

МІЖНАРОДНЕ ПРАВО

УДК 347.113

DOI: <https://doi.org/10.18524/2411-2054.2021.41.225615>

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FEATURES OF CONFLICT-OF-LAWS REGULATION OF INTERNATIONAL WORK RELATIONS

The article provides a comprehensive legal study of the basic principles of conflict-of-laws and legal regulation of work, complicated by a foreign element. It is determined that work relations complicated by a foreign element include: work of local citizens with foreign employers outside their country; foreign business trips of citizens to work abroad; work at enterprises owned by foreign entrepreneurs on the territory of their state; work of foreigners in the host state. It is noted that conflict-of-laws issues in the field of work relations complicated by a foreign element arise due to the specifics of the national legislation of each of the countries and the inconsistency of private international law in this area. The article analyzes the peculiarities of work of foreigners in Austria, Brazil, Canada, China, Romania, USA, Tunisia, Hungary, Ukraine, France, Germany, Czech Republic, Sweden, Switzerland, Japan. Based on the analysis it is concluded that the working conditions of emigrants are regulated by Public Law Regulations, which are mandatory and less humane in their content than the general conditions established by the general labor legislation and collective agreements. Foreign workers are directly dependent on entrepreneurs due to threats of expulsion, language difficulties, lack of professional training and other reasons. It is characterized by free overtime work, non-provision of vacations and sick leave. The article describes the conflict-of-laws bindings, which regulate work relations complicated by a foreign element, namely: the law of the autonomous will of the parties, the law of the place of performing of work, the law of the location of the employer, the law of the place of conclusion of an employment contract, the principle of the employer's personal law, the law of citizenship (domicile), the law of the flag, the principle of the closest connection. The features of the operation of conflict-of-laws bindings regulating work relations complicated by a foreign element in countries of different legal families are considered.

Keywords: work relations, work of foreigners, conflict-of-laws binding, working conditions, employment contract.

Problem statement. Today, in the conditions of the development of market relations, the continuous process of economic globalization, the process of legal regulation of work is very important, that is, the regulation of working conditions with international legal acts in the work sphere. International work law aims to protect the rights of employees, establish a specific level of their guarantees in labor relations and social security and improve the working conditions of workers.

Analysis of recent research and publications. The issue of features of conflict of laws regulation of international work relations was explored by Ukrainian and foreign scientists: V.M. Gaivoronsky, V.P. Zhushman, S.G. Kuzmenko, D. Lasok, P. Stone, A.J. Mayss, G.S. Phedinyak, L.S. Phedinyak.

Purpose of the article is to study the features of conflict-of-laws regulation of international work relations, as well as to develop recommendations on the most optimal legislative regulation of such processes in modern conditions.

Research result. The sphere of private international law cannot be imagined without conflicts. They are caused by the fact that in different states the legislative regulation of civil,

family, labor and other relations does not coincide. Conflict-of-laws rules, which mainly solve the conflict-of-laws problem, are the central institution of this legal area.

Conflict-of-laws rules are the most important regulators of work relations and they have a structure similar to other conflict-of-laws rules: breadth and binding. For the legal regulation of work relations, the National Law of different countries contains relevant legal norms in constitutions, codes, laws, employment contracts, etc. Thus, the work law of continental European countries is characterized by a significant share of legislative acts and collective agreements, which are the main sources of work law [1, p. 35]. Legislative regulation divides into two main categories of norms and institutions of international private law: general provisions of this sphere and conflict-of-laws prescriptions.

First, the provisions governing general issues of international private law determine the procedure and conditions for the extraterritorial operation of a national law and the application of foreign law on the territory of a particular state (or the execution of a court decision).

Secondly, all conflict-of-laws rules, including those one of work law, are subject to general rules governing such issues as references, the need for legal qualification and prevention of circumvention of the law.

These issues inevitably arise in the conditions of the coexistence and separation of legal systems of different states, each of which has its own specifics, and therefore they require appropriate regulatory regulation. Conflict-of-laws rules form the central part of the legislation on international private law issues and «substantive» issues do not mean prescriptions, which directly regulate the relations of the parties, but rather the material conditions for the application of conflict-of-laws rules. The legal problems of the conflict-of-laws rule in work relations also concern other issues, which are interrelated with these problems. Such urgent and special problems include:

- possibility of regulating the employment contract on the principle of autonomous will;
- state regulation of work relations and obligations of foreigners and stateless persons;
- the possibility of restricting the labor rights of citizens under the norms of bilateral international treaties.

