THE DOMAIN AND THE METHOD OF PRIVATE INTERNATIONAL LAW

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ABSTRACT: *The legal norms which compose the branch of private international law acquire special balances in the context of contemporary society, finding their applicability in countless hypotheses. Observing their internationalization and unification movement, we aim to make a brief incursion into the science of private international law. The current paper aims to study the field and the specific method of the subject.*

KEYWORDS: *private international law; sources; conflict of laws; conflict of jurisdictions*
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1. INTRODUCTION

The science of private international law is characterized by a rare complexity, stemming from the specificity of its study topic, respectively its vast and heterogeneous character of legal relations with elements of foreignness (Antonescu, 1934), which materialized in the context of the contemporary society. This offers "a new dimension of the person's movement, (…) unleashing the person, allowing him to escape from the pen of the national legislator, giving him the possibility of choosing the applicable law." (Popescu, 2019)

The issue of which law will govern the legal relationship between citizens belonging to different states, concerning goods located abroad, or contracts enacted under foreign legislation must always be resolved *a priori* to investigating the differences between the two legal systems. The juridical norms that comprise the branch of private international law tackle this area law, offering solutions with regards to the competent authority entitled to hear the case, identifying the applicable legislation, checking the compatibility of the foreign law with the legal order of the state in which it is to be applied and the limits and contents of the foreign provisions.

Throughout the literature it has been appreciated that private international law "appears to us as a science of conflict of laws in space, in the broadest sense of this notion, a science of conflicts and controversy in which any principle has its relativity embedded in the norm by which it is consecrated and from which springs the relativity

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given, first of all, by belonging to a certain internal legislation" (D. A. Popescu, M. Harosa, 1999).

The present paper wishes to offer an introduction in the study of the main institutions of private international law by observing the move to globalization and the unification of specific legal norms, the importance of European sources and the perspective of the European lawmaker (Oprea, 2015).

2. THE DOMAIN OF PRIVATE INTERNATIONAL LAW

Defining the object of study of private international law represents a delicate issue, raising ample discussions seeing the amplitude of divergencies on the matter and the complexity of the problem. Regarding the development of a definition aiming to be as comprehensive as possible, one has to keep in mind three perspectives: an intuitive one, which relates to the determination of the domain of private international law; an analytical perspective, emphasizing on the specific of the method used; and lastly a documentary approach, regarding the complex analysis of the sources of private international law.

Furthermore, we will analyze separately each of these approaches, with the aim that, at the end, we will be able to come up with a definition as complex and as exact as possible.

When determining the domain of private international law, we propose an exercise of imagination. Let's say you're asked to define an object, such as a book, that you have on hand right now. Some people will make a precise description of the way it looks (it is white, rectangular in shape, with pages, printed in a certain font, in black ink). On the other hand, others will relate to its function and usefulness (as a learning and knowledge tool). Observing this approach, we tend to appreciate more the second method, which is based on functionality, as it has the advantage of emphasizing the point of interest.

The same happens in the hypothesis of defining the subject of private international law, the remark of its functionality being the preferred one, which, of course, must be completed with descriptive aspects. In the following paragraphs we will determine the field of matter in terms of its functionality, observations that we will complete with those resulting from the application of the descriptive method.

a) Defining the subject from a functional point of view. Unlike civil or commercial law, the definition of the subject studied is much more difficult, as it relates to the confluence of several legal systems. The study of its functionality is the most important criterion in relation to which we can establish the definition of private international law.

The functionality of the rule of private international law is more limited than that of other rules of law, in the sense that it will lead to the identification of the competent jurisdiction and the applicable substantive law, not being able to offer the actual solution to the disputed situation. The aspect of functionality lies in the study of the usefulness of the norm of private international law, being nothing more than a reflection of the current of legal utilitarianism, which refers to an economic analysis of law in the sense of identifying a "maximizing individual and social utility" (Malaurie, 1994)

In a very general way, the functional approach is based on an empirical framework, which implies the deduction of the main functions of private international law starting from the various hypotheses of its application. The reasoning on which the functionality

is based is therefore of an inductive order: based on the finding of the facts, general and abstract principles are outlined. In order to observe it, we offer you a series of examples of the application of private international law.

Example 1: A Romanian student met a student from Italy, who is studying in our country, with a scholarship. They became friends and decided to do a master's degree together in the United States. They returned to Europe and married in Italy. Later, the Romanian found a job at a law firm in the USA. As a result, they both settled in America, where they had three children. From their savings, they bought an apartment on the Cote d'Azur, where they intended to retire. At the same time, they also owned an apartment in Rome, which, without their knowledge, was misused by an unknown person. Finally, the couple settled in France, where the Romanian died.

