# INTERNATIONAL UNIVERSAL UNIFICATION OF THE CONFLICT-OF-LAW REGULATION OF CROSS-BORDER UNFAIR COMPETITION

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*This article puts forward that there are diverse and sound grounds preventing the universal treaty regulating comprehensively the issues of legal protection from cross-border unfair competition by substantive norms from being worked out in the near future. The development of the universal unification of the conflict-of-law rules on the law applicable to the private relations arising out of unfair competition as a possible alternative is also proposed and substantiated. The authors give some possible reasons for the absence of such a treaty and demonstrate the results that have been achieved so far in this field. The concept of the Draft of the relevant Convention is drawn up. The conclusion is made that the latter needs to be centered on the lex mercatus as a single connecting factor (due to its advantages of predictability, account of the interests of the state where the effected market is situated etc.). Furthermore, the Convention should not provide for party autonomy, should set forth the detailed rules for the legal characterization of the basic terms of the Convention, including the scope of the applicable law as well as the public policy clause and the norms on the overriding mandatory provisions.*

*Keywords: applicable law; lex mercatus; obligations arising out of unfair competition; unfair competition; unification.*

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## Table of Contents

**Introduction**
**1. History of the Development of the Convention on the Law Applicable to the Private Relations Arising Out of Unfair Competition**
**2. Prospects for the Unification of the Conflict-of-Law Regulation of Cross-Border Unfair Competition, at the International Universal Level**
***2.1. The Reasons for the Absence of International Universal Unification***
***2.2. Goals of International Universal Unification***
***2.3. The Concept of the Draft Convention on the Law Applicable to the Private Relations Arising Out of Unfair Competition***
**Conclusion**

## Introduction

The development of foreign economic activity and economic processes under the influence of integration factors lead to the cross-border character of competitive relations between economic entities. In many cases these entities resort to the use of unfair methods and means for maximizing their profits and driving out competitors from the market which often brings about negative consequences (affecting both bona fide competitors, consumers and society as a whole) in the territories of different states. In this regard, effective protection of private and public interests is possible only through international legal cooperation in this field.

At present, there are neither universal nor regional complex substantive legal unification of provisions for protection from unfair competition.[1] In our view, this is explained by the following reasons.

Firstly, in the conditions of diverse and multidimensional manifestations of competitive behavior of economic entities, with constantly changing economic conditions, technological progress, tougher competition and many other factors,[2] it is practically impossible to define clearly absolute (normative) criteria for assessing competitive actions in the relevant international legal instrument.

Secondly, unification is possible only if there are appropriate grounds for it. At the same time, nowadays significant (sometimes conceptual) differences in the national legal regulation in this area may be found. National legislation regulates the issues

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[1] Tim W. Dornis, *Competition, Unfair* in *Encyclopedia of Private International Law* 433, 433 (J. Basedow et al. (eds.), Cheltenham: Edward Elgar Publishing, 2017).

[2] *Маркварт Э.* Сравнительный анализ регулирования недобросовестной конкуренции в ФРГ, Европейском Союзе и Российской Федерации: Дис. … канд. юрид. наук [Emile Markvart, *The Comparative Analysis of Regulation of an Unfair Competition in Legislations of Germany, the European Union and the Russian Federation: Thesis for a Candidate Degree in Law Sciences*] 19 (Moscow, 1998).

concerning the grounds for liability arising out of unfair competition, the remedies, forms and subjects of protection from it, etc. in a different way.

For example, states demonstrate diverse approaches to the legal definition of unfair competition, in particular concerning:

1) The requirements that may be violated to qualify the relevant action (inaction) as unfair competition: "legislation";[3] "the rules of ethics or the bona fide principles";[4] "the legislation of the Russian Federation, business traditions, requirements of respectability, rationality and equity,"[5] etc.;

2) The activities, in which unfair competition is possible: "entrepreneurial activity";[6] "commercial, industrial, craft or liberal activity";[7]

3) The necessity of some negative consequences (real and/or potential) of the relevant actions (or inaction) to be qualified as unfair competition (for example, the creation or possibility of creation of a hindrance, restriction or distortion of competition;[8] actual or possible causing of losses to other business entities (competitors) or damage to their goodwill[9]) or lack of such necessity.[10]

As we can see, each system of legal regulators of the market reflects well-established approaches to assessing competitive behavior. In one of the analytical documents of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), it is stated that:

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[3] Закон Азербайджанской Республики от 2 июня 1995 г. № 1049 «О недобросовестной конкуренции» [Law of the Azerbaijan Republic No. 1049 of 2 June 1995. On Unfair Competition], Art. 1, para. 3 (Apr. 22, 2019), available at http://base.spinform.ru/show_doc.fwx?rgn=2796.

[4] *See* Mustafa Yasan, *Consumers Protection Against General Terms in Banking Contracts as Unfair Competition: Practices According to Turkish Law*, 70 Collection of Papers Faculty of Law, Niš 785, 792 (2015).

[5] Федеральный закон от 26 июля 2006 г. № 135-ФЗ «О защите конкуренции» [Federal Law No. 135-FZ of 26 July 2006. On Protection of Competition], Art. 4(9) (Apr. 22, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_61763/baabe5b69a3c031bfb8d485891bf8077d6809a94/.

[6] Закон Республики Беларусь от 12 декабря 2013 г. № 24-З «О противодействии монополистической деятельности и развитии конкуренции» [Law of the Republic of Belarus No. 24-Z of 12 December 2013. On Counteraction to Monopolistic Activity and Promotion of Competition], Art. 1, para. 10 (Apr. 22, 2019), available at http://pravo.by/document/?guid=3871&p0=H11300094.

[7] Loi du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la directive 97/55/CE du Parlement Européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative, Art. 14 (Apr. 22, 2019), available at http://legilux.public.lu/eli/etat/leg/loi/2002/07/30/n3/jo.

[8] Latvian Competition Law of 2001, Art. 18(2) (Apr. 22, 2019), available at https://www.kp.gov.lv/en/normativie-akti/latvijas-konkurences-normativie-akti.

[9] Закон Республики Узбекистан от 6 января 2012 г. № ЗРУ-319 «О конкуренции» [Law of the Republic of Uzbekistan No. ZRU-319 of 6 January 2012. On Competition], Art. 4, para. 3 (Apr. 22, 2019), available at http://lex.uz/ru/docs/1931450.

[10] Estonian Competition Act of 2001, para. 50(1) (Apr. 22, 2019), available at https://www.riigiteataja.ee/en/eli/519012015013/consolide.

> The powerful forces that shape nations' competition and regulatory systems are often unique to particular nations…[11]

This is why it seems quite natural that in certain legal systems some actions on the market are qualified as fair (and, accordingly, legitimate and permissible), while in others – as unfair (illegitimate, unacceptable).[12]

In light of the above considerations, unification of the mentioned rules at this time seems unlikely to happen. In this regard, it is worth considering the possibility of using other mechanisms that increase the level of protection of individuals and the state as a whole from cross-border unfair competition, an example of which is the uniform conflict-of-law regulation in this area.

To this end, we find it necessary to consider the results achieved in the field thus far, through the identification of the reasons for the conditions that contribute to the lack of international universal unification of the rules on the law applicable to cross-border unfair competition, and then moving on to justifying the need for its development and to propose the concept of the Draft of the relevant Convention.

