МЕЖДУНАРОДНОЕ ПРАВО

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APPLICATION OF FOREIGN LAW IN EUROPE (PRACTICAL ASPECTS)

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SUMMARY

In this article the theoretical research is providing the application of foreign law in cases with foreign element according to the conflicts of laws rules of different legislations. The analysis of legal literature has been conducted on research of different approaches as to application of foreign law by judicial bodies in different countries. Difference in such approaches in common law and civil law countries has been distinguished. Practical aspects of application of international treaties in the sphere of application of foreign law has been analyzed. Conclusion on the necessity of application of foreign law has been made.

Key words: foreign law, conflict of laws, application, challenging, foreign element, private international law.

ЗАСТОСУВАННЯ ІНОЗЕМНОГО ПРАВА В ЄВРОПІ (ПРАКТИЧНІ АСПЕКТИ)

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АННОТАЦІЯ

У статті проводиться дослідження застосування іноземного права у справах з іноземним елементом, відповідно до колізійних прив'язок різних законодавств. Здійснюється аналіз юридичної літератури з дослідження різних підходів щодо застосування іноземного права судовими органами різних країн. Автор виокремлює різницю в таких підходах, які наявні в англо-саксонській та романо-германській правових системах. Також автор здійснює аналіз практичних аспектів застосування міжнародних договорів, які регулюють питання застосування іноземного права. Відповідні висновки щодо необхідності застосування іноземного права зроблені автором на основі аналізу зазначених питань.

Ключові слова: іноземне право, застосування, оспорювання, іноземний елемент, міжнародне приватне право.

Statement of the problem. Ensuring application of foreign law in cases with a foreign element by judicial bodies of different states according to the appropriate conflict of laws rules or international conventions.

The relevance of the research topic is confirmed by the degree of non-disclosure of the topic in the scientific literature of Ukraine as well as the necessity to study this topic as the issues of its practical application is very important both for the practitioners and for the judges.

Status of research. As of today this topic has not been researched by national legal scientists. In addition, scientific resources of Ukraine in the sphere of law lacks thorough research on this topic. The biggest contribution in the research of this topic has been made by foreign scientists, such as: M. Jänterä-Jareborg, T. Hartley, J. Fawcett, R. Fentiman and others.

The Object and Purpose of the Article is the study of different approaches in the common law and civil law countries towards application of foreign law in cases with a foreign element by the judicial bodies on the basis of the conflicts of laws rules or appropriate international treaties.

Presentation of the main material. Historically, foreign law was regarded in two aspects: as law and as a fact. Accordingly, it influenced on allocation of obligations of the parties and of the court concerning all aspects of application of foreign law. Over time, there emerged one more approach to application of foreign law which is a kind of a hybrid of the first and second approaches.

However, practice detected a number of problems, which prove that foreign law cannot be regarded exclusively as law or as a fact or as a hybrid. When considering a case by a court, these approaches are combined, which does not allow define exactly which approach is applied.

For example, in Italy and Belgium, legislations of which regard foreign law as law, the Supreme Court of the first country has subordinated the issue of application of foreign law to the principle of reciprocity, and of the second country – pointed on the possibility to review a case only if Belgian rules of conflict of law that were subject to application have been violated.

In Germany, the law does not define the nature of foreign law, though court and the doctrine regard foreign law as law.

In its turn, in the European countries where foreign law was regarded exclusively as a fact (England, Ireland, Malta, Cyprus) certain changes has took place. For instance, when a decision is challenged on the basis of wrong application of foreign law, then the foreign law will be studied not only as a fact but also as law. Accordingly, in the doctrine there has emerged new notion – "fact of peculiar nature".

Spanish practice seems to be quite interesting. On the one hand, it recognizes foreign law as a fact and even provides for an obligation of the parties to prove it. On the other hand, it establishes obligatory nature of the conflict of laws rules. This

means that a judge has to check presence of a foreign element in the case and, accordingly, decide whether Spanish conflict of laws rules should be applied. If the judge decides so, he should then decide whether foreign law should be applied. Thus, the parties do not have to require its application separately.

The examples of a hybrid approach are Lithuania and Latvia, which regard application of foreign law, according to the international treaties or national law as an issue of law and the issue of application on the basis of an agreement between the parties as an issue of a fact.

