PRINCIPLE AUTONOMY IN MARRIAGE CONTRACT

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Abstract. Different legal qualifications and unequal standards of family law in some states are due to the peculiarities that influence the formation of acts of family law. In view of this, the choice of the right of one of the proposed legal systems and the creation of an entire set of conflict rules containing «selection rules» in specific practical situations is becoming necessary. The author examined various points of view of the scholars regarding the legal nature of the autonomy of the will of the parties. This article is devoted to the clarification of the concept and legal nature of the autonomy of the will of the parties as the fundamental principle of the collision regulation of property family relationships, which applies in a marriage contract with a foreign element. The article analyzes the key problems of a marriage contract with a foreign element and the application of autonomy in the will of the parties in it.

Key words: *autonomy of the will of the parties (lex voluntatis), the principle of private international law, a conflict of laws, a foreign element, marriage, international family relationships, marriage contract, choice of law, agreement on the choice of law, property*.

Introduction

Autonomy of the will in the field of family relationships is desirable and natural, since the contractual mechanism is inherent in family law in general and is as convenient as possible in taking into account specific life circumstances and adapting the relations to the new conditions. An optimal option would be to enable parties to choose the law applicable to a marriage contract between them. In an autonomous choice of law, the parties can only refer to the substantive, but not collusive norms of this right, and therefore, the wider the scope of the principle of lex voluntatis, the less the probability of a reverse referral. However, in order to prevent the parties' intention to move away from the rule of law, which is closely connected with the legal relationship, and the choice of the most «advantageous» law, many laws on private international law provide for the rule of invalidity of the choice of law aimed at circumventing the law [5].

Marriage contract

Autonomy of the will in the field of family relationships remains a controversial issue in science, and the question of the autonomy of the will of the property family relations of the spouses is not sufficiently highlighted. In connection with the stated purpose of this article is to identify the general tendencies of the principle of autonomy of will, which applies in a marriage contract with a foreign element. By entering into a marriage, the foreign citizen becomes a member of the family and the subject (participant) who can conclude a marriage contract as an agreement in the interests of all family members. As we see, because the freedom of a marriage contract is taken into account, the parties may adhere to the principle of private law - the autonomy of the will of the parties. According to N. Mancini, autonomy of freedom is based on the principle of individual freedom. [1, p. 23–44]. We are joining the opinion of M.M. Boguslavsky, as it specifies that the institute of autonomy of will is a private manifestation of the principle of discretion (freedom of contract) in civil law [4, p. 480]. We emphasize that the opportunity to choose the right to be regulated by relationships, in particular through the choice of the applicable law, involves the inclusion of the principle of autonomy of will. The parties choose the applicable law with the consent of each other.

Choice of law in accordance with Part 1 of Art. 5 of the Law of Ukraine «On Private International Law» should be expressly expressed or directly derived from the actions of the parties to the transaction, the terms of the transaction or the circumstances of the case, which are considered in their totality, unless otherwise provided by law. That is, as S. Zadorozhna correctly notes, there are two possible ways to realize the autonomy of the will: on the basis of a written agreement and concluding actions that can be explained by the concepts of silent will expression and other characteristics [6, p. 158]. Although the law of the Federal Republic of Germany stipulates that an agreement (choice of law) on the choice of law applicable to the general effects of marriage must be certified notarially [2, 438]. We conclude that the forms of expression of the subjects of the investigated legal relationship are: explicit expression (directly derived from the actions of the parties, terms of the transaction or circumstances of the case, which are considered in their totality), written transaction (written consent), concluding actions (tacit consent). Rules of Art. 5 of the Law of Ukraine «On Private International Law» stipulate that, in cases stipulated by law, the participants (participant) of the legal relationship may independently exercise the right to choose the right to be applied to the content of legal relations. Accordingly, the principle of the autonomy of the will of private legal relations, which consists in the discretion of the participants in entering into or not entering into a property turn with which counterparty and on what terms, means that such decision is taken by the participants on their own initiative, at their own risk and under its own financial responsibility. They also decide on how to exercise their respective subjective rights, including the right to file any property claims in court [21]. At the same time, this principle in the field of the international civil process is embodied in providing the parties to the dispute with the right to independently determine the court which will conduct the consideration of the case. Since the main task of the international civil process is to ensure the judicial protection of the rights of persons in matters where the legal relationship is burdened with a foreign element, and therefore the definition of judicial jurisdiction is complicated, the establishment of jurisdiction on the basis of expression of will is one of the most effective ways to achieve this goal. It is clear that the right to choose a court is not boundless and requires the establishment of a reasonable system of conditions for the exercise of such a choice, as well as restrictions that would make it impossible to abuse [24]. The autonomy of an agreement in relation to a contract does not depend on whether it is issued in the form of an independent document or incorporated into the text of the contract as its condition. The value of the autonomy of the transaction may be expressed in the general form in the formula: the nullity of the agreement does not result in the invalidity of the contract, and the invalidity of the contract does not automatically mean the invalidity of the transaction. Like the conflict rule, the choice of law defines the charter of the treaty, prevents the collision of law and order and can give rise to problems of returning, primary qualification, etc. Thus, the institution of autonomy of will establishes special conflict rules, the binding of which is the right chosen by the parties [16, p. 77]. The contractual freedom and autonomy of the will of the participants in international civilian circulation are expressed (in relation to private international law) in the possibility not only of entering into a contract, as foreseen, but not provided for by law or other legal act, but also to determine, along with other terms of the contract, the right to be applied before him, and in a more general way, to choose within the limits stipulated by law and the

