American University of Armenia

Masters' paper:

The place of performance of the contractual obligations and the law applicable to the contracts in the Private international law

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Yerevan, Republic of Armenia

2010

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1. INTRODUCTION

The world becomes one, big family. Nowadays many serious problems can be solved only through international cooperation between the states. One way of such cooperation is the harmonization of different legal systems, which has purpose to prevent "conflict of law" problems as much as possible, making international relations more efficient. 21st century is the century of global integration of markets. Business community, by its political will and driven by economic reality, has opened national borders and is operating within a global economy[1], private parties of different states, or states themselves, tries to benefit from various international contacts. Now everybody could have an easy access to information about products available anywhere in the world and can conclude contracts in participation with national of different states. Armenia is also a part of such type of relations. States try to have a flexible jurisdiction, in order to be more attractive for foreign investors and to have good mechanisms to protect its nationals, which are considered to be weaker party in the private international contract, beside, this type of relations also has their final effect for stat's economy.

Private international law is a living instrument; therefore I cannot propose something which will fully remove uncertainty in this field. But I try to make proposals of rules, which will be attractive and convincing for the responsible political actors in Armenia, whenever they may decide to undertake new reforms or harmonization in this area of law. In this paper I have concentrated on two of the most important issues of PIL: first, how we can avoid uncertainty in the private international law and choose the "proper law"[2] by which the parties to the contract must be bounded, if the parties

[1] *Bruno Zeller,* The Development of Uniform Laws, 2001

[2] Forsyth, Private international law: The modern Roman-Dutch law including the jurisdiction of the Supreme Court, 1990

have failed to choose the law themselves. Second, how it must be defined the place of performance of the contractual obligations. I will describe a problematic situation in one hypothetical case, where the contract has foreign nature (participation of nationals at least two different stats) and will discuss the issues mentioned above, trying to find a solution, at first, applying Armenian legislation, and then, using the international best practice. In this context it will be easy to show the gaps of the articles of RA Civil code, which regulate this kind of relations. So the purpose of my paper is to discuss the application of traditional rules of private international law in case the parties of the contract don't decide the place of performance of the contractual obligations or\and the law they must be bounded, development of EU legislation in this respect and to propose possible remedies. Private international law was considered to be complicated, abstract and had the reputation of being the "nuclear physics of jurisprudence."[3]However, we don't have separate Private International Law in Armenia, and private international relations are regulated by the RA Civil code. In particular, article 355 concerns the place of performance of the obligations and article 1284: the law applicable to the contract. The characteristic for the private international contracts is the "foreign element", which means, that either the subjects of the contract represent different states, or the object of the contract is in the other state. The situation can be more complicated if, for example, Armenian citizen enters into contract by the national of USA or Great Brittan, because these states have as many legal systems as many states within their territories, and question may arise by which state's law the contract must be governed, or the territory of which state is the place of performance of the contractual obligations. So, it is not difficult to understand that this field is full of collisions (collisions of different legal systems), as we have deal with at least two different legal systems. Private international law has two methods: material (direct) and collision (indirect) for regulating

[3] *digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1193...*

this type of relations[4]. When parties haven't defined the place of performance of their contractual obligations or the law, by which they must be bounded, collision norms will be taken into consideration to determine which legal system, and the law of which jurisdiction applies to a given situation. The problem in this field is, that different jurisdictions have equal possibility to regulate the private international contract. For example, suppose that Russian Airline Company enters airplane sales contract with Armenian company, the airplane is in the territory of Russia. The seller is Armenian company. In Armenia, an airplane is moveable property, but in Russia, it is considered to be immovable. Russian company failed to meet the requirements of the contract and, therefore Armenian company applies to Armenian court to sue it. RA Civil code, chapter 80, states in article 1285, 1(3) that, if parties haven't defined the law, that must be applied, the contract will be regulated by the law of the state of the seller(the principle of "lex vendetories"),in this case that place is Armenia, so Armenian legislation must be applied, but, on the other hand according to Russian civil code, the airplane is immovable property[5], and both Armenian and Russian laws recognize the principle of "lex loci sitae", which means that it must be applied the law, where immovable property is founded. In this case that state is Russia, so which law must be given priority? To apply one national legal system as against another may never be an entirely satisfactory approach. For that reason, in order to avoid uncertainty when defining the place of performance in the contractual obligations, almost all states in their legislations have created so called "collision norms", which, in case of dispute will choose the legal system, that must be applied. The feature of the private international relations depends on the fact, which of these norms will be used, and what state's law will be chosen by these norms. States also adopt different conventions, treaties, to avoid ambiguity and to harmonize different national-legal systems. As we saw above, states try to define the place of