## 1. History of the Development of the Convention on the Law Applicable to the Private Relations Arising Out of Unfair Competition

The attempts to develop norms on the law applicable in this field have been undertaken repeatedly within the international scientific community. The experience of a number of authoritative international organizations, scientific institutions, and groups in this context (such as the International League against Unfair Competition, the Institute of International Law, the American Law Institute, the International Law Association of Korea and Japan, the European Max Planck Group on Conflict of Laws in Intellectual Property) are worth mentioning. Despite the recommendatory character of the adopted documents, the approaches laid down in many of them[13]

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[11] UNCTAD, The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy, TD/RBP/CONF.7/3 (2010) (Apr. 22, 2019), available at http://unctad.org/en/Docs/tdrbpconf7d3_en.pdf.

[12] *Белов А.П.* Недобросовестная конкуренция в международной торговле: Понятие. Правовая охрана // Право и экономика. 1999. № 1. С. 16 [Anatoly P. Belov, *Unfair Competition in International Trade: The Concept. Legal Protection*, 1 Law and Economy 15, 16 (1999)].

[13] *See* The Motion of International League Against Unfair Competition, adopted at the Congress of Nice on 30 April to 4 May 1967, 3 Monthly Review of the United International Bureaux for the Protection of Intellectual Property 79 (1968); Resolution of the Institute of International Law on the Conflict-of-laws Rules on Unfair Competition, adopted at session of Cambridge of 1983 (hereinafter the CLRUC) (Apr. 22, 2019), available at http://www.idi-iil.org/app/uploads/2017/06/1983_camb_01_en.pdf; Resolution of the International League of Competition Law on Transborder Advertising and Unfair Competition, adopted at Amsterdam Congress of October 1992 (Apr. 22, 2019), available at https://www.ivir.nl/publicaties/download/clarification.pdf; American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes of 2008

were considered during the development and improvement of national rules determining the law applicable to these relations.

According to the GEDIP Proposal for this Convention all the non-contractual obligations (including unfair competition) may be regulated by *lex voluntatis* (Art. 8). In the absence of choice of the applicable law, obligations arising out of unfair competition shall be regulated by *lex fermitatis*, which in Article 4 of the Proposal is presumed to be "the law of the state whose market is affected by unfair competition."[14] Nevertheless, in the early 2000s, the issues of the adoption of such a treaty at EU level were raised, although the developments of the GEDIP later formed the basis for the draft Regulation on the law applicable to non-contractual obligations, which resulted in the adoption of the Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[15]

However, the issue of international legal unification of the conflict-of-law regulation of private international legal relations arising out of unfair competition has never been an object of great interest for international intergovernmental organizations, the exception being the Hague Conference on Private International Law. The question of the appropriateness of the development of the universal Convention on the law applicable to cross-border unfair competition was raised exclusively within its framework.

In 1987 the Secretary of the Permanent Bureau of the aforementioned organization, A. Dyer, conducted research titled "Exploratory Study on the Law Applicable to Unfair Competition," wherein he spoke in favor of the development of such a Convention as it could "…help to provide predictability for business organizations…," "…give concrete and useful guidance to courts in many countries…,""…give the opportunity to review… the content of the Paris Convention's general formulation of a definition for unfair competition…," as well as "…lead to an appropriate specification for the conflicts rule concerning injunctions against conduct preparatory to the execution of acts of unfair competition."[16] This author believes that the relevant work had to be carried out

(Apr. 22, 2019), available at https://wipolex.wipo.int/en/legislation/details/7687; Principles of Private International Law on Intellectual Property Rights (Joint Proposal Drafted by Members of the Private International Law Association of Korea and Japan (Waseda University Global COE Project)) of 14 October 2010 (Apr. 22, 2019), available at http://www.win-cls.sakura.ne.jp/pdf/28/08.pdf; Principles on Conflict of Laws in Intellectual Property of 2011, prepared by the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) (Apr. 22, 2019), available at https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Final_Text_1_December_2011.pdf.

[14] GEDIP Proposal for a European Convention on the law applicable to non-contractual obligations (Apr. 22, 2019), available at https://www.gedip-egpil.eu/documents/gedip-documents-8pe.html.

[15] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40.

[16] Adam Dyer, *Exploratory Study on the Law Applicable to Unfair Competition*, Prel. Doc. No. 2 of the Permanent Bureau of the Hague Conference on Private International Law (1988), at 23.

within the Hague Conference on the Private International Law, since unfair competition claims were particularly characteristic of highly industrialized economies which had a significant market component. At the same time he did not rule out that contacts with the Secretariat of the WIPO could show the desirability or necessity of a wider opening of the topic to all Member States of that organization.[17] However, his research did not provide any specific proposals on the content of the Draft Convention.

In 2000 the Permanent Bureau of the Hague Conference on Private International Law issued "Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated." In this document the idea of the development of the Draft Convention was also supported based on the first and the second arguments put forward by A. Dyer. It was also pointed out that not only did the technical problems associated with the drafting of such a Convention appear to be well identified, but furthermore that the basic outline of possible solutions was relatively clearly discernible. At the same time it was noted that the Convention had to be grounded on a tridimensional or functional conception of unfair competition and seek to cover both the protection of competitors as well as consumers and the public in general. The authors of the Note pointed out the necessity to define the concept of unfair competition in as general and broad manner as possible. They argued that it had to be for the governing law (*lex causae*) to determine whether the behavior in question was in practice reprehensible or not.[18]

Obviously, in both studies the conclusion about the desirability or necessity of the development of the treaty on the law applicable to cross-border unfair competition was made. However, the Hague Conference on Private International Law has not taken any further practical steps in this direction so far.

## 2. Prospects for the Unification of the Conflict-of-Law Regulation of Cross-Border Unfair Competition, at the International Universal Level

### *2.1. The Reasons for the Absence of International Universal Unification*

In the course of this research several reasons for the lack of comprehensive international legal regulation in this area have been discovered.

1. *Absence of the legal institution of unfair competition in some countries.* The experience of international legal unification of private international law norms, including conflict-of-law ones, demonstrates that in most cases states are the parties of the relevant treaties if uniform conflict-of-law approaches are based on the legal institutions that are already known to their national legal systems. We believe that the reason for this is that many countries do not want their courts, or other competent

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[17] Dyer 1988, at 23.

[18] Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, Prel. Doc. No. 5 of the Permanent Bureau of the Hague Conference on Private International Law (2000) (Apr. 22, 2019), available at https://assets.hcch.net/upload/wop/gen_pd5e.pdf.

authorities, applying international legal instruments to face practical problems in the characterization of norms and legal concepts, which are neither inherent nor known to their legal systems.

Nevertheless, in the work of international organizations, there were many cases when the treaties extending their application to certain groups of countries with similar legal approaches, were joined by other states due to the fact that the relevant legal constructions unknown to them were widely spread in international commercial turnover. However, even in these cases foreign law enforcement practice demonstrated that in courts' characterization of the legal norms and the concepts of the treaty unknown to their national law, the law enforcement authorities often resorted to adapting such norms and concepts to adjacent legal institutions of the national law.[19]

Today, this approach is peculiar to the British legal system, since raising the question of choosing a competent law for the obligations arising out of unfair competition in English court is an extremely difficult task. Such concept as "unfair competition" is absent in the substantive law of Great Britain. Only certain unfair competition forms traditionally perceived by the continental legal system overlap with individual torts regulated in the commercial sphere of common law countries. For example, A. Robertson and A. Horton believe that there are three key torts in the United Kingdom law, which collectively reflect certain aspects of the continental concept of "unfair competition." In particular these are passing off, inducing breach of contract, and the spread of the malicious falsehood.[20] J. Davis also adds to these torts another offense, namely breach of confidence.[21]

Proceeding from the above, English jurisprudence for solving a conflict-of-law issue in the sphere of protection from unfair competition in each specific case correlates such forms of offenses as passing off, inducing to breach of contract, the spread of malicious falsehood, and breach of confidence with the "continental" unfair competition concept and the forms relating which claims have been filed in court.[22]

Such approaches often substantially distort the essence and main purpose of conflict-of-law regulation provided in the treaties or other unified acts, containing legal norms and concepts unknown to the country of the forum.

