Jurisprudencija, 2002, t. 31(23); 53–66

IV. CIVILINĖ TEISĖ IR PROCESAS

THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: COMPARATIVE ANALYSIS OF THE CHOICE OF LAW RULES UNDER LITHUANIAN AND THE UNITED STATES LAW

Doktoral Candidate Herkus Gabartas

Law University of Lithuania, Law faculty, Department of Fiscal and Revenue law
Ateities st. 20, 2057 Vilnius, Lithuania
Tel. +370 5 271 45 21
E-mail: h.gabartas@takas.lt

Pateikta 2002 m. balandžio 11 d.
Parengta spausdinti 2002 m. lapkričio 16 d.

Recenzavo Lietuvos teisės universiteto Teisės fakulteto Tarptautinės teisės ir Europos Sąjungos katedros vedėjas profesorius dr. ***Saulius Katuoka*** *ir Vilniaus universiteto Teisės fakulteto Tarptautinės ir Europos Sąjungos teisės katedros asistentas dr.* ***Audrius Perkauskas***

Abstract

This article deals with the specific provisions of the new Civil Code of the Republic of Lithuania that establish the rules used in order to determine the law applicable to contractual obligations (Article 1.37). The purpose of the article – to show the origins of the private international law rules established in the Lithuanian Civil Code and by employing the comparative analysis method to explain their content and meaning. Special emphasis is made to those provisions, which determine the law applicable to the contractual obligations, when the contracting parties failed to choose such law by themselves. By referring to the writings of the world-known legal scholars, author analyzes Lithuanian private international law rules and compares them with the relevant provisions under the American choice of law. Having in mind the unlike legal traditions in Lithuania and in the United States, the existing differences and similarities of various legal concepts are also explained. The great majority of Lithuanian private international law rules are taken from the Rome Convention On the Law Applicable to the Contractual Obligations as of 19 June 1980, therefore this Convention, where relevant, is also analyzed. It is expected that this article will be helpful in understanding the private international law rules under the Lithuanian Civil Code, which are both new and rather complicated.

The subject known in Europe as *private international law* is usually referred in the United States to as *conflict of laws*, and is perceived as covering at least three main areas: conflict of jurisdictions, *choice–of–law* and the recognition and enforcement of foreign judgments[1]. When a court in any country is dealing with international contract case, it usually follows a similar three-step route: first, it deals with a so-called jurisdictional issue, i. e., a court establishes whether it is competent to enter a binding judgment over the matter (as a rule, a court applies the procedural rules of the country where it sits (*lex fori*) in order to resolve this jurisdictional issue). On its second step, a court needs to select a set of result-oriented (i. e., substantive) national rules that will be applied in deciding the substance of the case. For this purpose a court again must refer to the special rules (i. e., choice–of–law

[1] Therefore, except where such distinctions are particularly relevant to the discussion, the terms „*private international law*“ or „*conflict of laws*“ or „*choice–of–law*“ hereinafter will be used in this work interchangeably.

rules) of the country where it sits in order to select the appropriate substantive law, which will determine the rights and obligations of the parties to the dispute. A court may apply the substantive law to the facts of the case only after the court's jurisdiction has been established and the governing substantive law is correctly determined. And thirdly, after a court issues a judgment, the question of judgment's recognition and enforcement arises. Hereinafter, following this oversimplified pattern of 3-step judicial process, this article will focus on the second step taken by a court, i. e., on the choice-of-law rules applied by a court in order to determine the relevant substantive law governing the case.

In July 18, 2000, the Civil Code of the Republic of Lithuania (the Code) was adopted[1]. It is a first independent civil code in the history of the Lithuanian state [1, p. 11]. Consequently, many rules and legal concepts enlisted there are still very new to the Lithuanian legal community. The author therefore believes it is useful to analyze these new Lithuanian private international rules and to judge them from the broader international perspective, i. e., by comparing them to the respective choice of law rules under the United States law. Also, since Lithuanian private international law rules repeat to the big extent the Convention on the Law Applicable to Contractual Obligations (the Rome Convention)[2], the relevant provisions of the Rome Convention are also discussed in this work.

This article attempts to examine the choice-of-law rules applicable to contractual obligations in general. Therefore certain questions, which are relevant but which nevertheless do not directly determine the contractual obligation itself, e. g., party's capacity to conclude a contract, the requirements to the form of the contract, etc., are not analyzed therein. Special legal regulation existing with respect to consumer, individual employment or other specific type of contracts is not addressed either.

1. Private International Law Rules in Lithuania and the United States

When comparing the private international rules in Lithuania and choice-of-law rules in the United States (US), it should not be forgotten that Lithuania and the US belong to the different legal systems. American law is generally a result of developments formulated by US courts (although a court in US will also apply the relevant existing statutes, the case law is, at least in the area of the choice-of-laws, a major source of law). Lithuania, on the other hand, belongs to the group of countries of civil law system, where legal precedents play a very limited role, if any. As a result, legal language and sometimes even entire legal concepts are understood very differently in Lithuania and the US. Thus, when we talk about private international law in Lithuania, we mean conflict of laws in the US.