Moreover, defending the possibility of using conflict-of-laws principles in the sphere of regulating work relations complicated by a foreign element, the legislative initiative consists in the possibility of consolidating the main principle of the international private law – the autonomy will of the parties. In this regard, approach to the relevant article containing a norm on the possibility of the parties to the contract, which regulates work relations complicated by a foreign element is used. It is important to choose the law, which will be applied when a contract is signed or even for regulating international work relations. At the same time, there is also a «protective» clause that the parties' choice of law cannot lead to the deprivation of the employee's rights, which are granted by the mandatory norms of the law of the country of residence of the employee, as well as by the mandatory norms of the law of the country where the work is carried out [2, p. 69].

Some states have a special legislation regulating work relations in joint enterprises, as well as in free economic zones. The relevant rules apply not only to foreign personnel of enterprises, but also to local citizens. Examples include the Act of the people's Republic of Korea «On joint enterprises with Chinese and foreign capital» 1979 and the Regulation «On the application of this Act» 1983.

So, in the French labor code there is a special section called «Foreign work and protection of the interests of the national labor power». The norms of this section relate to the access of foreigners to work in France. According to Article 341–2, in order to enter France for the purpose of performing hired work, a foreigner, in addition to the documents and visas required in accordance with the current international treaties and rules, must submit an employment contract signed by the administrative authorities or a work permit and medical certificate.

In the United States, Austria, Sweden and a number of other countries, annual quotas are set for the entry of foreigners, including for people who specifically come to work in the relevant

country. In this regard, the signing of intergovernmental agreements on the provision of certain quotas to citizens becomes of some importance.

The working conditions of foreign workers are largely determined by Public Law Regulations, which are binding and less humane in their content than the general conditions established by the general labor legislation and collective agreements. In practice, due to the dependence of immigrants on entrepreneurs, the threat of expulsion, language difficulties, lack of professional training and other reasons, their working conditions are even worse (longer working weeks than local workers, additional works, non-granting vacations, etc.) [3].

There are certain conflict-of-laws principles in the field of work relations. It should be noted that private international work law is characterized by the division of conflict-of-laws norms into basic and subsidiary (additional) ones. The main conflict-of-laws principles include the place of performing of work, the place of signing of an employment contract, the common location of the parties and common citizenship. Additional ones regulate atypical work relations – performing work during business trips, for example. In this case, there is a reference to the law of the state to which the employee was sent to a business trip, on the territory of which the work was last performed. Conflict-of-laws bindings are typical for the regulation of work relations in transport: the law of the flag; the registration of the vessel; the personal law of the carrier [4, p. 193].

The law of the autonomous will of the parties (*lex voluntatis*) means that the parties of an employment contract can independently choose the legal order to which they will subordinate their employment relations. Today, the legislation of most countries (especially those ones, which consider an employment contract as a component of civil law) allows the application of autonomous will in labor relations in the field of private international law. Moreover, this principle is recognized by doctrine and practice in certain countries as fundamental, and the legislation of such countries as Great Britain, Italy, Canada, Germany is not limited the application of the principle of autonomous will for work relations in this area with any specific legal order [5, p. 224]. On the other hand, due to the establishment of additional mandatory norms, other restrictions adopted by countries at the legislative level and taking into account the specifics of work relations with a «foreign element», the application of the principle of autonomous will of the parties to an employment contract is rarely applied (Austria, Liechtenstein, Switzerland).

The main limitation of the autonomous will in employment contracts and Employment Relations – the choice of the right of the parties should not lead to the fact that the employee is deprived of the protection, which is provided by the mandatory provisions of the legislation, which is current in accordance with the conflict-of-laws norms of the country of the court. The legislation of many countries does not provide for the autonomous will as a principle to the regulation of work relations (Ukraine, Tunisia).

In the vast majority of jurisdictions, the legislator has imposed restrictions on free choice of law under employment contracts:

- the choice of law is taken into account if it is made with direct way;
- the choice of law is not taken into account if it is made to the detriment of the employee (article 48.3 of the Liechtenstein Act «On Private International Law»);
- the choice of law is taken into account only to the extent if it does not affect the mandatory norms of the country's law:
 - 1) places of usual work performance (Germany, Romania, Canada);
 - 2) the state in which the employer has his usual place of residence (Germany, Liechtenstein, Canada);
 - 3) location of the company (Romania);
 - 4) states with which an employment contract or employment relationship reveals closer (Germany, Romania);
- the choice of law is limited by the legal order expressly established by the legislator: «The parties may subordinate the employment contract to the law of the country of the employee's usual place of residence or the law of the country of business acquisition, place of residence or ordinary stay of the employer» (article 121.3 of the Swiss Act «On Private International Law»).

