

SOME ASPECTS OF DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN THE CIS COUNTRIES

Accepted

13. 5. 2020

Revised

26. 5 2020

Published

22. 6. 2020

ISLAMBEK RUSTAMBEKOV

Tashkent State University of Law, Tashkent, Uzbekistan, e-mail:
prof.rustambekov@gmail.com

CORRESPONDING AUTHOR

prof.rustambekov@gmail.com

Abstract Globalization, development of the states and society and their rapprochement makes the issues of regulation of relation with a foreign element more urgent, and in particular private international law becomes relevant. In this aspect, states are aimed in unification and harmonization of norms of private international law and mostly within regional associations. This article traces these issues within the Community of Independent States (CIS). The CIS countries are trying to analyze and use the international experience, in particular similar experiences of the EU. The EU experience is acutely important in view of the development of Eurasian Economic Union in which more States are trying to become a member. This article traces the development and rapprochement of the private international law in the EU and the CIS countries, and analyzes international agreements of the States which are aimed to unify private international law and regulate such relations around the States. The article reflects upon and provides some basic perspectives regarding further regional harmonization and unification of private international law in the CIS.

UDC

341.9:339.923(47+57)

Keywordsconflict of
laws,
private
international
law,
European
Union (EU),
Community of
Independent
States or
Commonwealth of
Independent
States,
unification,
harmonization.

1 Introduction

The aim of the current paper is to explore the tendencies of private international law (PIL) within the regional perspective, namely the Community of Independent States (post-USSR) countries and the European Union (EU). The paper analyzes the relevant international instruments, the development of PIL, their unification and harmonization, as well as international documents and relevant supranational institutions. Additionally, the paper examines the objective reality of the processes that take part in the Community of Independent States or Commonwealth of Independent States (CIS) in comparison to the EU and doctrinal study of relevant legal and paralegal provisions and historical inquiry (while trying to show what steps the evolution of CIS law has followed).

The development of international relations, global integration and globalization generate a large number of public relations of international character. Each state has its unique, separate place in the world community. At the same time, regional integrations – associations - are of particular importance. One such association is the CIS. It is critically important for the CIS to further integrate into both the EU and worldwide society and to enhance the development of a single market and mutual free circulation of goods and services. In this regard, the establishment of not only a unified legal framework but also the development of legislation aimed at regulating international, and especially PIL relations, serve as important factors in the development of such relations and the economies of the CIS countries as a whole. At present, the intensive development of the economies of sovereign CIS Member States requires further improvement of the legal mechanism for conflict regulation. In this regard, the study of the experience of the EU and its implementation in the CIS is of particular importance.

2 Development of PIL in the CIS countries

The CIS was created in December 1991 after the dissolution of the USSR. In the adopted on December 21, 1991 Alma-Ata Declaration the participants of the Commonwealth declared their sovereign equality and cooperation on the basis of autonomy of each member. On 22 January 1993, the Charter (Statutes) of the CIS were signed, setting up the different institutions of the CIS, their functions, the rules and statutes of the CIS. The CIS performs its activities on the basis of this Charter.

The Charter enumerates both the goals and principles of the Commonwealth as well as the rights and obligations of the member countries. The Charter, consistent with the Declaration, states that the Commonwealth was formed on the basis of sovereign equality of all its members and that the Member States are independent and equal subjects under international law. The Charter also states that the CIS serves the development and strengthening of friendship, inter-ethnic accord, trust, mutual understanding, and cooperation between Member States.

The CIS does not have supranational powers. Countries' interaction within the CIS is accomplished through its coordinating institutions: the Council of Heads of State, the Council of Heads of Government, the Councils of Foreign Ministers, Defense Ministers, Border Troops Commanders, the Inter-Parliamentary Assembly, the Executive Committee (the legal successor of the Executive Secretariat), and the Interstate Economic Committee of the Economic Union (e-source 2017: cisstat.com).

After the collapse of the USSR, with respect to relations between the countries of the newly-created Commonwealth, the states needed to make a choice of connection (integration) of their legal system. Likewise, during that same period, internal legal regulations standing alone could not fully provide citizens with legal protections in the sphere of civil law outside their country. After its establishment, the CIS passed complicated and ambiguous legislation which in turn delayed and frustrated the Commonwealth's development in those embryonic years. The initial phase of this legislation only concluded agreements on certain issues requiring immediate resolution. However, to fully realize the necessity of multilateral cooperation, including cooperation in the legal sphere, the basic documents that consolidated the strategic directions of development of the CIS had to be prepared for signing. This did not occur until the end of 1992.

In 1994, the Secretary-General of the United Nations announced a report to all countries of the CIS, in which the attention was paid to that "in a world where people are increasingly interacting, transcending national borders, it is especially important that there were procedures and sets of norms regulating private international law relations" (Report, 1994: 183-184). The Report emphasized that improvement of the PIL "is not only useful for facilitating trade, but also contributes greatly to the formation of peaceful and sustainable relations". The prevailing doctrinal view of all

CIS countries is that the norms of the PIL regulate all civil law, family and labor relations matters that contain foreign or international elements.

In these countries, conflict of law is probably the most complex and significant aspect of the PIL, but at the same time the content of the PIL is not exhausted by the conflict of law. The material legal norms regulating these private law relations are usually included in this sphere. The literature notes that the conflict of law method of regulation and the material legal “interact, complement each other” (Khoshimov, 2001: 353). Traditionally, the issues of the so-called international civil process were and are included in the PIL.