international agreement, between the material and legal and collisional ways of influencing the relevant contractual relations [8, p. 14]. The choice of law is exercised to determine the statute applicable to the rights and obligations of the parties under the contract, and not to the form of the contract. In addition, before the occurrence and termination of the right to property and other proprietary rights in movable property, the choice of law shall be applied without prejudice to the rights of third parties. The choice of law can be applied to the transaction as a whole or its separate part, that is, there is a «splitting» of the contractual statute. Under the charter X. Koh and U. Magnus understand the competent law and order, which refers to the conflict of laws and regulates a certain type of relationship [13, p. 411]. However, the legislation of several countries does not provide for the split of the treaty charters (Switzerland, Venezuela, Egypt, China, Madagascar, Liechtenstein, Mongolia, Tunisia, Turkey). [19, p. 97]. Concerning certain parts of the law, the choice of law must also be clearly expressed. And, according to V.A. Kanashevsky, consolidating the splitting of the treaty charters, the legal systems formulate different rules, and one of the main - it is necessary to specify to which part of the contract is applicable the right. And the difficulties in splitting a treaty statute may arise in single, complex contracts, in which the relations between the parties are inseparable and represent a single legal entity, envisaged by the legislator. [12, p. 112].

Marriage and the Law of Ukraine

Doubtless, implementation of the «party autonomy» principle in a marital contract has boundaries, which is evidenced by the norms of the Hague Convention «On the Law Applicable to Matrimonial Property Regimes» [14]. *The choice of a competent legal framework* is characterized by a certain process, as resolution of private-law relations complicated by a foreign constituent has a dynamic quality. In turn, this process presupposes a series of interlinked stages: 1) determination that a legal relation can be characterized as an international private-law relation. After that, conflicts of laws between different national jurisdictions are identified and a competent legal framework is chosen; 2) application of a competent legal framework to the contentious relation. At the first stage, as *a competent legal framework is selected*, there arise issues concerning the process of law selection, among which the following can be singled out: autonomy of the parties, evasion of law, renvoi, etc. At the second stage, issues can arise from the parties' selecting a *foreign legal framework* (that is, the law of a third state). Such a choice is fixed, *for example, in a marital contract* and the parties voluntarily select the English law for resolution of disputes arising from such a contract [17, c. 189]. In the author's opinion, the English law is chosen, first, due to effective court practices; second, the English law provides freedom of contracts. Choosing the right or changing the previously chosen right may be carried out by the parties at any time, in particular, when the transaction is performed, at different stages of its execution, etc. If they are made after the transaction, they have a retroactive effect and are valid from the moment the transaction was made, but can not:

1) to be a ground for recognition of the transaction invalid due to non-compliance with its form;
2) restrict or violate the rights acquired by a third party prior to the election of the right or change of the previously chosen right.