1.1. Private International Law in Lithuania

The private international law is a relatively new issue in Lithuania. Until 1990, when the independence of Lithuanian Republic was restored, commercial relations with foreign countries were very limited. Consequently, neither Lithuanian legal theory, nor practice were interested in private international law questions. The situation has changed after 1990, when a relationship with international community began to grow rapidly. Lithuania has already concluded many international treaties with foreign countries and joined the most important international conventions; on the other hand, a number of so-called cases with international (foreign) element, which are decided in Lithuanian courts, is constantly growing each year [2, p. 10].

Starting from July 1, 2001, the Code became effective in Lithuania[3]. It replaced an old 1964 Civil Code, which was subject to continuous amendments after 1990. Being a major

[1] Valstybės žinios. 2000. Nr. 74–2262.

[2] The Rome Convention was opened for signature in Rome on 19 June 1980, and is effective starting from April 1, 1991. All member states of the European Union are parties to this Convention.

[3] Certain rules listed in the Code have different terms of effectuation. See Art. 2 of the Law of the Republic of Lithuania On Approval, Application and Implementation of the Civil Code // Valstybės žinios. 2000. Nr. 74–2262.

source of law in the civil law country, the Code reflects the major changes made in various spheres of private law, including the area of private international law. Chapter 2 of Book 1 of the Code, named „International Private Law", consists entirely of legal principles and rules, which are used to determine the substantive law applicable to civil relations. The rules concerning the determination of applicable law in the area of contracts have been drafted in close accordance with the Rome Convention[1]. Therefore, when interpreting and applying these rules, the jurisprudence of the European Court of Justice should also be taken into the account.

1.2. Choice of laws in the United States

American choice-of-law is not a uniform body of law. With the exception of the certain constitutional issues that might arise the process of application of foreign law, the questions of choice-of-law in the United States are almost exclusively attributed to the matters of law, which is regulated by the states rather than by the federal government. Each of fifty US states is a separate sovereign as regards their conflict-of-laws, and the precedents of one state's courts may have at best only the persuasive effect in the courts of the another. Even U.S. federal courts, which are supposed to form the uniform legal practice in the U.S., „borrow" local state rules (instead of applying some kind of uniform federal law) when the choice–of–law issue is at stake[2] – the factor, which does not contribute to idea of unification of US law. Therefore any attempts in this work to reach some general conclusions about American law necessarily involve some generalizations, which may not be valid in all US states. Thus, article does not provide any definite answers on American law; instead, it merely attempts to identify some general patterns and trends existing in the majority of US states.

The American choice-of-law rule went threw a long route of developments in order to achieve its current status. At the beginning of XX century American conflicts thinking was dominated by single-factor „connecting contact" tests such as *lex loci contractus* in contracts and *lex loci delicti* in torts. Pursuant to *lex loci contractus* principle, the parties to the transaction acquire vested rights under the law of that jurisdiction, where the „last event" of the transaction takes place. Thus, the applicable law is determined by single factors, which often are far from being characteristic to the entire contract[3]. For example, following the reasoning of this doctrine, the law of the place of the contract conclusion determines contracting party's capacity to make contract, the form of the contact or the type of character (absolute or conditional) of the promise. Similarly, the law of the place of contract performance determines a manner, time, locality, sufficiency of performance or excuse for non-performance, etc.[4] The majority of US courts accepted this concept nation-wide at the beginning of XX century. Consequently, a single-connecting factor approach, also known as vested-rights or traditional theory, was promulgated at American Restatement First, Conflicts of Laws, (1934) (the Restatement First)[5].

However, in the second half of the XX century the state courts in US occasionally started to departure from a single factor conflicts test; as a result, multi-factor approach, encompassing center-of-gravity and significant-connection tests, began to emerge. This theory requires a court to apply the law of the state having the closest connection to the

[1] Lithuania, being only an associated member of the European Union, is not a party to the Rome Convention yet.

[2] The US Supreme Court has held that choice-of-law rules are substantive (rather than procedural), thus calling for a federal court to apply the choice-of-law rules of the state where it sits; see *Klaxon Co. v. Stentor Electric Mfg. Co*., 313 U.S. 487, 1941.

[3] The critics to this doctrine usually argue that with modern technology and modern business practices, the place of contracting becomes less certain and more arbitrary.

[4] See American Restatement First, Conflicts of Laws, § 332-334, 358 (1934).

[5] According to Symeonides [3, p. 143], as of the year 1999 the following US states still followed the traditional *lex loci contractus* rule: Alabama, Florida, Georgia, Kansas, Maryland, Rhode Island, South Carolina, Tennessee and Virginia.

parties and the issues involved. The law is to be determined according to a variety of „contacts", looking for the „center of gravity", and no single connecting factor or contact point is allowed to attain more than „presumption" status[1]. In other words, the traditional *lex loci contractus* rule was abandoned. The „most significant relation" test thus was already established dominant one under American Restatement Second, Conflict of Laws (1971) (the Restatement Second)[2].

Later on, a more radical school, led by Duke University professor Brainerd Currie, unfurled the banner of a conflicts revolution by focusing on the analysis of competing state interests. The so-called „interest" theory generally proclaims that the law of that country, the interests of which in each particular case prevails over the interests of another „competing" country, shall be applied[3]. The theory affected all areas of conflict-of-law, especially torts[4]. It entailed three major changes. First, many courts replaced hard-and-fast rules with open-ended approaches. Second, the „conflicts revolution" shifted the emphasis away from territorial factors to state interests and policies. Finally, the method changed from selecting a jurisdiction in a content-blind fashion to selecting a law (at least in part) because of its preferable substance [4, p. 584].

