not applied by a court or, the reverse, the court applied a rule of international law which was not subject to application or when an incorrect interpretation of a rule of international law was given by a court (point 9).

The foregoing means that in the presence of an international treaty containing conflict rules, they will be applied to regulate the respective legal relation and not the rules of the Russian Civil Code or the Polish Law; therefore, the rules of the Treaty between Russia and Poland will be applied exclusively to relations with a foreign element on the territory of Russia and Poland (in the case of subjects of private

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<sup>24</sup> Bulletin of the Supreme Court of the Russian Federation. 1996. No.1; 2013. No. 6.

<sup>25</sup> Bulletin of the Supreme Court of the Russian Federation. 2003. No.12; 2013. No.5.

law of Russian or Polish nationality, other localization, for example, property or legal facts in the given states contemplating the simultaneous involvement of a Russian and Polish foreign element), and only in the case of their inadequacy will the rules of Russian or Polish conflict law be applied.

## **2) Basic Types of Connecting Factor Formulas in the Conflict Law of Russia and Poland**

We now consider the basic types of connecting factor formulas in Russian and Polish conflict law (by connecting factor formulas, we have in mind the connecting factor of a bilateral conflict rule; *i.e.* the rule containing the criteria for choosing the legal system subject to application and not indicating concretely which legal system must be applied). The scope of the present study does not allow for an analysis of all connecting factor formulas; therefore, we will focus on some of these containing the most important differences in private international law of Russia and Poland.

### **a) Personal law of natural person (*lex personalis*)**

**The personal law of a natural person regulates the legal status of the natural person.** The concept of the legal status of the natural person encompasses his civil legal capacity, the scope of personal rights (right to name, its use and defense), the sphere of marriage-family (or trusteeship and guardianship) and inheritance (the capacity of a person to draw up a will, inheritance) legal relations<sup>26</sup>. A personal law appears in two forms:

1) as a law of citizenship (*lex nationalis*); *i.e.* as a law of that state of which the person is a citizen;

2) as a law of domicile (*lex domicilii*); *i.e.* as a law of that state on the territory of which the person has a permanent place of residence.

The use of a particular form of personal law depends on the principles of the structure and historical peculiarities of development of a concrete legal system. In countries of the Roman-German system of law, the law of citizenship is applied, whereas in countries of the Anglo-Saxon system of law, the law of domicile is applied. However, at the present time, such a strict delimitation of the two forms of personal law is gradually becoming a thing of the past and is yielding its place to a combination of various elements. A clear example in this respect is Russian law. In accordance with Article 1195 of the

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<sup>26</sup> See Bazaev G.B. Personal Law of the Natural Persons in Private International Law: Thesis...candidate of juridical sciences. Moscow, 2008.

Russian Civil Code “Personal law of Natural Person”, the law of the country of which this person is a citizen shall be considered to be the personal law of a natural person. If a person together with Russian citizenship also has foreign citizenship, his personal law shall be Russian law. If a foreign citizen has a place of residence in the Russian Federation, his personal law shall be Russian Law. When a person has several foreign citizenships, the law of the country in which this person has a place of residence shall be considered to be the personal law (points 1-4). The personal law of a stateless person is the law of the country in which the person has a place of residence. The personal law of a refugee is the law of the country granting asylum (points 5-6).

Personal law as a connecting factor formula is used in several conflict rules contained in Russian law:

1. Civil legal capacity of a natural person is determined by his personal law (Articles 1196-1197 of the Russian Civil Code);
2. The rights of the natural person to name, its use and defense is determined by his personal law (Article 1198 of the Russian Civil Code);
3. Trusteeship or guardianship over minors, persons without legal capacity or limited legal capacity (persons of majority age) is established and revoked according to the personal law of the person with respect to whom the trusteeship or guardianship is established or revoked (Article 1199(1) of the Russian Civil Code).