Such a hypothesis raises a series of questions, as follows:

Which law establishes the formalities necessary to be fulfilled at the time of concluding the marriage: the Romanian law, the Italian law or another international law? Which law determines the rights and obligations resulting from the act of marriage: Romanian law, Italian law, American law or another international law? What nationality will the three children have? What law will determine the matrimonial regime? What law will govern the legal regime of the apartment in Rome? As for the succession of the husband - which court will be able to decide on it and on what law?

Example 2: X is a Spanish citizen, married to Y, a Romanian citizen. They are settled in Germany. X initiates divorce proceedings before the courts in Spain, where the marriage of the two was formalized. Feeling disadvantaged, Y filed for divorce in Romania.

Is the Romanian court competent in such a case? Can the decision handed down in Spain be binding on the Romanian courts?

Example 3: An enterprising student opened a company in the form of an L.L.C., whose object of activity was to organize an exchange of apartments between European students during the holidays. He mediated the relations between the students and put them in touch, and as a result of the service he provided, he received an indemnity. At one point, an Italian student, although he benefited from the targeted services, refused to pay their price.

Given that the service was to be performed in Italy, which court will have jurisdiction to hear the dispute? Which law will apply to the legal relationship? If a Romanian court will rule in favor of the Romanian student, how will he proceed?

Example 4: A Romanian lawyer ordered law books from the United States from the Internet. The site used was hosted by a company in England. The lawyer paid online with a credit card. However, he was not satisfied with the books delivered.

Is the Romanian lawyer protected by Romanian or European legislation on consumer protection in the legal relationship described above? Which court will have jurisdiction to hear the case?

Example 5: An English princess made a trip to Paris with her Egyptian friend, in a car made in Germany and sold in France. The car was driven by a French driver, who was an employee of a company in France, run by an Egyptian citizen living in London. To escape the curiosity of some American and English paparazzi, the driver accelerated, and the car entered a bridge. The princess died, leaving behind two children of English

nationality. The bodyguard of the princess, of Irish nationality, suffered severe traumatic injuries, which prevented him from practicing any further sports activity.

What law will govern the succession debate after the princess? Which court will be competent to adjudicate the action for damages filed by the body?

vi) Example 6: In the early 1930s, Antenor Patiño y Rodriguez, a Bolivian diplomat, was in Spain. He marries in Madrid with his wife Maria Cristina de Borbón, of Spanish nationality. By concluding the marriage, according to Bolivian law, the wife acquired the citizenship of the husband. The day before, the spouses opted for the matrimonial regime of separation of property in accordance with Bolivian law. Afterwards, the couple settled in Paris, then in New York. In the end, Mr. Patiño stayed in London. After several years of marriage, Ms. Patiño filed for divorce in New York, but withdrew it before being tried. The husband is trying to file for divorce in Paris, but this is rejected on procedural grounds. Finally, the divorce is pronounced under the auspices of the Mexican jurisdiction on the initiative and for the exclusive benefit of Mr. Patiño. Pragmatically, meanwhile, the wife is trying to protect her financial situation by asking the French courts to annul the marriage agreement and rule on the separation of the body.

Summarizing the situation, several aspects should be noted:

• the marriage certificate concluded in Spain between a Spanish woman and a Bolivian citizen becomes a Bolivian marriage;

• obtaining a divorce from her husband in Mexico;

• the application for separation and annulment of the marriage filed by the wife before the French courts.

The described hypothesis raises a series of questions, as follows:

1. Is the French judge competent to judge the wife's claim? There are elements of foreignness that tend to attract the jurisdiction of Spanish, American, Mexican or even English courts. The French judge must observe these elements of foreignness and apply the rule of private international law in order to claim or not to claim jurisdiction in such a case. This is the issue of conflict of jurisdiction.

2. Once the conflict of jurisdiction has been decided, the judge of the case must identify the law applicable to the disputed legal relationship. In the present case, there is a vocation for the applicability of French, Mexican, Spanish, American and English law. The legal practitioner must accept that in international disputes the judge of the case does not necessarily apply his own law (except for the procedural law which is always that of the court). Therefore, the French judge will be able to judge the case taking into account the Spanish, Mexican, American, English or French law, depending on the solution given to us by the conflicting norm, of private international law. This is the problem of conflict of laws.

3. The question arises as to whether the wife's application is admissible before the French judge, since the divorce has already been pronounced. In other words, to what extent does the Mexican judgment present res judicata and what is its impact on French territory?

4. The fact that Ms. Patiño acquired Bolivian citizenship by concluding the trip, widening the benchmarks calculated to determine the nationality of the natural or legal persons involved in the disputed legal relationship.