[4] Armen Haykyanc, Private International law, 2003

[5] Armen Haykyanc, Private International law, 2003

performance of the contractual obligations by collision norms, but this is not the solution to the problem, as these norms can be interpreted differently, also there is so called "public policy"(public order) doctrine, when courts can decide not to apply the law which is against state's public policy(RA Civil code also contain such provision, which we consider later), therefore, these conventions play very important role for unification state's collision approaches. The most significant convention in this field is the United Nations Convention on Contracts for the International Sales of Goods (CISG) or Vienna convention, which was adopted in 1980. Armenia is also a member state of this convention, and this has become part of our domestic law. Article 4 states that this Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. CISG is admissible for different legal systems because it is based on comparative research and contains flexible provisions[6]

Article 7 of the GISC also points to the application of good faith in international trade. Good faith as a principle is not only applied to the interpretation of the CISG as a whole but it also regulates the behavior of the parties. European Commission also has introduced its set of rules, governing the international sales of goods, which is acceptable by the international business community. Since 1693, the Hague conference on Private International Law has been invoked, which creates conventions in this field in order to develop a uniform system. One of these conventions is the Convention on the Law Applicable to Contracts for the International Sale of Goods, The Hague 1986[7]_. This convention tries to fill the gaps which exist in the Vienna convention. Another rule which regulate the private international relations is the Rome Convention on the Law Applicable to Contractual Obligations. All this conventions, mentioned above, plus customary law, are good source for solving disputes, concerning to the definition the place of performance of the contractual

[6] G.K. Dmitrievoy, International private law, 2002

[7] http://www.jus.uio.no/lm/hcpil.applicable.law.sog.convention.1986/doc.html

obligations in PIL, and some of them, which propose something new and important for the definition the place of performance of the contractual obligations, we will discuss in the next parts of this paper.

2. When the place of performance of the contractual obligations is in question

The place of performance of the contractual obligations is defined by RA Civil code; in particular, article 355 (1) states that an obligation must be performed at the place that is determined by statute, other legal acts, or contract or follows from the customs of trade or the nature of the obligation. So parties of the international contract can either define the place of performance of their contractual obligations or leave it to the statute (in Armenia it is the Civil code) to define. First of all, before trying to define the place of performance, let's see what we understand saying contractual obligation, as this is essential for the state's court jurisdiction in case of conflict. In the international practice we can separate two types of obligation: disputed and characteristic .Thus, in the case of a legal suit non-payment of the sales price is a disputed obligation, and it is the place of payment of the price which is determinant, the characteristic obligation is considered to be the place of delivery of the goods of the sales contract even though the dispute is about the payment of the sales price.[8] So, let's consider one hypothetical case, where the place of performance of the contractual obligations is not defined and see how effectively Armenian legislation will regulate this kind of relations. Let's suppose that Armenian airline company, "Ararat "has entered into the contract with Russian "Volga"Airline Company in October 11 2010. According to the contract, Russian company is obligated to sell Armenian company an Airbase, whiten one weak. The airplane after its last flight in UK has remained there. "Ararat" has bought that plane for Erevan-Paris-Erevan flight, and it has