On the other hand, common law is not the only source of choice-of-law rules. A number of states have enacted their own their own statutes addressing this issue (e. g., New York General Obligations Law, § 5-1401[5]). Some state statutes even deviate from the rules enacted in the US Uniform Commercial Code (UCC), which contains some general choice-of-law provisions (UCC, §1-105).

So what is the current status of the American conflict-of-law rules? In the words of one commentator, American conflicts law has become „a tale of a thousand-and-one-cases" [5, p. 578]. Indeed, all the said conflict-of-law theories to one extent or another are still „alive". The ultimate result of the said modern developments is a multifactor approach under which the US courts mix various territorial contacts with state interests and policies, trying to determine the jurisdiction with which the contract has the most relevant connection. And the Restatement Second is still a valuable object of study as it reflects all major US developments in this area of law. Much of the judge-made conflicts law applicable in the individual US jurisdictions is synthesized there. Notwithstanding the fact that not all states in the US have followed the approach enacted in the Restatement Second, this document is nevertheless the most recent authoritative set of rules. Therefore our analysis of the American law in this work will be primarily based on the Restatement Second. In this respect it is should be remembered that the American Restatement is a non-legislative codification of law[6].

2. The Law Applicable to Contractual Obligations

The basic principles of the private international law rules contained in the Code correspond to the American ones: a contract is to be governed by the law chosen by the

[1] The most famous pioneer cases representing „center of gravity" concept are probably *Auten v. Auten*, 124 N. E .2 d 99 (N. Y. 1954), and *Haag v. Barnes*, 175 N. E. 2 d 441. New York, 1961.

[2] According to Symeonides [3, p. 143], as of the year 1999 the following 29 US jurisdictions followed a „significant contacts" or „significant relationship" approach in contract conflicts: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, N. Carolina, Ohio, Oklahoma, Puerto Rico, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wyoming.

[3] According to Symeonides [3, p. 143], as of the year 1999 no pure interest analysis in contract cases was followed in US. However, „better law" approach in contract cases was followed in Minnesota and Wisconsin, whereas the eclectic approach (combining interest, *lex fori* and „better law" analysis) was followed in Hawaii, Louisiana, Massachusetts, New Jersey, New York, North Dakota, Oregon, Pennsylvania.

[4] Probably the most often cited precedent in tort cases is famous *Babcock v. Jackson*, 12 N.Y. 2d 473 (1963).

[5] NY CLS Gen Oblig § 5-1401 (2001).

[6] The American Law Institute's (ALI) Restatements are not authoritative sources of law; however, they are often cited in courts' opinions as persuasive indications of the direction in which courts are or should be moving.

parties. Under this so-called party autonomy principle the contracting parties are free to choose any substantive law they want to apply to the contractual obligations under the contract. On the other hand, such parties' choice of applicable law usually shall not infringe the mandatory rules or public policy of the forum country[1]. Notwithstanding some minor differences, this party autonomy principle could nevertheless be treated as one those „common cores" that is attributable to all major modern legal systems.

However, the contracting parties often fail to choose the law governing their contractual obligations. In such a case court determines such substantive law by referring to choice-of-law rules of the *forum* country. Hereinafter these rules will be discussed in more detail.

2.1. Law Applicable in the Absence of Parties' Effective Choice

The contracting parties often neither expressly nor impliedly choose a law to govern their contract. The applicable law then is determined by the special rules applicable in the absence of parties' choice. Both Lithuanian and American laws have fundamentally different set of rules applicable in such situation.

2.1.1. Lithuanian law

The basic rule under the Lithuanian law is that in case of the absence of parties' effective choice of law, the law of the country that has the closest connection to the contractual obligation applies.

„Closest connection" test

The first sentence of Art. 1.37(4) of the Code provides:

„If the parties have not chosen the applicable law, the law of the country, with which contractual obligation is most closely connected, shall be applied".

Thus, in order to determine the law governing the contract in the absence of parties' effective choice of law, the Code applies the „closest connection" test – the concept, which is the dominant concept of conflict-of-laws in various countries of the world[2] and which is also codified in the Rome Convention[3].

In the default of the parties' choice, it seems that both under the Code and under the Rome Convention a purely objective test regardless of the parties' intentions apply[4]. In other words, the factual situation of the case rather than the intention of the parties plays the crucial role. Such a test is totally opposite to the test applicable in case of parties' implied choice-of-law[5], when the law (or more precisely, the parties' intention to choose the law) is inferred from the contract's terms or from the factual circumstances of the case. When no effective parties' choice-of-law is made, the parties' real intent existing at the time of the conclusion of the contract is no longer important for the purposes of determining applicable law; instead, only the formal connection between the contract/contractual obligation and country (ies) involved shall be examined under the „closest connection" test[6].

---

[1] See Art. 1.37(3) of the Code; Art. 3(3) of the Rome Convention; comment (c) to §187 of the Restatement Second (1971).

[2] The key test under the American law is the „most significant relationship"; see Restatement Second, §188(1).

[3] The first sentence of Article 4 (1) of the Rome Convention provides: „To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 [party autonomy rule], the contract shall be governed by the law of the country with which it is most closely connected".

