

UDC 341.9.019

E. J. Streltsova

Candidate of Juridical Sciences, associate professor
Honored scientific worker of education of Ukraine
Odessa I. I. Mechnikov National University,
The Department of General Juridical Disciplines and International Law
Frantsuzskiy boulevard, 24/26, Odessa, 65058, Ukraine

UNIFICATION OF INTERNATIONAL PRIVATE LAW: TOPICAL ISSUES

The article examines the stages of development of unification of international private law and conceptual changes that have lately affected its forms and methods.

Key words: private international law, unification of law, unification by international treaties, regional unification, not normative unification.

Problem statement. The characteristic features of the modern world are being displayed through the strengthening integrity of the global economy, which in many respects is possible due to the development of economic relations between states, trade liberalization and the creation of modern communication and information systems, global technical standards and regulations. The intensification of the process of international economic integration in the context of globalization, the expansion of migration, and other processes have objectively led to the development of the unification of international private law, which aims to provide uniform regulation of various institutions: the international sale of goods, banking, international road, rail, air and sea transport. In addition to these areas there have recently emerged new areas of legal relations, which had not previously been subjected to unification, in particular: insolvency; e-commerce; transparency and openness of the activity of legal entities operating in the territory of offshore zones; new types of contractual obligations; torts; certain institutions of family law (such as «international» surrogate motherhood), etc. Issues related to the unification of private international law in the framework of the existing integration organizations (European Union) have also increasingly attracted the scholarly interest.

Analysis of recent research and publications. A number of domestic and foreign researches in the field of private international law explore problematic issues of unification of law as a whole, its individual forms, techniques, methods, fields, and so on. Among such scholars are: Anufriyeva L. P., Bachin S. V., Basedow J., Bonell M. J., Vilkova N. G., Dovgert A. S., Komarov A. S., Kisil V. I., Lunts L. A., Makovskiy A. L., Merezhko A. A., Neshatayeva T. N., Rubanov A. A., Tetley W., Twining W., and many others.

In the last decade in Ukraine there have been done a series of research in the field and defended dissertations: «Unification of Norms of the IPL in the Frames of UNIDROIT» (by L. G. Varsholomidze), «Unification of Legal

Regulation of Conditions of the International Commercial Contracts in the IPL» (by E. I. Porfirieva), «Unification of the IPL Rules in the Frames of the Hague Conference» (by V. V. Popko), «Unification of IPL in the European Union» (by O. V. Rudenko), etc.

Paper purpose is to identify the current trends in the unification of international private law and the problematic issues accompanying this process.

Paper main body. As examination of the problems of unification of law shows, a number of authors devote their research to unification of material and conflict law rules through international treaties, as one of the most historically and traditionally sought early forms of legal unification [1, p. 126 p.; 2, p. 254; 3, p. 92; 4, p. 382]. The effectiveness of this form, along with the certainty of the contents of norms, the stability of regulation of appropriate relations, is evidenced by the fact that the entry into force of a treaty, as a prerequisite for this form of unification, its performance and the actual implementation of its rules is maintained by the power of the State party.

Development of the unification of private law by international conventions, on a global scale, has passed certain stages. The first phase took its start in the second half of the 19th century, when there was felt the necessity for the unified legal regulation of intellectual property. In this area the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886) became the «first signs». Then maritime conventions took over: the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924), the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (1910), the Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels (1910) and others.

The second stage of the unification through international treaty began after the Second World War and was also accompanied by a successful initiative: in the second half of the 20th century there was adopted a number of international conventions in the field of transport (e.g., the UN Convention on the Carriage of Goods by Sea (1978), the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999), and others.); in the field of trade and economic relations (Vienna Convention on Contracts for the International Sale of Goods (1980), the Ottawa Convention on International Financial Leasing (1988), etc.). However, it should be noted that despite the high hopes that were pinned on the international conventions, unfortunately, not all of them have proved to be effective, since never entered into force for various reasons, for example, because of the insufficient number of accessions. There are also other reasons of legal, political and economic character deserving a separate study.

