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Bargaining inequality: ways to overcome it in international commercial law and in private international law

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Abstract. The basic tenet of contract law is freedom of contract, including the freedom to negotiate and the autonomy of the will of the parties. However, practice and doctrine show that many international commercial contracts are formed in conditions of actual inequality of counterparties. The present work is the first comprehensive study of the problem of cross-border bargaining inequality among professional merchants. The aim of the study is to systematize and critically evaluate the effectiveness of legal conditions formulated in the unified acts of international commercial law and private international law to overcome inequality of counterparties at the pre-contractual stage. The study is based on logical, formal-legal and comparative-legal methods. The results and conclusions may be formulated as follows: (1) The set of legal means to resolve the problem of unequal position of the contracting parties is represented by a complex of complementary spheres of unified normative regulation – substantive norms and conflict-of-law norms. (2) Universal conventional legal regulation of the pre-contractual stage has not been developed. (3) Recommendatory acts of substantive unification of commercial law enshrine developed models of regulation of the parties' conduct in cross-border negotiations. The main legal means to balance the position of the counterparties is the institution of the pre-contractual liability based on the principle of good faith. (4) Both in European law and in Russian law, the conflict-of-law issue is resolved through a combination of non-contractual qualification of the pre-contractual relations and the complex nature of regulation involving the consecutive use of contractual and tort-based connecting factors. (4) Where there is inequality, conflict-of-laws must provide for an equitable solution to situations where the choice of law applicable to each of the contracting parties is not truly free, including permitting a deviation from the principle of autonomy of will. (5) In the absence of parties' choice of applicable law, the list of criteria for establishing the closest connection between the pre-contractual legal relation and the competent legal

order should be expanded: the court should be able to consider the law of the future contractual obligations' place of performance and the law governing other related contracts.

Key words: inequality; international commercial contract; cross-border pre-contractual relations; contract negotiation; autonomy of will; weaker party; UN Convention on Contracts for the International Sale of Goods 1980; UNIDROIT Principles; Principles of European Contract Law; Rome II Regulation

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Неравенство в переговорах: способы его преодоления в международном торговом праве и в международном частном праве

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Аннотация. Основным постулатом договорного права служит свобода договора, включающая свободу ведения переговоров и автономию воли сторон. Однако практика и доктрина свидетельствуют, что множество заключаемых международных коммерческих контрактов формируется в условиях фактического неравенства контрагентов. Настоящая работа – первый опыт комплексного осмысления проблемы трансграничного неравенства переговорных возможностей коммерсантов. Цель исследования – систематизировать и критически оценить эффективность правовых условий, сформулированных в унифицированных актах международного торгового права и международного частного права, для преодоления неравенства контрагентов на преддоговорной стадии. Исследование выполнено с опорой на логический, формально-юридический и сравнительно-правовой методы. Результаты и выводы. Набор правовых средств разрешения проблемы неравного положения договаривающихся сторон представлен комплексом взаимодополняющих сфер унифицированного нормативного регулирования – материальной и коллизионной. Универсальное конвенционное регулирование преддоговорного этапа в праве не выработано. Рекомендательные акты материально-правовой унификации торгового права закрепляют развитые модели регламентации поведения сторон в трансграничных переговорах. Основным правовым средством

для достижения баланса положения контрагентов служит институт преддоговорной ответственности, основанный на принципе добросовестности. В европейском и в российском праве коллизионный вопрос решается путем комбинации нормативно закрепленной внедоговорной квалификации преддоговорных отношений и комплексного характера регулирования, предусматривающего последовательное использование договорной и деликтной привязок. В условиях неравенства коллизионные нормы должны предусматривать справедливое разрешение ситуаций, в которых выбор применимого права не является действительно в равной степени свободным для каждого контрагента, в том числе допускать отклонения от принципа автономии воли. В отсутствие выбора применимого права перечень критериев для установления наиболее тесной связи преддоговорных правоотношений с компетентным правопорядком следует расширить: так, суд должен иметь возможность учитывать право места исполнения будущих договорных обязательств и право, регулирующее другие связанные договоры.