According to Art. 43 of the Law of Ukraine «On International Private Law», the parties to the contract, in accordance with Articles 5 and 10 of this Law, may choose the law applicable to the contract, unless the choice of law is expressly prohibited by the laws of Ukraine. With the content of the agreement (contract) on the choice of law (at least in relation to contractual obligations) is another problem - the possibility of subordination of the contract to more than one system of law. In the science of international private law, this phenomenon was called dépeçage. Dépeçage assumes that different legal systems are applied to different parts of the transaction. Although dépeçage is not always regarded as a positive phenomenon because it excludes the possibility of a holistic (unified) application of the law to a treaty, the sources of modern private international law, however, allow it to be, since, on the other hand, it makes the choice of law more flexible, such that takes into account the various factors that link the relationship with the law chosen for use, gives the parties more opportunities to implement the principle of autonomy of will. So, dépeçage admits as ch. 3-4 tablespoons 5 of the Law, as well as Part 1 of Art. 3 And the Rome Rules. The main special constraints on the choice of law are the caveat about public order and imperative norms. These include the prohibition of circumvention of the law and certain special reservations, which are typical only for some institutes of private international law [24].

It is worth analyzing the *approaches to the choice of law* applicable to *relations arising from a marital contract* complicated by a foreign constituent. This issue should be resolved in such a way, in the case of 1) entering into a marital contract by individuals *sharing the state of citizenship*, the spouses can choose the law of the state of their citizenship; 2) entering into marriage in the territory of the state of citizenship of *one spouse*, the spouses can choose the law of the state whose citizen one of the spouses is; 3) concluding a marital contract by spouses *with different states of citizenship*, they can choose the law of the state in whose territory they are *entering into the contract*; 4) concluding a marital contract by spouses as regards *real estate*, the law of the state where such real estate is fully of mostly located should apply [18, c. 8].

The question of the validity of the choice-of-law agreement can be resolved on the basis of the principles of lex fori, lex causae, lex voluntatis or the principle of a closer connection. At the present stage, researchers consider it most appropriate to determine the validity of the contract on the choice of the right of the right chosen by the parties. [19, p. 98].

In the absence of the consent of the parties to the contract on the choice of the right to be applied to this contract, the right shall apply according to ch. 2-3 tablespoons 32 of this Law. That is, in the absence of the choice of the right to the content of the transaction, the law, which has the closest connection with the transaction, applies, and unless otherwise stipulated or does not follow from the conditions, the essence of the transaction or the totality of the circumstances of the case, the transaction is more closely connected with the right of the state, in which party to perform the execution, which is crucial for the content of the transaction, has its place of residence or location. Thus, according to Ukrainian legislation, the autonomy of the will for the parties is not absolute, and the choice of the right by the parties may be limited by the lack of consent of the parties to the choice of law agreement (transaction), since, without reaching the agreement, the parties were unable to choose, and then the law which has the most close connection with the law. But it can not

be argued that in this case, the choice of the right of the parties will be limited by the right of the state or the existence of a close connection with the law (contract). If *no law choice* is made by spouses, the proprietary effects of a marriage are determined by the law applied to the legal effects of a marriage, in particular, when spouses can use the law that both the spouses otherwise *have the strongest connection with*. The laws of some countries and international instruments sometimes limit the autonomy of the will to the understanding of the «essential» or «most closely related» relationship with a certain right or clearly defined limits. [23, p. 46].

Thus, the legislation of the Republic of Poland imposes restrictions on the existence of a «close connection» with the treaty. Under the Law of the Republic of Poland «On Private International Law», 1965 [7] in the field of contractual obligations, the parties may subordinate their relations according to the chosen right, if it is related to the obligation. However, when the obligation relates to real estate, it is subject to the law of the state in which the property is located (Article 25). If the parties did not exercise the right to choose, the obligation shall be governed by the law of the country in which the parties had a seat (in the case of legal persons) or place of residence at the time of the conclusion of the contract. This rule does not apply to obligations relating to real estate (Article 26). Preliminary analysis makes it possible to determine that the regulation of a marriage contract in the spouseship with a foreign element allows the application of the principle of autonomy of the will of the parties, or the ability of the parties to make an obligation on their own, that is, when the «will creates the right». At the same time, the choice of law to be applied must be due to the close connection of the chosen law with the relevant legal relationship. [18, p. 15].

Apart from Ukraine, in countries such as Austria, Germany, Spain, Italy, the principle of autonomy of the will in the spheres of property relations, which finds expression in the form of a marriage contract and is the most flexible mechanism of regulation of these relations, is also used, because the contractual mechanism inherent in the family the law as a whole is relatively convenient in taking into account specific life circumstances to protect the weak side. [27, p. 132]. According to A. Pokakalovoy, the parties may choose not only the right to contract, but also in relation to substantive law [19, p. 101]. Anufriyeva L. L. notes that at the present stage of development of legislation, it is precisely the collisional principles inherent in obligations that are an alternative to the law of the location of things. According to the researcher, the prevailing law, if proceeding from the binding law, should be the rule of law, chosen by the parties. Legislation of some countries allows freedom of choice not only in respect of the treaty, but also in relation to the charter status (Switzerland). However, in many countries this option is not allowed (Germany, France, England, etc.). [3].