Thus, one of the main problems in the sphere of the unification of law through international treaties deals with the situation that some conventions never enter into force, which, in its turn, represents an obstacle on the way to the desired result of the unification. Another problem in this area concerns the need to revise, modify, and supplement existing conventions due to evolution of relations subject to their action. Practice shows that in some cases

the lack of effective mechanisms for such modifications prevents this process, and, as an outcome, there emerged more than one international treaty acting in a given sphere and governing the same relations. The Montreal Convention of 1999 and the Warsaw Convention of 1929 — in the field of air transport; Hague, Hague-Visby Rules and the Hamburg Rules — in the field of maritime transport of goods; and others are examples of this. However, certain international conventions, the mentioned above conventions on intellectual property, may perform as a good example, even as «model» international instruments. Adopted almost at the end of the 19th century, they are still viable, adapted to regulate sufficiently mobile and fragile areas due to very difficult, but reasonable system of administration of the conventions with special bodies, bases, conditions and timing of the review [5].

The above-mentioned obstacles to international universal unification over the last 50–60 years have led to the transformation of the concepts of international unification of private law: today there is felt more foreseeable need for new methods and forms of unification, which may be explained by qualitative and quantitative changes in the nature of international trade, the lack of legal instruments ensuring the balance of interests of participants of the international commercial turnover.

In connection with this the third stage of unification, the so-called informal unification, appeared, which has gradually started its way since the end of the 20th — beginning of the 21st century and continues to evolve nowadays. It is generated by the development of institutions of contract law on the background of the complexity of social relations, trade, and contractual relations and is not focused on the development of international conventions. The growing development of the principles of international private law, as the party autonomy, freedom of contract allows business entities to develop their own contractual standard forms and structure for the exchange of goods, financial markets, namely, model contracts, general conditions, a set of uniform rules, etc. These capabilities give rise to a number of legal issues related, in particular, to the clarification of the legal nature of such structures from the perspective of treating them as a source of law. As it is known, within each national legal system there are different established approaches to the question of what the source of law is, therefore, in respect of these documents there are different views. Not all state courts acknowledge them as sources of law, and in some cases use them as complementary institutes. However, in practice, they have a very important practical significance and have a regulating effect on certain relationships [6, p. 50–51].

In this perspective, the doctrine of *Lex Mercatoria* (now called by researchers «the new *Lex Mercatoria*») that has been known since the Middle Ages is worth mentioning. As it is accepted, the essence of this doctrine is to create an autonomous system of regulation of international trade on the basis of established customs and practices [7, p. 245]. In favor of this doctrine evidences also the fact that the method of regulation by conflict of law rules does not fully satisfy the needs of international trade. As a result of application of the conflict of law rules international trade transactions are governed by the

national legislation that does not sufficiently take into account the specificity of international trade, is intended to rule internal relations, and reflects the traditions, the history and characteristics of the legal machinery of a particular state. Thus, the contradiction between the international nature of a transaction and the national character of governing rules has facilitated the development of the new *Lex Mercatoria* [9]. Despite the attractiveness of the concept of this doctrine, it also has its opponents who criticize it, in particular, for the uncertainty of its sources. In order to find a compromise in this matter the international community through the UNIDROIT initiated the development of a set of standard rules, which had to become an example of general principles. This work resulted in the adoption in 1994 of the Principles of International Commercial Contracts of the UNIDROIT, which is still in force (the third edition of 2010), the fact that indicates the relevance of this document. The aim of working out this document was to create rules that would apply in appropriate cases as the rule of law, that is, that by choosing the UNIDROIT Principles as the applicable law, they would be similar to the parties' choice of any national law or to any national law applicable by virtue of the conflict of law rule [9, p. 185].