The first international legal act of the CIS countries, namely in the Agreement on its creation, concluded in Minsk on December 8, 1991, established that each member party guarantees citizens of other member parties, as well as stateless persons residing in their territories, regardless of their nationality or other differences, civil, political, social, economic and cultural rights and freedoms in accordance with generally recognized international human rights norms (Article 2). This principle was approved in the Alma-Ata Declaration of December 21, 1991. This Declaration stated that the CIS is neither a state nor a supra-state entity. The CIS Charter became the legal basis for the activities of the Commonwealth. The Charter defined, as one of the objectives of cooperation, “ensuring the human rights and fundamental freedoms in accordance with generally recognized principles and norms of international law and CSCE documents.” Another objective, related to the legal field, concerns the implementation of mutual legal assistance and “cooperation in other spheres of legal relations” (Article 2). According to the Article 5 of the CIS Charter, the main legal bases for interstate relations within the framework of the Commonwealth are multilateral and bilateral agreements in various fields of relations between Member States.

After the CIS countries gained individual autonomy, it became possible for them to ensure closer legal relations, but only at the interstate level. Two avenues of generating international regulation opened up: first, the conclusion with each of the former union republics of bilateral agreements regarding legal assistance and legal cooperation or, second, the signing of one comprehensive multilateral convention on these issues (Evdokimov, Mikhaylenko, 2004: 57).

In our opinion, both options have certain advantages. It is clear that when signing a bilateral agreement, it is possible to take fuller account of all the issues that require resolution and legal regulation. At the same time, firstly, the multilateral convention provides an opportunity to achieve a uniform regulation of these issues, thereby providing a common approach. Secondly, having one, comprehensive source document makes it much easier and more convenient for citizens to access information and also to apply the principles of the convention in practical activities.

It should be noted that there should either be no or certainly few difficulties in concluding multilateral agreements due to historically developed circumstances in the relations between the CIS countries. This is true because prior to the CIS, there was a similar, and in some cases, a complete coincidence of domestic legislation. For example, the CIS countries have developed a model Civil Code and all countries have adopted their civil codes on the basis of this model code. It should also be noted that all the former union republics, and now the CIS Member States, have had many years of experience in applying the USSR's treaties with foreign states on their territories to provide legal assistance. It is also important that all Member States were fully interested in continuing legal cooperation with each other.

In the early years of the CIS, the conclusion of multilateral agreements designed to promote economic cooperation played a significant role in the development of the Commonwealth.

The defining principle for legal integration became the Agreement on Principles of Approximation of the Economic Legislation of the Commonwealth Member States of October 9, 1992. It stipulates that legislation regulating economic activity should be concentrated in the following areas: civil legislation (in the part regulating economic activity); legislation on inventions, industrial designs and trademarks; legislation on business activity, on the procedure for resolving economic disputes; antimonopoly legislation; legislation on environmental protection; legislation regulating the interstate movement of goods and services, including legislation on the quality and standardization of goods and services; legislation on the monetary banking system and securities; legislation on finance, taxes and prices; transport legislation; legislation on foreign economic relations, including legislation on foreign investment and currency regulation; and, legislation regulating customs rules and tariffs (Article 1).

From the point of view of problems concerning the PIL, it was of particular importance to include in the list of the legislation regulations relating to the interstate movement of goods and services. The Agreement even envisaged the implementation of a long-term goal of cooperation on approximation of the legislation as the elimination of variations between the norms of the current legislation of the parties regulating economic relations in the sphere of common interests that could adversely affect the implementation of cooperation (Article 4). In the Article 6, it was stipulated that during the performance of work on approximation of the legislation, the parties should proceed from the generally recognized norms of international law, as well as the principles underlying the convergence of the legislation of countries with a developed market economy.

In order to organize and conduct preparatory work related to cooperation in the field of approximation of economic legislation, the parties established a legal advisory council consisting of ministers of justice and chairmen of the highest arbitration (economic) courts. The Regulations on the Legal Advisory Council of the Commonwealth Member States were approved. Its decisions have a recommendatory character.

On March 20, 1992, an Agreement was concluded on general conditions for the supply of goods between organizations of Member States of the CIS. It established rules relating to the duties of bodies regulating the supply of goods, buyers and suppliers to ensure the timely conclusion of supply contracts within the framework of interstate economic relations. The Agreement also stated that the prices and procedures for accounting, the quality and completeness of the supplied goods, the quantity, range, timing and order of supply of goods and property liability of the parties are to be determined in contracts for the supply of goods on the basis of mutual agreement between the supplier and the consumer.

The Kiev Agreement of 1992 was based on the need of providing economic entities within the CIS Member States with equal opportunities for protecting their rights and legitimate interests. The Agreement differentiates the competence of the courts of these states on resolving cases arising from contractual and other civil law relations between economic entities, from their relations with state and other bodies; regulates issues of recognition and enforcement of decisions of competent courts that have entered into legal force in such cases; and, determines rules of application

of civil legislation of one Member State of the Commonwealth in the territory of another Member State of the Commonwealth.

On October 9, 1992, an Agreement was signed on mutual recognition of rights and regulation of property relations aimed at creating legal norms preventing mutual claims of the Commonwealth Member States and ensuring the protection of property rights of these States, their citizens and legal entities. A number of provisions of the Agreement were devoted to joint ventures. The property of the parties, their citizens and legal entities enjoy full and unconditional legal protection provided by the party in the territory of which the property is located. This property cannot be subjected to compulsory seizure, except in exceptional cases provided for by legislative acts. In cases of its compulsory confiscation, the State pays compensation to the owner, corresponding to the real value of the seized property, within the terms established by the legislation of the party to its location.