[4] With respect to the Article 4 (1) of the Rome Convention, see [6, p. 291].

[5] See Art. 1.37 (1) of the Code and Article 3 (1) of the Rome Convention.

[6] This is also an explanation for the rule that for the purposes of determining the country with which the contract is most closely connected, it is possible to take into account the factors that supervened even after the

Moreover, the wording of both Art. 1.37(4) of the Code and Article 4 (1) of the Rome Convention suggests that while examining the „closest connection" test, the content of laws of various countries competing for „the title of most closely connected country" shall be ignored: not the most closely connected system of law, but rather the most closely connected *country* is examined[1]. In other words, a court should not examine the content of the law itself in order to determine whether this law should be applied. The content of the laws of the competing countries in no way shall influence the results of „closest connection" test both under the Code and the Rome Convention. This constitutes to the major difference from the American „interest" analysis used in order to determine the governing law in the absence of parties' choice, when court is examining the content of the law and the policy standing behind it[2]. While a court in the USA usually will closely examine the laws of the „competing" states, a court in Europe is expected „to close its eyes" with respect to the content of competing laws and decide the conflict-of-law issue based exclusively on the formal contacts existing between the contract and the competing countries.

General presumption of „characteristic performance"

The Code formulates the main rule used in determining which country is the most closely connected country to the contract. Art. 1.37(4) (1) of the Code assumes that the contract is most closely connected with the country, in the territory of which is a habitual residence or central administration of the party, who has to fulfill the obligation that is most characteristic to that contract. In comparison with the Rome Convention, the latter contains the same rule[3], therefore the interpretation of the Rome Convention might be helpful in disclosing the rational of the Lithuanian rule.

To be clear from the beginning, let us have in mind that the main principle is that if the parties fail to choose the governing law of the contract, then the law of the country, to which the contract is most closely connected, applies. And such „most closely connected country" is the country where the characteristic performer of the contract resides. So, who is that characteristic performer in the contract? And why this performer is such an important person so that his/her place of residence determines the law applicable to the contract?

Notwithstanding that the concept of „characteristic performance" is the center of gravity of this presumption, it is not defined under the Convention [6, p. 293]. Mario Guliano and Paul Lagarde explains that the submission of the contract to the law appropriate to the characteristic performance „defines the connecting factor of the contract from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded. The concept of characteristic performance essentially links the contract to the social and economic environment of which it will form a part" [8].

Hence, in a situation of typical bilateral sales contract, where one party's (e. g., German GmbH) obligation to deliver goods corresponds to another party's (e. g., Lithuanian UAB) obligation to make the payment, the obligation to deliver goods (and not obligation to pay) is the obligation that is characteristic to the contract[4]. Thus, under the general presumption of „characteristic performance" the law of the country where the seller (e. g., German GmbH) resides (i. e., seller's law) shall be applied to the contract; in this case it is

---

conclusion of the contract and which, obviously, may have nothing to do with parties' original intent at the time the contract was concluded. See also Guliano & Lagarde Report on interpretation of Article 4 (1) of the Rome Convention.

[1] Regarding the comments on Article 4 (1) of the Rome Convention, see also [7, p. 307].

[2] Regarding „interest" analysis under American law, see part 2.1.2. of this work.

[3] The Rome Convention, Article 4 (2), in the relevant part provides: „<…> it shall presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in case of a body corporate or unincorporated, its central administration. <…>".

[4] For the purposes of this hypothetical situation assume that neither CISG (Convention of International Sales of Goods, 1980, Vienna) nor any other international treaty solves this problem of applicable substantive law.

German law. And indeed, as a rule it is the performance for which the payment is due, i. e., depending of the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, security, etc., which usually constitutes the center of gravity and the socio-economic function of the contractual transaction[1]. The rulings of national courts in EU confirm such preposition[2].

On the other hand, the applicable law to the contract may be determined not necessarily by the place of residence of characteristic performer, but instead by the *business place* of such characteristic performer (the place of business and the place of central headquarters (residence) are not necessarily the same). Art. 1.37 (4) (1) of the Code provides in particular:

„If the [most characteristic] obligation is more closely connected with the law of the country where the party of [such] obligation has its business place, then the law of the country of business place is applicable".

Thus, the place of business of characteristic performer might prevail over the place of habitual residence or central administration of such performer if the contract is more related to the former place. The Rome Convention contains the same rule[3]. If the contract is entered into the course of the trade or profession of the party who is to effect the characteristic performance, then the applicable law is presumed to be that of the country of that party's principal place of business or of the place of business through which, under the terms of the contract, performance is to be perfected [9, p. 76]. Therefore the vendor's place of business will determine the governing law of the contract, in case vendor is conducting his business in the place other than his living place (or the place where vendor's headquarters are located) and when sale in question is more related to the former place (i. e., place of business). In our hypothetical situation of sales contract between German seller and Lithuanian buyer, the law of Poland will apply if the deliveries of goods for sale are delivered from German's branch in Poland. In other words, when a seller (the characteristic performer) has a business place abroad, the law of the place of the business will apply if a contract is related to that business more than to the seller. Similarly, in case of a banking contract, the law of the banking establishment with which the transaction is made will normally govern the contract[4].

