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Исторически-правовые аспекты развития и эволюции теорий императивных норм: «теория специальной связи» (W.Wengler, K.Zweigert), «теория анализа интереса правительства» (B.Currie), «теория прямого применения» (Ph.Francescakis)

Аннотация. Цель статьи – рассмотреть в сравнительно-правовом аспекте теоретические предпосылки возникновения концепции императивных норм современного международного частного права.

Необходимость углубленного рассмотрения данного вопроса определяется особой важностью доктрины в процессе создания норм международного частного права, а также тем обстоятельством, что проблема применения императивных норм, в отношениях с иностранным элементом, различным образом решается в нормативном регулировании многих государств. Анализ теоретических предпосылок возникновения концепции императивных норм позволяет обнаружить и более общие тенденции развития современного международного частного права, которые касаются допустимых границ автономии воли сторон, утверждения новых методов регулирования, которые дополняют традиционную систему коллизии определения применяемого права. В статье рассмотрена «теория специальной связи» (Sonderanknüpfung) немецких ученых В.Венглера (W.Wengler) и К.Цвайгерта (K.Zwaigert), «теория анализа интереса правительства» (governmental interest analysis) американского юриста Б.Карри (B.Currie) и концепция «прямого применения» норм (regies d'application immediate) французского коллизиониста Ф.Франческакиса (Ph. Francescakis). Эти теории оказали влияние на содержание многих международных конвенций и национальных нормативных актов относительно вопросов международного частного права.

Ключевые слова: Императивные нормы, теория специальной связи, теория анализа интереса правительства, концепция прямого применения норм.

Preamble

The domain of imperative norms is quite complicated. Lack of uniform grounds for choice of the law applicable to specific matter or the need for application of uncoordinated or even contradicting norms is the fundamental problem to be solved by the entity applying legal norms. Even though such process is time-consuming, legally complicated and tends to decrease legal certainty, it is impossible to abandon the application of imperative norms given the level of coordination of national laws and the available scientific support to the application of such norms whenever conflict of laws is involved.

In our days, the international private law is composed of two types of imperative norms: imperative norms of domestic civil law and supra-imperative norms.

According to the presently accepted classical meaning, imperative norms of law are norms unconditionally binding upon the parties to transaction. Any provisions of transaction

(agreement) contradicting to such norms are void, and the party who fails to comply with such norm may not seek excuse on the account of agreement the provisions of which are contradicting to such norm.

Imperative norms of domestic civil law determine the permissible limits of application of the principle of autonomy of the parties in domestic civil law.

Whenever legal relations fall in the scope of application of international private law because of the presence of a foreign element, the application of imperative norms of the state of forum may be prevented, either by reference to the conflict of laws of the foreign State or by direct choice of the parties. Exclusion of operation not only of dispositive but also of imperative norms of the law of the state of forum *(lex fori)* due to subjugation of the given legal relations to foreign laws may be treated as one of the best established principles in the international private law. According to the said principle, application of foreign law to any legal relations means application of both dispositive and imperative norms of such law.[1,329; 2,203; 3,130]

Application of the norms attributable to the group of supra-imperative or directly applicable norms is mandatory regardless of the law accepted by the applying entity as appropriate to the given legal relations. The application of such norms may be waived neither by choice of the parties nor by operation of the conflict of laws of the state of forum. Such special imperative nature of the said norms means that the national policy expressed in such norms is so intrinsic that the State can under no circumstances permit that relations in question are made subject to a foreign law.

The concept of directly applicable norms reflects the creation of new approach to the contemporary international private law in regulating relations. Such approach provides not only for limiting the application of the principle of autonomous intention of the parties by operation of supra-imperative norms but also for their adjusting effect on the functioning of application of the conflict of laws system when the parties have no choice of law. The creation of new regulation method in the international law is the result of, first, increased interference by the State in the field of private legal relations in the countries with developed market economy and, second, the attempt to add flexibility to the traditional approach to regulation of the conflict of laws whenever a foreign element is present.

Genesis of the theory of imperative norms is substantiated by the fact that development of the doctrine plays an important role in the process of establishing the international private law and that it is seriously influenced by the processes of legislation and application of law, as well as by the fact that the matters of legal nature and legal effect of the imperative norms are differently regulated in the domestic laws of different countries.

Theoretical basis for the place of imperative norms in private law has formed from the concepts of European and American specialists in conflict of laws of the 20th century. The concepts to be mentioned there include, first of all, the «Special link theory» *(Sonderanknüpfung)* of the German scientists W.Wengler and K.Zwaigert, the «Governmental interest analysis» theory of the American lawyer B.Currie, and the concept of direct application of norms *(regies d'application immediate)* proposed by Ph. Francescakis, French specialist in conflict of laws. The said theories have influenced the content of a number of international conventions and national regulatory acts on the matters of international private law.

There are two fundamental systems of law established in the global practice: the Anglo-Saxon Law and the Continental Law. In the former system, validity of an agreement was determined by the related law or the law most closely and really linked to the agreement.[4,1218; 5] There were, however, two exceptions to this rule: 1) the court had to apply imperative norms of its State *(lex fori)* to the validity of agreement, and; 2) imperative norms of the State in which the agreement is implemented may be applied *(lex loci solutions)*.