During this period, a number of other multilateral agreements were concluded, in particular the Agreement on the Joint Use of Scientific and Technical Facilities within the framework of the CIS of March 13, 1992; Agreement on Cooperation in the Field of Investment Activities of December 24, 1993; on March 28, 1997, the Convention on the Protection of Investors' Rights was concluded; on September 9, 1994, the Eurasian Patent Convention, providing for the creation of an interstate system for the protection of inventions on the basis of a single patent operating in the territories of the Member States of the Convention, was signed.

The CIS Member States also concluded a multilateral Agreement on Measures of Preventing and Suppressing the Use of False Trademarks and Geographical Indications, on June 4, 1999 and an Agreement on Cooperation in the Field of Protection of Copyright and Related Rights, on September 24, 1993.

In the field of labor relations, the CIS Member States concluded an Agreement on guarantees of the rights of citizens of the CIS Member States in the Field of Pension Provision, on March 13, 1992.

A number of agreements were also signed, providing for the establishment of a single economic space and uniform regulation of economic relations between enterprises of the CIS countries.

In the field of PIL, concerning the definition of the right to be applied to private law relations, in other words – in the sphere of conflict problems, as well as in the field of international civil process - the CIS countries managed to move forward quicker on the path of integration than in the field of the legal regulation of the single economic space, both through the conclusion of international treaties and by using the specific tool of model legislation. Let us first focus on the conclusion of multilateral agreements by the CIS countries.

The most important international agreement between the CIS countries is the Minsk Convention of 1993, along with the Protocol to the Convention that was signed on March 28, 1997. The new edition of the Minsk Convention of 1993 was adopted in Chisinau (Chisinau Convention, 2002). For the participants of the Chisinau Convention of 2002, the Minsk Convention of 1993 and Protocol to it of 1997 ceased to apply. The Chisinau Convention of 2002 entered into force on April 27, 2004. The Chisinau Convention includes various forms and types of mutual legal assistance, the procedure and conditions for its provision, mutual recognition and enforcement of court decisions.

The development of domestic legislation of the CIS countries in the field of the PIL is closely related to the implementation of multilateral international cooperation of these countries in the field of law. Implementation of such cooperation in a number of areas is envisaged in various multilateral agreements of the CIS countries (Moiseev, 1997: 55). Among the most important acts of this kind is the Fundamentals of the Customs Legislation of the CIS Member States of February 10, 1995.

Organizational structures of interstate legal cooperation were established within the framework of the CIS. The main structure of this kind was the Interparliamentary Assembly (IPA), formed on March 27, 1992 in Alma-Ata by seven Commonwealth States. This organization was created as a consultative institution of representative government for the purpose of discussing the broadest range of political and socio-economic issues that arose in the territory of the CIS after the collapse of the USSR. The IPA generated recommendatory legislative acts, which facilitated the approximation of national legislations. At the first plenary meeting of the IPA in September 1992, a number of basic documents were adopted, including the Regulations of the IPA. At the same time, a mechanism for interparliamentary

cooperation was established, based on the principles of equal representation. The headquarters of the IPA is located in Saint Petersburg, and since December 1992 all of the main events of the IPA have been held in the Tauride Palace. By the middle of 1995 the IPA completed its formation stage. IPA is recognized by all interparliamentary organizations of the world and enjoys great authority in the Commonwealth States. This is evidenced by the growing number of its members. The membership of the IPA includes Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Uzbekistan, Moldova, Russia, and Tajikistan. Representatives of the Parliament of Ukraine regularly participate in the IPA events as observers.

On May 26, 1995, the Council of CIS Heads of States in Minsk adopted the Convention on Interparliamentary Assembly of the Member States of the Commonwealth of Independent States. In accordance with the Article 1 of the Convention, the IPA is an interstate body of the CIS.

The IPA takes the leading place in the system of the CIS bodies. In its activities, the IPA pays special attention to the development and adoption of model legislative frameworks. These acts are the basis for bringing together the legislative base of the Commonwealth States.

Thus, the CIS actively uses these kinds of legislative instruments of rapprochement as model normative acts, in order to strengthen and harmonize relations between the CIS Member States. In this respect, we cannot fail to mention the model Civil Code, which became a model for the formation of civil legislation in the CIS countries. Part 3 of the model Civil Code served as the basis for the development of legislation in the sphere of the PIL.

At the same time, model acts serve only to harmonize national legislation and do not form the basis for unification. In some cases, the national normative acts adopted in the Member States can, in case of harmonization, vary from the model basis. A model, or typical, legal act adopted by an international or regional organization cannot be considered binding for Member States. Rather, such model acts are merely recommendatory in their legal nature. Accordingly, each CIS country has the autonomy to develop its own national legislation, using model legal acts, however, as important tools and guideposts for developing such legislative acts.

In addition to the Model Civil Code, over 100 model laws have been developed within the IPA CIS. Unfortunately, however, mere quantity often does not equate with equally high quality. Excessively detailed, fractional and casual regulation is sometimes poorly thought out in terms of the systematic nature of the regulation. Moreover, model laws are not always developed in those areas in which the establishment of legal unity is most required.