These examples show that approaches of different states to the issue of nature of foreign law is quite controversial and in many cases the final decision will depend on the nature of the conflict of laws rules of a specific state, as well as the procedural requirements to the foreign law, court practice (especially appeal and cassation courts) and the doctrine [2, pp. 18–21].

In general, the issue of application of foreign law depends on a number of different factors:

1. Determination of a foreign element.
2. Nature of the conflict of laws rules.
3. Ways to ascertain the content of foreign law.
4. Consequences of impossibility to ascertain the content of foreign law.
5. Control of the higher courts over application of foreign law.

The nature of the conflict of laws rules in a state, first of all, depends on the issue of the foreign element. Presence of a foreign element makes application of the conflict of laws rules possible. And, given that a foreign law is, evidently, an issue of a fact, it is actually the point where the conflict of laws rules and procedural rules intersect.

As to the procedural status of a foreign element in a case, three concepts have been distinguished:

a) dispositive – according to which the fact of presence of a foreign element will be studied as any other fact. And if the parties decide not to prove presence of the foreign element, it is quite possible that the case will be considered under the local law (common law states, the Netherlands). A judge is not obligated, and in certain cases on his own will, to pay attention to presence of a foreign element, that may require application of foreign law. Accordingly, it opens the way for the so-called "procedural agreements" through which the parties may exclude application of foreign law. At the same time, in the civil law countries that follow this concept, in the result of performance of the discretionary power, a judge may inform the parties on presence of the facts that may lead to application of foreign law (Sweden) or by virtue of the so-called "soft *ex officio* obligation" inform the parties on presence of a foreign element (Denmark, Finland).

b) non-dispositive or obligatory – according to which a foreign element is excluded from the general regime which is applied to the facts, and a judge is obligated to define the foreign element *ex officio* (Austria, Italy, Portugal). In many states the special status of a foreign element comes from the obligatory nature of the conflict of laws rules.

c) double – under which depending on the circumstances of a case, a foreign element will be regarded as an ordinary fact or as a fact of peculiar nature which will be studies by the court *ex officio*. Application of the specific approach also depends on the kind of the process. So, in Germany in the adversarial proceedings, the parties are entitled to establish presence of a foreign element, and in the administrative ones – this is a right of a tribunal to define the elements or the facts even if the parties have not submitted it. In France, Belgium and Luxembourg the difference between application of the dispositive and obligatory regimes of establishment a foreign element depends on the nature of the rights that are subject to consideration. In particular, in the issues on the status of a person, the courts study presence of a foreign element *ex officio* [1, p. 132–134].

When comparing the above concepts, the following problems may be distinguished.

The first concept, on the one hand, allows the parties to exclude application of conflict of laws rules and accordingly – foreign law, however, on the other hand, it prevents efficiency of the conflict of laws rules. In addition, it should be noted that there is a discrimination of the cases in which foreign law is applied, in comparison with the national cases.

At the same time, the second concept does not take into account the preferences of the parties and the result its application may be less flexibility and less legal certainty for the parties which may not imagine the consequences of application of foreign law.

In majority of the European states application of the conflict of laws rules has obligatory nature. It means that a judge has to apply them regardless of the parties' will. At the same time, this approach is explained in different ways. In Germany, Czech Republic and The Netherlands it is explained by the fact that law, including conflict of laws rules, has obligatory nature. In Estonia, Austria, Poland and Bulgaria it comes from the provisions on the obligatory application of foreign law.

In the common law countries (England, Ireland) conflict of laws rules are not obligatory. Accordingly judges in these states have not a right to interfere into the process of application of conflict of laws rule.

Dualistic approach provides for a combination of the first and the second approaches (Finland, France, Sweden). At the same time, there are defined criteria under which certain approached should be chosen. In France, for example, this is a criterion of "free disposal of the rights", in Slovakia and Slovenia – "subject of the case". As a rule, obligatory application of the conflict of laws rules takes places in cases when the subject of the dispute belongs to the branch of law that has a big governmental interest (for example, family law in Denmark, the issue of capability in the Czech Republic). Non-obligatory application of the conflict of laws rules as a rule pertains the sphere that encompasses the party autonomy. However, regardless of the fact, whether the conflict of laws rules are obligatory or not, they will be applied only if the circumstances of the case so require.