In the Continental Law, validity of an agreement was determined by the law applicable to it, namely, by law of the State in which the legal relations were localized (such as domicile, location of the subject of agreement, etc.). The said theory was proposed in the middle of 19th century by Friedrich Carl von Savigny as a «pre-determined principle of the conflict of laws» according to each form of legal relations: *lex loci delicti comissi, lex loci contractus*, etc.[6,115] The possibility to apply

imperative norms of the law of the state of forum was an exception. The theory of strict conflict of laws principles prevailed in Europe at that time. Such approach continued in European countries till the Rome Convention of 1980 on the law applicable to contractual obligations (hereinafter also – the Rome Convention).

Article 4 [7] of the Rome Convention proposed a radically different approach – flexibly tied conflict of laws. However, even the new theory of flexible conflict of laws did not solve all issues because the very approach to conflict of laws was made subject to criticism.

Formation of a conceptually new theory of supra-imperative norms *(les regles d'application immediate)* started in the middle of 20th century in France with regard to all shortcomings that resulted from the application of conflict of laws approach alone.

Latvian legal literature lacks special studies concerning the application of imperative norms in the international private law. The issue of imperative norms in the international private law is quite superficially discussed by specialists of law science in Latvia in their works as well as historical and legal aspects of the formation thereof, yet certain developments have methodological importance in the understanding of such issues – for example, the study by K. Krasta on the prevailing imperative norms; collection of articles by I. Ziemele «Starptautiskās tiesības un cilvēktiesības Latvijā: abstrakcija vai realitāte» (International law and human rights in Latvia: an abstraction or reality) and monograph by J.Bojārs; scientific articles by young scientists J.Pleps, E.Pastars, I.Plakane on constitutional law are also noteworthy. Legal science of our neighbor states has outpaced us in similar studies and elaborated a number of different matters methodologically important for the understanding and analysis of the issues of application of the imperative norms. The following works deserve mentioning among the most significant ones: «Starptautisko privāto tiesību kurss» (Course in the International Private Law) by L.Luncs; «Ārējās ekonomiskās operācijas: tiesības un prakse» (Foreign Economic Transactions: Law and the Practice) by I.Zikins, «Starptautiskās privātās tiesības» (International Private Law) by M.Boguslavskis, «Imperatīvās normas starptautiskajās privātajās tiesībās» (Imperative Norms in the International Private Law) by O.Sadikovs, etc.

Theoretical and methodological basis of this article forms from the logic and historical, as well as systemic legal and comparative legal approach. Theoretical approaches applied in the process of work are reflected in the works of well-known European and American law scientists, such as F.C. von Savigny, W.Wengler, K.Zwaigert, Ph. Francescakis, B.Currie, A.Ehrenzweig.

The matters discussed and conclusions drawn in this article as well as the article itself would serve as a reasonable source of reference for law students on the issues of law theory and on the international private law disciplines.

The «Special link theory» by W.Wengler and K.Zwaigert

The initial fundamentals for elaborating the imperative norm theories formed in Germany in the 30s of the 20th century when in 1939 Professor W. Wengler first formulated a number of principles on which the *«special link theory» (Sonderanknüpfung)* was later based.

According to the W. Wengler's teaching, the court should apply to the validity of an agreement not only the imperative norms of the state, which laws govern the agreement in question *(lex causae)*; it may also apply the imperative norms of another State to which the agreement is related. A valid agreement according to *lex causae* may be therefore declared invalid if the court finds it appropriate to apply the imperative norms of another country and the agreement should be declared invalid in accordance with such norms.

It is important to accentuate that Professor W. Wengler has only formulated general criteria for defining the relation between agreement and the legal system of another State. According to the Wengler's theory, the court may take into consideration the imperative norms of specific State if the range of interests of such State is affected by the agreement.[8,16-17]

The «special link theory» first introduced a principally new meaning of application of the imperative norms in the international private law. Application of imperative norms was made dependent on the trend to application by the imperative norm itself, rather than on the fact

whether or not such law is found applicable to the legal relations in question.

The above-described criterion of imperative norm – trend to application – paved the way to further studies of imperative norms in the field of international private law. It should be noted that the principles, proposed by Wengler, supplemented and developed rather than replaced the traditional approach to the conflict of laws.

The teaching of W. Wengler was further developed by Conrad Zweigert, another outstanding German specialist in conflict of laws, in his works.

During the World War Two C. Zweigert proposed in one of his articles to apply foreign regulatory norms in the field of economics for imposing restrictions on export/import of certain goods even if such norms were not a part of *lex causae*, provided however that such application is justifiable in the global public opinion. [9, 172; 10]

Both Wengler and Zweigert were guided by the concept that application of imperative norms that do not form a part of either *lex fori* or *lex causae* was only possible if the legal system of which they were parts had close enough relation to the agreement. Zweigert, seeking to substantiate his understanding of the application of imperative norms, attempted to propose a criterion according to which the court would determine whether or not the legal system in question had close enough relation to the agreement.

According to the Zweigert's theory, foreign imperative norms may be applied by courts of other countries if the economic interests of such country are involved (such as restriction, distribution of quotas, prohibition of export/import of certain goods, etc., provided that application of the imperative norms of another State is only possible if justifiable in the global public opinion.