[8] THE PLACE OF PERFORMANCE OF THE OBLIGATION TO PAY
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already sold the tickets for October 20 flight. The risk both to lose many and to adverse the company's reputation in case of failure to obtain plane is higher, therefore, Armenian company wants to understand what is the place of performance of the contractual obligations, otherwise, in which state's territory Russian company must give the plane to Armenian company and consider the contractual obligations performed, and what is the place of performance when the payment for the plane is in question. RA Civil code article 355, 2(4) states 4)performance on a monetary obligation–at the place of residence of a creditor at the time the obligation arises and if the creditor is a legal person–at its place of location at the time the obligation arises and in 5) states: on all other obligations If a place of performance is not defined, performance must be made at the place of residence of the debtor and if the debtor is a legal person–at its placing of location[9]. So, Armenian civil code defines the place of performance of the contractual obligation by using "disputed obligation" because it separates different possibilities to define the place of performance based on the fact which obligation of the party can be in question. For example, if in Airplane case Armenian party fails to meet the requirement of the contract and to pay for the plane, it must be sued according to Russian legislation, therefore cannot protect it's right by Armenian rules because the disputed obligation is to pay for the plane, and as we mentioned above article 355 (4) states that on a monetary obligation the place of performance is the place of residence of the creditor. In our case this place is Russia. Let's suppose that in Airplane case both parties fail to meet the requirements of the contract and mutually accuse each other for not compliance of the contractual obligations, what is this mean? This means that "Ararat" company has to protect its interest based on two different jurisdictions; one is Russian jurisdiction, if the payment is in question (mentioned above), and second is the UK jurisdiction. Why UK, because as opposite to Armenian legislation, Russian legislation considers the airplane to be immovable property. Article 316(1) of the Russian Civil code

[9] RA Civil code

uses the world discharge, (not performance) and states: the discharge shall be affected by the obligation to transfer the land plot, the building, the structure or the other immovable property - at the place of location of the property.[10] As we informed from the facts of the case, the airplane is in the territory of UK which means that UK law must apply if Russian party fails to meet the requirements of the contract, because according to the article 355 (5) the performance must be at the place of residency of debtor. As debtor is Russian company, place of performance is Russia. At first it seems that everything is fine. Armenian company will receive the plane in the territory of Russia and will avoid additional expenses. But we must also consider Russian Civil code, as the debtor's placing of location is Russia and see whether Armenian and Russian Civil codes has the same approaches. So, to which legal system must be given priority? , Armenian? Which say that the place of performance is Russia, or Russian? According which that place is UK. Armenia is a member state of the Vienna convention (CISG 1980)[11], which in article 57 states: (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: a) at the seller's place of business; or b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place[12]. This convention is a part of our legislation, and has almost the same wording as article 355 (4).

Now let's try to solve the problem in Airplane case by applying the international best practice.

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[10] The Civil Code of the Russian Federation

[11] United Nations Convention on Contracts for the International Sale of Goods (CISG)

[12] http://www.cisg.law.pace.edu/cisg/text/e-text-57.html

Three different legal instruments provide for the place of performance of the contractual obligation in Europe as a special case of jurisdiction, in addition to the general jurisdiction based on the domicile of the parties.[13]

- The Brussels Convention of September 27, 1968;

- The Lugano Convention of September 16, 1988, which is a parallel

convention to the one of Brussels and applies to the EFTA States;

- The European Community Regulation No. 44/2001, which has replaced the Brussels Convention for EU Member States. According to Article 5 of the Brussels Convention, "A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. In matters relating to a contract, in the courts for the place of performance of the obligation in question;[14] .There are some cases developed by the European Court of Justice (ECJ), which state that the contractual obligation to which Article 5(1) refers to is the disputed obligation, not the characteristic one. In particular the most famous case concerning to this issue is the ECJ's landmark De Bloos[15] ruling, where the Court found that article 5 was a disputed obligation and in case of dispute the jurisdiction will be chosen depends on what obligation is in question. This interpretation was later confirmed by the Accession treaty of 1978.