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[19] *Соколова Н.В.* Гаагская конвенция о праве, применимом к трастам, и их признании и ее влияние на концепцию траста в континентальной системе // Юрист. 2010. № 2. С. 95–101 [Natalya V. Sokolova, *The Hague Convention on the Law Applicable to Trusts and on Their Recognition and Its Impact on the Concept of Trust in Continental Countries*, 2 Lawyer 95 (2010)].

[20] Aidan Robertson & Audrey Horton, *Does the UK or the EC Need an Unfair Competition Law?*, 17 European Intellectual Property Review 568, 569 (1995).

[21] Jennifer Davis, *Why the United Kingdom Should Have a Law Against Misappropriation*, 69(3) Cambridge Law Journal 561, 561 (2010).

[22] *Ребриш Б.Ю.* Правове регулювання зобов'язань, що виникають внаслідок недобросовісної конкуренції, в міжнародному приватному праві: Дис. … канд. юрид. наук [Bogdan Yu. Rebrish, *Legal Regulation of Obligations Arising Out of Unfair Competition in Private International Law: Thesis for a Candidate Degree in Law Sciences*] 99–103 (Kharkiv, 2017).

2. *Lack of uniformity in conflict-of-law regulation in this area.*

Firstly, two main approaches to the issue may be discerned.

Thus, in the law of one group of states (Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, China, Tunisia, Uzbekistan, Ukraine, Japan, etc.) there are no special rules for the choice of the applicable law for the relations arising out of unfair competition.

On the contrary, the law of another group of countries (EU member states (except Denmark), Dominican Republic, Moldova, Russia, Turkey, Switzerland, etc.) does provide such rules.

Secondly, even within each of the approaches, legislation of various countries differs significantly in wording of scope and (or) connecting factor (factors) of the relevant conflict-of-law rules.

For example, Article 136(1) of the Swiss Act "On Private International Law" of 1987 stipulates that:

> Claims based on a tort of unfair competition are governed by the law of the state in whose market the result occurred.[23]

Article 37(1) of the Turkish Act "On Private International and Procedural Law" of 2007 (hereinafter the TPIPLA) states:

> The demands resulting from unfair competition are subject to law of state whose market is directly affected from the unfair competition.[24]

Article 1222(1) of the Russian Civil Code (Pt. 3) of 2001 (hereinafter the RCC) sets forth that:

> The obligations arising out of unfair competition shall be governed by the law of the country whose market has been affected by the competition, except as otherwise stems from law or the substance of the obligation.[25]

In Article 6(1) of the Rome II it is provided that:

> The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.[26]

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[23] Loi fédérale sur le droit international privé (LDIP) du 18 décembre 1987 (Apr. 22, 2019) available at https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html.

[24] Act on Private International and Procedural Law (Act No. 5718) (Apr. 22, 2019) available at http://jafbase.fr/docAsie/Turquie/Private%20international%20law%20Turkey.pdf.

[25] Гражданский кодекс Российской Федерации (часть третья) от 26 ноября 2001 г. № 146-ФЗ [Civil Code of the Russian Federation (Part 3) No. 146-FZ of 26 November 2001] (Apr. 22, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_34154/.

[26] *Supra* note 15.

M. Pazdan and M. Szpunar correctly point out that

> …the way of describing the special attachment formula in Part 1 of Art. 6 Rome II is fundamentally different from the way it is formulated in the national legislation of many countries.[27]

The same can be said about the scope of the application of the quoted conflict-of-law rules since the subject matter of the regulation of the special norms of the Swiss and Turkish laws is outlined in a much broader manner than that of the norms of the RCC or the Rome II.

In the states of the second group principal differences are also traced in the legal regulation of the issues regarding the possibility of choice of law to the obligations arising out of cross-border unfair competition.[28]

Thus, the legislation of some states does not allow *party autonomy* in these relations. In rare cases this position is clearly stated in the legal texts. As a rule, the corresponding prohibition follows from their analysis. For example, the TPIPLA, in contrast to the legislative acts of many other foreign countries, does not contain the reference to the admissibility of *party autonomy* regarding the obligations arising out of unfair competition. Although, as it is noted in the foreign literature on private international law, the Turkish legal system denies party autonomy for this category of obligations.[29] We can assume that this position is largely based on the rule of Article 2(4) of the TPIPLA, stipulating that

> only in cases where there is a possibility of choosing the applicable law, unless otherwise is designated by the parties, the substantive provisions of the chosen law shall be applied.

Legal acts of other countries, for example, the Tajikistan Civil Code of 2005 (hereinafter the TCC), follow the same path. It also does not directly prohibit party autonomy in these obligations. However, since the obligations arising out of unfair competition are classified in it as non-contractual ones and there is a possibility of

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[27] Maksymilian Pazdan & Maciej Szpunar, *Cross-Border Litigation of Unfair Competition over the Internet* in *International Litigation in Intellectual Property and Information Technology* 131, 136 (A. Nuyts (ed.), Alphen aan den Rijn: Kluwer Law International, 2008).

[28] Bernard Dutoit, *Une Convention Multilatérale de Droit International Privé en Matière de Concurrence Déloyale: Mythe ou Nécessité?* in *E Pluribus Unum: Liber Amicorum Georges A.L. Droz: On the Progressive Unification of Private International Law* 51, 65 (A. Borrás et al. (eds.), The Hague: Martinus Nijhoff Publishers, 1996).

[29] *See* Tekinalp Gülören, *The 2007 Turkish Code Concerning Private International Law and International Civil Procedure*, 9 Yearbook of Private International Law 313, 338 (2007); Darya Tarman Zeynep, *Remarks on the General Principles of Turkish Private International Law* in *Essays in Honour of Spyridon VI. Vrellis* 967, 969 (Athens: Nomiki Vivliothiki, 2014).

*party autonomy* only for the latter,[30] it can be concluded that with respect to the former it is not sanctioned.

The legislation of other states within the mentioned group provides for the choice of law applicable to the obligations arising out of unfair competition, but only in certain cases and/or under a number of conditions. Thus, in accordance with Article 72, para. 2 of Dominican Private International Law Act of 2014:

> Acts of unfair competition, exclusively concerning the interests of competitors, should be governed by the provisions of Article 69 of this Act.

In its turn, the latter Article establishes that:

> Extra-contractual obligations arising out of the actions causing harm should be governed by the law chosen by the harm-doer and the victim.[31]

The same approach is shared by the Russian legislator setting forth in Article 1222, para. 2, subpara. 1 of the RCC the possibility of the choice of the law applicable to the obligations arising out of unfair competition only if the latter affects individual interests exclusively.[32] In this case, the parties to a non-contractual obligation may, under the agreement concluded by them, choose the law of any country. However, even in this case, party autonomy is substantially limited: firstly, the parties can choose the law only after the act or other circumstance that caused damage has occurred (ex post.); secondly, the chosen law should not cause harm to third parties; thirdly, such a choice cannot affect the effect of the overriding mandatory provisions of the law of the country with which all the circumstances that are essential for the relations of the parties are connected (Art. 1223.1 of the RCC).