The Code has followed the first sight clear, but at the same time, quite vague concepts of „closest connection" and „characteristic performance" of the Rome Convention. On the one hand, theses concepts greatly simplify the problem of determining the law applicable to the contract in default of choice by the parties. Generally, only the place of habitual residence or location of the central administration (in case of legal person) of characteristic performer is decisive in determining the contract law. The place where the contract was concluded becomes unimportant. On the other hand, the methods used in determining the applicable law may be treated as being too formalistic. Therefore the doctrine of characteristic performance has been subject to an overwhelming criticism in this respect. The real source of objection to the doctrine of characteristic performance lies with its highly questionable attempt to attribute a functional significance to the country of residence of one party to the contract (or to the country where the party's center of administration is situated, in case of legal person), without any regard whatsoever to the material content of the contract itself, much less to any other surrounding circumstances. „Thus, it is highly mystifying, to say the

[1] To take another example, in an agency contract concluded in France between a Belgian commercial agent and a French company, the characteristic performance being that of the agent, Belgian law will govern the contract if the agent has his place of business in Belgium. See [8] on interpretation of Art. 4(2).

[2] See Dutch courts' decisions in *Machinale Glasfabriek de Maas BV v. Embaillerie Alsacienne* [1984] E.C.C. 123 (sale of goods); *Bata v. Beugro* N.J. 1984 No. 745, 2663 (agency); *Tribunal de Grande Instance, Paris, in S v. K and ors*, 3 Feb. 1982, D.1983 J. 146 (legal services).

[3] Second sentence of Article 4 (2) of the Rome Convention in relevant part provides: „<…> if the contract is entered into in the course of that party's trade or profession, that (most closely connected) country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated".

[4] See [8] on interpretation of Art. 4 (2).

least, to be informed that every contract "properly belongs" to the „social-economic environment", not of the country in which the characteristic performance is to take place, but of the country in which the characteristic performer has his habitual residence" [10, p. 163].

Special presumptions

Notwithstanding the general presumption of characteristic performance, the Code also lays down the two exceptions from the „characteristic performance" presumption, which are applicable in contracts related with immovable property and carriage of goods. Thus, when a contract is related to immovable property and carriage of goods, the general presumption is ignored and instead special presumptions apply.

With respect to the contract related to immovable property, the place where immovable property is situated (rather than the residence place of characteristic performer of the contract) is important. Art. 1.37 (4) (2) of the Code provides that when the subject matter of the contract is a right in immovable property or a right to use immovable property, it shall be presumed that the contractual obligation is most closely connected with the country where the property is situated. The Rome Convention contains the same rule[1].

In this respect it should also be noted that the provision in question merely establishes a presumption in favor of the law of the country in which the immovable property is situated. In other words, this is a presumption which, following Art. 1.37 (5) of the Code, could also be rebutted if the circumstances so require. Therefore, for example, if two persons resident in Lithuania were to make a contract for renting a holiday home in Spain, it might well be argued that the characteristic obligation of the contract is most closely connected with the country of the contracting parties' residence (i. e., Lithuania), but not with the place where immovable property is situated (i. e., Spain)[2].

Finally, it should be stressed that Art. 1.37(4)(2) of the Code does not extend to contracts for the construction or repair of immovable property. This is because the main subject matter of these contracts is the construction or repair rather than the immovable property itself[3].

With respect to the contract related to carriage of goods, the carrier's principal place of business (which may not necessarily be the same as the residence place of characteristic performer of the contract) is important. Art. 1.37 (4) (3) of the Code provides that if the country in which, at the time of the contract is concluded, the carrier has his principle place of business is also the country in which the place of loading or the place of discharge or the principal place of business of consignor is situated, it shall be presumed that the contractual obligation is most closely connected with that country[4].

It often happens in contracts for carriage that a person who contracts to carry goods for another does not carry them himself but arranges for a third party to do so. The term „carrier" in the aforesaid rule means the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself[5].

It should also be noted that contracts for the carriage of passengers and carriage of goods are subject to different set of rules, as the former contracts (carriage of passengers)

---

[1] Article 4 (3) of the Rome Convention provides: „Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated".

[2] See also [8] on interpretation of Article 4 (3) of the Rome Convention.

[3] *Id*.

[4] Article 4 (4) of the Rome Convention provides the similar ruling: „A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts of carriage of goods".

[5] See also [8] on interpretation of Article 4(4) of the Rome Convention.

are not covered by Art. 1.37 (4) (3) of the Code, but instead they remain subject to the general presumption of „characteristic performance", i. e., that provided for in Art. 1.37 (4) (1)[1].

And again, special presumption mentioned in Art. 1.37 (4)(3) of the Code is a rebutable presumption, which, following Art. 1.37 (5) (4), may be rebutted if the circumstances so require.

Finally, special presumptions applied to contract related with immovable property and carriage of goods (Art. 1.37 (4) (2) and Art. 1.37 (4) (3) of the Code) do not apply to certain consumer contracts, which are subject to special treatment in order to protect weaker parties and which are governed by Article 1.39 of the Code.