Ключевые слова: неравенство, международный коммерческий договор, трансграничные преддоговорные отношения, переговоры о заключении договора, автономия воли, слабая сторона, Конвенция ООН о договорах международной купли-продажи товаров 1980 г., Принципы УНИДРУА, Принципы европейского договорного права, Регламент Рим II

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Introduction

The principle of freedom of contract prevails everywhere in the regulation of private commercial relations, with legal equality of the parties presumed[1]. International commercial law, much more so than the domestic legal order, is based on this approach, including the fundamental concept of autonomy of the will of counterparties. Following this logic, in cross-border arrangements and in international commercial dispute resolution, these principles should be respected with particular care (Grebelsky, 2021).

However, with increasing economic inequalities, the proliferation of standardised contract proformas by more powerful global market actors and information asymmetries, compounded by geopolitical shifts, social upheavals and financial crises, the legal

[1] For more on freedom of contract and autonomy of the will in contractual relations, see: (Karapetov & Saveliev, 2012).

equality of counterparties from different countries is shattered by their actual economic, political and, consequently, negotiating inequalities.

When the parties' relation extends beyond one jurisdiction, the state of inequality and its consequences are exacerbated. This is due to the collision of several legal orders in cross-border commercial relations and the fact that the legal regulation in such jurisdictions may be highly heterogeneous. Where, in domestic business relations, bargaining power is substantially out of balance, the idea of *de facto* inequality provides a valid justification, on the one hand, for the *implied* inclusion of certain mandatory contract terms by express statutory mandate or, on the other hand, serves as a valid reason not to give legal effect to a contractual provision by court order. In domestic litigation, this protection serves as a good tool for negotiators whose positions are weakened[2]. For a cross-border commercial transaction, this rule will not always apply, as the applicable law is often not predetermined, and the applicable law subsequently established by the court may not always offer the desired support to the weaker negotiating party.

The inequality of the parties to a future contract is particularly evident at the pre-contractual stage of the relationship. The extent to which a negotiator can get his or her position reflected in the contract largely determines the position of the counterparties during the performance of the contractual obligations. In a situation of unequal opportunities, the negotiation stage is the main source of problems throughout the implementation of contractual provisions.

Finding the legal means to strike a balance in a situation of unequal contracting parties, where there is not yet a binding contract between merchants, is not an easy task. Some scholars believe that contract law in principle lacks mechanisms to address the problem of inequality (Carrigan, 2013). Moreover, some authors are convinced that contract law not only reflects but also reinforces inequality (Gava, 2013). Often inequalities in cross-border business negotiations are not explored at all[3]. We assume that, in combination, the provisions of the uniform acts of international commercial law and of private international law (PIL) are designed to serve as a pivot to ensure equal positions of parties in cross-border business transactions. The purpose of the present study is to systematise and critically evaluate the effectiveness of the legal conditions set out in such acts to overcome the inequality of contracting parties at the pre-contractual stage.

Pre-contractual liability as a legal means of balancing negotiations

The concepts of *inequality, unequal bargaining power* or *weaker party to the contract* are not normatively defined in international commercial law. There is no

[2] The category of a *weak party* to a contract, including in a comparative legal context, is very concisely and convincingly elaborated on in contemporary domestic doctrine (see, for example: Volos & Volos, 2019). Weak party in civil legal relationship: comparative legal research. Moscow, Prospect Publ. (in Russian). This paper relies on such findings and a number of other writings and does not seek to delve deeper into the legal phenomenon in question.