However, one of the most useful rules, which are successfully applied in most cases, when the place of performance of the contractual obligations is in question, is the Regulation No. 44/2001, which is based on the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (it was adopted in September 27, 1968). Article 5(1) of the Regulation No.

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[13] *www.uncitral.org/pdf/english/CISG25/Witz.*

[14] C O N V E N T I O N on jurisdiction and the enforcement of judgmentsin civil and commercial matters, article 5

[15] Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, 1976 E.C.R. 1497

44/2001 gives completely different definition what is to be understood by the place of performance of the obligation, thus amending the ECJ's *De Bloos* ruling. In the case of the sale of goods, Article 5(1)(b) provides that it will be" the place in a Member State where, under the contract, the goods were delivered or should have been delivered."[16] So, according to this regulation, it must be applied only the state jurisdiction, where the characteristic obligation must be performed, even if the dispute is not about that particular obligation.

The advantage of this article is that it gives "pragmatic determination of the place of enforcement," relying on a purely factual criterion,[17] and the place of delivery of the Goods, in other words, the place of performance of the characteristic obligation, often, but not always, fulfill the requirement of proximity between the litigation and the forum having to dispense justice to it.[18] In my opinion this Regulation's approach is much more flexible, as in case of dispute the parties of the contract will not go from one state to another, in order to protect their interest, which of course can be reason of many uncertainties, expenses, because it can be a situation, when at least two different jurisdictions will be applied for one dispute. So, if we try to apply article 5 (1) of the regulation for our hypothetical case, we will see that the place of performance is neither Russia nor UK but Armenia, because "Ararat" airline company is located in Armenia, and it is logical that the airplane should have been brought to Armenia. Besides, if the seller, which in our case, is an Armenian company, refuses to pay for the airplane, e.g. if it is not satisfied with the quality of that good, and if Russian party wants to bring "Ararat" airline company before the court, jurisdiction should go to the court of the place of delivery which verifies the conformity of the goods or has it verified. In particular, for Armenia, this

[16] http://eur-lex.europa.eu/

[17] *https://litigation-essentials.lexisnexis.com/.../app?...J...*

[18] *Claude Witz**THE PLACE OF PERFORMANCE OF THE OBLIGATION TO PAY THE PRICE ART. 57 CISG

article will be much more flexible, as most of goods which are essential for us, we import from abroad, and if we determine the place of performance when the obligation is in question by this way, not only individuals but also State will gain. Another approach concerning to the definition of the place of performance, according to many specialists, must be the intention of the parties relating to the place of delivery. But in some cases it is difficult to understand the party's intention. There is an opinion, that the place of delivery can be found by way of an autonomous method, inspired by the Principles of European Contract Law and the UNIDROIT rules[19]. UNIDROIT is otherwise called the International Institute for the Unification of Private Law, which is an independent intergovernmental organization. Its purpose is to try to moderate, harmonize, and coordinate private international law and to draft international Conventions to address the needs. However, the Regulation No. 44/2001(Brussels Regime) has jurisdiction only when parties are resident in different member states of the European Union and the European Free Trade Association. Armenia is not a member state of both. It is not real that Armenia in the near feature will be a member state of EU, or participant of the European Free Trade Association, (as for entrance EFTA, first of all some requirements must be met), but like other states, such as Russia, Turkey, India[20], Armenia also can start negotiations with EFTA which will bring us both economic and legislative good results. You can argue, that Armenia is a member state of the Vienna convention, and must be bounded by it, as article 6 of RA Constitution states: … The international treaties are a constituent part of the legal system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the treaty shall prevail….[21] , but, Vienna convention is very flexible, in particular, article 6 of CISG states: the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provision. So we

[19] . Gsell, *supra* note 14, at 491; Leible, *supra* note 14, at 112, no. 52.