In accordance with the Polish Law, legal capacity of a natural person are determined by national law (*i.e.* the law of citizenship of the natural person) (Article 11(1)).<sup>27</sup> Deeming a natural person to lack legal capacity is subject to national law (Article 13(1)). The declaration of a natural person to be deceased or the confirmation of the death of a natural person is subject to national law (Article 14(1)). The right of a natural person to a first and last name is determined by his national law (Article 15(1)). Personal benefits of a natural person are subject to his national law (Article 16(1)). The possibility of the

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<sup>27</sup> The Polish Law states that if application of national law is provided for therein, a Polish citizen is subject to Polish law even if in accordance with the law of another country, he is deemed to be a citizen of the latter. The national law of a foreigner having citizenship of two or more countries is the law of the country with which he is more closely connected. If a law conditions the application of law depending on whether certain persons are citizens of a country, the requirement is considered satisfied if in accordance with the law of such country the persons are deemed to be its citizens (Article 2). If the application of national law is provided for but it is not possible to establish the citizenship of a person, the person does not have citizenship or it is not possible to establish the content of a national law, the law of the country in which the person has a place of residence is applied; in case of the absence of a place of residence of a person, the law of the country in which the person is usually situated is applied (Article 3 (1)).

conclusion of marriage is determined with respect to each of the parties by the national law thereof at the moment of conclusion of the marriage (Article 48). The common national law of spouses is applied to personal and property relations between spouses. In the case of the absence of a common national law, the law of the country in which both spouses have a place of residence, and in the absence of a place of residence in a country, then the law of the country in which both spouses are usually situated is applied. If the spouses do not have a usual place of sojourn in a country, the law of the country with which the spouses together are otherwise closely connected is applied (Article 51 (points 1-2)). In the case of dissolution of marriage, the common national law of the spouses at the moment of presentation of the demand to dissolve the marriage is applied. If there is no common national law of the spouses, the law of the country in which both spouses have a place of residence at the moment of presentation of the demand concerning dissolution of the marriage applies, and if the spouses do not have a common place of residence, then the law of the country in which both spouses had a common place of sojourn if one of them continues to have a place of sojourn there (Article 54 (points 1-2)).

The establishment and contesting of the origin of a child is subject to national law of the child at the moment of his birth. If the national law of the child at the moment of his birth does not provide for the establishment of paternity in a judicial proceeding, the national law of the child at the moment of establishment of the origin of the child applies to establishment of the paternity in a judicial proceeding. Recognition of paternity is subject to the national law of the child at the moment of recognition thereof. In the event that this law does not provide for the recognition of the child, the national law of the child at the moment of birth, if it provides for recognition of the child, applies. Recognition of a conceived but unborn child is subject to the national law of the mother at the moment of recognition (Article 55 (points 1-4)). Adoption is subject to the national law of the child to be adopted. Adoption jointly by spouses is subject to their common national law. In the absence of a common national law, the law of the country in which both spouses have a place of residence applies. In the absence of a place of residence in a country, the law of the country in which both spouses have a usual place of sojourn applies. If the spouses do not have a common usual place of sojourn in a country, the law of the country with which the spouses otherwise together are closely connected applies (Article 57 (points 1-2)).

The establishment of trusteeship or guardianship or any other remedies with respect to a minor is subject to the national law of the minor (Article 60(1)). The testator in a will or other disposition in

case of death has the right to subject inheritance questions to his own national law, the law of the place of his residence or the law of the place of his usual place of sojourn at the moment of conclusion of such expression of will or at the moment of his death. In the absence of a choice of law with respect to inheritance, the national law of the testator at the moment of death applies (Article 64 (points 1-2)). The validity of a will and other dispositions in the event of death is determined by the national law of the testator at the moment of their conclusion (Article 65). Comparing the texts of respective rules of Russian and Polish legislation, it is possible to affirm that the conflict law of Poland contains a broader range of criteria determining the personal law of a natural person than does the conflict law of Russia, where together with criteria of citizenship and place of residence, common to both legal systems, criteria of place of sojourn and criteria of place of close connection also have a place.

In accordance with the Treaty between Russia and Poland, legal capacity of a natural person is determined in accordance with legislation of the Contracting Party of which this person is a citizen (Article 19(1)). The conditions of concluding marriage are determined for each person entering into marriage in accordance with the legislation of the Contracting Party of which the person is a citizen (Article 24(1)). Personal and property relations of the spouses are determined by the legislation of the Contracting Party on the territory of which they have a place of residence (Article 25(1)). The capacity to draw up or revoke a will, as well as the legal consequences of inadequacy of expression of will, are determined by legislation of the Contracting Party of which the testator was a citizen at the moment of drawing up or revoking a will (Article 41(1)). Thus, in the bilateral Russian-Polish Treaty, the personal law of a natural person is consolidated in two forms: as a law of citizenship and as a law of domicile.