Rebuttal of presumptions

Putting aside all exceptional cases, the general rule under the Code[2] is that the governing law of the contract, where the parties have not themselves chosen it, is normally the law of the party rendering characteristic performance. Such rule is capable of creating the predictable results in the conflict-of-law issue, if the law is applied uniformly. This seems to be true, however, only until we come to Art. 1.37(5) of the Code, which provides:

„Part 4 of this Article [i. e., general and special presumptions of the most closely connected country] does not apply, if the place of performance of most characteristic obligation can not be determined and the presumptions established in part 4 of this Article can not be relied on, because from the circumstances of the case it appears that the contract is more closely connected with another country"[3].

The power to disregard presumptions provides flexibility, and is intended to apply where, for example, the presumptions lead to a subcontract being governed by a law different from that governing the principal contract [6, p. 297]. Indeed, this was the conclusion reached on interpretation of the Rome Convention in English case *Bank of Baroda v. Vysya Bank Ltd*, where the presumptions were disregarded in order for the same law to govern two contracts relating to the same provision of credit[4]. A pertinent illustration of the ambit of Art. 1.37 (5) of the Code would also be a contract for the sale and leaseback of same equipment. In such a scenario characteristic performer would be different under these two contracts, even if these contracts were related to the same equipment. Therefore, pursuant to Art. 1.37 (5) of the Code, the characteristic performer's residence would have to be ignored is such a case and instead, the law of the country where equipment is located would have to be applied.

Thus, the rule in Art. 1.37 (5) of the Code provides for the possibility of applying a law different from that identified under the presumptions when the circumstances of the case so require. This rule obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the

[1] *Id*.

[2] As well as under the Rome Convention.

[3] The Rome Convention contains the same rule. Article 4 (5) provides: „Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraph 2, 3 and 4 shall be disregarded if it appears form the circumstances as a whole that the contract is more closely connected with another country".

[4] [1994] 2 Lloyd's Rep 87. In that case V, an Indian bank with no branch in England, had requested B, another Indian bank with an office in London, to confirm a letter of credit in favor of the beneficiary G, an Irish company with no office in London. B confirmed the letter of credit and paid the contract price to the beneficiary G upon the delivery of the documents. On the question which law governed the contract between V and G, the learned judge held that presumption under Art. 4 (2) of the Rome Convention [Art. 1.37 (4) of the Code] pointed to Indian law as the place of central administration of V, the party who was to effect the characteristic performance. This, however, would have meant that two different legal systems would govern two contracts relating to the same provision of credit (because contract between V and B on the confirmation of the letter of credit was governed by English law). Therefore, in court's view, this was a classic demonstration of the need and appropriateness of application of Art.4 (5) of the Rome Convention [Art. 1.37 (5) of the Code].

presumptions[1]. Therefore, unless this rule „is applied with the utmost circumspection" [11, p. 39], it may have the effect of destroying the whole point of the private international law rules established in the Code.

2.1.2. American law

As under Lithuanian law, the American party autonomy rule is only the starting point. If the parties have not chosen the applicable law or if their choice of applicable law is ineffective, then an issue arising in a contract case is to be determined by the law that, with respect to that issue, has the most significant relationship to the transaction and the parties.

„The most significant relationship" test

§ 188 of Restatement Second provides for the specific rules in order to determine the law governing in absence of effective choice by the parties:

„(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles state in § 6.

(2) In the absence of an effective choice-of-law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

a) the place of contracting,

b) the place of negotiation of the contract,

c) the place of performance,

d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as other in § 189-199 and 203".

Thus, Restatement Second will apply the law that has the most significant relation to the transaction and parties. Pursuant to § 188 (1), in order to establish „the most significant relationship", court must refer to the non-exclusive list of principles enumerated in § 6 of Restatement Second[2]. However, pursuant to § 188 (2), court is also required to take into account the factors listed in § 188 (2)[3] when applying the principles listed in § 6. Therefore, „what sounds simple and straightforward becomes quite complex if one attempts to apply the qualifying proviso, which requires recourse to the choice-influencing considerations the Restatement [Second] enumerates in section 6" [12, p. 299]. The two lists of multiple factors are so encompassing as to be meaningless, and are so nebulous as to justify nearly any decision [13, p. 652]. And indeed, Restatement Second provides for rather flexible „multi-

[1] See [8] on interpretation of Art. 4(5) of the Rome Convention.

[2] § 6 of Restatement Second lists the following factors:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

[3] I. e., place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, the domicil, residence, nationality, place of incorporation and place of business of the parties.

factor“ approach when considering the applicable law in the contract case in the absence of parties’ choice.

The general factors provided in § 6 of Restatement Second and the specific factors listed in § 188 (2) of the Restatement Second represent fundamentally different approaches to choice-of-law issue. Hereinafter we will discuss these two different approaches.

Due to § 6 of the Restatement Second „interest analysis“ becomes a very important part of the conflict-of-law problem. The general factors listed in § 6 reflect a „free-form“ approach to choice of law, according to which a court, in choosing between competing laws, should disclose the content and purpose of competing laws. The policies behind those laws should also be taken into account when selecting any of those laws. The law of the country, which has the higher interest in the outcome of the case, is usually applied.

The § 188 (2), on the other hand, provides for the so-called „significant contacts“ approach. In contrast to interest doctrine, „significant contacts“ approach does not require the court to disclose the content of competing laws in order to determine each country's interest in having its law chosen[1]. Instead, a court evaluates the contract’s „territorial“ contacts with each of the country in order to determine which country is the center of gravity of the matter in controversy. In other words, the court is expected to analyze every contact that connects a particular country to the contract, and the law of the country, which has the most significant contact (or which has more contacts than the other), is usually applied[2].