5. What are the consequences of the applicant not having French nationality? The issue of the status of foreigners also arises.

From reading the above examples, a hypothesis that presents elements of foreignness differs substantially from a purely internal situation, as it is much more complex. In principle, once it finds that the element of extraneousness exists, the judge of the case must answer with priority the following questions: Which court is competent to judge the disputed situation? What law will apply? What are the effects of a foreign court decision?

Each state has its own system of rules, according to which these issues are resolved - the rules of private international law. On a European Union level, there is a phenomenon of unification of the norms of private international law in various fields - family law, contract law, tort liability, etc., by establishing rules common to the Member States (Kerhuel, 2012).

This phenomenon tends towards a universal vocation - the internationalization of this branch of law, which involves identifying rules that correspond to and be applicable in as many states in the world, implemented through conventions or agreements (Popescu, 2007). In the present field, the most numerous provisions of private international law have been adopted by the Hague Conventions.

The existence of an element of extraneousness determines the birth of a conflict of laws in space, in connection with the legal relationship in which it is materialized, which implies the need to identify the most appropriate jurisdiction and rules of substantive law, to which it is the closest linked to, so, the international society to be able to subsist and offer its members everything that is expected of its existence. In other words, these are the guidelines of the international legal order - the rules that express them in international law (H. Batiffol, P. Lagarde, 1983).

Therefore, the legal treatment of a situation with elements of extraneousness conferred by the legal norm of private international law aims at identifying an analytical framework. Its function is to identify solutions to problems that may arise from the most appropriate referral, given the legitimate interests and expectations of the parties involved, of the States concerned as well as the jurisdictional imperatives - security and legal efficiency.

The functionality and applicability of the rule of private international law may be affected by multiple variables. First of all, it is relevant who enacted the rule of private international law - the state that applies it or another state, or an international, European organization or a professional body such as, for example, the International Chamber of Commerce. At the same time, it is relevant whether the drafter of the norm of private international law distinguishes the particularity of situations with elements of foreignness or resembles them to purely internal hypotheses. Then, it depends on the method adopted - the development of directly applicable material names (rules of law that directly decide the merits of the law), respectively the implementation of rules of international jurisdiction or to opt for conflict of jurisdiction rules and conflicting rules of law material through which to determine the competent court and the applicable law (to resolve the conflict of laws).

In essence, the solution of the legal problems that present elements of foreignness supposes the identification of the juridical norms that have vocation of applicability and the establishment of the closest connection. Two specific aspects are outlined:

- the articulation of normative instruments of different nature (conventions, laws, customs, principles, legal norms) - the discussions related to the interoperability of the

rules of law, which is treated up to this level within a hierarchy constituted at the level of each legal order .

- a possible incompatibility between the rules that have a vocation for applicability: resolving the divergences between the solutions offered (it can be very problematic insofar as it relates to fundamental legal values of the legal systems).

b). *Defining the subject in a descriptive aspect*. The phrase private international law is in itself the first indication of what this branch of law entails. A literal interpretation of the terms contained in the name of the subject may lead to a basic description of it. However, there is no doubt that such a definition is insufficient, at least for the reason that it does not include what does not represent this branch of law.

We begin our analysis by capturing the two attributes of the term "law":

- international law (as opposed to domestic law);
- private law (as opposed to public law).

i) Is the PIL an international law or a domestic law?

Despite the term "international", PIL is an essentially domestic law, by its source. Each state has, in principle, its own system of PIL rules providing solutions to situations with extraneous elements. In some regions, these rules have been unified, as is the case, for example, with the European Union hypothesis (Oprea, 2015). Any court seized of a dispute which presents elements of extraneousness shall apply its own rules of private international law to determine whether or not it has jurisdiction, or to identify which law it must apply to the disputed legal relationship, and to what extent the judgment rendered abroad may be recognized. In order to undertake all these steps, the judge will refer to legal categories of domestic law. At the same time, each state must implement a set of rules based on reproach for the recognition of the status of foreigners.

However, the term "international" is not unjustifiably allocated. By its specific object, PIL is an international law, in the sense that it aims to regulate situations of an international nature, which present elements of foreignness. There is an unprecedented increase in the application of the rule of private international law in the current conditions of geographical mobility of people, the development of trade in goods and services and the progress of telecommunications, which has multiplied the opportunities for interpersonal relations at the international level.