According to the Zweigert's theory, the fact that implementation of agreement requires that goods cross the territory of a State, which regulatory law base contains an imperative norm aimed at prohibition of the given type of agreements, means close enough relation, and therefore sufficient grounds for application of the given imperative norm. [11,158; 12] Such criterion is not universal, however, since it is only valid in relation to the international trade, and therefore such criterion may not be applied by analogy in other legal relations. In fact, the criterion proposed by Zweigert serves as general substantiation of the theory.

The criterion for applicability of imperative norms of one State by the court of another State, among other things, is noteworthy.

Wengler and Zweigert realized that, apart from the requirement for close relation between the agreement in question and the foreign legal system that contains the imperative norm, the said norm has to possess some specific qualities to justify a special spatial field of its application, such as imperative and/or public law nature, special purpose or similar, enabling the justice to determine the norms of foreign legal system that can be reasonably applied regardless of *lex causae*. Zweigert preferred in his search of appropriate criterion on the protection of typical, from the international view, national interests, and therefore he distinguished between two different types of norms: the norms aimed at protection of common values of the international community, and the «alien» norms (political criterion). In Zweigert's opinion, the latter norms embodied untypical interests: for example, the norms that reflect systematic management typical to socialism-oriented States. Consequently, when deciding on extra-territorial applicability of foreign imperative norms, the court would only apply the norms of the first group and decline application of the norms of the second group.

The concept of «alien» norms is hardly acceptable, because it is not true that the whole socialist system of law contradicts with the commonly accepted principles of the international law. Such concept would be attributable to individual norms in the field of private property law, for example, while the norms of family law were well established in the socialist system of law.

One can also hardly agree with the nature of the criterion which implies obligation of the court to provide political and ideological assessment of a foreign legal system, and this contradicts the contemporary approach of the comprehensive jurisprudence.

This aspect of Zweigert's theory was made subject to criticism by F.A. Mann, specialist of English conflict of laws science.

The proposal to apply subjective assessment was another shortcoming of this teaching. The

justice has to determine the interests more characteristic to the international community: those protected by imperative norm or those containing a foreign norm, which application is excluded by the former norm. This is quite an abstract and vague criterion. No such principles «characteristic to the international community» existed in writing at that time, and their accurate definition would be difficult even in our days.

It should be noted that, while drafting the Rome Convention of 1980 on the law applicable to contractual obligations, it was proposed that, when determining the applicability of foreign imperative norms, the court should be guided by similar criterion – «a criterion accepted by the international community» (the existence of similar legal norms in different systems of law, for example, or protection of common values by the means of such norms, etc.). The proposal was, however, declined by most of experts on the grounds that no such criterion accepted by the international community existed, and the courts would therefore be put in burdening position.

In general, the assessment of the theories proposed by Wengler and Zweigert requires understanding that these were the very first attempts to develop a uniform theory of imperative norms, and therefore the shortcomings can be justified. Notwithstanding that the criterion proposed by these scientists for applicability of foreign imperative norms by courts of another State lacked sufficient and exhausting elaboration, they revealed the shortcomings of the traditional approach to the conflict of laws and proposed methodological basis for elimination of such shortcomings thus paving way to future scientific research and drafting of international treaties.

Theory of «Governmental interest analysis» by Brainerd Currie

The American teachings on the conflict of laws in the middle of 20th century and the theory of «*governmental interest analysis*» by Brainerd Currie as the most influential of them affected largely the concept of contemporary imperative norms in the international private law.

Although this theory did not touch directly upon the concept of imperative norms, it played an important role in the development of methodological machinery that was essentially important to the formation of the said concept.

According to Currie, the traditional scheme of determining the applicable law by means of rules of the conflict of laws was unable to ensure that the court would achieve equitable and reasonable solution in the matter of the conflict of laws.

Firstly, the traditional conflict of laws mechanism that determines strict application of the conflict of laws conjunction is *blind* regarding the content of the potentially applicable legal norms. In a situation with identical norms of law systems concerning the given legal relations, for example, the conflict of laws rule would support *blind* reference to a single system of law even in the absence of conflict.

Secondly, according to Currie, application of the conflict of laws approach leads to paradoxical situation where thoroughly formulated legislation policy expressed by means of certain substantive norms has to be sacrificed every time to the legislative policy of a foreign State to obey the «*blind dictate*» of the conflict of laws rule that is aimed solely at international harmonization of decisions made in different countries.[13,52-53; 14, 1475-1478] Currie did not confine himself to the criticism of the conflict of laws approach. He also proposed his own different concept for determining the applicable law.

Currie believed that, when dealing with the matter of the conflict of laws, the court firstly the objective and «policy» at had to be determined at the implementation of which each of the potentially applicable norms was aimed. Currie was guided in such belief by presumption of the natural priority of laws of the state of forum. Having determined the policy at the implementation of which the law of the state of forum is aimed, the court has to determine whether or not the «tie between the state of forum and the dealt matter, i.e., relation between the parties, the transaction, the subject thereof and the adjudication as such, is sufficient to draw the attention of government and to serve as grounds for interest of the State in application of such policy to the matter in question».[13, 189; 14, 1475-1478]

Brainerd Currie proposed a new approach to the international private law – an approach that envisages determination of the competence of

substantive legal norms by means of analysis of the involved norms and the interests expressed by them, rather than by the conflict of laws approach. Even though Currie's method was intended for solution of inter-state, rather than the international conflict of laws, it is nowadays applied in European international private law to determine the sphere of operation of imperative norms.