The Law of Ukraine «On Private International Law states that with the consent of the parties may be established the right to apply to the occurrence and termination of the right to property and other property rights that is the subject of the transaction (Part 2 of Article 39).

When choosing to marry the lawful regime of relations under the law of one or another country, the autonomy of freedom is expedient to extend to all the circle of relations between them, and not only on property, since the subordination of relations within one family to different legal order is illogical and can lead to unjustified complications [5]. Yes, in Art. 5 of the Law of Ukraine «On Private International Law» states that in cases provided for by law, the participants of the legal relationship may independently carry out the choice

of the right to be applied to the content of legal relations. On this basis, the parties to the marriage contract may choose the applicable law from a certain circle of law and order, unless otherwise provided by law. Consequently, the parties to a marriage contract may choose the right of the state, the citizen of which is each of the spouses, etc., ie choose one of the legal order. In this way, you can choose the right to apply to the legal consequences of a marriage if the spouse does not have a common place of residence or the personal law does not coincide with the law of the state of their common residence, but the choice is limited solely to the law of the spouse of one spouse without application Part 2 of Art. 16 of the Law of Ukraine «On Private International Law». Choice of law, provided by Part 2 of Art. 60 and Art. 61 of this Law shall be made in writing or explicitly derived from the terms of the marriage contract. The agreement of the parties on the choice of law, concluded in Ukraine, must be notarized and terminated if the personal law of the marriage becomes a joint one.

Marriage in the international perspective

Spouses' choice of a legal framework is not limited to the law of specific country (in foreign states, the choice of law is normally limited to the law of the state where the spouses or one spouse maintains residence or citizenship). The Ukrainian legislation can also serve as an example, as it imposes limitations with respect to the state of citizenship of one spouse or his/her residence, the state where spouses real estate is located, etc. However, one can not fully exclude the cases when spouses are pressured by one of them into choosing the law of a state where, for example, equality of men and women in property relations is insufficient. If inconsistency of application of the selected foreign family law with the basic principles of the Ukrainian legal framework is established, its application can be limited with reference made to its incompatibility with the public policy of Ukraine [26, c. 103]. To regulate the contractual relations of the spouses in the sphere of property family relations, the «limited» autonomy of the will of the parties is applied. Thus, the spouse may choose the right to be subject to the marriage contract. At the same time, the choice of law causes the question of the circle of law and order, among which the parties can make this choice. The peculiarity of the realization of the principle of the autonomy of the will in the sphere of marriage and family relations is the mandatory existence of certain restrictions on the choice of law and order of the country [9]. In accordance with Part 2 of Art. 45 Law of Georgia on Private International Law 1998, which deals with the effects of marriage, the choice of law is possible, if it indicates the right of the country:

a) to which one of the spouses belongs;
b) where one of the spouses has a usual place of residence;
c) where real estate is located.

According to Part 4 of this article, the choice of law is made in a notarial manner [20]. There is no doubt that the best option for using the institution of autonomy would be to provide the parties with the opportunity to choose the right to regulate a marriage contract between them, including when the choice of law clearly follows from the content of the contract in the absence of a clear indication of this. After all, it is with the help of a marriage contract, the parties establish an optimal range of mutual rights and responsibilities. Right chosen in accordance with Part 1 of Art. 61, ceases to apply or changes with the consent of the parties