The analysis of the norms of the Rome II also does not allow making an unambiguous conclusion about the admissibility of party autonomy for the obligations

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30 Ch. 64, § 6, Art. 1218 of the TCC.

31 Ley No. 544-14 de Derecho Internacional Privado de la República Dominicana de 15 de Octubre de 2014 (Apr. 22, 2019), available at http://ojd.org.do/Normativas/CIVIL%20Y%20COMERCIAL/Leyes/Ley%20544-14%20de%20Derecho%20Internacional%20Privado%20de%20R.D..pdf.

32 *Блинова Ю.А.* О некоторых новеллах части третьей раздела VI Гражданского кодекса Российской Федерации // Вестник КГЮА. 2013. № 4. С. 209–210 [Yulya A. Blinova, *About Some Novelties of the Third Part of Section VI of the Civil Code of the Russian Federation*, 4 Bulletin of KSLA 208, 209–210 (2008)]; *Вознесенский Н.Н.* Обязательства вследствие недобросовестной конкуренции в международном частном праве: Дис. … канд. юрид. наук [Nikolay N. Voznesensky, *Obligations Arising Out of Unfair Competition in Private International Law: Thesis for a Candidate Degree in Law Sciences*] 172–173 (Moscow, 2008); *Кривенкова М.В.* Применение принципа автономии воли во внедоговорных правоотношениях международного характера // Проблемы российского законодательства и международного права: Сб. статей Международной научно-практической конференции (31 января 2015 г., г. Уфа) [Maria V. Krivenkova, *Application of Party Autonomy in International Non-Contractual Relations* in *Collection of Articles of International Scientific Practical Conference (31 January 2015, Ufa)*] 22, 23 (Ufa: Aeterna, 2015).

arising out of an act of unfair competition. Thus, in accordance with Article 6(4) of the Rome II the law applicable under this Article may not be derogated from by an agreement pursuant to Article 14 of the Rome II. At the same time where an act of unfair competition affects exclusively the interests of a specific competitor Article 6(2) of the Rome II refers to Article 4 of this Regulation, containing a general rule for determining the law applicable to non-contractual obligations arising out of tort. In this connection, a number of scholars believe that the Rome II does not exclude the possibility of *party autonomy* in specified cases. For example, A.A. Dickinson substantiates this point of view by the restrictive nature of the phrase "…pursuant to this Art…" set forth in Article 6(4) of the Rome II,[33] N. Joubert – by the reference to 14 in Article 4 of the Rome II.[34]

3. *The exclusive competence of the antimonopoly authorities of some foreign countries to establish the fact of unfair competition.* Today one of the key means of effective legal protection from unfair competition is a private lawsuit (to cease the illegal action, to compensate damages, etc.), based on the fact that the defendant has committed the relevant civil offense. Whereas in foreign practice the following approaches to establishing this fact in court are identified:

1) On the basis of the common means of proof (written and material evidence, conclusions of forensic experts, explanations of representatives of the parties and other persons involved in the process) (so-called "*stand-alone*" actions);

2) On the basis of the decision of a special administrative authority by which the defendant is found to have breached the national or supranational competition norms (so-called "*follow-on*" actions).

The ratio of these approaches depends on whether the legislation or judicial practice of a particular foreign country imposes on the potential claimant the obligation to base his or her private lawsuit on the results of the relevant investigation of the antimonopoly authority.

The first approach is predominant in world practice. For example, Article 28, para. 1 of the Georgian Law "On Competition" of 2014 states that:

> Any person may apply to a court with respect to the infringement of this Law without applying to the Agency.[35]

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[33] Andrew A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* 426 (Oxford: Oxford University Press, 2010).

[34] Natalie Joubert, *Les Règles de Conflit Cpéciales en Matière de Délits dans le Règlement du 11 Juillet 2007 (Rome II)* in *Le Règlement Communautaire "Rom II" sur la Loi Applicable aux Obligations Non Contractuelles: Actes du Colloque, 20 septembre 2007* 55, 69 (S. Corneloup & N. Joubert (eds.), Dijon: LexisNexis Litec, 2007).

[35] Law of Georgia No. 2159 "On Competition" of 21 March 2014 (Apr. 22, 2019), available at https://matsne.gov.ge/ka/document/download/1659450/4/en/pdf.

As well, the Clarification of the Presidium of the FAS of Russia of 11 October 2017 No. 11 "On Determining of the Amount of Damages Caused by Antimonopoly Law Violations" stipulates that:

> The Russian legislation does not prevent the injured person from applying to the court for compensation for damages before or without taking an appropriate decision by the antimonopoly authority.[36]

Similarly, the Resolution of the Supreme Court of Ukraine of 20 December 2005 stipulates:

> Article 35 of the Economic Procedural Code among the grounds for exemption from proof does not assume the decision of the Antimonopoly Committee of Ukraine. Chapter 6 of the Unfair Competition Protection Act does spread the competence of the Antimonopoly Committee of Ukraine to settling the issues of compensation for damages. So, the fact of carrying out unfair competition actions in the lawsuits under Article 24 of the said Act in accordance with Articles 32, 33 of the Economic Procedural Code is subject to the general rules of proof.[37]

It is worth mentioning that the second approach is peculiar to the legislation of foreign countries in the sphere of antimonopoly regulation, and not in the sphere of protection from unfair competition. For example, Article 79(2) of the Moldavian Competition Law of 2012 (hereinafter the MCL) states that:

> The natural and/or legal persons, considering themselves prejudiced by an anticompetitive practice prohibited by the present law, shall be able to submit request for compensation within one year from the date on which the decision of the Competition Council, on which the action is grounded, remained final or was maintained, entirely or in a part, by a final and irrevocable court decision.[38]

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[36] Разъяснение Президиума ФАС России от 11 октября 2017 г. № 11 «По определению размера убытков, причиненных в результате нарушения антимонопольного законодательства» [Clarification of the Presidium of the FAS of Russia No. 11 of 11 October 2017. On Determining of the Amount of Damages Caused by Antimonopoly Law Violations] (Apr. 22, 2019), available at https://fas.gov.ru/documents/587995.

[37] Постанова колегії суддів Судової палати у господарських справах Верховного Суду України (витяг) від 20 грудня 2005 р. у справі № 12/141-185-21/51-20/170 [Decision of the Panel of Judges of the Chamber in Commercial Affairs of the Supreme Court of Ukraine (excerpts) in the case No. 12/141-185-21/51-20/170 of 20 December 2005] (Apr. 22, 2019), available at http://www.scourt.gov.ua/clients/vs.nsf/3adf2d0e52f68d76c2256c080037bac9/2c5c247b22d290d1c22573ca005702a4?OpenDocument.

[38] Competition Law of the Republic of Moldova of 2012 (Apr. 22, 2019), available at https://competition.md/public/files/Competition-Law-nr-183-from-11072012b4a7c8896b.pdf.

At the same time, concerning a private lawsuit for compensation for damages caused by unfair competition, Article 80(9) of the MCL specifies otherwise:

> The right to action provided for in para. 3 is prescribed within one year from the date on which the injured party learned or must have learned the damage and the person who caused it, but not later than 3 years from the date of committing the deed.