The view that a state might be interested in any private law disputes between private individuals was a novelty in domestic as well as inter-state legislation of America. Such idea had been continuously featured in a number of court rulings of the US Supreme Court in the 30s of the 20th century when interpreting the constitutional clause of full recognition and reliance. Such concept was emphatically shared by Currie.

The key problem in B. Currie's theory of interests was not so much the basic notion of the interests of state as his narrow assumptions of the nature and scope of such interests.

Currie refused to consider the «multi-state» interests of a state, that is, any interests derived from membership of the state in a more extensive commonwealth without being expressly reflected in domestic laws of the state. In particular, Currie declined the view that, when deciding on choice of the applicable law, the state would be guided by the «needs of inter-state and international system». [15, 614; 16] He believed that the «pressure of internationalist and altruistic ideals» was taking over the traditional system because of the international origin; it had «criminally suppressed natural instincts of the community interests... (and) forced it into pointless self-denial». [15,525]. To compensate for it, Currie advocated for «rational, moderate and controlled following of our own interests». [15,525] Such adjectives proposed some consolation as well as his statements that a «short-sighted, selfish state is merely an experimental model» and that «no such state exists, at least in our country». [15,616] The whole essence of this theory and its numerous peculiarities were, however, much less moderate.

Second, Currie assumed that on most occasions the state is only interested in application of their own law for the benefit of local inhabitants, rather than *«non-locals»* in similar situation (this term is also referred to as the *«personal law principle»* of Currie).

B.Currie argued that the state is only interested in application of rules beneficial to claimants only in case of local claimants and the rules beneficial to respondents – only in case of local respondents. [15,691]

Finally, Currie expressly suppressed the interests of individuals involved in the conflict contradicting the interests of the state of their domicile. Some critics accused Currie's approach as constitutionally unstable because of the above postulates. [17,123-126]. Currie, who expected such criticism, argued in the point of facts that his theory was not anti-constitutional because the Constitution would not permit it. In Currie's opinion, clauses of the Constitution regarding equal protection, privileges and immunity would help to control undue protectionism while clauses regarding proper legal procedure and full recognition and reliance would help to control excessive partiality of the forum. The real problem presented by such postulates, however, was their applicability, in particular to inter-state conflicts, rather than their abstract constitutional admissibility.

Currie postulated that, whenever a party to legal proceedings argues that foreign legal regulation should be applied by court to the case in which more than one state is involved, the court should first investigate the policy contained in the regulatory norms of the stakeholder states by asking the question whether or not each state would reasonably declare their interest in application of the laws of such state to implement their policy. Such investigation may have three possible results that correspond to three commonly known (if not commonly accepted) categories of conflicts: (1) only one of the involved states is interested in application of their rules (the model of *«false conflict»*); (2) more than one state is so interested (the model of *«true conflict»*); or (3) none of the states is so interested (the model of *«disinterested»* or *«non-statutory matter»*).

Brainerd Currie also recognized in his later work the fourth category classified by him as *«apparent conflict»* – something between a true conflict and a false one. It would be the case where each state had constitutional justification to claim their interest yet the conflict could be discussed and obviated.[18,754,763 – 764; 19, 754-794].

In Currie's opinion, the terms «*policy*» and «*interest*» were not synonyms, and legal norms were expressions of the national social, economic and administrative policy of the state in question. The mere fact that a legal norm utters certain policy may not constitute grounds for application of such norm by court in solving a conflict of laws matter. In addition to that, the court has to determine the existence of «*governmental interest*» of the State in application of such «*policy*» to legal relations to which foreign element is a party.

The term «*interest*» was understood by Currie as «1) product of public policy, and 2) product of proper relation between the country, which policy is involved, and the transactions, parties or adjudication «. [14, 1475-1478] Such definition of «*interest*» means that, according to Currie's scheme, the presence (or absence) of interest did not depend on the «intention» of the State in question.

Where the court establishes that their State has «interest» in the application of their legal norms to specific matter in dispute and the other State has not, legal norms of the first State are applicable. If, however, a foreign State alone is interested in application of their norms to legal relations the court has to apply such norms. Currie described the above two occasions as «*apparent or false conflict of laws*» which also exists if the content of the prevailing law is identical or if neither of the States is interested in application of their laws. The concept of «*False conflict of laws*» was among the most significant theoretical discoveries made by Currie and this concept later had material effect on further development of both American and European international private law by introduction of the need for analysis of the purpose of prevailing norms in the process of determining the applicable law. [20,17-18].