in the event of a change in the personal law or usual place of residence of the spouse, to the personal law or the usual place of residence of which the chosen right was tied. The choice of law in relation to the legal consequences of marriage and property relations of the spouses must be made in writing or explicitly derive from the terms of the marriage contract (Article 62 of the Law of Ukraine «On Private International Law»). Note that in Art. 59 of the Law of Ukraine «On Private International Law» provides for the parties to the marriage contract to choose the law applicable to the marriage contract, which is the right of the individual law of one of the spouses or the right of the state in which one of them has a usual place of residence or in relation to immovable property law the state in which this property is located. However, property relations of a spouse regarding immovable property are determined by law and subject to the jurisdiction of the courts of the Contracting State in whose territory the property is located [15]. As you can see, the Ukrainian legislator considered the real estate in the analyzed law in relation to the marriage contract. It is clear that it is of paramount importance, given its value and significance in the system of market relations, but this does not mean that movable property is not included in the subject of a marriage contract. As stated in Art. 38 of the Law of Ukraine «On Private International Law», the right of ownership and other real rights to immovable and movable property are determined by the law of the state in which the property is located, unless otherwise provided by law. It should be emphasized that used in Part 1 of Art. 61 of the Law of Ukraine «On Private International Law», a «or» conjunction may give reason to believe that the conflict of laws is applied to the settlement of property consequences of marriage in relation to immovable property - the personal law of one of the spouses. But this is a false conclusion, since according to the imperative norm of private international law, namely Art. 31 of the Law of Ukraine «On Private International Law», the form of the real property transaction is determined in accordance with the law of the state in which the property is located, and in respect of immovable property the right of which is registered on the territory of Ukraine - the rights of Ukraine. [22, p. 208]. It is noteworthy that, since marital contracts include *provisions on maintenance of each spouse*, such connecting factors are used as the law of the residence state of the individual entitled to such maintenance, common lex personalis law of both the spouses, the law of the state where the individual obliged to provide maintenance resides.

Still, considering that, besides spouses, *maintenance is also provided for children*, then first priority is given to the connecting factor of «the child's personal law», and the law which *has a strong connection* with respective relations and is most favorable for the child. The author believes that the possibility of limiting the parties' choices by implementing *the principle of applying a more favorable legal framework* is quite relevant for regulation of a marital contract. Although such parties are legally equal before the law, in practice the parties can be in different positions, one important factor capable of affecting the rights and interests of the other party being the party's property status. Clearly, a lawmaker's goal is the protection of the interests of the more disadvataged party to an agreement, which includes rights and interests of a child eligible to maintenance from each spouse being a party to a marital contract. This is confirmed by the norm set forth in Art. 93 (part 4) of the Civil Code of Ukraine which presupposes that a marital contract cannot impair the rights of

a child stipulated by the Code, as well as put one of the spouses in *an extremely disadvantageous financial situation*.

Thus, it appears reasonable that respective conflict-of-laws rules should be established, according to which the legal framework chosen by the parties *cannot significantly impair the position of a child* or one of the spouses in comparison with the legal framework that would apply is there was no such choice of law. In this case, conflict-of-laws regulation of a marital contract becomes consistent to an extent. First of all, the parties have an opportunity to choose applicable law for their marital contract. Further on, lawmakers determine the range of legal framworks available for choosing (based on the principle of a strong connection). After that, a warning should be made that the legal framework chosen by the parties cannot significantly impair the position of a child or one of the spouses in comparison with the legal framework that would apply is there was no such choice of law. Finally, conflict-of-laws rules concerning the marital contract should be formulated (already contained in the Law of Ukraine «On the International Private Law») [11].

Qazaryan K. points out the need to provide parties to a marriage contract, complicated by a foreign element, unlimited autonomy of will in choosing the right to be applied to a marriage contract. The discretion of international private law in the sphere of regulation of contractual marital relations is manifested in the autonomy of the will of the parties to the marriage contract. In order to implement the dispositive nature of contractual marriage relations, it is fully proposed to grant the right of the parties to choose any system of law to subordinate existing relations between them. Providing parties to the marriage contract of unlimited autonomy of will will automatically eliminate the problem of circumventing the law. A marriage contract may contain various conditions regarding the property of the spouses, which may substantially coincide with the provisions of the law of any country in the sphere of regulation of marriage relations. Thus, the application of the provisions of the marriage contract and the rules of law of any foreign country may have the same legal effect, while the realization of the intentions of the state for the non-application of foreign law in certain cases may be carried out with the help of supra-imperative norms [10].

Conclusions

In conclusion the author would like to point out that conflict-of-laws regulation of a marital contract should be carried out in the following sequence:

1) the election of the parties to the marriage contract of the principle of the autonomy of the will;
2) establishing a list of legal frameworks available for choosing on the basis of the principle of a strong connection;
3) verification against the warning that the chosen legal framework should not impair the position of each spouse and a child and/or comparison with the law that the parties would use without any choices available.

Regulation of a marital contract as regards spousal relations involving a foreign constituent allows choosing a legal framework from an available range of laws, which applies on condition that there is a strong connection between the selected law and the family relations that the marital contract deals with. Using the principle of applying the more favorable law

will allow protecting the rights and meeting the interests of the more disadvantaged party, in particular, a child, a disabled spouse or the spouse requiring maintenance.

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