However, the main reason for the low productivity of model rulemaking within the framework of the CIS is that after the development of a model draft law, no one can trace its future fate, efficiency of use, or the reality of creating a single legal regulation on its basis. Meanwhile, in this respect, it would be very revealing to summarize the information about which states from among the CIS members placed reliance on which model law when developing their national normative act. Most importantly, as part of this analysis, how did the final texts of these national legal acts deviate in significant ways from the model sample(s).

Speaking of the low efficiency of model approximation of law within the framework of the CIS, it must be recognized that a similar reproach can be made about the conventional approximation of the national legislation. Within the framework of the CIS, there is no effective mechanism to compel Member States to fulfill their commitments undertaken on the basis of CIS agreements. It has already been noted more than once that some of the treaties within the CIS remain only on paper.

Thus, within the framework of the CIS, a large number of interstate agreements were concluded that directly stipulate the regulation of economic relations, not only between the CIS states, but also between economic entities of these countries. However, presently these agreements are toothless in light of the fact that mechanisms for monitoring the implementation of these interstate agreements have not been developed, and most of the contracts are not actually executed after signing. The mechanism of taking control over this execution is not provided because of a lack of sufficient experience. To remedy this serious deficiency, it would be advisable to expand the powers of the CIS economic courts to develop control over and apply economic sanctions for improper execution or non-fulfillment of the treaty. In fact, proposals of this kind are being developed. Practice has shown that the development and adoption of model draft laws has proved to be a more effective instrument for convergence of the legislation of the CIS countries, including in the

field of the PIL. Based on generalization of the experience of introducing model laws in individual countries, it would be necessary to intensify the work on introducing amendments and additions to the earlier adopted draft laws.

3 The EU experience in the sphere of unification and harmonization of PIL

The economic integration of the independent states of the region inevitably entails the unification and harmonization of the legislation of the Member States at a higher level than in the course of universal cooperation. An example of this is the legislative activity of the EU bodies (Entin, 2008a: 68–69).

In the past decade, the EU has become an important player in the negotiations of international conventions laying down PIL rules. The increasing activity of the EU legislator in PIL resulted in April 2007 in the accession of the EU to the Hague Conference on Private International Law. In early 2009, the EU signed its first convention, the Hague Convention on Choice of Court Agreements (2005). The coherency of union law is protected by a so-called ‘disconnection clause’ which provides that Member States shall apply the relevant international instrument externally, but that amongst each other the EU rules shall be applied (Convention, 2005). However, the disconnection clause in PIL is different from traditional disconnection clauses in so far as it does not seek to ensure the applicability of EU law every time that it is applicable. Instead, it coordinates or blends the application of the international agreement with the common rules in situations where both are applicable. In that way, the disconnection clause contributes towards ensuring uniform rules in PIL, which is the aim of the Hague Conference (Kuipers, 2012: 18).

The EU has been actively conducting the legislative activity for several years in the sphere of the PIL and the international civil process. The measures of EU harmonization of conflict rules, currently adopted or proposed, may be classified under five headings: civil jurisdiction and judgments; the law applicable to civil obligations; family matters; insolvency; and procedural co-operation. In addition, in the sphere of company law (in a narrow sense) the Court of Justice of the EU (CJEU) has utilized the Treaty provisions on freedom of establishment to insist, in the context of the internal market, on respect for the law of the country of incorporation

and non-discrimination against companies incorporated in other Member States (Stone, 2014: 4).

The CJEU adopted a rather large number of decisions on various aspects of the PIL. Entered into force on December 1, 2009, the Treaty of Lisbon, which amended both the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007¹ (The Treaty of Lisbon), does not affect the legal norms of the PIL, which were previously adopted by the EU bodies, and preserves the foundations of the existing competencies of the EU in the field of PIL.

Since the entry into force of the Treaty of Lisbon, the adoption at the EU level of measures for the harmonization of conflict rules is now governed by Title V (Articles 67–89) of Part III of the Treaty on the Functioning of the European Union² (TFEU). These provisions have replaced Title IV (Articles 61–69) of the Treaty establishing the European Community³ (EC Treaty), under which many important measures had been adopted in the sphere of the PIL, mainly in the form of EU regulations adopted either by the Council alone, or jointly by the Council and the Parliament. Under the Lisbon Treaty, the EU has a single legal personality and has replaced and succeeded the EC (Stone, 2014: 6).

Considering this issue historically, it should be noted that the Treaty on Establishment of the European Economic Community (hereinafter referred to as the EEC) of 25 March 1957 (hereinafter referred to as the Rome Treaty or EEC Treaty) provides the basis for implementing the above-mentioned mechanisms, which is necessary for the formation of a single EU PIL, which in turn is paramount for the unification of conflict of laws (Basedow, 2002: 18).

The original Rome Treaty focused on the creation of a common market based on the freedom of movement for goods, persons, services and capital. The rules intended to achieve this result were almost exclusively those of administrative and other public law, such as rules regarding customs duties, qualitative import restrictions, residence and labour permits, prohibition of anti-competitive behavior,

¹ OJ C 306, 17. 12. 2007, p. 1–271.

² OJ C 326, 26. 10. 2012, p. 47–390.

³ OJ C 325, 24. 12. 2002, p. 33–184.

etc. The original Rome Treaty contained, consequently, practically no mention of PIL or PIL-related problems. A small exception was Article 215 (today Article 288), stipulating that the contractual liability of the Community shall be governed by the law applicable to the contract in question, but this was hardly anything new (Bogdan, 2006: 18).