The main issue of application of the above approaches to the conflict of laws rules by the judges is that sometimes they differ from the approaches chosen to establishment of a foreign element. The countries which have chosen obligatory nature of application of the conflict of laws rules treat a foreign element as an ordinary fact and leave and opportunity for the parties to avoid application of the conflict of laws rules without raising this issue in a court (Estonia, Finland) [4, pp. 54–55].

There are also other inconsistencies in the practice of states. For example, in Luxembourg, regardless of the fact that application of the conflict of laws rules is not obligatory, court in certain cases apply foreign law *ex officio*.

Special attention should be paid to the nature of the conflict of laws rules not for judges but for the parties.

When conflict of laws rules have non-obligatory nature, they may be applied on demand of the parties to a dispute which may agree to exclude application of foreign law and subordinate the dispute to the *lex fori*. Such agreements are allowed, for example, in Austria and Hungary. In other states (Finland, Latvia) such agreements are governed in the same way as the ones on amicable dispute resolution.

In those cases, where conflict of laws rules have obligatory nature, such agreements are possible only if appropriate conflict of laws rules allow party autonomy (Belgium, Estonia). And they are not obligatory for a judge if they contradict to the conflict of laws rules that should be applied (Sweden, Finland).

However, there is one more problem, which is connected with the fact that obligatory nature of the conflict of laws

rules do not always allows to avoid application of foreign law through conclusion of an agreement on choice of law. At the same time, in some states, for instance in Hungary, law allows parties to require court to apply Hungarian law in a case where foreign law should be applied. *De facto* the same situation is in Austria and Greece [5, pp. 39–44].

The next important moment in application of foreign law is ascertainment of its content and appropriately allocation of the duties on its prove between the parties.

Depending on the above approaches, foreign law as a fact is proved by the parties (England, Ireland), and foreign law is proved by a judge (Austria, France, Italy). At the same time, the last option does not exclude engagement of the parties for ascertainment of the content of foreign law on their own initiative and on the initiative of the court (France, Estonia). One more possible option is a combination of an obligation of a court and of the parties depending on the approaches to application of the conflict of laws rules.

There has been distinguished one more model, based on the case-by-case approach. This model aims to optimize expenditures for ascertainment of the content of foreign law through application of personal knowledge of a judge as well as other available opportunities of a court and the parties (Finland, Sweden).

With this regard there is a question – what means are permissible for ascertainment of the content of foreign law. Some states do not limit the form of such means (Germany, the Netherlands, Romania), other cases (Latvia, England). Majority of states allows documentary evidence that are not supported by oral expert statements. Within the EU (European judicial network) there even was discussed an idea to work out a universal draft of such a document concerning ascertainment of the content of foreign law, the form of which would be recognized by all EU members (European law certificate). At the same time, if an obligation to prove foreign law is on the judge, he may use his own knowledge or independently search appropriate rules [3, pp. 203–207].

Apart from internal mechanisms, there is a possibility to apply international instruments, such as the European Convention on Information on Foreign Law of 1968. Though, as the practice demonstrates, this Convention has not become an effective mechanism due to a number of reasons, among which there should be noted limitations of the bodies which may receive or request such information (judicial bodies through central bodies of the Contracting parties) and duration of such a procedure.

For instance, in Germany where the Convention is applied more often than in other countries, courts in 1999–2000 sent 30 requests while in Austria, France and Italy – less than 10.

The issue of costs is very important in the process of ascertainment of the content of the foreign law. In those states where an obligation to ascertain the content of foreign law is imposed on a judge, appropriate costs should be covered by expense of the court. These costs do not belong to the litigation costs and are not covered from the governmental budget (Germany, Sweden). In those states where the obligation to ascertain the content of foreign law is imposed on the parties, appropriately, they incur the expenses (Greece, Italy). Such costs (translations, costs for experts for their affidavits, for specialized institutes for their statements, *etc*.) should be qualified as litigation costs and in the long run may be imposed on the losing party. Even if such costs are not qualified as litigation costs, procedural legislations of some states (Luxembourg, Malta) provides for an opportunity for a judge to decide which party should cover these expenditures. In some states (Lithuania) a court may facilitate the parties in search the information about foreign law which in its turn may seriously cut their expenditures.