[3] For example, key dissertation studies by domestic scholars devoted to doctrinal understanding of cross-border pre-contractual relations do not directly address the issue of inequality in negotiation (see: Stepanisheva, 2015; Muratova, 2015).

independent doctrine of inequality of contracting parties in commercial law literature either. The concept of unequal bargaining power in relation to business-to-business relationships has neither been developed at the level of national contract law, *e.g.*, inequality *per se* is not discussed in the contract law of England and Wales (McKendrick, 2019:334–335). It is probably due to weak doctrinal elaboration of this topic that no significant jurisprudence dealing directly with the problems of negotiated inequality in cross-border legal relations has been formed. Doctrine (and – subsequently – law enforcement practice) predominantly addresses inequality situations through the lens of general private law categories of good faith and fairness specific to individual legal systems, with the concept of pre-contractual liability taking the lead on this issue.

Negotiations that precede the conclusion of the main contract between entrepreneurs do not always have legal framework that is obvious to counterparties, however, they do entail certain legal consequences. The principle of freedom of contract presupposes that reasonable parties to a civil law relationship should make an effort to assess the circumstances relevant to the contract and should bear the risks associated with a lack of diligence in negotiating the terms of the transaction. However, the parties are entitled to pursue their own interests in disclosing information to each other to the extent that they do not deceive or mislead the counterparty.

The pre-contractual stage is characterised by a set of problems stemming from unbalanced negotiating positions. In a situation of inequality, a party's reasonable expectations may not correspond to reality, which leads to concluding unfavourable contract. When it comes to negotiating the material terms of the transaction, misrepresentation, or omission of significant information about the subject matter of the contract puts a party at odds with its counterparty. The capacity of one party may allow it to unreasonably terminate negotiations and enter into a contractual relationship with another person, while the weaker counterparty, with whom the business relationship has been terminated, may have spent significant funds and other resources to negotiate the transaction.

Restrictions on the principle of freedom of contract, including the freedom to negotiate, correct the effects of the inequalities noted above.

A set of rules obliging parties to respect each other's interests in the process of business cooperation is commonly referred to as the institution of pre-contractual liability. The concept of *culpa in contrahendo* (Latin for *guilt in negotiation*) was developed in the XIXth century in German doctrine (Ihering, 2013) and nowadays the rules of pre-contractual liability based on it have been implemented by many legal systems. Equally essential is that such rules are enshrined in the new *lex mercatoria*, the core of the international commercial law.

Pre-contractual liability is based on the breach of a statutory duty to negotiate in good faith. It is separate and unrelated to the subject matter of the contract (Gnitsevich, 2009:24). On the basis of analysis of foreign literature and practice of civil law countries, O.V. Mazur combines pre-contractual duties into two main groups related to the content of the requirement of good faith conduct in negotiations: (1) the duty of consistency in conduct that does not mislead the other negotiator (the duty of consistency), and (2) the

duty to act openly, to provide or disclose information (referred to as the duty of transparency / the duty of disclosure). The foreign doctrine also refers the prohibition to take unjustified advantages from the transaction due to inexperience or inattention of the counterparty to the second group (Mazur, 2012:198). The first set of duties and corresponding rights under the institution of pre-contractual liability is intended to ensure the dynamics of pre-contractual contacts, while the second is more oriented towards creating the conditions for an informed and logical decision to enter into a contract and to prevent the negative consequences of unequal bargaining power (Boyarsky, 2022:149).

In implementing the institution of pre-contractual liability, the risk of negative property consequences is transferred to the bad faith party, which must compensate the counterparty for the costs by paying damages. This mechanism allows to restore the lost balance in the relationship between negotiators.

Regulation of pre-contractual relationships in international commercial law uniform acts

In international commercial relations, standards of conduct for counterparties vary depending on the area of business and often differ from similar national standards[4]. It is noteworthy that the concept of *culpa in contrahendo*, for the purposes of international commerce, is isolated in international instruments[5] as a distinct legal institution and as such need not be interpreted within the meaning of any national law but may be interpreted independently of domestic legal rules.