[20] http://www.efta.int/free-trade/news-archive.aspx?Page=18

[21] The constitution of the Republic of Armenia, article 6

must either try to be a member state of EU and EFTA, or make changes in our legislation, in particular, articles which concern to the definition of the place of performance of the contractual obligations taking into consideration all these European practices .

3. When the law applicable to the private international contract is in question

Private relations in Armenia are regulated by the civil code and some other legislative acts. In particular, division 12 of the Civil code is called "Private International law", which includes chapters 80(general provisions) and 81 (conflicts norms), articles 1253-1293[22]. Article 1284 (1) of RA Civil code states: a contract shall be regulated by the law of the state chosen by agreement of the parties. From the wording of this article we can understand that the parties of the contract enjoy unlimited "freedom of choice" opportunity. They can choose to be bounded by the legal system they want, even if the chosen law does not have any connection with the contract. This is not the best solution and can have bad affects both for the state (state's economy) and the private party of the contract. The expression of the "freedom of choice" can be imposed either in the contract or by the separate agreement, but it is not clear whether that agreement is required to be in a written form or not, whether notaries verification is needed. Different specialists in this field have accepted that the principle of party autonomy is effective as it allows the parties to select the law most appropriate to their transaction. And it works well in practice[23]. But In my opinion, unlimited party autonomy is not a good idea, because in the practice there is a "bad intention" doctrine, when the stronger party of the

[22] Civil law of the RA, page 343, 2003

[23] http://en.wikipedia.org wiki/Conflict_of_laws

contract (e.g. employer in the employment contract) can choose the law which put him in a stronger position and doesn't have any connection with the contract.

The problem becomes more complicated in the subparagraphs 2 and 3 of the article 1284: 2) the parties to a contract may choose the law subject to application both for the contract as a whole and for individual parts of it. 3) a choice of the law to be applied may be made by the parties to the contract at any time, both at the conclusion of the contract and later. The parties may also at any time agree on changing the law applicable to the contract. I think that these kinds of provisions will create obstacles for the state to protect internal market which is target for foreign investors. So if we suppose that in Airplane case parties have chosen to be bounded by the law of e.g. UK, it will be easy to understand how the situation can be complicated, as UK has many legal systems, and we must understand which one is more appropriate for our case. This is both time and money consuming process. Or can parties of this contract choose (our legislation gives that opportunity) the law of South Africa, because Russian party knows that it will be in a better position than Armenian party, which has less knowledge about the gaps of SA legislation, however, Armenian party signs the contract, and then, when dispute arises, it becomes clear that Russian party doesn't have to pay damages for not performing the contractual obligations, because e.g. According to SA legislation Volga"Airline Company lacks the capacity to enter into such a contract, so the contract is invalid. Let's discuss another situation, when the parties of the contract in our case have not put provisions in their contract both about the place of performance and also about the law applicable to their contract; by what law they must be bounded. In article 1285, 1 (3) of RA Civil code states: In the absence of agreement of the parties to a contract on the applicable law, the law of the state shall be applied of where the party was founded, has its residence or basic place of activity who is: the seller–in a contract of purchase and sale. As we see, in such situations our Civil code applies the principle of lex venditoris . So Russian law must be applied for this contract, but, as we see above, an airplane is considered to be immovable property in Russia, and Russian law as