This approach is reflected in the legislation of the Republic of Serbia: according to Article 73, para. 1 of the Serbian Law "On Protection of Competition" of 2013,

> the compensation for damage caused by acts and practices which constitute competition infringement in terms of this Law, and which is determined by the decision of the Commission, shall be received in a civil procedure before the court of competent jurisdiction.[39]

Although, Article 50, para. 3 of the Serbian Law "On Trade" of 2013 only notes that:

> The trader, who suffers the damage due to unfair competition acts, is entitled to compensation of that damage.[40]

It bears noting, however, that in some foreign jurisdictions, the rules on the exclusivity of the administrative decision extend also to action for damages caused by unfair competition. For example, Article 58(1) of Peruvian Legislative Decree Approving the Law "On Suppression of Unfair Competition" of 2008[41] states that:

> Any person harmed by acts of unfair competition declared by the Commission or, where appropriate, the Tribunal, may make to the Judicial Authority a civil claim for compensation for damages against those responsible identified by INDECOPI.[42]

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[39] Law of the Republic of Serbia "On Protection of Competition" of 2009 (Apr. 22, 2019), available at http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf.

[40] Law of the Republic of Serbia "On Trade" of 2013 (Apr. 22, 2019), available at http://www.zapotrosace.rs/CMS/download/law-on-trade-republic-of-serbia-eng.pdf.

[41] *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Inteletual* (The National Institute for the Protection of Free Competition and the Protection of Intellectual Property) – a specialized public agency attached to the Office of the Prime Minister, with independent legal status of internal public law of Peru. As such, it enjoys functional, technical, economic, budgetary and administrative autonomy (Executive Order 1033). Its function is to promote the market and protect the rights of consumers.

[42] Decreto Legislativo No. 1044 que aprueba la Ley de represión de la competencia desleal (Apr. 22, 2019), available at https://www.indecopi.gob.pe/documents/20182/143803/leyrepresioncompetennciadesleal.pdf.

A similar rule is reflected in Article 104(4) of the Bulgarian Law "On Protection of Competition" of 2008:[43]

> The decision of the Supreme Administrative Court which has entered into force, and which upholds a decision of the Commission finding a committed infringement of this Law, shall be binding upon the civil court as regards the fact whether the decision of the Commission is valid and compliant with the law. A decision of the Commission, which has not been appealed against or the appeal application against it has been withdrawn, shall have binding force upon the civil court as well. In these cases the right to claim indemnity shall lapse by limitation within 5 years as of the coming of the decision of the Supreme Administrative Court or of the Commission into force.[44]

As M. Illmer correctly indicates, in the majority of cases, which will be follow-on actions, the market will already have been determined by the competition authority or the court once the follow-on action is brought.[45] It seems quite logical since the activity of an administrative authority of any country is aimed at suppressing only those competitive offenses which are detected in the national commodity market. Accordingly, the courts of many countries in private actions concerning protection from cross-border unfair competition often apply national law, since competition authorities were previously guided by it in relevant administrative cases.

On the other hand, the problem can occur when the relevant competition authority refuses to open the administrative case on the grounds that though the disputable actions are committed within the country, they only have or may have a negative impact on the foreign market. In such cases, the claimant does not have legal grounds to file a private lawsuit with the court of the country where the administrative case is heard, because the disputable actions cannot be considered as illegal under the national legislation. This fact demonstrates that the exclusive competence of the antimonopoly authorities of some foreign countries in establishing the fact of unfair competition can significantly restrict the mechanism of conflict-of-law regulation in the Draft of a relevant treaty, since the courts of these countries do not have the authority to:

1) Consider the issue of cross-border unfair competition in a foreign market, and, accordingly;

2) Apply foreign law, which, obviously, could be applicable according to the special conflict-of-law rules.

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43 Including unfair competition.

44 Закон за защита на конкуренцията (Apr. 22, 2019), available at https://www.lex.bg/laws/ldoc/2135607845.

45 *Rome II Regulation: Pocket Commentary* 189 (P. Huber (ed.), Munich: Sellier European Law Publishers, 2011).

### *2.2. Goals of International Universal Unification*

Thus understood, the necessity to develop the universal treaty with the unified conflict-of-law rules in the sphere under consideration is evident, since it will contribute to the achievement of the following important goals:

1. *Providing predictability of the choice of the applicable law.* International economic activity is impossible without a predictable "exchange of civil laws of different states." As the sole proprietors in the internal turnover can have a pattern of their own behavior embodied in the basic civil laws so in the international economic turnover it is advisable for the parties to know beforehand the civil norms of which state are to regulate their obligations and proprietary rights. It is easier for the parties to calculate the risk and express their interests when they are informed about the legislative regime of their legal relations.[46] In addition, due to the presence of the unified set of conflict-of-law rules, both parties and law enforcement bodies will be exempted from the need to study the various and, in some cases, quite complex national conflict-of-law regulation. This will result in a reduction of their costs, both in time and effort, and as a consequence, the judgment awarding to the shortest possible time, i.e. to the *procedural economy*.

Upon the analyses of the existing rules for determining the law applicable in this field the conclusion that at present this requirement is not fulfilled in many cases can be made. This is most true for general conflict-of-law rules relating to tort obligations.

First, in the legislation of some states, the very formulations of these norms are not unambiguous both for the law enforcement agencies and for the parties. For example, the connecting factor "other circumstances, served as the reason for demand for compensation of harm," which is common in the legislation of the post-Soviet countries (Art. 26(1) of the Azerbaijani Law "On Private International Law" of 2000,[47] Art. 1129(1) of the Belarusian Civil Code of 1998,[48] Art. 49(1) of the Ukrainian Law "On Private International Law" of 2005,[49] etc.), can mean both the state of the place of harm being caused, and the state of the place of the onset of harmful consequences.[50]

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[46] *Монастырский Ю.А.* Господствующие доктрины коллизионного права в США: Дис. … канд. юрид. наук [Yuriy A. Monastyrsky, *The Prevailing Doctrines of Conflict of Laws in the United States: Thesis for a Candidate Degree in Law Sciences*] 78 (Moscow, 1999).

[47] Закон Азербайджанской Республики от 6 июня 2000 г. № 889-IГ «О международном частном праве» [Law of the Azerbaijan Republic No. 889-IG of 6 June 2000. On Private International Law] (Apr. 22, 2019), available at http://base.spinform.ru/show_doc.fwx?rgn=2633.

[48] Гражданский кодекс Республики Беларусь от 7 декабря 1998 г. [Civil Code of the Republic of Belarus of 7 December 1998] (Apr. 22, 2019), available at http://pravo.by/document/?guid=3871&p0=hk9800218.

[49] Закон України від 23 червня 2005 р. № 2709-IV «Про міжнародне приватне право» [Law of Ukraine No. 2709-IV of 23 June 2005. On Private International Law] (Apr. 22, 2019), available at https://zakon.rada.gov.ua/laws/show/2709-15.

[50] *Банковский А.В.* Деликтные обязательства в международном частном праве: Дис. … канд. юрид. наук [Anton V. Bankovsky, *Delictual Obligations in Private International Law: Thesis for a Candidate Degree in Law Sciences*] 87 (Moscow, 2002).

Secondly, in the legislation of some countries the conflict-of-law regulation of torts is formulated in such a way that the court decision on the applicable law may be based on the subjective factor, the manifestation of which may not be previously known to the other party to the dispute. For example, according to Article 32 of the Venezuelan Private International Law Act of 1998, torts are governed by the Law of the place where its effects have been produced: at the same time the victim may move for application of the Law of the State where the cause generating the tort was produced.[51]

2. *Increase in the level of rights and the legitimate interests protection of the affected subjects.* Since the courts of the contracting parties to the Convention will have the opportunity to recognize cross-border unfair competition actions in accordance with both national and foreign law, judgments awarded under the applicable law will be able to be recognized and enforced in any contracting state, regardless of the venue of the dispute.