Notwithstanding the fundamental difference between „interest“ analysis and „significant contact“ approach, both doctrines are equally tolerated by the Restatement Second[3]. And both doctrines still have their respective authority among the courts in the US. The following cases illustrate this phenomenon.

Illinois is one of those 29 US states that still follow „significant contact“ approach when dealing with a contractual choice-of-law issue[4]. In *Wildey v. Springs*[5], Richard, an Oregon cattle rancher, and Sharon, an Illinois attorney, had become acquainted through long-distance telephone calls from their respective domiciles and then took a five-day joint trip to Florida. While waiting in the Orlando (Florida) airport for the return flight to Illinois, Sharon „suggested“ marriage and Richard agreed, reluctantly. During a subsequent visit to Chicago, Richard purchased an engagement ring, „got down on one knee“, and restated the marital promise. The parties set a date for a wedding to be performed in Illinois. A few months later, Richard decided to break the engagement. Sharon responded with a letter in which, *inter alia*, she threatened to sue Richard for breach of promise to marry. She eventually filed suit in Illinois. A Florida statute provides that agreements to marry made in Florida may not be enforced „within or without this state“. An Illinois statute allows enforcement of such agreements, but sets rigid requirements of written notice. The trial court applied Illinois law and awarded Sharon $ 60,000 in damages. The court of appeals affirmed the application of Illinois law but reversed on the merits. The court dismissed as "something of a fortuity" the fact that the initial exchange of promises to marry had taken place in Florida and, employing § 188 of Restatement Second, concluded that the law of Illinois should apply because that state had „the most significant contacts“[6].

---

[1] Therefore the contacts listed in 188 (2) mostly resemble the approach taken in the Restatement First.

[2] The most unrepentantly „territorial“ section is 188 (3) of the Restatement Second: „If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except [for some specific kinds of contracts dealt with in subsequent sections]“.

[3] Therefore, according to some authors, „a simple presumption of validity would have been preferable to section 188's confused mixture of territorial and policy-oriented directions“; see [14, p. 1299].

[4] See Symeonides [3], *supra*.

[5] 47 F.3d 1475 (7th Cir. 1995).

[6] Unfortunately for Sharon, the application of Illinois law could not salvage her cause of action because her letter, although carefully drafted so as to comply with the Illinois statute, had failed to include the date on which the promises had been exchanged. Inclusion of that date was a necessary requirement under the Illinois statute, the true purpose of which was, according to the court, to make very difficult the enforcement of such agreements; see 47 F.3d 1475 (7th Cir. 1995).

New Jersey, on the other hand, is one of those states in USA, where the interest theory prevails over the „significant contact“ approach[1]. In *Black v. Walker*[2], a mother filed action against a father seeking, *inter alia*, contribution to college expenses of parties' child born out of wedlock. The Superior Court, Chancery Division, ordered the father, and subsequently his estate, to contribute to child's college expenses. Appeal was taken. The Superior Court, Appellate Division, held that: 1) any contacts New York had with voluntary child support agreements, based on facts that agreements were drafted with assistance of New York counsel and executed in New York, were not essential to choice-of-law analysis; 2) New Jersey's interest was sufficiently dominant to require application of New Jersey law authorizing the father or his estate to be compelled to contribute to college education of child who was virtually life-long resident of New Jersey, rather than application of New York law which allegedly would not impose any such obligation against the father's estate. The court ruled that the traditional contract choice-of-law rule would suggest construing the agreements' terms under the *lex loci contractus*, i. e., the law of New York. New Jersey, however, has rejected the traditional view that the law of the place of contracting automatically and conclusively determines the parties' rights and duties. By referring to the choice-of-law factors listed in § 6 of the Restatement Second, the court concluded that New Jersey interests in applying its law prevailed over the interests of New York. The law of New Jersey was chosen by the court as a governing law of the contract, despite of the facts that child was born in New York, that the father had been New York resident, that voluntary child support agreements which did not address college costs had been executed in New York, and that the father's other children who lived in New York could not make same claim for college costs. The interests of New Jersey in applying its law thus prevailed over the formal contacts with New York.

The Restatement Second is not the only authoritative source of rules used by US courts in deciding the choice-of-law problem. UCC also has its own choice-of-law provisions applicable in the absence of parties’ choice. Chief among them is section 1-105, which provides for party autonomy and, in the absence of a choice-of-law clause, for the law of the forum, provided that the transaction bears „an appropriate relation“ to the forum. Thus, the key question here is whether UCC phrase „an appropriate relation“ has any different meaning that the concept of „most significant relationship“ contained in the Restatement Second. In fact, most courts’ opinions use some modern choice-of-law methodology to interpret the phrase „an appropriate relation“ and often equate it with the Second Restatement's most-significant-relationship formula[3].

3. Conclusion

So do Lithuanian and American laws approach the choice-of-law problem similarly, when the contracting parties fail to choose the law governing their contractual obligations?