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The assignment of the term "international" to the name of the subject is justified for other reasons. Thus, the legislative source of PIL represents in most cases international conventions or unifying rules, adopted at the level of several states. In the same vein, the implementation of the PIL rule concerns a procedure that presents aspects of internationality, in the following senses: firstly, the judge invested with resolving the case may end up, by applying the PIL mechanism, resolving the dispute based on a foreign law; secondly, the court referral technique may target the application of conflict rules enacted by foreign laws; last but not least, in order to develop PIL rules, each state

must take into account the rules of other states, in order to avoid situations of negative conflict as much as possible.

In conclusion, we can say that private international law presents itself as a sui generis right. Due to its specificity, it was even cataloged as an autonomous legal order (Lerebours-Pigeonniere, 1937).

ii) Is PIL a public or private right?

Ab initio, we point out that in the context of the unprecedented development of contemporary society, this distinction between public and private law tends to be less and less accentuated, recognizing even an intertwining of these branches, justified by the emergence of legal situations. such as environmental law or competition law. The growing influence of Union law is converging in this respect, as it increasingly ignores the distinction between public and private law.

With regards to private international law, the very terminology used in the name of the matter establishes the direction of its cataloging towards the branch of private law. However, this qualification is sometimes debatable, materializing hypotheses in which it manifests itself as a public law. Therefore, the following theses were outlined:

• *The thesis according to which PIL belongs to public law*. This thesis is based on the idea that the PIL must be considered as a specific means of determining the spheres of sovereignty of the state concerned, respectively the foreign state (J.-P.Niboyet, 1955). In support of the thesis the following are stated:

• Conflict of jurisdiction rules ensure the international protection of domestic law, and this mechanism is specific to public law.

• Conflicts of laws, even when they lead to the application of foreign laws, take into account the political factors, enacted by the public power, which is specific to public law.

• The nationality and the legal condition of the foreigner materialize issues related to public law - the relationship between the individual and the state.[1]

• The thesis according to which PIL is a private right. The first argument in support of this thesis is presented by the very name of the matter, which shows that the PIL falls under private law rather than public law.

Proponents of this theory respond to the proponents of the thesis that PIL belongs to a public law, seeing the following:

• Conflicts of jurisdiction relate to relations governed by private law.

• Although most rules of international jurisdiction are considered to be aimed at protecting domestic competences, they also have multiple other purposes.

• It does not follow that the rules of domestic jurisdiction necessarily belong to public law. It is even argued that the procedural norms are materialized as an autonomous legal order, which can be classified neither as belonging to public law nor as being integrated under the auspices of private law.

• The issue of nationality of course presents aspects related to public law, but, indisputably, it also concerns aspects of private law, such as for example the situation in which the renewal of a contract between two traders of different nationalities is discussed.

- The thesis that supports the sui generis nature of private international law. If, by its object, the DPI presents elements of attachment to both public and private law, it

[1]Cass. Réu., 2 fév. 1921, D. P. 1921. 1. 1, note COLIN

nevertheless materializes as an original one, distinguishing itself from each one and finally overcoming the split between these branches of Right. Thus, its material field of application falls under both the auspices of public law and those of private law.

From the perspective of its ratio personae competence, it is always a private law, having the ability to regulate international situations between private persons or between private persons and public persons when the latter act as private persons. The reference will always be made to the norms of private law. The problem that arises results from the fact that the identification of private relations becomes more and more difficult to achieve, the private law tending to be categorized as an instrument of economic regulation, through the manifest influences of the union law. In addition to the economic analysis of the law, the conflict of laws is also assigned a global "allocative" function of state resources. (M. Audit, H. Muir Watt, E. Pataut, 2008)

Another argument of the thesis is the specificity of the method of implementing private international law, especially when conflicting rules are targeted.

c). *Negative definition*. Given what has been stated so far at this point in our analysis, sufficient elements can be deduced to positively define our object of study. However, in order to better understand the specifics of the subject, a negative approach to the definition of DPI is also needed. This definition takes into account three points of view: private international law should not be confused with international trade law, respectively, it is not a public international law, moving significantly away from what is an international criminal law.

i). *PIL and international trade law*

The law of international trade represents the set of legal norms that regulate the economic operations realized between persons located in different states, always involving the economic interests of two or more states (Macovei, 2014)[2]; we consider the international sale of goods, aspects related to intellectual property in international relations, financing, guarantees, international transport, companies, etc.

Private international law differs from international trade law primarily in its specific field of regulation.

Second, PIL rules are essentially rules of conflict, while the rules of international trade law are substantive rules - rules of substantive law.

However, several similarities between these branches of law can be concretized. Both concern the private sector, and the position of the parties is that of legal equality. At the same time, both assume the existence within the legal relationship of a foreign element - of foreignness in the case of PIL, respectively of internationality in the case of ITL. PIL also includes substantive rules, such as those on the condition of the alien in our country (Popescu, 1994). At the same time, since PIL covers all private law relations, it can sometimes include rules of international trade law.