> The fact that the courts… apply the same conflict rules to determine the law applicable to a practical situation reinforces the mutual trust in judicial decisions… and is a vital element in attaining the longer-term objective of the free movement of judgments without intermediate review measures.[52]

For example, the application by the court of one contracting state of mandatory competition rules operating in the affected market of another state will exclude the possibility of refusal of the enforcement of final foreign court judgment in its territory on the grounds that it contradicts its public policy. In this case, the mandatory rules of the country where the market is affected will be effectively ensured by the courts of other countries through a mechanism of conflict-of-law regulation enshrined in the Convention.

3. *Prevention of forum shopping.* The answer to the question of what kind of law will be applied to cross-border competition largely depends on the court where the relevant case is examined. The existing and often significant differences in the substantive and conflict-of-law regulation of cross-border unfair competition contribute to the fact that the claimant can calculate in advance which court to sue in order to obtain the most favorable award. Such speculation on the international jurisdiction, known as *forum shopping*, can create uncertainty for the defendant and other potential case participants as well as lead to infringement of their interests. As a result of the development, conclusion and application of the Convention, the law of

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[51] Ley de Derecho Internacional Privado de 1998 (Apr. 22, 2019), available at https://www.oas.org/juridico/mla/private/rexcor/rexcor_resp_ven25.pdf.

[52] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), COM (2003) 427 final (Apr. 22, 2019), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2003)0427_/com_com(2003)0427_en.pdf.

the same state will be determined as applicable, irrespective of the court hearing the relevant dispute. Thus, unification of conflict-of-law rules in the researched sphere can prevent these and other negative consequences of *forum shopping*.

### *2.3. The Concept of the Draft Convention on the Law Applicable to the Private Relations Arising Out of Unfair Competition*

We believe that the concept of the Draft of the relevant Convention should cover the following aspects.

Thus, as the only conflict-of-law rule for determining the law applicable to the obligations arising out of unfair competition, the Draft Convention should provide for the connecting factor "the law of the affected market" (*lex mercatus*).

The following arguments can be given in support of this position.

1. Liberalization of world trade in goods and services has to presuppose not only the elimination of customs barriers and the removal of import restrictions but also the adoption of the effective measures relating to the judicial cooperation in civil matters with cross-border consequences by the states at the international level. As a result of fixing the specified connecting factor in the Draft Convention the subjects of foreign economic activity will fall under the competition law of only those countries where they purposefully engage in an economic contest for consumers. Consequently, the goods (works, services) exported by them can, without losing their initial competitive advantage, freely move to foreign markets, facilitating the development of international trade.

2. This connecting factor takes into account the specifics of unfair competition as an offense, which can only take place in the economic space of the country in which the subjects of commercial activity are engaged in a purposeful contest for consumers. In this context, we share the opinion of T.W. Dornis according to which this special conflict-of-law rule reflects an essential economic logic: the extension of a market not only provides opportunities to increase profits but also implies costs. One facet of these costs is compliance with foreign laws. Hence, whatever can be foreseen as an opportunity abroad should also be foreseen as being attached to a corresponding set of limitations. Accordingly, it is the foreseeability of foreign-based effects that implies the application of foreign law regulating these effects.[53] It shall be recalled that it was also mentioned in the CLRUC. In particular, Article 2, para. 1 of this document states:

> Where injury is caused to a competitor's business in a particular market by conduct which could reasonably have been expected to have that effect, the internal law of the State in which that market is situated should apply

[53] Tim W. Dornis, *Trademark and Unfair Competition Conflicts: Historical-Comparative, Doctrinal, and Economic Perspectives* 503 (Cambridge: Cambridge University Press, 2017).

> to determine the rights and liabilities of the parties, whether such conduct occurs in that State or in some other State or States.

3. The application of the law of the affected market ensures the implementation of the principle of equal conditions in competition or *par conditio concurrentium*. In order to make the market transparent and competitive, it is necessary that the rules regulating the economic struggle were the same for all its participants. There shall not be different competitive models on the same market.[54]

4. The conflict-of-law rule "*lex mercatus*" expresses a high degree of interest of the states whose market is affected by unfair competition in applying their own legal regulation in this area on their territory, since this will ensure protection of not only certain individuals but also of the society as a whole. Such conclusion can be made on the basis of the analysis of the goals which the acts of national antimonopoly legislation pursue.

For example, according to Article 1 of Venezuelan Decree of Rank, Level and Validity of the Antimonopoly Law of 2014 it is provided that this Decree is

> ...intended to promote, protect and regulate the exercise of fair economic competition, to ensure the democratization of productive economic activity with social equality that strengthens national sovereignty and favors endogenous, sustainable development, focused on meeting social needs and building a fair, free, joint and responsible society.

In accordance with Article 1(2) of the MCL

> the goal of the present Law is to regulate the relationship arising out of the protection, maintenance and stimulation of competition, with a view towards promoting consumer's legitimate interests.

Article 1(1) of Lithuanian Law "On Competition" of 2014 states that:

> The purpose of this Law is to protect freedom of fair competition in the Republic of Lithuania.

We consider that the purposes of the entire set of the legal norms aimed at counteracting and combating unfair competition, including the norms on civil remedies and liability for unfair competition, to be the same.

In our view, the Conventional conflict-of-law regulation of unfair competition *should not provide for party autonomy*.

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[54] José Ignacio Paredes-Pérez, *Sobre la conveniencia de una norma de conflicto especial sobre competencia desleal*, 6 Anuario Español de Derecho Internacional Privado 427, 429 (2007).

As the Dutch scholar T.M. de Boer correctly points out, commenting Article 6(1) of the Rome II,

> ...unfair competition and restrictive trade practices affect public rather than private interests… or… in the area of unfair competition and restrictive trade practices, interests of a higher order than those of individual competitors are at stake.[55]

However, concluding agreements on the choice of the applicable law, the parties are guided by purely personal considerations. As the Polish scientist E. Figura-Góralczyk reasonably points out, as a result of their choice of an applicable law, there may be a threat that this law will provide less sensitive sanctions or a softer responsibility for violating competition or give more powers to the competitor than the law in force in the place where competitive relations or collective interests of consumers are localized.[56] In addition, we believe that a rather serious consequence of this choice may be that, unlike the law of the affected market, the law chosen by the parties will not allow attributing this or that action (inaction) to unfair competition. Thus, it will, as it were, sanction unfair activity of individuals, while for others it will be illegal. This would lead to the existence of various rules of the game in the same market, in other words to the creation of so-called *enclaves juridiques*, which contradicts the economic policy of the state in question.[57]

In addition,

> ...the principle of *party autonomy* necessitate that all the participants of the relation have a reasonable opportunity to be involved in the choice of the applicable law (the principle of fairness in choosing the applicable law).[58]

In many cases, the range of people affected by unfair competition is extremely wide (for example, in case of misleading, dumping, selling of gratis goods, etc.), which jeopardizes the implementation of the mentioned principle.

It also seems necessary to set forth *the public policy clause* in the Draft Convention. The courts referring to such a clause in cases on cross-border unfair competition may be guided by different motives, for example, when the applicable law permits

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55 Ted M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 Yearbook of Private International Law 19, 21–22 (2007).

56 Edyta Figura-Góralczyk, *Nieuczciwa Konkurencja w Prawie Prywatnym Międzynarodowym* 193 (Warsaw: Wolters Kluwer, 2017).