According to the Japan Act «On Private International Law» (Article 11), even if the parties of the employment contract have chosen the applicable law, but the employee informs the employer that he intends to follow the norms of the law most closely related to the employment contract, then this law is subject to application. It is assumed that the employment contract is most closely related to the law of the place where labor activity should be carried out under the contract [6].

The law of the place of work (*lex loci laboris*) is an important conflict – of-laws reference, which is often called the main one; at the legislative level, it is fixed as the main principle in Austria, Germany, Hungary, Brazil, Canada, Liechtenstein, Tunisia, the Czech Republic, Switzerland and other countries. According to this principle, the law of the country where the work activity is directly carried out applies to foreigners. Most often, it is applied if the parties have not made a choice of law.

A special feature of this law is that alternative bindings cannot be used if real estate objects are being built. In this case, only the law of the place of performing of work will be relevant.

The theoretical justification for the application of such a binding is: 1) this conflict-of-laws binding concerns most relations regulated by work law, in particular individual and collective relations; 2) work performs its economic and other functions mainly in the country where it is carried out; 3) usually the employee is integrated into the work collective at the place of performing of work and the appeal to the law of this place allows, on the one hand, to create equal working conditions for all employees of the same enterprise, and on the other hand – to provide an integral and consistent system of legal regulation, taking into account the operation of mandatory labor rules in this place; 4) the place of work is often also a place of judicial review of conflicts; 5) the parties of the employment contract are better acquainted with the current law of the place of work; 6) for the application of this binding, it also matters that the employment contract is executed in this place [5, p. 231].

It is a fairly common practice to choose the legal order according to the law of the employer's location. According to this conflict-of-laws principle, if, according to an employment contract, work is to be performed on the territory of several states, then the law of the employer's location, place of residence or place of commercial activity should be applied to the employment relationship. The employer's personal law applies in the form of the employer's location or citizenship. For example, according to Hungarian law, if employees of a Hungarian employer perform work abroad during a business trip or on longer foreign service, then Hungarian law should be applied to the legal relationship. The principle of the employer's personal law is mostly additional [7, p. 337].

The law of the place of signing of an employment contract – rarely finds application, because it is not always unambiguously possible to find out such place. In addition, the material work legislation of the place of signing of the contract may be different from the place of performing of work.

The principle of the employer's personal law is mostly complementary and can be applied in cases where work is performed on the territories of different states (as provided for by the Hungarian Act «On Private International Law», 1979).

The law of common citizenship, domicile or location of the parties – often expresses a closer relationship with the legal relationship than others. Therefore, they are inherent in the legislation and practice of many legal systems as alternatives to other bindings. The law of citizenship (domicile) applies to subjects of work relations, in particular to determine the legal capacity of individuals, and for legal entities – the law of the place of signing of the contract or the law of incorporation. These bindings also include references to the legislation on restrictions on work capacity (for example, the signing of a written contract with a minor; the need for written or oral consent of parents or persons replacing them to sign an employment contract for a minor, etc.) [7, p. 349].

The conflict-of-laws principle «law of the flag» (*lex flagi*) is a transformation of the binding «personal (national) law» in relation to aircraft and water vessels. It means that the employee's employment relations are regulated by the law of the country where the vehicle in which he performs official duties is registered [7, p. 352].

The «principle of the closest communication» (Proper Law) plays an important role in regulating work relations with a foreign element in private international law. It is applied by countries if it is not possible to find the charter of work relations with the help of such conflict-of-laws bindings. This norm is applied in exceptional cases, when it follows from the totality of circumstances that an employment contract or employment relationship has a significantly closer connection with another state and, as a result, clearly prevails over the principle of basic binding [7, p. 360].

Conclusions and prospects. So, based on the conflict-of-laws norms given above and others, the status of international work relations is established. It is defined as the totality of all work relations: the emergence, implementation and termination. The lack of a developed system of norms in the field of conflict-of-law regulation of international work relations at the national and legal level is characteristic of a significant number of states. In such circumstances, gaps can be filled both through the provisions of international treaties and through the development of appropriate decisions in the process of law enforcement of national jurisdictional bodies (courts).