On the other hand, the instruments of law specific to international trade often resort to the conflict technique, such as for example art. 1 of the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980[3].

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[2] According to the author, international trade law is the set of rules governing "international trade relations, international economic and technical-scientific cooperation, in which the parties are on a position of legal equality".

[3] According to art. 1: „1. This Convention shall apply to contracts for the sale of goods between Parties established in different States:

In conclusion, the two branches of law represent autonomous disciplines, with their own legal regimes, but between which there are strong links (Trocan, 2013).

ii). Private international law and public international law

Public international law comprises the set of principles and norms that regulate the relations between states, respectively, between states and other subjects of international law (Cocoşatu, 2012) (international, non-governmental organizations). Given the tendency of States and the guidance of the International Court of Justice stated in the 1988 Advisory Opinion on the Application of the Arbitration Obligation[4], one of the fundamental principles enshrined in public international law is that of this branch of domestic law (Moldovan, 2018).

On the other hand, private international law refers to private persons in their relations with each other. It is part of the internal law of the states, the object of study being totally different.

iii). Private international law and international criminal law

International criminal law has emerged at the confluence of criminal law and domestic criminal procedural law, on the one hand, and public international law, on the other hand, comprising all legal regulations on combating the most serious crimes at the international level, namely governing rules. of the institutions called to apply the law in the event of committing these acts (Crețu, 1996) (Pivniceru, 2000). It differs from what international criminal law entails, which deals with the international aspects of domestic criminal law, while international criminal law deals with the criminal aspects of international law (Henzelin, 2000,).

International criminal law is guided by the following rules: The principle of territoriality - the applicability of the law on crimes committed in the territory of that country; The principle of personality - which gives competence to the criminal law regarding the crimes committed by the citizens of a certain country, outside it subject to *ne bis in idem*; respectively, the Principle of Reality - which determines the incidence of the criminal law on crimes committed by a foreigner on a citizen of a particular country, abroad.

Both branches are significantly different from everything that is private international law. The object and method of study differ.

d). *Proposal to define the subject.* Discussions on the definition of private international law demonstrate the difficulty of this operation or at least the variety of views outlined. However, they tend to set out the premises of a possible definition of synthesis.

In the literature (Mayer, 1979), private international law has been defined as the branch of law that deals with international legal relations between private persons. The

a) when these States are Contracting States; or

b) when the rules of private international law lead to the application of the law of a Contracting State.

2. No account shall be taken of the fact that the parties are established in different States if this does not result from the contract, from previous transactions between the parties, or from information provided by them at any time prior to the conclusion or conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties to the contract shall be taken into account for the application of this Convention. "

[4]*ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 26 April 1988, I.C.J. Reports 1988, p. 12, para. 57, http://www.icj-cij.org/files/case-related/77/077-19880426-ADV-01-00-EN.pdf [accessed on 26 February 2018]*

definition can undergo multiple additions. It is important to emphasize in this that the studied subject aims at a series of rules and inter-normative techniques that allow the identification of a legal solution for private relations with foreign elements in a context of confrontation of vocations of applicability of two or more sets of legal norms.

The main features of private international law are the following:

i). PIL is a special right. PIL is a special right due to both its object of regulation and the method used. By its object, the PIL is a special right as it applies to private situations of an international nature. By its method, PIL is a special right since it is necessarily linked to an original methodology, which results from the potential alignment of the studied international situations that determine the vocation of applicability of several legal orders.

Private international law therefore participates, through international rules, in the resolution of conflicts of laws.

ii). PIL is a law applicable to private legal relations. Except for the issue of foreigners in our country and their status, private international law applies only to private legal relations, unlike public international law, which involves states or international organizations in the context of relations governed by it (M. Audit, H. Muir Watt, E. Pataut, 2008).

iii). PIL presupposes the existence of a legal relationship with an element of extraneousness. The mechanism of private international law is triggered by the presence of an element of extraneousness, which can manifest itself in various forms, such as:

- in the event of a marriage, the element of extraneousness may result from the difference in nationality of the two spouses or from the place where it is formalized - in a country other than that of the nationality of the spouses.

- in the case of a contract concluded between two companies, the element of foreignness may result from the fact that the headquarters of one is located in another country or the object of the contract must be executed abroad.

It should be emphasized that this element of extraneousness can be assessed from two perspectives:

- a subjective one, according to which - a situation is international when it presents connections with another state; in this respect, a purely internal situation for the authorities of one State may entail several elements of extraneousness for the authorities of another State.

- an objective one, according to which a situation is international only when, even before any litigation, it presents connections with several states (eg: the marriage of two Romanians in Italy).