The exceptions to PIL were the norms of the Article 220 (in the modern edition – the Article 293) of the Rome Treaty, which called on Member States to enter into negotiations on concluding international agreements only in two spheres: in the field of international corporate law and the international civil process. In this regard, the joint activities of Member States in the sphere of international civil process turned out to be effective. Consequently, with respect to the implementation of the provisions of the Article 220 of the Rome Treaty, one of the most important EU procedural conventions was adopted – the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968⁴ (Brussels Convention).

Some changes regarding the issue of formation of a unified European PIL occurred in connection with the entry into force of the Treaty on Establishment of the European Union of February 7, 1992 (Maastricht Treaty). According to paragraph 6 of the Article K.1 of the Maastricht Treaty (the third pillar of the EU – “Joint activities in the field of justice and internal affairs”), the EU was empowered to work in the sphere of civil law, and accordingly in the field of conflict of laws (Kreuzer, 2006: 10), which made it possible to adopt European international agreements in this sphere. However, this decision was not of great practical importance anymore, because in connection with the significant increase in the number of Member States then in the EU in comparison with 1957, the mechanism of ratification of European international agreements became much more complicated, which often made their adoption unpredictable. To pass the competence to the Community (the first pillar of the EU – “European Communities”) on the establishment of binding European acts in such a fundamentally important area as the conflict of laws of the Member States, the participants of the Maastricht Treaty did not dare.

⁴ OJ L 299, 31. 12. 1972, p. 32–42.

The Convention on the Law Applicable to the Contractual Obligations⁵ (Rome Convention), adopted on June 19, 1980, is not strictly an EU instrument (Kreuzer, 2008: 13). Although the EU took an active part in its preparation, in fact it was created outside the Article 220 of the Rome Treaty (Linke, 2002: 536). This peculiar status of the Rome Convention until recently caused controversy in the EU legal literature on the issue of its “European” or “non-European” nature (Staudinger-Magnus, 2002: 7). However, for us today there is another important issue – the Rome Convention is the actual basis of the current EU conflict of contract law.

The Rome Convention was very widely known. The norms of this Convention are included in many laws of different countries of the world. In particular, it had a significant impact on the norms of the Model Civil Code of the CIS (CIS Model Civil Code, 1996: 3). However, the norms of the Rome Convention are devoted only to one type of relations with a foreign element and, even in comparison with the volumes of conflict norms of a conventional treaty on legal assistance, the sphere of its application is narrow.

In July 2007, in the history of development of the EU PIL, a significant event occurred – the final version of the Regulations, containing conflict of laws rules applicable to non-contractual obligations, the so-called Rome II,⁶ was developed. The development of this document took more than 30 years. After all, the issue of unification of conflict of laws rules on non-contractual obligations was raised during the work over the draft of the Rome Convention. Rome II was adopted on July 11, 2007 and is applied from January 11, 2009, with the exception of the Article 29, which is applied from July 11, 2008. As noted by the Russian researcher *E. A. Patrikeev*, Rome II is called upon to fill the existing gap in a single EU regulation in this sphere, formed in connection with the initiative of the British side on limiting the subject of regulation of the Rome Convention (Patrikeev, 2006: 126).

Activities to unify conflict of laws rules in the field of non-contractual relations have significantly intensified after the establishment of the European Group on Private International Law (GEDIP). In 1998, after three years of work, the group sent proposals to the EU Commission regarding the Rome II. They summarized the main

⁵ OJ L 266, 9. 10. 1980, p. 1–19.

⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31. 7. 2007, p. 40–49).

binding regulations in the field of tort obligations applied in the EU Member States. The group also adopted recommended approaches to resolving the conflicts of The Hague Conventions both relating to the law applicable to traffic accidents (1971) and to the law applicable to the products liability (1973), which taken together constitute the two main current conventions of the Hague Conference on Private International Law. The main provisions of the GEDIP project, along with the basic principles used in the Rome Convention, have become fundamental in the activities of the European Commission in the preparation of the draft regulation (subsequently – Rome II) (Bankovsky, 2006: 26).

In the PIL of most of the EU Member States, the most important conflict rules regarding contracts are found in the Rome Convention. The Rome Convention entered into force in 1991 after having been ratified by seven Member States. Since then, it has been joined by all of the remaining pre-2004 Member States. A convention on the accession of the ten new (2004) Member States to the Rome Convention was signed in April 2005 and is expected to be effective relatively soon, although the process has started to convert the Rome Convention into an EU Regulation⁷ (Rome I Regulation). One of the principal purposes of the Rome Convention is to neutralize, at least to some extent, the effects of the *forum shopping* made possible by the Brussels Convention, as the advantages of a tactical choice of court are diminished when the choice is between courts using the same conflict rules (Bogdan, 2006: 7).

Along with the unification of laws pertaining both to auto accidents and products liability in the EU, material unification is developing in the field of non-contractual relations (Zvekov, 2007: 325). The realization of the difficulties of achieving a uniform European substantive private law has led to an increased understanding of the importance of unifying or at least harmonizing the PIL of the Member States. Despite the continued diversity of substantive law, the unification or harmonization of the rules of PIL improves the chances that the outcome of a legal dispute normally will be the same regardless of where in the EU the judicial proceedings take place (Bogdan, 2006: 7).

⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4. 7. 2008, p. 6–16).

The European group of tort law, consisting of authoritative European legal scholars, has prepared the Principles of the European Tort Law. The Principles consist of six sections: the foundations of the occurrence of obligations as a result of the commission of a tort; the general foundations for liability for the caused harm; circumstances exempting actors from liability; responsibility for jointly caused harm; and, judicial remedies (Zvekov, 2007: 325). As an institutional basis for the development of the Principles, the European Center of Tort Law was established, with the support of the tort law research department of the Austrian Academy of Sciences.