almost all other countries adopt the principle of lex rei sitae, which means that must be apply the law where the immovable property is located. That will be the law of UK. At least these complicated issues will be solved, but it may last months and will have many adverse effects for the private parties, therefore we need more flexible approaches in our legislation. Besides, there is another problem. Both Armenia and Russia are the member state of the convention on legal aid and legal relations in Civil, Family and Criminal cases, signed by member states of the Commonwealth of Independent States. Article 47 of this convention states, that the right and obligations of the parties of the contract is defined by the law, where that contract is signed[24]. As we see, this convention chooses the principle of lex loci actuse, which is in a contradiction with the principle of lex venditoris stated in our civil code, article 1285. But as, according to our constitution, article 6, the international treaties are considered to be the part of our legal system, and have priority to apply in case of contradiction with domestic rules, so, because of this convention our Civil code becomes less effective, and, though in the "airplane" case it will be chosen the law of Armenia, as the contract was signed there, in practice it may raise many difficulties if the parties will have to be bounded by only one principle (lex loci actuse). We must take into consideration, that this convention was ratified in 1994[25], and during sixteen years Private international law has developed much. It's difficult to imagine, which will be considered to be the place where the contract signed, if the parties have entered into contract e.g. via internet. I think Armenia must make derogation from article 47, and choose the approaches of the states which suggest modern mechanisms for removing uncertainties in this field. In this context, let's consider the practice of European states. Europeanization of Private international law is actually under way. Its, because merging economies companies require legal expertise exceeding national systems and languages. A formal starting point for these developments is the Resolution adopted by

[24] Civil law of the RA, 2003

[25] ttp://zakon.rada.gov.ua/cgi-bin/laws/anot.cgi?nreg=240%2F94-%E2%F0

the European Parliament in 1989 which encouraged the European Commission to take up work in order to create a European Code of Private law.[26] And now we can say that European states have the most flexible rules in their Private international law.

As we mentioned in the "airplane" case, Armenian company didn't know what to do, because of our Civil code, article 1284 (1), which gives the parties "free choice" opportunity. "Ararat" and "Volga" airline companies had chosen to be bounded by the law of South Africa (or the UK, it doesn't matter). If we try to regulate this type of relations by the Private International law of Poland, we will receive completely different picture. In particular, article 25 of the polish Private International law (1965) states: the parties of the contract can choose to be bound only by a law which is substantially connected with the contract[27]. I think this is more logical approach and the stronger party of the contract will have fewer chances to avoid from the performance of the contractual obligations. In the "airplane" case that place will be Russia because if we take into consideration the principles, modern approaches and the logic of Private international law, saying "substantially connected with the contract", we can suppose that it is the law of sellers residency (lex venditoris). Private International law of Austria (1978), article 1 also states that the law applicable to the contract must be defined according to the "substantial connection" principle.[28] This principle is the most applicable mechanize in Europe when defining the law applicable to the contract. This approach also has its application in other, non-European states. In particular, Canadian conflict of law rules state that Where the parties have not chosen the proper law, the court determines, in light of all the circumstances, the system of law with which the contract has the

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.(http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/hartkamp/perspectives_trento.htm

[27] Private International Law of Poland, article 25

[28] Private International Law of Austria, article 1

closest and most real connection.[29] However, each state's court will decide itself whether the chosen law has connection with the contract or not. Each state's jurisdiction contains so called territorially limited rules, which have imperative nature. These rules are called to protect public order. RA Civil code is not exclusion and also contains provisions referring to the public order. In particular, article 1258(1) state: a norm of foreign law subject to application in accordance with Paragraph 1 of Article 1253 of the present Code shall not be applied when the consequences of its application would clearly contradict the bases legal provisions concerning to the principles of public order. The meaning of these provisions is that the parties of the contract by their own act can not violate the fundamental principles of the local municipal law. (E.g. in cases, when the chosen law will result in an immoral outcome or give extraterritorial order (public order) of the Republic of Armenia. In such a case if necessary the respective norm of the law of the Republic of Armenia shall be applied. But what, if the stronger party has a'' bad intention'' and wants to escape from performing its contractual obligations, and, therefore has chosen the law which is not against the "public order" rule of Armenia and can be applied. So, whether our courts have authority to find out the parties intention and, therefore, decide if chosen law can be applied or not. From the wording of article 1258(1) we understand that our courts only apply the law and cannot interpret it. Here I think the most flexible approach is the rule of Switzerland concerning to the public order (public policy). According to the Private International law of Switzerland, the court chooses the "proper law" itself and can set aside the law chosen by parties and apply another law, which it will consider the most appropriate one. The advantage of this approach is that a court can take into consideration many factors, among them, the intention of parties when choosing the law and then decide which one can be applied. This is a new but a good approach, which Armenian legal system doesn't use. However, in some cases, a court may decide not to use the defined law and apply another one, which even is not familiar to parties. So this approach has