International commercial arbitration institutions in their practice have widely applied these principles. It should be emphasized as well, that in general, the current stage of development of relations, which are the subject of international private law, is being characterized by an increase in demand of the mechanism of non-state international arbitration, because a dispute resolution procedure creates the necessary conditions for the application of contractual structures, which the parties develop for the regulation of their relations, and provides adequate application of uniform rules of the *Lex Mercatoria*. In this regard, the prospect for unification of law on alternative ways of settling commercial disputes — cross-border conciliation (conciliation) procedures is becoming more and more topical. In this context, a special role belongs to the UNCITRAL Model Law on International Commercial Conciliation and Mediation Rules [10; 11], as well as to regional harmonization of legislation on mediation in civil and commercial matters within the European Union that can be applied as a basis for the development of national legislation on mediation. Although today in Ukraine a system of alternative dispute resolution is yet to be formed, it is possible to assert the need for the introduction of mediation in the domestic system of law. First of all, because it is the most acceptable and the preferred method of dispute resolution, and, in addition, there is a positive experience of its use in many countries [12, p. 248]. The Draft Law of Ukraine «On Mediation» (March 2015), however, did not consider the mentioned regulations as guiding principles. This fact seems to create additional obstacles to the unification in this area, and hence — on the way of rapprochement and cooperation between national legal systems.

Another feature of the present stage of unification of international private law on a global scale — the regional unification of private law — is seen as a more effective mechanism of regulation of relations in comparison with universal unification by international treaties. This refers to the unification

within the EU, the CIS, the Eurasian Economic Community, Latin America, Africa, etc. [13, p. 92]. The new impetus to the unification of private international law in interstate integration associations was given by the development and complexity of regional economic integration.

For example, the EU has been experiencing the process of harmonization and unification of contract law. This phenomenon has developed in stages: in 1998, there was set up a team to research the European Civil Code; at the end of the 1990s, the Lando Commission developed the Principles of European Contract Law; in 2008 series of documents referred to as Principles and directions for the regulation of certain types of contractual and non-contractual relationship (principles of European Law on commercial agency, franchise, distribution and others) were published; in 2009 the Draft Common Frame of References (hereinafter — DCFR) was prepared, which represents a codification of European contract law; in 2010 there came out the Green book on European contract law, which offered for further discussion seven versions of the DCFR; etc. Thus, the EU has developed a unified system of regulation of contractual relations, which include, in addition to the relevant EU regulations, principles and general scheme of a recommendation nature [14].

One of the directions of the regional unification of law, which is broadly defined as a process of harmonious interaction of legal systems, was manifested by the decisions of the courts of integration associations in Latin America, for example, the Court of Justice of the Andean Community, Mercosur Permanent Court, the Caribbean Court of Justice, and the Central American Court. The main objective of the establishment and operation of such courts is associated with ensuring a uniform formation, interpretation and application of the uniform law of the integration association [15].

The diffusion of law represents one of the new trends in contemporary studies of international private law. The diffusion theory is considered as a natural penetration of foreign legal norms in force into national law. According to scholars, one of the benefits of the diffusion as a way of unification of law is that it is carried out regardless the mutual agreement between the subjects of international law and can be regarded as an alternative to the international unification of law [16, p. 505]. Examination of the diffusion of law is relevant in view of the fact that the borrowing successfully formulated legal norms and a principle is becoming more prevalent. Due to the transition of many countries to the market system, most often, in the depths of the economic relations there are found the same type of contractual arrangements. Along with the diffusion of law such new methods of unification as transplantation of law and export of law were introduced to the science of international private law. These methods are considered as different types of harmonious interaction between national legal norms that is to unify the legal regulation of the relations between the subjects of the civil law of different countries. Researchers believe this theory is mostly fitted for adaptation of a foreign legal system to a given national circumstances [16, p. 506].

It is broadly admitted, that the process of unification of law is initiated mainly by governmental or non-governmental organizations, in some cas-

es — by individuals. One of the leading roles in this matter is played by the International Chamber of Commerce (hereinafter — the ICC), UNCITRAL, UNIDROIT, etc. In particular, the International Court of Arbitration of the ICC has made a significant contribution to the resolution of the conflict of law issues, in particular, it is the only court that does not specify the law to be applied based on the direct method, and provides greater powers to the arbitrators to decide the dispute based on the legal rule, which they deem applicable [17]. The activity of the ICC is aimed at addressing the most pressing issues, including the development of uniform rules and standards of business conduct, and dealing with problems related to the liberalization of international trade. Among the documents, developed by the ICC, are: the Incoterms (last edition of 2010), documents providing payments between the participants of contracts (Unified Rules on Letter of Credits, etc.), standard forms of international contracts. Within the UNIDROIT there were designed, in particular, the mentioned above Principles of international commercial contracts, as well as were established a number of uniform substantive rules governing the relations of representation in international commercial transactions, and others.