PIL in the Member States of the EU is undergoing radical changes. A growing body of PIL rules is contained in EU regulations. Human rights and the principles of mutual recognition, country of origin and non-discrimination, which are recognized in the EU Treaties and the Charter of Fundamental Rights of the EU,⁸ are reshaping PIL (Bergé, Francq, Santiago, 2015: 444).

Unification of conflict regulation is spurred by discussion of differences between the law of Member States, an assessment of their seriousness and the search for a compromise, or at least recognition of the possibility of finding it. The unification of the substantive law on non-contractual relations is part of the large-scale task of enacting the single EU Civil Code. The increasing influence of Union law upon private law did not only generate the desire to codify PIL at a EU level, but also had already of its own motion a major impact upon PIL (Kuipers, 2012: 21). The European Principles of Contract and Commercial Law have already been developed. The process of developing uniform material norms is carried out with the long-term perspective of introduction of the unified civil code of the EU, most likely through the adoption of regulations.

The influence of the EU legislator on the PIL of the Member States is significant. An increasing number of national regulations are being replaced by EU regulations. This trend is mirrored on the international level by the increasing use of external competences. The growing involvement on the part of the EU legislator in PIL is not surprising. The general consensus seems to be that, despite the repetitive calls of the European Parliament for the creation of a European Civil Code, the Union

⁸ OJ C 326, 26. 10. 2012, p. 391–407.

has no competence to introduce a comprehensive codification. Even the Commission has acknowledged that some areas of private law will not be harmonized in the near future, or perhaps ever. Such areas will essentially be governed by national PIL rules. PIL constitutes a good alternative to substantive harmonization of private laws since it is able to enhance legal certainty while at the same time does not necessitate any change of substantive law. PIL is therefore better able to respect legal diversity (Kuipers, 2012: 22).

The EU is involved in the legal regulation of private law relationships. EU law in this area usually takes the form of directives. These are binding as to the result to be achieved, but leave the Member States an amount of discretion as to the form and method of their implementation. By leaving many private law issues to national regulation and refraining from imposing uniformity in the areas in which it legislates, the EU aims to create an ever-closer union among the peoples of Europe, in which decisions are made as closely as possible to the affected citizens. A mechanism is needed to coordinate and maintain the resulting legal diversity. EU PIL is such a mechanism (Bergé, Francq, Santiago, 2015: 445).

The impressive success of the EU in the implementation of harmonization and unification of law in those areas where attempts to achieve the introduction of uniform norms by international universal organizations have failed, is due to the fact that the EU is endowed with broad legal personality. The combination of elements and the beginnings of interethnic and supranational lawmaking coupled with the complexity of the internal structure of the EU determine the uniqueness of the EU law. From the point of view of conditions and order of formation and place occupied in the general hierarchy of the norms of the EU law, they are all subdivided into three groups, though not quite equal in scope and significance: the norms of the primary (or fundamental) law, the norms of the secondary (or derivative) law, and norms of the tertiary (or additional) law (Entin, 2008b: 93).

Undoubtedly, the EU is the only organization that has a wide and rather specific competence on unification of PIL by acts adopted by the bodies of this intergovernmental association. The ways of improving the legislative powers of the bodies of integration associations established in the post-Soviet space are beyond the scope of this article. However, based on the experience of the EU, we note that unification through the adoption of an act of secondary law is faster, more efficient

and has more predictable results than unification based on an international treaty. Rome II is an Act of the EU bodies by its legal nature – the European Parliament and the Council. As an Act of direct applicability, it eliminates procrastination and different approaches of Member States to introducing it into enforcement.

Rome II is not the last step in unification of conflict of law in the field of non-contractual relations at the EU level. The EU Commission initiated measures on preparation for the adoption of new sources of conflict regulation of relations on inheritance, as well as marriage and family relations. The Rome III⁹ regarding situations involving conflict of laws in the areas of divorce and legal separation, and Rome IV¹⁰ regarding the terms of the succession, are at the center of civil justice cooperation and together provide new PIL within the EU.

Thus, in a strictly legal sense, a single EU conflict of laws is under development based on the experience of the application of the Rome Convention and the developed regulations to it, as well as competence of the EU that emerged with the adoption of the Amsterdam Treaty in 1999,¹¹ which makes it possible to create binding unified EU acts.

4 Features and tendencies of PIL in EU and CIS

Based upon our analysis, it can be pointed out that the advantage of unification of PIL in the EU based on implemented regulations, which formed EU regional PIL. In essence, the Rome I can be considered as the most valuable instrument of PIL in the field of contractual relations. The regulation significantly improved the Rome Convention by increasing the predictability and certainty in the formation of applicable law under various obligations, as well as on the issue of the autonomy of the will of the parties in commercial transactions.

⁹ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343, 29. 12. 2010, p. 10–16).

¹⁰ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27. 7. 2012, p. 107–134).

¹¹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ C 340, 10. 11. 1997, p. 1–144).

In addition, improvements can be found in numerous details, for example, in the fact that Rome I provides definitions or at least basic guidance on controversial issues such as “super-imperative norms”; or that Rome I formed a small arbitrary list of consumer contracts; or the fact that it addresses in more detail the question of where the debtor fulfilled the obligation. The same can be said about the Rome II, which can be considered the most perfect PIL in the field of non-contractual relations.