The fundamental international legal instrument that provides some guidance on the legal regulation of the pre-contractual stage in cross-border commercial relations is the 1980 United Nations Convention on Contracts for the International Sale of Goods (the Convention, CISG)[6]. Article 7 of the Convention establishes the principle of good faith in international trade, which is widely applied in practice (Muratova, 2019). A number of clauses thereof (Art. 14–24) deal with the procedure for concluding an international commercial contract: qualification, entry of the contract into force, sending and withdrawal of an offer and acceptance, response to an offer, consequences of failure to comply with established timeframe, *etc*. At the same time, the text of the Convention does not contain direct references to pre-contractual relations. Under Article 7, matters which fall within the scope of the Convention's regulation but which are not expressly set out in the instrument are to be settled either in accordance with the general principles on which CISG is based or, in the absence thereof, in accordance with the law that would be applicable under the PIL rules.

[4] Art. 1.7. of the UNIDROIT Principles. Comment 3. Available at: https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf [Accessed 23rd February 2023].

[5] For instance, such reference is given in the 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), that will be discussed further.

[6] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). The Russian Federation is a party to the Convention as the legal successor to the USSR. Hereinafter, the source of publication of Russian legal acts and judicial acts is ConsultantPlus Reference Legal System.

Researchers argue that professional market participants rarely conclude legally binding agreements of intent or negotiation agreements at the pre-contractual stage, thus leaving it to courts and international commercial arbitral tribunals to resolve future disputes (Guillemard, 1994:55). Thus, unless otherwise agreed by the parties, most issues of pre-contractual relations and pre-contractual liability are to be resolved in accordance with the rules of applicable national law. It seems that this approach may not be appropriate to protect the weaker party in negotiations, since no national legal order alone can adequately take into account the specific nature of cross-border commercial relations.

Notwithstanding this general formula of CISG and the reference to national law, it should be noted that its provisions must, in certain circumstances, be directly considered by judges and arbitrators in disputes arising from contract negotiation. Article 16 of the Convention, for example, highlights cases where the withdrawal of an offer is impossible. Within the meaning of this normative act, a breach of the above rule entails contractual liability for non-performance of contractual obligations (Moura Dário, 2003:708). Similarly, where the buyer did not know and could not have known at the negotiation stage that the goods were not in conformity with the contract, the seller will not be liable under national law for pre-contractual liability, but for non-performance or improper performance of its contractual obligations (Art. 35 of the Convention).

It is important to recall that, despite the seemingly wide geographical scope of CISG[7], there remain influential countries for modern business such as the UK, India, Qatar, Saudi Arabia, Kazakhstan, Pakistan and South Africa which have not acceded to it. As a result, the significance of the Convention may be nullified for legal relations with counterparties from such jurisdictions, unless the contracting parties explicitly agree on its application. Moreover, the legal act in question deals exclusively with contracts for the sale of goods, which also narrows its scope of application to some extent.

In order to streamline cross-border traffic, to better reflect and cover more precisely the types and phases of contractual relations, including the negotiation stage, authoritative international and regional organisations and academic centres have developed special unified *soft law instruments*, also referred to as the new *lex mercatoria*. These are the results of private law unification, as reflected in the Principles of International Commercial Contracts (UNIDROIT Principles) [8] and the more academic, but well established, Principles of European Contract Law (PECL)[9], which have already gained recognition in business, courts and arbitral tribunals[10]. Besides, the model rules

[7] As of 15 June 2023, 95 states participate in the Vienna Convention. Available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status [Accessed 23rd February 2023].

[8] UNIDROIT Principles of International Commercial Contracts. The document is currently in force in the 2016 version. Available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ [Accessed 23rd February 2023].