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Стаття надійшла: 04. 02.2021 р.

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ОСОБЛИВОСТІ КОЛІЗІЙНОГО РЕГУЛЮВАННЯ МІЖНАРОДНИХ ТРУДОВИХ ВІДНОСИН

Резюме

У статті проведено комплексне правове дослідження основних засад колізійно-правового регулювання праці, ускладненого іноземним елементом. Визначено, що до трудових відносин, ускладнених іноземним елементом відносяться: праця місцевих громадян у іноземних роботодавців за межами своєї держави; відрядження громадян для роботи за кордоном; робота на підприємствах, що належать іноземним підприємцям на території своєї держави; праця іноземців у державі перебування. Зазначено, що колі-

зійні питання у сфері трудових відносин, ускладнених іноземним елементом виникають через специфіку національного законодавства кожної з країн та неузгодженість міжнародного приватного права в даній сфері. Проаналізовано особливості праці іноземців у Австрії, Бразилії, Канаді, КНР, Румунії, США, Тунісі, Угорщині, Україні, Франції, ФРН, Чехії, Швеції, Швейцарії, Японії. На підставі проведеного аналізу сформовано висновок, що умови праці емігрантів регулюються публічно-правовими приписами, які носять обов'язковий характер і за своїм змістом менш гуманні, ніж загальні умови, встановлені загальним трудовим законодавством і колективними договорами. Іноземні працівники напряму залежать від підприємців через загрози висилки, мовні труднощі, відсутність професійного навчання та інші причини. Характерним є безоплатні надурочні роботи, ненадання відпусток та лікарняних. Надано характеристику колізійним прив'язкам, які регулюють трудові відносини, ускладнені іноземним елементом, а саме: закон автономної волі сторін, закон місця виконання роботи, закон місця знаходження роботодавця, закон місця укладення трудового контракту, принцип особистого закону наймача, закон громадянства (доміцилію), закон прапора, принцип найбільш тісного зв'язку. Розглянуто особливості дій колізійних прив'язок, які регулюють трудові відносини, ускладнені іноземним елементом у країнах різних правових сімей.

Ключові слова: трудові відносини, праця іноземців, колізійна прив'язка, умови праці, трудовий договір.

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ОСОБЕННОСТИ КОЛЛИЗИОННОГО РЕГУЛИРОВАНИЯ МЕЖДУНАРОДНЫХ ТРУДОВЫХ ОТНОШЕНИЙ

Резюме

В статье проведено комплексное правовое исследование основных принципов коллизионно-правового регулирования труда, с иностранным элементом. Определено, что к трудовым отношениям, с иностранным элементом относятся: труд местных граждан на иностранных работодателей за пределами своего государства; командировки граждан для за рубежом; работа на предприятиях, принадлежащих иностранным предпринимателям на территории своего государства; труд иностранцев в государстве пребывания. Отмечено, что коллизионные вопросы в сфере трудовых отношений, с иностранным элементом возникают из-за специфики национального законодательства каждой из стран и несогласованности международного частного права в данной сфере. Проанализированы особенности труда иностранцев в Австрии, Бразилии, Канаде, КНР, Румынии, США, Тунисе, Венгрии, Украине, Франции, ФРГ, Чехии, Швеции, Швейцарии, Японии. На основании проведенного анализа сформирован вывод, что условия труда эмигрантов регулируются публично-правовыми предписаниями, которые носят обязательный характер и по своему содержанию менее гуманны, чем общие условия, установленные общим трудовым законодательством и коллективными договорами. Иностранные работники напрямую зависят от предпринимателей из-за угроз высылки, языковых трудностей, отсутствия профессионального обучения и других причин. Характерным являются безвозмездные сверхурочные работы, неоплачиваемый отпуск и больничные. Дана характеристика коллизионным привязкам, регулирующим трудовые отношения, с иностранным элементом, а именно: закон автономной воли сторон, закон места выполнения работы, закон места нахождения работодателя, закон места заключения трудового контракта, принцип личного закона нанимателя, закон гражданства (домицилия), закон флага, принцип наиболее тесной связи. Рассмотрены особенности действия коллизионных привязок, регулирующих трудовые отношения, с иностранным элементом в странах разных правовых семей.

Ключевые слова: трудовые отношения, труд иностранцев, коллизионная привязка, условия труда, трудовой договор.