In essence, EU law has set new standards on how to adapt modern PIL to the needs of parties involved in relations with foreign entities.

Currently, contract law is the most important and priority area of harmonization of the national legislations of the EU Member States. The main tendency of its development is the gradual transformation of “soft” law into “hard” law, meaning that part of the principles of *lex mercatoria* receives legislative consolidation. At the moment, the unification of contract law among EU countries (EU contract law) occurs through harmonization, i.e. the compatibility of various legal systems is achieved through the incorporation of the Principles of European Contract Law (PECL) into the national legislation of the EU countries, which leads to the creation of a uniform EU legal regulation and creates the basis for the adoption of the European Civil Code in the future.

It should be noted that EU lawmaking in the field of PIL is based on the recognition of the fact that conflicts of laws of Member States create clear obstacles to the realization of fundamental freedoms of the domestic market. The elimination of these obstacles is a paramount task to unify PIL within the EU.

Within the CIS countries, there is an external similarity of the main provisions of the Rome Convention. However, there are differences of a conceptual nature. The Rome Convention uses the doctrine of characteristic performance as a “general” presumption to interpret the principle of “closest connection”. Giving the doctrine of characteristic performance the primary consideration in determining the applicable law, and the civil codes of the CIS countries, fails to reflect current trends and realities in the development of PIL, as reflected, in particular, in the latest international treaties. The principle of “closest connection” in the legislation of the CIS countries is used only if it is impossible to determine the characteristic

performance, that is, as a last resort. A comprehensive analysis allows us to conclude that the principle of "closest connection" is subsidiary in nature as a whole - for the entire sphere of civil law relations with a foreign element, and in particular - in the field of contractual obligations.

Also, within the CIS, attempts to unify PIL were carried out by adopting model laws, including a model Civil Code. The presence of model codes and laws adopted within the CIS are only samples recommended for adoption by states, which does not and cannot lead to the creation of uniform norms in the field of PIL. Such model acts are not binding on the CIS countries, and model legislation is unsystematically contradictory in some areas, which is manifested in the adoption on the same issue of not only documents that are duplicative of each other, but also documents that significantly contradict one another. Thus, the adoption of model acts does not seem to be an optimal means of solving the problem of the regional development of private-public partnership. In addition, unification through the development of model legislation requires Member States to commit to implement such legislation in the national legal system, raising the issue of sovereignty. Even if the model legal act is approved by all Member States and adopted in each CIS Member State, doubt will remain as to the possibility of ensuring the necessary flexibility and speed of regulation in those areas of relations that are connected to the implementation of foreign economic policy, which is changing rapidly enough in accordance with ebb and flow of economic conditions (Bogustov, 2012: 23).

The Eurasian Economic Union (EAEU), a new economic union, has been created with the participation of the CIS countries. The main instruments of unification within the framework of the EAEU are international treaties, which, as noted above, significantly reduce the effectiveness of establishing uniform standards in view of the need to carry out domestic procedures, as well as the ability to make appropriate reservations. So, for example, in the EU, this internationally agreed method of unification is used only in the absence of a single legal regulation of the corresponding sphere of public relations, and, in particular, the spheres of family and inheritance relations. The reason for this, as a rule, lies in the differences in the legal systems of Member States, as well as in the complexity and variety of aspects of legal regulation of certain areas. Due to these circumstances, European cooperation on relevant issues is possible only by concluding international treaties by individual Member States, which can subsequently form the basis for the creation

of a proper European regulatory framework. At the same time, EU Member States are trying to “move away” from the internationally agreed method of unification. This is evidenced by the adoption of the Rome I.

Thus, the use of the international treaty as the primary method of unification of PIL within the framework of the EAEU seems unjustified, since the legal mechanisms of the EAEU provide significant opportunities for introducing uniform rules of law using unification methods similar to those used by the EU. In the EAEU, the compatibility of legal systems is carried out through the adoption of the following types of acts by the Inter-Parliamentary Assembly:

- the foundations of legislation in the basic areas of legal relations - the fundamental regulatory legal acts of the Community, establishing the same legal principles for Member States in the relevant areas of public relations;
- standard draft legislative acts - recommendatory model normative legal acts intended for use in the development of specific national laws are implemented in national laws according to the legislative procedures established in the EAEU Member States;
- recommendations on approximation (unification, harmonization) of legislation.

In our opinion, the most effective tool for unifying PIL in the framework of the EAEU today is the adoption of the foundations of legislation as acts aimed at ensuring mutual compliance with the rules governing a certain sphere of public relations, which are not uniform for all Member States of the EAEU. By both the legal nature and nature of the prescription, the foundations of the EAEU legislation are similar to the directives of the EU, the purpose of which is to harmonize national law.

Within the framework of the tendency to unify the norms of PIL in the EAEU, it seems reasonable to transform the “soft” law into the “hard” one. In this situation, “soft” law should be understood as an act that business entities can independently apply to their relations, for example, as the Principles of European Contract Law. The principles cover a wide scope. Accordingly, they are intended to be used as general norms of the EU contract law, which indicates the possibility of their settlement of both trade and civil contracts. The main value of the Principles of

European Contract Law is that they can form the basis not only for the codification of national legislation but also for the unification of substantive civil law in the EU. In addition, such non-national regulators - documents of non-state unification - can be selected by the parties as applicable law, which also helps to bring legal systems closer together.