Where all States involved in legal relations are interested in the application of their rights, the «*true conflict of laws*» becomes apparent. In Carry's opinion, the court should then seek to solve the conflict by means of «*moderate*» interpretation of the goals at the implementation of which one of the prevailing laws is aimed. If this appears to be impossible, *lex fori* shall be applied [19,757] logically derived from the initial presumption that the law of the state of forum has priority. If, however, the «*moderate interpretation*» succeeds, the «*false conflict of laws*» becomes apparent. The applicable law in such case shall be different from the law that permits «*moderate interpretation*». Absence of interest of the foreign state party is determined as the most probable outcome of «*moderate interpretation*» because, as noted earlier, Currie was guided by the presumption of the priority of the law of the state of forum. [20]

The scope of «*false conflict of laws*» Currie also proposed the situation of «*negative conflict of laws*» where legal relations were tied to more than one State with different purpose and contents of legal norms, yet neither of such States was interested in application of their law to legal relations. The court had to apply *lex fori* in such situation unless application of foreign law leads to more appropriate result. Such decision was dictated by the fact that, in Currie's opinion, application of *lex fori* in such situation is more economic and comfortable because it unburdens the parties as well as the court from the need to determine the content of foreign law.

The problem of «*disinterested third State*» appeared to be the most complicated issue presented in Currie's methodology. What decision should the court make in a situation where two (or more) States are interested in application of their mutually contradicting norms of law to specific legal relations while the state of forum lacks such interest? Initially, Currie believed that finding solution of such situation through application of *lex fori* was illegitimate because the state of forum disinterested in application of their law had no grounds to solve it. However any other decision would lead to inevitable submission of the interests of one state to those of another, and this was inacceptable for Currie because no criterion could be found to solve the conflict of interests in favor of any specific legal system. Currie had therefore no choice but recommending the courts either to waive adjudication of similar matters by means of «*forum non conveniens*» doctrine or to interpret the legal system of one State party so that the situation may be qualified as «*false conflict of laws*». Where no such qualification is appropriate, the court has to apply *lex fori*.

Hence, in the absolute majority of occasions discussed by Currie the court guided by the «*governmental interest analysis*» methodology has

to apply their own law as a consequence of the above-mentioned Currie's initial presumption that lex fori prevailed over the foreign law. The reason of derogation from the fundamental principle of traditional international private law that prescribed equal treatment by courts of foreign law and their own law was the fact that Currie flatly refused to accept any «*weighing*» or comparative analysis of the interests represented by the prevailing laws and their assessment by courts. Currie pointed out in this respect that, whenever several states pursued different policy yet they all have legitimate interest in the application of such policy, the court is not competent to «*weigh*» contradicting interests or to assess their point in order to make choice between them. In no circumstances the court can declare the interest of another state to be less important. The court may only apply their national law. If, however, the court decides to apply foreign law when solving a real conflict of laws, it assumes high liability for recognizing the policy or interest of their own state to be less important and giving preference to the policy or interests of another state. In Currie's opinion, the assessment of importance of competing interests of two sovereign States in order to determine the prevailing one is a political function that may not be left in discretion of the court in the conditions of democracy. Such task may only be performed by a legislative institution.

Currie concluded that courts were unable to find a fair solution of a «*true conflict of laws*» that would properly take into consideration all interests involved in legal relations. The US Congress as legislative authority is only capable of achieving such result. As noted by A. Ehrenzweig, Currie's theory appears to fully depend on the existence of legislative institution that is «capable of detecting and solving conflicts». What makes Currie to insist on application of the law of forum in the absence of corresponding decision adopted by the Congress is his belief that the Congress is able to and it has to declare their opinion that the interests of one state prevail over those of another state.

Currie's refusal to perform comparative analysis of competing interests in case of «true conflict of laws» was the key shortcoming in his methodological scheme. As a result, the basic methodological principle envisaging that determination of the applicable law should be based on determination and analysis of the purpose of competing legal norms makes no sense at all because the presence or absence of «interest» of the State in question is only relevant in specific situations for the purpose of qualifying the conflict of laws as «true» or «false», rather than for choice of the applicable law.

The «governmental interest analysis» proposed by Currie was later made subject to reasonable criticism. [21; 22;23,1-50;24, 772-973;25,392-431]

The fact that, according to Currie's doctrine, the forum applies their own law to virtually all occasions, inevitably leads to the lack of uniformity in legal regulation of any relations involving a foreign element.

Professor F.K.Juenger pointed out with criticism that Currie tended to determine the sphere of application of substantive norms by means of analysis of the policy embodied in them. Such approach means that certain purpose may be attributed to each and every substantive norm. Yet a norm of law may well result from compromise or, as Currie acknowledged, express no policy at all. Moreover, legislative bodies of more than one country may be guided by quite different considerations in adopting identical norms of law. [23,1-50]

The excessive focusing on «*governmental interests*» without taking into consideration the parties' interest may be treated as a crucial trouble spot in Currie's theory.

Even though Currie's teaching has conditional effect on the concept of our days, it is important to note here that, for the purpose of facilitating the task of forum to determine the objective expected to be achieved by the norm in question, Currie recommended legislative institutions to include special provisions regarding particular spatial sphere of application in the laws drafted by them. [14,1475-1478]. Hence, Currie's idea of the need to determine the spatial and/or personal operation sphere of a norm of law by means of analysis of the purpose thereof has been partially perceived in the concept of contemporary imperative norms.