In both cases, the rules of private international law must be applied.

iv). DPI comprises a set of inter-normative rules and techniques. In order to solve the problem of identifying the competent jurisdiction and the legal norm applicable in a situation that presents elements of extraneousness, it is necessary to implement specific rules, called inter-normative rules. They organize the relations between the different legal norms that belong to different states, but which have a vocation of applicability in the given hypothesis.

In the internal legal order, the conflict of names is resolved by applying the principle of vertical hierarchy of organization of rules. But what happens in the case of horizontal relations, more precisely, if the legal rules in question are at exactly the same level and

come from two different national legal orders or even from Union law? (L. Idot, S. Poillot-Peruzzetto, 2004)

Private international law is the legal instrument used to answer this question. Initially, this branch of law was developed in a context of horizontal relations between various states, while also serving as a model in the construction of the union.

Therefore, PIL targets inter-normative techniques, which seek to coordinate national legal norms in the development of harmonized standards. Like all branches of law, the DPI is first defined as a set of legal rules. It is characterized by the method of reasoning used by the lawyer who is facing a relevant situation, which presents elements of extraneousness.

3. THE METHOD OF PRIVATE INTERNATIONAL LAW

The originality of the method of implementing this branch of law is the most defining element of the matter, which significantly distinguishes it from other branches of law, such as, for example, civil, commercial, or family law. The method specific to private international law - the conflicting one involves, first, the enactment of legal norms meant to coordinate national legal systems, according to which to determine the competent jurisdiction and the material law applicable to situations with foreign elements.

In addition to the conflict method, private international law also uses the material method of regulation (regarding the legal status of the alien), the method of rules of immediate application and the method of proper law.

In the following, we aim to analyze the most specific method of matter - the conflicting one, focusing on the material method of regulation. Regarding the other two methods, in the conditions of their rare incidence, we will treat them punctually in a future study of the legal mechanisms that trigger them.

a) Conflictual method

In order to develop a comprehensive presentation of the conflictual method, it is necessary to go through a series of three steps, as follows: first, we must observe its scope, then the reasoning used for implementation, and finally to we highlight the specific features of the conflictual norm.

i) The field of the conflictual method

The conflictual method is the common law in the field of private international law. Its incidence is triggered by the outlining of the element of extraneousness within the targeted legal relationship.

This involves the application of the conflict rules, respectively the rules according to which the legal order against which there is the closest connection with the disputed situation will be determined.

There are two types of conflict rules:

- conflict-of-jurisdiction rules, which are intended to designate the competent court in respect of the case in question, respectively,
- norms regarding the conflict of material laws.

To observe the field of the conflictual method, we propose the following case example: two companies from countries A and B conclude a contract regarding the international sale of goods. In country A its own PIL rules are implemented, and country

B in turn has its own PIL rules. In this case, the conflicting rules are unified through the Vienna Convention on the International Sale of Goods or through European Regulations.

ii). Reasoning used to implement the conflictual method

The identification of the first element of foreignness presupposes the need to determine the applicable conflict rule. In this regard, it will be considered, first, the qualification of the constitutive facts of the given situation, so that they can be included in the categories of implementation of private international law. Each category has a conflict rule with a specific attachment. The factual qualification decides the conflict rule to be used, which in turn determines the attachment element to be adopted. This element of attachment decides the conflict rule which will then establish the competent jurisdiction, respectively the rule of substantive law to be applied with regard to the given case.

We present the following practical example: in the case of an action to establish the paternity of a child, filed by a Romanian woman on behalf of her son against a Danish citizen, the judge of the case will report this approach to the category of actions on personal status, especially on establishing parentage. For this category, the connecting element provided by the conflict norm is the nationality of the child from the date of birth - art. 2605 et seq. Civil Code.

iii) Features specific to the conflict rule:

- The conflicting norm is an intermediate norm. A conflict rule will never decide the solution to the disputed situation. This will be limited to identifying the competent jurisdiction, respectively, the applicable substantive law regarding a certain hypothesis that presents elements of extraneousness.

- The conflict rule may belong to a state or may be the result of interstate cooperation. In the case of a conflict rule belonging to a state, the element of attachment refers to a subjective choice that relates to the legal culture of each state - for example, regarding personal status, some states will prefer to choose to attach their jurisdiction and rules their materials, while other states will decide on re-attachment. On the other hand, in the case of a conflict norm elaborated following an interstate collaboration, the choice of the attachment element represents the result of the multiple negotiations and consensus reached between different states that want a unification of the conflict norms.