[29] http://recueil.cmf.gc.ca/eng/2001/2001fct13/2001fct13.html

some disadvantages, but we also must take into consideration the fact that when parties applying to the court, they don't care by which legal system their relations will be regulated, they just want to have a justifiable solution for the dispute, and the court is in the best position to find out which solution is justifiable. Some other countries use different approaches when defining the law applicable to the contract. In particular, there are two views in the law of the Republic of South Africa, regarding the position where the parties to a contract have not chosen a legal system.1 the court presumes that the parties intended a legal system to govern their contract, but if it is not clear, 2 the court still presumes that they must have had some legal system in mind.[30] We can say that this approach is similar to the principle of "substantial connection", because the parties' intention can also be defined by applying the principle of "substantial connection''.

4. Conclusion

Armenian legislation has many flexible rules concerning to the definition of the place of performance of the contractual relations, and the law applicable to the contract. We cannot say that Armenian legal approaches in this field are bad. Indeed, we have good conflicts norms in our civil code, which are more modern and flexible than those of other state's conflicts norms. But Armenian system has some gaps, or some vague rules that need to be improved in order to exclude uncertainty in the Private international relations. It is very difficult to apply traditional principles of private international law (saying traditional principles, I mean rules, which have been applied for a long time, but now, because of the developed international communication, it's difficult to apply those rules), when a transaction is not clear by which law it is regulated or where it is consider being the place for the performance of the contractual obligations, in particular if parties enter into contract

[30] . Gsell, *supra* note 14, at 491; Leible, *supra* note 14, at 112, no. 52.

via an internet. However, Private international law is a living instrument and it always tries to satisfy the needs of this field. But there is still uncertainty in Armenia referring to the interpretation of the terms which regulate the relations that have private international nature. Business world has very serious anxieties about very wide interpretation of such terms. However, some specific rules have been adopted which is a one step forwards. But the fact, that we don't have a separate Private International law, like some developed countries, such as Poland, Switzerland, Germany, is already bad, because this means that we cannot regulate this kind of relations more detailed. Two chapters of RA civil code in my opinion are not enough.

Based on the already existing international practice I suggest the following recommendation:

1. I suggest the National Assembly to adopt Private International Law. I think that we must have separate law, where will be reflected European best practice. Making the legislation more detailed, it will narrow the scope of the application of the general rules for specific cases. There are many conflicts norms in the private international laws of states which are used to define the place of performance of the contractual obligations. RA Civil code doesn't regulate this type of relations more detailed. And, as we saw above, only two principles are used: lex venditoris and lex rei sitate. So, question may arise, how it will be defined the place of performance of the contractual obligations if parties have entered into the contract of exchange. In such a contract the parties are both buyer and seller. The importance to have such a law is to make persons engaging in such relations to feel them more protected and to avoid uncertainty. We can put in Private international law norms, which will be applicable for particular situations. Its logical that RA Civil code cannot regulate private international relations more detailed, that's why it contains only a few principles of conflicts norms. For example, Private international law can contain beside lex venditorise or lex rei sitae, also the

principle of lex cousae (the law which is more connected with the contract), which will be applied well in the contract of exchange, or in the contract via enternet.