The approach embodied in American and Lithuanian rules dealing with choice-of-law problem seems to be very different. Lithuanian private international law rules are based on European concept of „the most close connection“. In other words, the law of the country which is most closely connected to the contract shall govern the contract. All connecting factors such as place of contract performance, domicile of characteristic performer, etc., shall be analyzed for this purpose.

Even though American law also has the similar concept of „most significant relationship“, the reasoning used by US courts is often dominated by conceptually different „interest“ analysis. Under this analysis, where the laws of two or more states have some relationship with the contract, US court examines the content of such laws in order to determine the underlying policies of each law and then determines the reasonableness of

[1] See Symeonides [3], *supra*.

[2] 295 N. J. Super. 244, 684 A.2d 1011 (1996).

[3] See *Collins Radio*, 623 P. 2 d at 1046; See also *Wallis v. Mrs. Smith's Pie Co*., 550 S. W. 2 d 453. P. 456-57 (Ark. 1977).

applying one's states law at the expense of another. In other words, a judge in US opens its eyes as to what the substantive laws of the competing countries say and selects the „better" law. In contrast, Lithuanian judge does not analyze what the laws of the related countries say; instead, he/she searches for that formalistic relationship that would connect the contract to the particular country.

Indeed, American court is expected to focus more on the substantive content of the laws in order to evaluate the interests of each „competing" state, whereas Lithuanian court is asked to look to the factors that connect the contract to the territory (rather than to the law) of the related country. Therefore content-neutral methods stipulated by the Lithuanian law seem to be in sharp contrast to interest analysis method that is currently dominant under American law.

☞☞☞

BIBLIOGRAPHY

1. **Lietuvos Respublikos** civilinio kodekso komentaras. – Vilnius: Justitia, 2000.
2. **Mikelėnas V.** Tarptatutinės privatinės teisės įvadas. – Vilnius: Justitia, 2001.
3. **Symeonides**. Choice of Law in the American Courts in 1999: One More Year // Am. J. Comp. 2000. Vol. 48 (143).
4. **Reimann M.** Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century; 39 Va. J. Int'l L. 571. 1999.
5. **Kozyris J. P**. Interest Analysis Facing its Critics // Ohio St. L. J. 1985. Vol. 46 (569).
6. **Mayss A., Reed A.** European Business Litigation. – Darmouth, 1998.
7. **Lookofsky J.** Transnational Litigation and Commercial Arbitration: a Comparative Analysis of American, European & International Law. Transnational Juris Publications, 1992.
8. **Giuliano M., Lagarde P.** Council Report on the Convention on the Law Applicable to Contractual Obligations // O.J. 1980. Vol. 283.
9. **Folsom R. H., Gordon M. W., Spanogle J. A. Jr.** International Business Transactions. – St. Paul: West Group, 1999.
10. **Graveson R. H.** Problems in Private International Law. – North-Holland Publishing Co., 1982.
11. **North P. M.** Contract Conflicts. – North Holland Publishing Company, 1982.
12. **Juenger F. K.** The E.E.C. Convention on the Law Applicable to Contractual Obligations: an American Assessment; Contract Conflicts / Ed. by North P. M. – North Holland Publishing Company, 1982.
13. **Scoles E. F., Hay P.** Conflict of Laws. – West Publishing Company, 1982.
14. **Weintraub R. J.** Symposium: the silver anniversary of the Second Conflicts Restatement: „At least, to do no harm": does the Second Restatement of Conflicts meet the Hippocratic standard? // Md. L. Rev. 1984. Vol. 56.

☞☞☞

Teisė, taikytina sutartinėms prievolėms: Lietuvos Respublikos ir JAV kolizinės teisės lyginamoji analizė

Doktorantas Herkus Gabartas

Lietuvos teisės universitetas

SANTRAUKA

Straipsnyje detaliai analizuojamos naujojo Lietuvos Respublikos civilinio kodekso nuostatos, reguliuojančios teisės, taikytinos sutartinėms prievolėms, nustatymo tvarką (1.37 str.). Straipsnio tikslas – atskleisti Civiliniame kodekse įtvirtintų tarptautinės privatinės teisės normų prigimtį, taip pat remiantis lyginamąja analize išaiškinti šių normų turinį ir prasmę. Daugiausia dėmesio kreipiama į kolizinės teisės normas, nustatančias sutartinėms prievolėms taikytiną teisę, kai pačios sutarties šalys dėl tokios teisės nesusitaria. Remiantis įvairia pasaulyje žinomų teisės mokslininkų literatūra,

straipsnyje lyginamos naujajame Civiliniame kodekse įtvirtintos taisyklės su atitinkamomis JAV kolizinės teisės nuostatomis. Atsižvelgiant į Lietuvoje ir JAV egzistuojančias nevienodas teisės tradicijas bei jų priklausomumą skirtingoms teisinėms sistemoms, paaiškinami ir nagrinėjamoms teisės koncepcijoms būdingi panašumai bei skirtumai. Dauguma Civiliniame kodekse įtvirtintų kolizinės teisės normų buvo paimtos iš 1980 m. birželio 19 d. Romos konvencijos „Dėl sutartinėms prievolėms taikytinos teisės", todėl kartu yra analizuojamos ir atitinkamos šios konvencijos nuostatos. Tikimasi, jog tai padės geriau suvokti Civiliniame kodekse įtvirtintas taisykles, kurios yra naujos ir kartu gana sudėtingos.