- The conflict rule can be unilateral or bilateral. Unilateral conflict rules specify the scope of their own law, without reference to foreign law. They therefore determine only the situations in which the Romanian law is competent to apply, without establishing when the foreign law is also competent.

At the same time, a unilateral jurisdictional conflict rule can only determine the jurisdiction of the Romanian courts. For reasons of sovereignty, the rules of jurisdiction are essentially one-sided because one state cannot rule on the jurisdiction of another state without prejudice to the latter.

Bilateral conflict rules specify both the scope of its own law and that of foreign law.

iv). Criticisms of the conflictual method

The conflicting method is often challenged, its usefulness even being relativized. It is criticized for its complexity, the uncertainty it raises, and its lack of relevance.

- The complexity of the method. This method is based on an abstract logic, which tends to present elements of serious complexity. Its application is based on a certain automation, but without sufficient intuitive elements. In other words, the method gives

the case judge a margin of appreciation which relates in particular to the material solution of the dispute in question. This explains why the method sometimes remains unapplied, ie it is possible for situations to be analyzed as purely internal situations, while they have elements of extraneousness, as is the case, for example, most often in the case of divorces.

- Uncertainty of the method. Despite the apparent rigor, the conflicting method leaves a far too wide margin of appreciation for the judge of the case. Indeed, the conflict rules are essentially of jurisprudential origin and fair. These are factors in identifying the solution. Uncertainty is given in particular by use of state exceptional mechanisms. At the same time, the slowness is manifest in the presence of the public policy exception, which allows the replacement of the foreign law designated by a conflict norm with the law of the notified court. Similarly, uncertainty can result from the application of police rules.

- Lack of relevance. It is argued that the conflicting method would not be appropriate for the purpose for which it is intended. Conflict rules are still, in general, of internal source, leading to the application of rules developed for domestic situations, on international assumptions. The criticism appears to be particularly convincing in the field of international trade. Contracts specific to international trade have particularities that cannot be assimilated to domestic contracts. International trade law is in perpetual development and derogates from international conventions.

On the other hand, in their classical conception, the rules of conflict are neutral in terms of the result of the material norm to which they refer. The economic analysis of the law, however, questions the fact that this aspect remains, especially when the exception of public order or the conflict of substantial laws is targeted

v). *Conclusions*

Despite criticism of the conflictual method, it is widely used. The conflictual technique interconnects the legal systems and contributes significantly to the process of establishing a uniform material right - an issue of maximum interest. It is intended to establish the technique according to which the applicable rule of substantive law is reached. To the extent that a total unification of substantive law is not achieved, the conflictual method will remain unique in that it can provide legal solutions when there is no directly applicable law. The evolution of the Union's legal order rediscovers the conflicting method and its importance.

b). *Material regulatory method*

Exposure plan. The analysis of the material method of regulation will start by presenting a definition of the rules of substantive law, continuing with the identification of their field, respectively, with the observation of their specificity, by reference to the conflicting method.

i). Defining the norm of material law. Substantive rules of law or substantive rules are those rules of law which directly provide the solution to a legal problem. In fact, most rules of law fall into this category. The sources of these rules can be diverse: of state origin (laws, jurisprudence), conventional (international conventions, regulations or European directives) or customary.

ii). The field of material norms. A distinction must be made between two broad categories of substantive law:

- Rules that come from national sources, even from tendencies to harmonize the law (such as the implementation of European directives, model laws) or standardization (eg conventions containing uniform laws) manifested under the influence of an international or Union standard (Jeammaud, 1998).

- Material rules of international origin, unified under the auspices of an international institution (international conventions for the unification of law) or of Union law (regulations).

In the context of an international situation:

- the rules of substantive law of the various states, which have a vocation for applicability, will enter into competition, until the norms of private international law will differentiate them and determine which of them will be effectively applied to the given situation;

- by definition, unified rules of substantive law at international level avoid any problem of conflict of rules, as these are common to the states involved.

iii). The specificity of the rules of material law. The specificity of the rules of substantive law relates directly to their scope and sources.

- Specificity from the perspective of the scope. Assuming that the rules of substantive law are of international origin, they are applicable only to international situations, being elaborated and developed only from this perspective. For example, the Vienna Convention on the International Sale of Goods defines its area of substantive competence by using a specific criterion. In fact, every legal text that comes from international surnames uses its own definition of internationality (Drago, 2002).

However, certain material rules of international origin are sometimes designed to apply to domestic situations as well, such as the 1930 Geneva Convention on the Effects of Trade and the 1931 Geneva Convention on the Effects of Trade and the CEC.

- Specificity from the perspective of sources. While the rules of conflict are for the most part of national origin, the material rules come from a variety of sources. These can be purely domestic rules, which were not designed for international situations, or national rules proposed specifically for such assumptions. Their sources may consist of laws, jurisprudence, or customs.