At the moment, the unification of contract law in the EU occurs through harmonization, i.e. the compatibility of various legal systems is achieved through the incorporation of the Principles of EU contract law into the national legislation of the EU countries, which consequently leads to the creation of a uniform European legal regulation and creates the basis and opportunity for the future adoption of the European Civil Code. It seems that this experience should be used in the formation of the EAEU. The development of a similar document, for example, the Principles of EAEU contract law, will contribute to the development of a single domestic market and the unification of legal regulation of individual institutions of PIL within the framework of an integration association.

5 Conclusion

Interactions between countries play a crucial role for the unification of PIL. Hence, it is indispensable to carefully look at the composition of the Member States relative to each instrument (Toshiyuku, 2014: 131). The need for harmonization of the PIL is always more acute in those regions where interregional trade exchanges and social contacts differ in special intensity. Global trends of regionalization of cooperation of Member States, economic and technological progress guarantee the continuity of this process.

Regardless of whether the PIL norms are formulated in the CIS countries in various codes and laws or in independent, autonomous laws, specifically dedicated to this branch of law, the PIL evolves in these countries taking into account modern international trends, especially those existing in the European continent. At the same time, it should be noted that the CIS countries have concluded a bilateral Agreement on partnership and cooperation with the EU, which recognized that an important condition for strengthening economic relations between the CIS countries and the EU is the compatibility of the legislation. Thus, the experience of convergence (unification and harmonization) of law within the framework of the EU should not

only be studied, but also actively used within the framework of the CIS and also EAEU.

Acknowledgement:

The main part of this article is prepared within the research conducted at the Max Planck Institute for Comparative and Private International Law in September-October, 2017.

References

- Bankovsky, A. (2006) "The New Stage of Unification of Private International Law of the EC: Rome II", *Journal of Private International Law*, 3.
- Basedow, J. (2002) *Die Vergemeinschaftung des Kollisionsrechts nach dem Vertrag von Amsterdam*. In Baur, J. F., Mansel, P. H. (Dirs.), *Systemwechsel im europäischen Kollisionsrecht* (Munich: C. H. Beck).
- Bergé, J., Francq S., Santiago M. G. (2015) *Boundaries of European Private International Law* (Bruxelles: Editions juridiques Bruylant).
- Bogdan, M. (2006) *Concise introduction to EU Private International Law* (Groningen: Europa Law Publishing).
- Bogustov, A. (2012) Problems of interaction of model and national civil legislation of the CIS countries, *Russian Justice*, 3, pp. 21–24.
- CIS Model Civil Code (1966) A legislative act recommendation for the Commonwealth of Independent States. Part three (Adopted in St. Petersburg on February 17, 1996 at the 7th plenary session of the Interparliamentary Assembly of CIS member states), Appendix to the Information bulletin. Interparliamentary Assembly of the member states of the Commonwealth of Independent States, 10, pp. 3–84.
- Evdokimov, V., Mikhaylenko, K. (2004) *International legal assistance in civil and criminal cases on the example of CIS countries* (Moskow: Olma-Press).
- Entin, L. (2008a) *Actual problems of the European law: Textbook allowance* (Moskow: Flinta).
- Entin, L. (2008b) *European law: The law of the European Union and legal protection of human rights: a textbook* (Moskow: Olma-Press).
- Khoshimov, V. (2001) Conflict issues of private international law and the main ways of solving them. In *Civil law of the Republic of Uzbekistan for ten years of its independence: Material for the International scientific-practical conference* (Tashkent: TSUL).
- Kono, T. (2014) *Efficiency in Private International Law* (Hague: The Hague Academy of International Law).
- Kreuzer, K. (2006) Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts: Wie europäisch soll das Europäische Internationale Privatrecht sein?, *RabelsZ*, 70, pp. 1–88.
- Kreuzer, K. (2008) Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechts?, in Jud, B., Rechberger, W. H., Reichelt, G. (eds.), *Kollisionsrecht in der Europäischen Union, Neue Fragen des Internationalen Privat- und Zivilverfahrensrechtes* (Wein: Jan Sramek Verlag).
- Kuipers, J. J. (2012) *EU Law and Private International Law: the interrelationship in contractual obligations* (Leiden: Martinus Nijhoff Publishers).
- Linke, H. (2002) Die Europäisierung des Internationalen Privat- und Verfahrensrechts. Traum oder Trauma? In *Einheit und Vielfalt des Rechts: Festschrift für Geimer, R., Schütze, R.* (eds.) (München. Verlag C.H. Beck).
- Moiseev, Y. (1997) *International legal framework of cooperation of the CIS countries*. Moskow. Jurist. (pp. 55-56).
- Patrikeev, E. (2006) Development of private international law of the member states of the European Union (on the example of conflict of laws), *Jurisprudence*, 5, pp. 121–132.

- Report of the Secretary General "An Agenda for Development" (1994), A48/435, pp. 183–184.
- Sonnenberg, H. (1996) *Europarecht und Internationales Privatrecht*, *Zeitschrift für Vergleichende Rechtswissenschaft*, 95, pp. 19–27.
- Staudinger, J., Magnus, U. (2002) *Kommentar zum Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB)* (Berlin: Sellier-de Gruyter).
- Stone, P. (2014) *EU Private International Law* (Cheltenham, Nordhampton: Edward Elgar Publishing).
- Zvekov, V. (2007) *Collisions of laws in private international law* (Moscow: Wolters Kluwer Russia).

About the author

Islambek Rustambekov, PhD, DSc,

is a Professor of Law at Tashkent State University of Law in Uzbekistan.