#### **b) Personal Law of a Juridical Person (*les societatis*)**

The personal law of a juridical person encompasses a whole group of legal relations, including:

1. Status of the entity as a juridical person;
2. Organizational-legal form of a juridical person;
3. Requirements for naming of a juridical person;
4. Questions of foundation, reorganization and liquidation of a juridical person, including questions of legal succession;
5. Content of legal capacity of a juridical person;

6. Procedure for acquisition by a juridical person of civil rights and assuming civil duties;
7. Internal relations, including relations of a juridical person with its participants;
8. Legal capacity of a juridical person to be liable for its obligations;
9. Questions of responsibility of founders (or participants) of a juridical person for its obligations (Article 1202 (2) of the Russian Civil Code).<sup>28</sup>

The sense of the given connecting factor formula is that the legal status of a juridical person is determined by the law of the state with which the juridical person has state affiliation (nationality).<sup>29</sup> The difficulty arises from the fact that the laws of various states regulate this question differently by virtue of a historical divergence in the formation of the criteria determining State affiliation (nationality) of a juridical person. The determination of nationality of a juridical person substantially influences the establishment of its affiliation to a concrete legal order – its own or foreign, which is its personal statute. Thus, the personal statute of a juridical person is established by means of determination of its state affiliation (nationality).<sup>30</sup> Traditionally, the criteria of incorporation, localization, and place of conducting activity.

**The criterion of incorporation** (or place of foundation) means that the nationality of that state on the territory of which the formalities of its foundation were fulfilled, where it is organized and registered, is recognized for a juridical person. The legislation of countries of the Anglo-Saxon system of law and a number of other states, including Russia, adheres to this criterion. In accordance with Article 1202(1) of the Russian Civil Code, the law of the country where the juridical person is founded is considered to be the personal law of the juridical person. In the case of a foreign entity which is not a juridical person in accordance with foreign law, the law of the country where that entity is founded

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<sup>28</sup> A similar list of types of relations regulated by the personal law of a juridical person are contained in Article 17(3) of the Polish Law. The list of such types includes the following: 1) the foundation, merger, division, transformation and liquidation of a juridical person; 2) the legal status of a juridical person; 3) name and also firm name of a juridical person; 4) legal capacity of a juridical person; 5) competence and principle of functioning as well as designation and recalling of members of organs; 6) representation; 7) acquisition and loss of status of a participant or of membership and also rights and duties connected with them; 8) responsibility of the participants or members for obligations of a juridical person; 9) consequences of violation by the representative of a juridical person of a law, foundation act or charter.

<sup>29</sup> See *Borg-Barthet J.* The Governing Law of Companies in EU Law (Studies in Private International Law Series). Hart Publishing, 2012; *Paschalidis P.* Freedom of Establishment and Private International Law for Corporations (Oxford Private International Law Series). Oxford University Press, 2012.

<sup>30</sup> See *Sutormin N.* The Criteria for Determining the State Affiliation of a Juridical Person // Gerald of the State Registration Chamber under the Ministry of Justice of the Russian Federation. 2010. No. 4.



(Article 1203 of the Russian Civil Code)<sup>31</sup> is the personal law. An analogous criterion is used in the Treaty between Russia and Poland, in which it is indicated that legal capacity of a juridical person is determined by the legislation of the Contracting Party in accordance with which the juridical person was founded (Article 19 (2)).

The criterion of “localization” (the location of the administrative center) proposes that the nationality of that state on the territory of which the administrative organs of a juridical person are situated is deemed to be the nationality of the juridical person. This criterion is provided for in legislation of the Roman-German system of law, although the concept of “localization” is not interpreted in the same manner in the practice of various states. In some cases, by “localization” is meant “charter localization” (the location of administrative organs consolidated in foundation documents), and in other cases, the actual “localization” arising from the *de facto* location of the administrative center of a juridical person.

The Polish Law names the criterion of “localization” as the basic criterion for determining the nationality of foreign juridical persons. In accordance with Article 17(1), a juridical person is subject to the law of the country in which it is situated. However, if in accordance with the above indicated law, the law of the country on the basis of which the juridical person was founded is subject to application, the law of that country is applied (Article 17(2)). Thus, the Polish conflict rules contain the personal law of the juridical person based on the criterion of “localization” as the basic connecting factor, but as a subsidiary criterion – the criterion of incorporation. “Subsidiariness” is presented in the form of adoption by Polish Law of *renvoi* of foreign law.