The contribution made by Currie to the development of contemporary international private law has been marked by a number of specialists in conflict of laws. In the opinion of L.Strikwerda,

Currie's theory «played the role of catalytic agent in the renewal of conflict of laws, even in Europe». F.K.Juenger noted that the concept of European imperative norms «largely resembled the ideas of Currie». [26,117-133] P.Williams proposed that article 7(1) of the Rome Convention of 1980 was based to some extent on the concept of «governmental interest analysis». [27,22] In the opinion of P. de Lagarde, «the Rome Convention of 1980 authorized justices to conduct the analysis of governmental interests before adopting the decision on the application of imperative norms of a third State «.

Currie's doctrine was further developed by I. Baxter in his «comparative assessment of interest restriction» theory [28], by A.Ehrenzweig in his «lex fori» theory [29], and by A.T. von Mehren, D.Trautman and R.Weintraub in their «functional analysis» approach. [30;31].

The point of Baxter's teaching was abandoning the presumption in favor of the law of the state of forum and application of governmental interest comparative analysis approach expected to enable the court to determine which of the consolidating interests tied to legal relations of certain States would be made subject to more restrictions if legislative policy of one State was subordinated to legislative policy of another State.

A. Ehrenzweig was guided in building his theory by the need for prior analysis of the *lex fori* purposes. However, unlike Currie, he anticipated notable opportunities for the application of foreign laws. According to his scheme, the court first has to determine the presence of express «trend» of substantive lex fori norms for application to the relations burdened by foreign element. In the absence of such trend, the court has to determine the existence of conflict of laws norms, either written or implied, that substantiate the application of foreign laws to the given matter. In the absence of such norms, the court has to analyze the purpose of substantive *lex fori* norms to determine the possibility of their substitution by foreign law. Ehrenzweig's system therefore led to apparent advantage of the law of the state of forum: the latter could be applied initially in case of express «trend» for application as well as in later stages when the court had established that substitution of *lex fori* norms by foreign law was impossible. [20,21-22]

As a result of the above-mentioned, the teaching of Ehrenzweig also had negative consequences, in spite of further developed Currie's approach, whereas the parties could now change the outcome of the case by choice of the forum.

The «*Functional analysis*» approach envisaged not only comparative analysis of the purposes of competing domestic and foreign norms but also analysis and accounting of «inter-state and international system» *(multistate policies)* since, according to the advocates of this approach, conflict of laws on the international level is featured by certain peculiarities, compared to the conflict of laws on the inter-state level.

In spite of the special approach to solution of the issue of conflict of laws, all American scientists described above have a common methodological basis: analysis is focused on substantive norms of law, and spatial and/or personal sphere of application of substantive norms is chosen depending on the purposes defined by interpretation of the norm taking into account the factual circumstances of the matter in question as well as reasonability of application of the norm to the respective legal relations.

Concept of «direct application» of norms

«The whole system (contemporary European conflict of laws) may seem complicated, occasionally sophisticated, and excessively eclectic from the point of view of an American lawyer – in conflict of laws. It is true. The whole system, however, has been inspired by considerations that express real concern for the «multistate policy» as such, or for the «maintenance of inter-state and international order», or «comfort between nations... as understood by the increasing global community». Europeans do not claim to be the saviors of the world by means of such system established for choice of the norms of law. Yet we are reasonably satisfied with and continuously seek to improve it without the spirit of exclusivity and dogmatism.» [32].

Among the numerous questions asked in the field of international private law there is the question of «imperative norms». The purpose of choice-of-law rules is determination of applicable laws without adopting the decision on legal proceedings, and therefore, according to the

identified common factor, on the applicable law, regardless of the content. The body of conflict of laws rule may be limited, however, to the application of substantive norms or public order norms, or immediately applicable («*loi d'application immediate*») norms including «*lois de police*» or «imperative norms».

The category of imperative norms in the international private law should not be mistaken for the norms applied to the solution of domestic matters. The matter of lexicon is therefore crucially important. In case of domestic matters, «imperative norms» *(ius cogens, regle imperatives)* mean the norms that may not be excluded, altered or limited by the contracting parties, contrary to dispositive norms *(ius disposium, regles suppletives)* applied if the parties have not expressed their intention regarding regulation of the given situation. Where international relations are involved, the choice of the norms of law is limited to «imperative norms» that step in directly to regulate the relations, fully or partially, regardless of the applicable legislation. Such norms are referred to in the general system of law or «*lois de police*» as «supra-imperative norms», «primary norms» or «international imperative norms» to mark distinction of the latter mechanism.

Development of the above-described concept of directly applicable norms in European international private law *(règles d'application immédiate)* is related to the name of French lawyer Phocion Francescakis [33;34] who, based on summarization of French and Italian case law, concluded in the middle of 20th century that there existed a special category of substantive norms that formed exception of the traditional scheme for conflict of laws scheme used to determine the law applicable to relations burdened by a foreign element. Theoretical elaborations pursued by Francescakis were not quite innovative, however, since they were based to large extent on the ideas of European specialists in conflict of laws of the 19th century. For example, Friedrich Carl von Savigny, founder of the traditional approach to conflict of laws, recognized a law of «strictly positive or imperative nature» that could be applied by courts for the purpose of protection regardless the existence of the fundamental principles in the system of law of the state of forum in which the conflict of laws norms were operating. [35] In 1876 Charles Braucher introduced the terms of domestic and international public order to develop Savigny's idea. A couple of years later Antoine Pillet and Gilles Valérie classified the imperative norms distinguishing them by the sphere of territorial or personal application. The above-mentioned ideas, however, remained in background until the increasing interference by the State in private legal relations, on the one hand, and increasing treatment of the traditional conflict of laws approach in the international private law as inadequate to enable fair solutions in the matters involving foreign elements, on the other hand, resulted in the development of the concept of directly applicable norms.