A significant part of the PIL's substantive rules results from international arbitration. When arbitrators investigate the case, they are free to depart from the solutions proposed by state law. However, the solution thus pronounced has effect only between the parties to the dispute and is likely to serve only as a source of inspiration beyond that framework.

The practice of international trade also provides a very generous source of rules of substantive law, such as in the field of customs, standardized contracts, customs, etc. We consider what is enshrined under the auspices of lex merchandise. The idea of a trade law derives from the observation that there is a de facto international trade company which, in the absence of specific legal rules, is likely to meet its own needs, creating a special set of rules, the legal value of which is indisputable. Debates are becoming increasingly heated in the current context, given the unprecedented development of the internet user society.

Within the European Union, the developed directives are transposed into the national law of each Member State with a view to achieving a unification of the required rules. In

the end, it is not a question of a field of rules of substantive law, but of the idea of undertaking harmonization.

On the other hand, if we refer to the European Regulations, they are true uniform rules, as is the case with certain international conventions. Of course, states are given the opportunity to express reservations.

c). The connections between the conflicting method and the material method of regulation

The study of the conflicting method and that of the material regulatory method suggests that they are essentially technical, alternative, in the sense that the conflicting method is, in principle, used in the absence of a directly applicable material law. However, the discussion includes a series of observations. In reality, there may be a link between these two methods or a coordination between the organs that apply them.

i). *The principle of mutual exclusion*. The principle under review presupposes that, in so far as there is a directly applicable substantive rule governing a situation with an element of extraneousness, it precludes the implementation of the conflicting method. As the rule of substantive law is directly applicable, there are no longer any issues regarding the identification of the national legislation to be applied. Therefore, it can be stated that the conflicting method is residual.

ii). *The connection between the two methods*. International conventions based on the conflict technique and which present elements of unified substantive law allow for the establishment of common definitions, such as the case of the Hague Convention on Matrimonial Property Regimes.

Moreover, international conventions recognize the reservations of police laws, which are rules of substantive law.

At the same time, a substantive law convention may use conflicting techniques to determine its scope. The uniform rule laid down by it is to apply only in so far as the rule of private international law refers to its application. In this regard, we recall the Vienna Convention, which provides that it applies to contracts for the sale of goods concluded between parties established in different States, when those States are Contracting Parties or where the rules of private international law led to the application of the law of a Contracting State. (art. 1).

In the same vein, the presence of several police laws that have the vocation of applicability determines a conflict of laws which denotes another hypothesis in which a connection between the two methods can be observed.

As the text of the Vienna Convention illustrates, the two methods should not be excluded. On the contrary, their coordination is necessary - the most appropriate approach in the context of the era of unprecedented globalization, which responds to the desideratum of the unitary guidance of the legal order, without losing its identity.

The conflict between the two methods tends to become complicated given the recourse to general principles that derogate not only from national law, but also from international law, lex mercatoria (Goldman, 1987), legal texts developed by the European Union or other such sources of inspiration. The established hierarchy of rules regarding their applicability must be considered. Of all the potential conflicts, the most problematic arise when two instruments are incompatible and involve respect for fundamental rights. The interest of the parties involved in private international law shows that the inter-normative process is still full of elaboration.

iii) The contribution of coordination between authorities. In recent years, private international law has seen an improvement through the implementation of another method, which is not the opposite, but a parallel one: coordination between state authorities. This method is widely adopted in the European Union, which tends to build real networks between people, judges, authorities, public bodies, instead of standardizing the norms[5].

4. SHORT CONCLUSIONS

The study of the norms of private international law denotes that their pattern is perfectible, being the duty of the courts to proceed to adapt it to the diversity of interpersonal relations, regardless of the branch of private law to which they belong - civil, commercial, family law, etc .. Their evolution emphasizes the significant contribution made to the process of interconnecting legal systems around the world and the need for this in the conditions of contemporary society.

It should be noted that a new approach to private international law is gradually emerging - the economic one. This is clear from the economic analysis of law in general. The reasoning on which this new vision is based favors the pursuit of efficiency, to the disadvantage of undertaking the act of justice. The aim is to establish, as a general rule, the observation of the cost-benefit ratio, so that, in reference to any case, the rule that produces the most significant benefit at the lowest price applies.

Although many criticisms of this approach can be made, we must also be aware of the effects of the economic rationale of the rule of law. Understanding and applying economics in this field can enrich the development and improvement of legal science, in line with the new needs of society.

We conclude by emphasizing the autonomy of private international law, its tendency to internationalize, but especially its importance.

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[5] See the European Atlas

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