In some states (Belgium, Finland, France) there provided an opportunity to use the mechanisms of legal assistance to cover the expenditures for translations or other actions aimed at ascertaining the content of foreign law.

Foreign law will be applied when the court is sure that it has fully ascertained the content of foreign law and applied it in the same way as the court of the that foreign law would have performed.

At the same time, the fact that there are no special legal rules, which would answer the question when the content of foreign law is deemed to have been ascertained by court, should be taken into account. These issues are studied by the doctrine. In Germany the courts have to obtain real knowledge about legal realities of foreign law, in Slovenia foreign law is regarded as proved when the court may conclude that it may apply this foreign law in the same way as Slovenian law.

So, it may be concluded that this issue fully depends on a court even if the parties ascertain the content of foreign law.

At the same time, laws and the doctrine of a number of states directly point on the necessity to ascertain and apply foreign law as it operates and is interpreted in the state of its origin (Austria, Belgium).

It should be noted that time limitations for ascertainment the content of the law are very important. According to the general understanding, it should be done within a reasonable period (Austria, Czech Republic) and should not affect the procedural terms for considering the case.

After ascertaining the content of the foreign law by a judge on his own or by the parties of the process or by the court with engagement of the parties, the court has to apply foreign law. And this process is not an easy one. Despite of absence of a uniform answer to the question how foreign law should be applied, two basic ways may be distinguished:

– foreign law will be applied as national law, taking into account its interpretation and application in state of origin (Greece, Latvia, Romania); or

– foreign law will be applied as foreign law, again, taking into account its interpretation and application in state of origin (Belgium, Italy, Portugal).

However, generally, it seems that regardless presence of different way, in practice it will not significantly influence application of foreign law since even if it has gaps, they may be fulfilled by the court.

Analysis of legislation and practice shows that civil law system does not provide for any punishment for non-ascertainment of the content of foreign law by the parties. In the system of common law impossibility to ascertain the content of foreign law may be a ground for rejection in a claim.

In majority of states in case of impossibility to ascertain the content of foreign law, *lex fori* is applied (Austria, Denmark, France, Sweden, England). Seldom there may be used the method of alternative law defined by the conflict of laws rules, other provisions of foreign law, generally recognized principles of law or the principle of the closest connection (Portugal, Italy, the Netherlands). However, *lex fori* is still the most relevant one.

In this regard, there is a question whether application of national law instead of foreign law defined by the national conflict of laws rules cannot be regarded as violation of basics of private international law.

It should be noted that there are cases when application of national law is more efficient, for instance, when for provision of interests of the parties it is necessary to apply urgent (provisional) measures for protection of rights or property, and this aim national law is applied, regardless whether conflict of law rules refer to application of foreign law which is not applied to the dispute (Lithuania).

The possibility for the court to refuse from application foreign law because of violation of public order, which is enshrined in legislations of majority of states, is very important. In Hun-

gary there even has been provided grounds for refusal – lack of reciprocity, joint request of the parties, *etc*. [4, pp. 59–61].

After taking a decision on application foreign law, majority of states provide for a possibility to challenge it on the basis of wrongful application of the conflict of laws rules or wrongful application of foreign law. Such an opportunity provides for proper operation of private international law and provides proper access for justice. Nonetheless, such harmony of legal rules in the issues of challenging differs much in the issues of grounds for challenging and competence of courts.

For example, in Austria such a decision may be challenged because of improper or wrong application but taking into mind "qualified legal issues" (par. 502 of the Civil procedure code of Austria). The same grounds for challenging are provided in Belgium, however, the possibility to submit an appeal to the Supreme Court is limited by the cases pertaining the issue of violation of Belgian conflict of laws rules. In Spain there is a variety of thoughts on the possibility to submit cassation because of the disadvantages of application of foreign law to the Supreme Court.

It is quite interesting that in the common law states which classically regard foreign law as a fact, there is an opportunity to challenge a decision on the basis of wrong application of foreign law to the higher court (England, Ireland). Accordingly, application of foreign law during consideration of an appeal will be studied as a legal issue.

In 2009 the Swiss institute of comparative law carried out a research on application of foreign law in the European states.

All interviewed, majority of which were judges and practicing lawyers (70%) pointed on increasing of the number of international cases during the last 5 years. At the same time, the issue of foreign law is from 25 to 75% of the whole amount of work.