### **c) The Law of the Localization of Property (*lex rei sitae*)**

**The law of the localization of property determines the legal status of ownership.** The following questions are included in the legal status of property:

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<sup>31</sup> Despite the clear consolidation of the criterion of incorporation, an innovation is contained in the modern conflict law of Russia. In accordance with Article 1202(4) of the Russian Civil Code, if a juridical person founded abroad effectuates its entrepreneurial activity principally on the territory of the Russian Federation, its founders (participants) or other persons who have the right to give binding instructions to it or otherwise have the possibility to determine its activity, then Russian law or, if the creditor chooses, the personal law of such juridical person applies to the responsibility for obligations of the juridical person. Such a formulation speaks to the possibility of the subsidiary application of the criterion of place of conducting economic activity, which in its pure form provides that a juridical person has the nationality of the state on the territory of which it effectuates its business activity.

1. Types of objects of property rights, including the affiliation of property to immoveables and moveables;
2. Circulability of objects of property rights;
3. Types of property rights;
4. Content of property rights;
5. The arising and termination of property rights, including the transfer of ownership;
6. Effectuation of property rights;
7. Defense of property rights (Article 1205<sup>1</sup> of the Russian Civil Code).

The essence of the given connecting factor formula is that the legal status of property and related property rights are determined in accordance with the law of that state where the property is situated. This generally-recognized connecting factor formula is reflected in Russian law, which provides that the ownership and other property rights in immoveables and moveables are determined by the law of the country where this property is situated (Article 1205 of the Russian Civil Code). The law of the location of property is used as a connecting factor formula in a number of conflict rules, such as the following rules of Russian legislation:

1) The arising and termination of ownership and other property rights are determined by the law of the country where this property is situated at the moment when an action or other circumstance serves as grounds for the arising or termination of the ownership and other property rights if not provided otherwise by law (Article 1206(1) of the Russian Civil Code);

2) During the absence of agreement of the parties concerning the law subject to application to a contract with respect to immovable property, the law of the country with which the contract is most closely connected is applied. The law where the immovable property is situated is considered to be the country with which the contract is most closely connected unless it follows otherwise from a law, the conditions or essence of the contract or aggregate of circumstances of the transaction (Article 1213 (1) of the Russian Civil Code);

3) Inheritance of immovable property is determined by the law of the country where this property is situated and inheritance of property which is entered in the State Register of the Russian Federation – according to Russian law (Article 1224(1) of the Russian Civil Code).

Provisions contained in the Polish Law, in accordance with which ownership and other property rights are subject to the law of the country in which the object of such rights is situated are similar on the whole with Russian conflict rules. Acquisition and loss of ownership, and also acquisition, loss or change of content or priority of other property rights are subject to the law of the country where the object of these rights was situated at the moment when the event occurred which resulted in the foregoing consequences (Article 41 (points 1-2)). The law of the country where a vessel or means of transport is entered in a register is applied to property rights in aircraft and marine vessels, and in the absence of a register or procedure for entering in a register – the law of the country of the port of registration, station or other similar place is applied (Article 42). Property rights in estate situated en route are determined in accordance with the law of the country from which this estate was dispatched. If, under the circumstances, the property rights are closely connected with the law of another country, the law of that country is applied (Article 43). An analogous position is adhered to in the Treaty between Russia and Poland where it is provided that legislation is applied and institutions of the Contracting Party are competent on whose territory the immovable property is situated to the legal relations affecting the immovable property (Article 35).

## **Conclusion**

In conclusion, it should be stressed that modern conflict law in Russia and Poland is developing in accordance with the basic developmental trends of private international law, following its logic and using its instruments. The basic types of connecting factor formulas formed over the period of a hundred years have found expression in Russian and Polish legislation. The essential peculiarity of the structure of conflict law in Poland is determined by the circumstance that Poland is a member of the European Union and by virtue of this is obliged to apply on its territory the acts of European private law. Therefore, questions of conflict regulation of contractual and non-contractual obligations are relegated to the competence of Rome I Regulation and of Rome II Regulation. Moreover, Russian conflict law is oriented towards the best forms of legislative application of connecting factor formulas and thus is not at all inferior to the quality of foreign conflict law. With respect to domestic sources of private international law in Russia, the author remains convinced of the necessity to adopt a single codified act in the field of Russian private international law in the form of either a law or a code. In this context, the

Law of Poland “On Private International Law”, analyzed in this article, is a good example for Russian legislation.

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