The said concept was composed of the following basic conditions: (1) there can exist in the system of law of any State a special group of substantive norms, traditionally referred to as directly applicable norms, supra-imperative norms, absolute norms and so on, applicable to relations burdened by a foreign element regardless of the legal system treated as competent with reference to the conflict of law clause; (2) the sphere of application of directly applicable norms is determined by themselves by means of a special «qualifying element» – reference to the territorial and/or personal operation *(scope rule)*. According to general procedure, the reference to application sphere is clearly expressed in the text of the norm thus enabling discussion of directly applicable norms as structurally composed of two parts: substantive legal composition and the «qualifying element». A special sphere of application of supra-imperative norms can also be determined by court through interpretation of the purposes thereof. As noted by B. Audit, application of supra-imperative norms in a certain situation inevitably implies interpretation of such norms; (3) a special sphere of operation of directly applicable norms is derived from the interests protected by the said norms and the purpose enshrined in them; [36, 17] (4) the goals at achievement of which the norms are aimed are especially important for the State issuing such norm. Moreover, it may be concluded that special public interests at the protection of which directly applicable norms are aimed appear to prevail over the general goal for the achievement of which the conflict of laws regulation approach is intended: international

harmonization of decisions adopted in different countries; (5) the fact that directly applicable norms are aimed at the protection of the interests that are especially important for the issuing State implies that many of the norms in this category have the nature of public law norms. Yet a number of norms featured as directly applicable pertain by their nature to private law. Consequently, the fact whether or not a certain norm has the nature of public law norm may not serve as the decisive criterion for attributing the norm to some category of directly applicable norms; (6) as a rule, a directly applicable norm is aimed solely at prevailing over certain aspect of legal relations, and this inevitably leads to *dépeçage*. As mentioned in this respect by F.K.Juenger, «analysis of the legislation policy on which a specific norm of law is based inevitably leads to *dépeçage*». [37,42]

Therefore, unlike Currie's «*governmental interest analysis*», the given concept does not envisage full waiver of conflict of laws approach in determining the applicable law; instead, it modifies and enhances such concept by introducing the need to analyze the legislation policy and purposes on which only individual norms of substantive law especially important for the State of their origin are based, rather than all norms. Ph. Francescakis has defined directly applicable norms as the norms «abidance by which is necessary for the purposes of protection of political, social and economic organization of the State in question».[38,137] However, neither this definition nor understanding of the especial importance of the spheres regulated by directly applicable norms for the issuing State solves the problem of strict distinction of the norms in the above-discussed category from those falling within the classic choice-of-law scheme.

It has to be admitted that each and every norm in the present conditions is aimed at ensuring the protection of certain economic or social interests. Such function may not be a privilege of directly applicable norms alone. P. Mayer, French lawyer, veraciously noted in this respect that «directly applicable norms present, first, the problem of their identification because legislators in most occasions do not bother to make any reference to the sphere of application of the norm drafted by them... Definition of clear borders between the categories of directly applicable norms is apparently a highly complicated task». [39, 87-88]. It seems that the difficulty to define clear borders between the regular norms and directly applicable norms is the key issue of the concept with identical name. The difficulties in drafting a concept, as noted by P. Mayer, may not, however, justify the abandoning of the concept, especially where it reflects the objective reality. [39,88] Lack of clear criteria for determining whether or not specific norm pertains to the category of directly applicable norms means, among other things, that courts are burdened with solving this issue when adjudicating specific matters.

The concept of directly applicable norms inevitably brings the element of discretion and unpredictability into the choice-of-law process. On the other hand, it eliminates the principal weakness of many-sided conflict of laws approach: indifference to the material result of the choice-of-law process. Some balance is achieved between the advantages of the traditional conflict of laws approach, such as predictability and comparatively simple nature of the choice of law, and positive features of the approach based on analysis of the purposes of individual norms of substantive law and the legislation policy, such as independence of material legal result on the interference of abstract conflict of laws.

According to the concept of Francescakis, the prime criterion on the basis of which the court has to decide on attributing a norm to the category of directly applicable norms is the legislator's intention expressed by the purpose of such norm to make it applicable to a specific factual situation or relations and to exclude the possibility of application of foreign law to such situation. This aspect of concept is rather essential, given that the international private law doctrine of our days admits the existence of substantive law norms that limit the sphere of their own application and, even though they may contain a qualifying element in form of reference to special sphere of territorial and/or personal application, they are only applicable if the conflict of law norm contains reference to the system of law of which it is a part, because the qualifying element is clearly aimed at limiting the sphere of application of such norm by means of certain actual composition or legal relations. The need for providing clear distinction between the two categories of norms has been

expressed by a number of specialists in conflict of laws in Western Europe. [40,61-664].

Conclusion made by Francescakis regarding the consolidation of the new approach to the choice of law in the international private law can be probably treated as the topmost rule of his teaching that provides essential supplement and adjustment to the traditional conflict of law and substantive law approaches and forms the contemporary understanding of the place and role of imperative norms in the international private law.