However, 35% of the interviewed stated that they were trying to avoid application of foreign law quite often, 20% – not often because of a) absence of permanent access to its provisions or b) delay in the process, desire of the parties or their representatives; c) costs. At the same time, 55% of the interviewed stated that they had not tried to exclude application of foreign law (20% stated it was forbidden).

In general, lawyers and judges use foreign official sources to which they have access through the Internet (80% of the interviewed), 40% – e-libraries, 35% – international law firms for ascertaining the content of foreign law, and only then – national sources containing provisions of foreign law. However, using Internet resources carries certain problems. 35% point on the quality of such resources, 25% – on the duration of the research of necessary information and 25% – on the other problems pertaining the language and interpretation.

Fee-paying legal basis are used permanently only by 10% of the interviewed, 12% – periodically, 15% – seldom. And 67% admit that the price of access to the foreign legal bases is very expensive.

As to the issue of "*amicus curiae*", only 5% of the interviewed stated that they were often using it for ascertaining the content of the foreign law.

At the same time, from 40% to 50% of the interviewed in the common law states often engaged foreign experts for ascertaining the content of foreign law, while in the civil law states – from 50% to 76% admitted that they had never engaged for experts for that. At the same time, 57% of the interviewed stated that the main issue of engaging foreign experts is the price, on the second place they put time.

It is quite interesting that international legal instruments of cooperation in order to get information about foreign law (diplomatic channels (up to 20% of the interviewed), European judicial network on civil and commercial issues, European Convention on Information on Foreign Law of 1968 (almost 65% stated that they did not use its mechanisms, and 45% – bilateral international treaties) do not widely use it. The same is about international research institutes.

However, it should be noted that this information can be different depending on a state, if appropriate interview is carried out within its territories.

Generally, the above statistics proves the necessity to improve the system of exchanging the information about the foreign law. Outdated mechanism, as practice shows, do not operate properly and it negatively effects the possibility to apply foreign law, which in its turn is one of the key issues of private international law.

Recently, wide process of harmonization of conflict of laws rules has been taking places, especially in the European countries.

Though, this question has left aside an issue which may directly nullify its efficiency, this is the issue of application of foreign law. It pertains both application of foreign law by judicial bodies and by non-judicial bodies.

It seems that despite little attention to it by a number of states, the issue of application of foreign law is a key issue of application the conflict of laws rules. And the European countries do not have an answer to this question.

Moreover, the above analysis of the legislations of the European states shows a number of problems in the results of inconsistencies between theoretical positions and their practical transformation, as well as a number of procedural disadvantages existing almost in all states.

In the scientific literature attention is even paid to the fact that such a situation in certain circumstances may lead to violation of Article 6 of the European Convention on Human Rights and weaken operation of the internal market.

However, there is a question whether such harmonization of the rules on application of foreign law is generally possible, since such rules may have different effect on the legislation of each country. On the other hand, it seems to be reasonable not to deny such a possibility, despite of the fact that the aim of the unification may not be fully reached.

It should be underlined that The Hague conference on private international law in 2009 regarded the necessity to develop a general instrument in the sphere of application of foreign law. Such facilitation should include free access to the electronic legal bases, facilitation to publications and translations. Accordingly, all legal materials, especially legislation, judicial or other decisions should be in free access, including drafts and preparatory materials.

Within the conference it was also admitted that a number of The Hague conventions, in particular in the sphere of children protection, impose on the states an obligation to provide exchange of the appropriate information in an effective manner, and some of them even contain special provisions on cooperation in the issues connected with foreign law (Art. 14, 15 of The Hague Convention on the Civil Aspects of International Child Abduction and Art. 35 of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children of 1996) [2, pp. 56–60].

In any case it is an inescapable fact that proliferation of information on foreign law, including through special courses and free access to it will allow to raise the legal standards both within the Europe and outside of it since it will make easier the access to its national law from other states.

Conclusions. To sum up, as practice shows application of foreign law by the European states has a tendency to remove the clear borders between foreign law as a fact, as law or as a hybrid. Then, those states, which previously followed exclusively one of the above stated approaches, today, apply alternative mechanisms which can be clearly seen in the practice of the Supreme Courts. We estimate that in the future the

approaches to application of foreign law will be more unified that will facilitate wider application of foreign law and harmonization of the appropriate practice in different European states.

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