Conclusions. An overview of contemporary issues of unification of international private law allows to conclude that, firstly, unification, in its various forms, methods and instruments, has been and remains a regular trend of international private law; secondly, the factors of political and economic nature affect considerably the dynamics of various forms of unification; thirdly, the further development of the principles of private law, as the party autonomy, freedom of contract; changes in the number and quality of relations between subjects of different national legal systems and integration associations have led to a rethinking of the traditional forms of unification and the development of alternative, non-normative, unification, as well as new methods and techniques, such as diffusion of law, export of law, transplantation of law, etc.; fourthly, for achieving the primary objectives of the unification there should be used, depending on the particular circumstances, all available unification tools, and where it is necessary — in conjunction of its different forms, methods, etc.

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Є. Д. Стрельцова

Одеський національний університет імені І. І. Мечникова,
кафедра загальноправових дисциплін та міжнародного права
Французький бульвар, 24/26, Одеса, 65058, Україна

УНІФІКАЦІЯ МІЖНАРОДНОГО ПРИВАТНОГО ПРАВА: АКТУАЛЬНІ ПИТАННЯ

Резюме

Загальний огляд сучасних проблем уніфікації міжнародного приватного права дозволяє дійти висновку про те, що уніфікація, у різних її проявах, способах і формах, була і залишається закономірною тенденцією розвитку міжнародного приватного права. Багато в чому чинники політичного і економічного характеру впливають на динаміку тих чи інших форм уніфікації. Розвиток і зміцнення таких принципів приватного права, як автономія волі сторін, свобода договору, а також зміна кількості та якості різного роду правовідносин між суб'єктами різнонаціональних правових систем, інтеграційних об'єднань (наприклад, ЄС) призвели до переосмислення традиційних форм уніфікації та вироблення альтернативної, ненормативної, уніфікації, а також нових способів і прийомів, таких як: дифузія права, експорт права, трансплантація норм права тощо. Для досягнення цілей уніфікації доцільно використовувати, залежно від конкретних обставин, весь наявний «арсенал» уніфікації, а в необхідних випадках — різні її форми, способи тощо можливо використовувати у поєднанні.

Ключові слова: міжнародне приватне право, уніфікація права, міжнародно-договірна уніфікація, регіональна уніфікація, ненормативна уніфікація.

Е. Д. Стрельцова

Одесский национальный университет имени И. И. Мечникова,
кафедра общеправовых дисциплин и международного права
Французский бульвар, 24/26, Одесса, 65058, Украина

УНИФИКАЦИЯ МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА: АКТУАЛЬНЫЕ ВОПРОСЫ

Резюме

Общий обзор современных проблем унификации международного частного права позволяет прийти к заключению, что унификация, в разных ее проявлениях, способах и формах, была и остается закономерной тенденцией развития международного частного права. Во многом факторы политического и экономического характера влияют на динамику тех или иных форм унификации. Развитие и укрепление таких принципов частного права, как автономия воли сторон, свобода договора, а также изменение количества и качества разного рода правоотношений между субъектами разннонациональных правовых систем, интеграционных объединений (например, ЕС) привели к переосмыслению традиционных форм унификации и выработке альтернативной, ненормативной, унификации, а также новых способов и приемов, таких как: диффузия права, экспорт права, трансплантация норм права и т. д. Для достижения целей унификации целесообразно использовать, в зависимости от конкретных обстоятельств, весь имеющийся «арсенал» унификации, а в необходимых случаях — использовать сочетание разных ее форм, способов и т. д.

Ключевые слова: международное частное право, унификация права, международно-договорная унификация, региональная унификация, ненормативная унификация.