57 *Id.* at 194.

58 *Абросимова Е.А.* Внедоговорные обязательства в МЧП и косвенная автономия воли // Право и экономика. 2016. № 6. С. 59–61 [Ekaterina A. Abrosimova, *Noncontractual Obligations in Private International Law and Indirect Party Autonomy*, 6 Law and Economy 55, 59–61 (2016)].

the commercial activity prohibited by *the lex fori* (drug trafficking, the trade of organs, prostitution).[59] However, in cases of protection from cross-border unfair competition, public policy issues most often become relevant when the applicable foreign law provides for a stricter amount of civil liability than the *lex fori*. It is possible to distinguish three state approaches to resolving the issue.

1. *Restrictive approach*. In some countries, legislation contains quite strict requirements for foreign law rules concerning the degree of liability. These requirements do not directly arise out of the general rules of public policy, although they do, in fact, restrict full operation of foreign law on the territory where the dispute is heard. Thus, in accordance with C. 2, § 52 of the Estonian Private International Law Act of 2002:

> If a claim arising from unlawful causing of damage is governed by foreign law, compensation ordered in Estonia shall not be significantly greater than the compensation prescribed for similar damage by Estonian law.[60]

Taking it into account, some researchers believe that such norms are typical manifestations of the positive the public policy clause.[61] The same approach is reflected in Article 22(2) of the Japanese Act on General Rules for Application of Laws 1898, which states that

> Even where the events that should otherwise be governed by the foreign law applicable in tort constitute a tort both under the foreign law and under Japanese law, the injured person may not demand recovery of damages or any other remedy not recognized under Japanese law.[62]

2. *Proportional approach*. The courts of a number of states (for example, the Netherlands) use the public policy clause only if foreign law norms impose on the guilty person the obligation to reimburse excessive damages for the offense committed. However, it bears noting that the issue of the contradiction of punitive damages to public policy is most often considered in foreign courts in the context of the recognition and enforcement of foreign courts judgments. In texts of many

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59 Figura-Góralczyk 2007, at 399–400.

60 Estonian Private International Law Act of 2002 (Apr. 22, 2019), available at https://www.riigiteataja.ee/en/eli/513112013009/consolide.

61 *Дмитриева Г.К.* Новые подходы в правовом регулировании трансграничных внедоговорных обязательств по международному частному праву России // Lex Russica. 2006. № 6. С. 1112 [Galina K. Dmitrieva, *New Approaches to the Legal Regulation of Cross-Border Non-Contractual Obligations Under Private International Law of Russia*, 6 Lex Russica 1106, 1112 (2006)].

62 Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsokuhō], Law No. 10 of 1898 (Apr. 22, 2019), available at http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_08.1_anderson.pdf.

judgments an indication stating that the national civil legislation does not accept punitive sanctions and does not allow their application, since it recognizes only the restorative, proportional nature of civil liability, may be found.

3. *Moderate approach.* Nowadays, this approach is adhered by the jurisprudence of France, Spain, Italy, Russia, etc. As a rule, the courts of these states believe that the determination or awarding of the super compensation damages "by itself does not contradict public policy" of the country of the forum unless the relevant sum is excessive and disproportionate to the actual damage caused. For example, in 2001, the Supreme Court of Spain (*El Tribunal Supremo de España*, ATS) heard the issue of recognition and enforcement of the judgment of the District Court of the Southern District of Texas (the USA) in the case of *Miller Import Corp. v. Alabastres Alfredo S.L.*, where the defendant was charged with paying a triple amount loss for an unauthorized use of the trademark of the claimant and conducting unfair competition against him. The defendant insisted on non-recognition and enforcement of this judgment, giving as one of the arguments the fact that the recovery of punitive damages, allegedly, was contrary to the public order of Spain. The Supreme Court rejected the defendant's arguments and satisfied the plaintiff's claims. In its judgment of 13 November 2001, ATS 1803/2001, it pointed out that

> …although the economic claims awarded in this judgment were not intended to strictly compensate, but to punish and prevent future losses, neither the principles of the compensation mechanism nor the mandatory authorization instruments provided for by the Spanish law, are not completely alien to the idea of prevention.

It also noted that in civil penalties civil liability was an institution of private law, which was in full compliance with the doctrine of its minimal penetration into the sphere of criminal law, therefore, it was impossible to talk about the contradiction of punitive damages to the public policy. The Supreme Court also took into account the fact that the American court used the principle of proportionality awarding punitive damages for unfair competition.[63]

Considering all the above-mentioned facts, we share the opinion of the majority of scholars, according to which the application of the public policy clause shall have a rare nature. Proceeding from this, the formulation of this clause, contained in Article 26 of Rome II seems to be well-drafted, and therefore it can form the basis for the relevant provisions of the Draft Convention.

In addition to the rules for the application of the public policy clause in cases of cross-border unfair competition, the Draft Convention shall also contain detailed

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[63] Exequátur del Tribunal Supremo de España de 13 de noviembre de 2001 (ROJ: ATS 1803/2001) [Exequatur of the Supreme Court of Spain of 13 November 2001 (ROJ: ATS 1803/2001)] (Apr. 22, 2019), available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=1030375&links=da%C3%B1os%20punitivos&optimize=20060112&publicinterface=true.

*provisions concerning the limitation of the application of the foreign law by the overriding mandatory provisions of the country of the forum*.

In the doctrine of private international law, overriding mandatory provisions are considered as the basis for restricting the application of foreign law, since it is considered that there is a range of such substantive national norms which application cannot be eliminated or limited by the connecting factors referring to the foreign law. Such provisions in most cases relate to the protection of public interests, and they, in fact, ignore both ordinary conflict-of-law rules and the *party autonomy* principle.

Unfortunately, in modern private international law doctrine and practice, a systematic understanding of the overriding mandatory provisions in the sphere of competition has not emerged. In many countries, the relevant legal acts do not contain norms on overriding mandatory provisions, while in others – there is a general normative reference to their existence, and there are no criteria delineating how to assign certain provisions of substantive law to the appropriate category. Proceeding from this, it can be claimed that the resolution of the question of whether competition law norms are overriding mandatory provisions or not, is completely left to the discretion of the judicial and administrative authorities of a particular country. For example, the Swiss Federal Supreme Court (*Bundesgerichts*, BGE) in a case concerning an electronic tourist guide, took the position that the rules of Article 10 of the Swiss Unfair Competition Act 1987 authorizing the State Secretariat for Economic Affairs to file a lawsuit for protecting the reputation of the Swiss Confederation abroad in the Swiss court, shall be qualified as *lois d'application immediate*.[64]

In this context, some foreign scientists fairly point out that while many scholars suggest interpreting and applying the laws regulating competition to be imperative, it remains unclear how strong public interest must be to recognize certain legal norms as overriding mandatory provisions. Otherwise the broad interpretation will lead to the inclusion of each rule of the national laws in the appropriate category.[65] This will exclude any raising of a choice-of-law issue in this sphere, and most importantly, the possibility for the courts to apply foreign law in private disputes on protection from cross-border unfair competition.

In addition to the public policy clause and the norms arising out of overriding mandatory provisions, the Convention under consideration, in our opinion, shall also contain *separate articles concerning characterization of the concepts of this treaty and the scope of the law applicable to the private relations arising out of unfair competition*.