Conclusions

There is no single term established in contemporary international private law for description of the norms that constitute exceptions from the traditional choice of law in conflict of laws scheme. Researchers from different countries have been defining the category of described norms at their discretion, and this has influenced the lack of uniformity in this sphere. Such norms are referred to as «lois de police» or «norms of direct or mandatory application (lois d'application immédiate, lois d'application nécessaire), or «self-applicating rules», «absolute rules», «priority rules» (voorrangsregels), «self-localizing rules», «strictly imperative norms» or, finally, imperative norms (peremptory norms, imperative norms, mandatory rules). It has to be admitted that such diversity of terms without clear distinction defined between the above-mentioned terms can burden the contemporary understanding of imperative norms in the international private law.

Speaking about the contemporary understanding, it is important to understand the preconditions to formation of the imperative norms and theoretical basis of their place in international private law.

Understanding of the place, role and content of imperative norms has formed from the concepts of European and American specialists in conflict of laws in 20th century, including the «special link theory», «governmental interest analysis theory» and the concept of direct application of norms.

The theories of Wengler and Zweigert marked the first attempts to develop a uniform theory of imperative norms. According to Zweigert's «special link theory», foreign imperative norms may be applied by courts of other countries if the economic interests of such country are involved (such as restriction, distribution of quotas, prohibition of export/import of certain goods, etc., provided that application of the imperative norms of another State is only possible if justifiable in the global public opinion. [41,161] The fact that implementation of agreement requires that goods cross the territory of a State, the regulatory law base of which contains an imperative norm aimed at prohibition of the given type of agreements, means close enough relation, and therefore sufficient grounds for application of the given imperative norm. It should be admitted, though, that such criterion is not universal since it is only valid in relation to the international trade, and therefore such criterion may not be applied by analogy in other legal relations.

In spite of the fact that the above described criterion proposed by scientists for applicability of foreign imperative norms by court of another state was not sufficiently and exhaustively elaborated, the scientists demonstrated imperfections in the traditional conflict of laws approach and proposed methodological basis for elimination of such imperfections, thus paving way to further scientific research and drafting of international treaties.

According to Currie's analysis, nearly all roads lead to *lex fori*. According to Currie's theory, foreign laws should only be applied in two situations which are quite rare: (a) in case of false conflicts where the disinterested state is the forum; and (b) in case of apparent conflicts where the justice selects to make the law of the state of forum, rather than of the other state, subject to limited interpretation. In all other occasions *lex fori* applies, namely: (1) in a false conflict where the interested state is the forum; (2) in a true conflict where one of the interested states is the forum; (3) in a disinterested or non-statutory matter, and (4) even in case of true conflict brought before disinterested forum where the court is unable to dismiss the case on the grounds of *forum non conveniens*.

The theory of Currie prevailed in the views on conflict of laws in the United States for nearly three decades. His «seductive» style of writing «hypnotized a whole generation of American lawyers» [42,812], probably similar to the Beale doctrines that had ideologically influenced the

previous generation. Currie's analysis «continues to govern the agenda of academic conflicts» [23], probably because it is still the most popular pedagogic mechanism for teaching conflict of laws at American law schools, and «interest analysis is the quintessence of language used in contemporary conflict of laws theory» [43].

Finally, the concept of directly applicable norms *(règles d'application immédiate)* was developed in the middle of 20th century in European international private law. Ph. Francescakis concluded that there existed a special category of substantive norms that formed exception of the traditional scheme for conflict of laws scheme used to determine the law applicable to relations burdened by a foreign element. This concept does not envisage full waiver of conflict of laws approach in determining the choice of law; instead, it modifies and enhances such approach by introducing the need to analyze the legislation policy and purposes on which only individual norms of substantive law especially important for the State of their origin are based, rather than all norms. Ph. Francescakis has defined directly applicable norms as the norms «abidance by which is necessary for the purposes of protection of political, social and economic organization of the State in question». [38,488]

The theories of supra-imperative norms were later consolidated in a number of regulatory acts of European countries as well as in texts of multilateral international treaties on the matters of international private law. A similar clause was first included in the 1969 Unified law of the Benelux countries on international private laws, though it has never been enacted. Similar clauses were also included in the Hague Convention of 1971 on the Law Applicable to Transport Accidents (Article 7), the Hague Convention of 1985 on the Law Applicable to Trusts and their Recognition (Article 16); the Convention of 1978 on the Law Applicable to Agency and Representation (Article 16). Incorporation of such clauses in the Convention of 1980 on the Laws Applicable to Contractual Obligations (Article 7(1)) marked an important milestone in development of the principle of supra-imperative norms.

Resume

The analysis of theoretical preconditions of genesis of the concept of imperative norms allows detecting development trends in modern private international law, affecting the limits of acceptable autonomy of the will of the parties, validation of new methods of regulation complementing the traditional applied law collision system. The article addresses the following issues: the «special link theory» (Sonderanknüpfung) of German scientists W.Wengler and K.Zwaigert, the theory of governmental interest analysis of American lawyer B.Currie, and concept of French collisionist (Ph. Francescakis) on «direct application» of norms (Régis d'application immediate). These theories influenced the content of many international conventions and national regulatory enactments in private international law issues.

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