2. I suggest to change the wording of article 355 and to define the place of performance based on the fact, where, under the contract, the goods were delivered or should have been delivered.[31] This approach is designed in article 5(1) of the Regulation No. 44/2001, which, I think, is much more flexible than RA Civil code, article 355. [32] Appling article 355, we see that different jurisdictions can be applicable for one contract; if the payment of the price is in question, the place of performance is the state where the price must be paid, therefore the law of that state must be applied, and if the dispute is about the good, which must be delivered, the place of performance is the state, where the seller has residency, and the law of that state must be applied. These issues may arise in the same case. So the complexity is obvious. The logic of the article 5(1) is to proximate the litigation and forum in the same case. The importance to have such article is that we can avoid uncertainties and Armenian party of the contract will not have to go from state to state in order to protect its interest. I suggest Armenian government to start negotiations with the EFTA, because it will have both economic and legislative good effects in particular for Armenian importers, as the Regulation 44/2001 is binding for EFTA and in case of dispute, Armenian law will be applied. The advantage of this article is that one contract will be regulated only by one jurisdiction.
3. My next suggestion is referring to article 1284 of RA civil code[33], which gives the parties illogically broad[34] "choose of law" opportunity, when it states that the contract should be

[31] http://eur-lex.europa.eu/

[32] RA Civil code, article 355

[33] RA Civil code, article 1284

[34] Armen Haykyanc, Private international law

regulate be the law chosen by the parties, and the parties can change the law whenever they want. Parties must have the right to choose the law by which they must be bounded, but that right must not be absolute, as it can be reason for many uncertainties. Parties can choose the law, which don't have any connection with the contract, and this can put the weaker party of the contract in a bad position, because the chosen law may give the other party some advantages, e.g. to escape from meeting the requirements of the contract. European states have much more flexible approach concerning to this issue. In particular, I think, Armenian legislation can apply the polish practice. Article 25 of the Private international law of Poland gives the parties of the contract only restrictive rights to choose the law, by which they must be bounded[35]. Parties can choose only the law which has substantial connection with the contract.

4. I also suggest to give our courts authority to find the ''proper law'' of the contract. Article 1258(1) of RA Civil code states: a norm of foreign law ….shall not be applied when the consequences of its application would clearly contradict the bases legal provisions concerning to the principles of public order.[36] But , it may be the situation, when the chosen law is not In a contradiction with the principles of public order but that law doesn't have any connection with the contract, parties choose it, because they have ''bad intention'' to use some gaps of that law. In this case the most modern approach has Switzerland, which gives a court an authority to apply the law he finds to be the most appropriate, and not the law that parties have chosen in their contract.[37] This means that law of Switzerland protects not only the weaker party of the contract but also foreign state's public policy. The importance of this

[35] Private international law of Poland, article 25

[36] RA civil code, article 1258

[37] Private International law of Switzerland

article is to give judges an opportunity to choose the law based on the facts and the provisions of the contract and to find more justifiable solution.

5. I suggest Armenian government to derogate from the article 47 of the convention on legal aid and legal relations in Civil, Family and Criminal cases, signed by the member states of the Commonwealth of Independent States, which states that the right and obligations of the parties of the contract is defined by the law, where that contract is signed [38](the principle of lex loci actus). This article is in contradiction with the article 1285 of RA Civil code, which choose the law based on the principles of lex vendetores (the place of residency of the seller) and lex rei sitae (the place where immovable property is located)[39]. However, according to the article 6 of the Constitution of Armenia,[40] article 47 of the convention has priority against the article 1285 to apply. The convention is binding only for the member states, but Armenia is in an active commercial relation with these states and regulation of the contractual relations only based on the principle of lex loci actus can create some difficulties, (e.g. parties of the contract, which are nationals of two different member states of the convention, have signed their contract in the third country. According to the article 47 the contract must be regulated by the law of that country, though it doesn't have any connection with the contract), even in some cases it will be impossible to define the place of performance of the contractual relations.

[38] Civil law of the RA, 2003

[39] RA civil code, article 1285

[40] The constitution of RA, article 6

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