The characterization of the terms determining the scope of application of the special conflict-of-law rules on unfair competition is a matter of lively debate in modern private international law science and practice. However, in our view, the

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[64] Urteil des Bundesgerichts vom 1. Oktober 2009 [Decision of the Swiss Federal Tribunal of 1 October 2009] (Apr. 22, 2019), available at http://www.servat.unibe.ch/dfr/bger/091001_4A_106-2009.html.

[65] Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6(2) Melbourne Journal of International Law 205, 222 (2005).

unfair competition concept to be provided for in the Draft treaty shall be interpreted precisely on the basis of the norms of the Paris Convention on for the Protection of Industrial Property of 20 March 1883[66] (hereinafter the Paris Convention). Firstly, the provisions of this treaty are accepted by most legal systems. Consequently, referring to them largely eliminates the problem of "conflict of characterization" in view of the generally recognized nature of the provisions of this Convention. Secondly, lots of countries have a certain experience in applying Article 10*bis* of the Paris Convention in settlement of private-law disputes on unfair competition. Thirdly, a detailed list of unfair competition forms stipulated in Article 10*bis*(3) of the Paris Convention, makes it possible for the court of the country where the case is heard to directly refer the disputed actions to the scope of application of the conflict-of-law rules of the Draft treaty. At the same time, in cases when certain competitive actions are not directly mentioned in the Paris Convention as unfair competition, it seems reasonable to assess them based on the autonomous meaning of the unfair competition term.

As for the rules concerning the scope of the law applicable to the obligations arising out of unfair competition, their practical importance, first of all, is to avoid competition of conflict-of-law rules differently determining the applicable law, and *forum shopping*, as certain issues are in accordance with the *lex fori* considered procedural and not substantive (for example, limitation periods, the burden of proof and the measure of damages).[67]

For example, Article 6 of the CLRUC, states that the relevant rules determine, in particular:

> 1) the basis and extent of liability; 2) the grounds for exemption from liability, any limitation of liability and any division of liability; 3) the kinds of injury for which relief can be given; 4) the measure of damages, but excluding all questions of multiple damages; 5) the question whether a claim to relief may be assigned or inherited; 6) subject to the rules of the *forum* concerning standing to sue, the persons who may seek a remedy; 7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee; 8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability; 9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription of limitation, and the interruption of this period.[68]

It is worth noting however, that at the present time there are no national acts regulating private international law issues which provide for a separate scope of

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66 Available at https://www.wipo.int/treaties/en/text.jsp?file_id=288514.

67 *Rome II Regulation: Pocket Commentary*, *supra* note 45, at 343.

68 CLRUC, *supra* note 13.

the law applicable to the obligations arising out of unfair competition. However, in some countries, sectoral laws clearly outline the range of the issues governed by the general scope of the law applicable to the compensation of damage. Thus, Article 142(1) of the Swiss Act on Private International Law of 1987 states:

> The law applicable to a tort determines in particular the capacity to be liable in tort, the prerequisites and extent of liability, as well as the person liable.

In the Russian legislation the range of issues falling under the scope of the law applicable to a tort obligation is determined in a broader way. In accordance with Article 1220 of the RCC, the law governing the obligations arising out of the causing of damage shall determine, in particular, the following: 1) a person's capacity to be liable for the damages; 2) the levying of liability for damages on a person not being an injurer; 3) basis for liability; 4) the grounds for limitation of liability and for exemption from it; 5) the methods of compensation for damage; 6) the scope and measure of compensation for damage.

The broadest list of issues that are legally defined as the scope of the law applicable to non-contractual obligation is contained in Article 15 of the Rome II, which in particular are: 1) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; 2) the grounds for exemption from liability, any limitation of liability and any division of liability; 3) the existence, the nature and the assessment of damage or the remedy claimed; 4) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; 5) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; 6) persons entitled to compensation for damage sustained personally; 7) liability for the acts of another person; 8) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

For the purposes of conflict-of-law regulation of cross-border unfair competition the most adequate list of issues to be included in the scope of the applicable law seems to be the one stipulated in Rome II. It is evidenced, for example, by the fact that in most countries the scope of the law applicable to the obligations arising out of unfair competition is formed not only by a substantive legal institution of compensation for damage, but also by other civil law institutions (for example, concerning the obligations arising out of threatening the person's property, injunctions and other preventive measures of civil rights' protection, etc.). Stipulation in the Draft Convention of a more detailed list of issues, including those relating to the application of preventive measures by the courts of the States Parties to the Convention, is justified, at least because in combating unfair competition the

prohibition of unlawful competitive actions is not less (and perhaps more) important than civil liability for the damage to the market.

## Conclusion

Today the conditions of trade turnover, tough competitive practices and their negative impacts as well as particularities of different national legal systems predetermine the specifics of the basic principles of foreign countries' unfair competition institution. National legal regulation in this sphere develops in different ways and is characterized by the complexity and diversity of norms of various branches of law (civil, administrative, and criminal). Therefore, the provisions of current multilateral treaties determining the minimum legal standards for protection from unfair competition are the consequence of extremely limited opportunity of the unification of substantive legal norms in this sphere.

Unlike other spheres of private international law, the existing treaties in the field of protection from unfair competition are aimed at regulating not cross-border but internal relations having legal and economic consequences exclusively within the national market of each Member State. At the same time, the peculiarities of regulating cross-border competition in international or regional markets are still not given special attention at international level for many reasons, including the prevailing opinion in the past few years about strict territorial character of national laws in the sphere of unfair competition prevention. Considering this fact, the comprehensive unification of the substantive legal norms at this historical stage seems extremely difficult and unlikely.

Increasingly, it has been recognized, that the conflict-of-law method is an alternative legal approach facilitating improvement of the quality of regulation of protection from cross-border unfair competition. However, at the present stage of the development of private international law, special conflict-of-law rules of the choice of the law applicable to the obligations arising out of cross-border unfair competition are formulated exclusively in: 1) national legislative acts; 2) national jurisprudence; or 3) supranational legal acts (EU regulations and directives). In other words, at the present time, there is no universal treaty containing special conflict-of-law rules, and, accordingly, providing a common mechanism of choice of the applicable law in the relevant sphere for the majority of countries. Undoubtedly, this state of international legal regulation of cross-border unfair competition makes the development of international economic turnover very difficult. On the one hand, significant differences in conflict-of-law rules of many countries make the participants of international commercial activity directly legally dependent on the preferences of the injured persons regarding the venue of hearing of the dispute and, as a result, on the choice of the substantive law by the competent court. On the other hand, this also leads to a decrease in the protection of the rights and legal

interests of competitors and consumers in foreign legal systems, due to the refusal of state authorities to enforce the judgments of the foreign courts in the cases of cross-border unfair competition.

It is evident that the elimination of the differences in national conflict-of-law rules necessitates a search for appropriate ways for the unification of legal regulation of private international law relations arising out of cross-border unfair competition. One such way is the adoption of the universal treaty aimed at their complex conflict-of-law regulation.

The analysis of the previously developed Drafts of international legal and recommendatory acts, legislation of many countries as well as law enforcement practices in the relevant sphere demonstrates that the concept of the Draft Convention should cover the widest possible range of conflict-of-law issues arising out of cross-border unfair competition. At the same time, this concept has to be grounded on the idea of the necessity of the conflict-of-law regulation of the relations in question on the basis of the special connecting factor "the law of the affected market" (*lex mercatus*). In addition, the Convention should contain the detailed rules regarding: 1) the characterization of the basic terms of this treaty; 2) the scope of the applicable law, and 3) the public policy clause and the norms on overriding mandatory provisions in the sphere of competition.

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