[9] Principles of European Contract Law. Available at: https://www.trans-lex.org/400200/_/pecl/

[10] These and some other sources of modern *lex mercatoria* have been published in an easy-to-grasp format: in the original English version, accompanied by a parallel translation into Russian by the Department of Commercial Law and the Basics of Law of Lomonosov Moscow State University's Law Faculty. See: (Puginskiy & Amirov, 2023).

of European private law, known as the Draft Common Frame of Reference (DCFR)[11], the CENTRAL Principles[12], the draft Uniform Act on General Commercial Law of the Organization for the Harmonisation of Business Law in Africa (OHADA) of 2011[13], the draft Principles on International Commercial Contracts of the Organisation for the Harmonisation of Business Law in the Caribbean (OHADAC) of 2015[14], which are less common in cross-border commercial practice but are of obvious research interest, are also worth mentioning. It should be noted that the UNIDROIT Principles have received significantly more attention both in literature and judicial practice. It is believed that this is largely because PECL, like DCFR, despite their universality, were created to unify European contract (private) law and are therefore perceived as instruments for regulating regional relations within the European continent. The other above-mentioned instruments are poorly represented in the Russian legal doctrine, and the prospects for their influence on cross-border relations involving Russian businesses are yet to be conceptualized. We will concentrate on the most well-known acts in Russia: the UNIDROIT Principles, PECL and DCFR.

The principle of good faith is enshrined in each of these three non-binding instruments. Pursuant to Art. 1:201 of PECL, each party to an international trade relationship must act in accordance with good faith and fair dealing. The source of such an obligation in the UNIDROIT Principles is Art. 1.7 and Art. I.-1:103 of DCFR (the latter also defines good faith and fair dealing).

By consistently disclosing the duty to act in good faith, the uniform acts impose liability for bad faith in negotiation (*e.g.*, Art. 2:301 of PECL; Art. 2.1.15(2) of the UNIDROIT Principles; Art. II.–3:301(2) of DCFR). Articles 2:301, 2:302 PECL, Art. 2.1.15(3), 2.1.16 of the UNIDROIT Principles, Art. II.-3:301(3;4), II.-3:302 of DCFR identify types of bad faith conduct for which liability for the incurred damage arises; this involves entering into negotiations without the actual intention of reaching an agreement with the counterparty; wrongful interruption of negotiations; disclosure or misuse of information that is presented to a party during negotiations as confidential.

Articles 3.2.2, 3.2.5, 3.2.7 of the UNIDROIT Principles outline the grounds for challenging a contract. These include mistake, fraud and gross disparity. Whether or not the contract has been challenged, the party who knew or ought to have known about these grounds is liable to compensate the counterparty for losses arising from bad faith (Art. 3.2.16 of the UNIDROIT Principles). Under Art. 4:106 and Art. 4:107 of PECL on fraud, liability is imposed on the party who induced the

[11] Principles, Definitions and Model Rules of European Private Law (Draft Common Frame of Reference). Available at: https://www.trans-lex.org/400725/_/outline-edition-/ [Accessed 23rd February 2023].

[12] List of Principles, Rules and Regulations of *Lex Mercatoria* CENTRAL (Russian translation). See: (Puginskiy & Amirov, 2023:145–177).

[13] General commercial law. Available at: https://www.ohada.org/en/general-commercial-law/ [Accessed 23rd February 2023].

[14] OHADAC Principles on international commercial contracts. Available at: https://www.ohadac.com/textes/2/ohadac-principles-on-international-commercial-contracts.html [Accessed 23rd February 2023].

counterparty to enter into the contract by misrepresentation or intentional withholding of information.

DCFR establish information obligations in more detail. Articles II.-3:301 to II.-3:109 regulate the procedure of fulfilment of certain information obligations by the parties at the pre-contractual stage (*e.g.*, obligation to disclose information on goods, other property, services; obligation to provide relevant information in case of remote conclusion of the contract, *etc.*). Article II.-7:204 imposes liability in the form of damages on the party who has provided incorrect information to a counterparty during negotiations, (a) assuming that such information was incorrect / having no reasonable grounds to believe it was correct, (b) knowing / reasonably believing that the recipient would take such information into account when deciding to enter into a contract. Article II.-7:205 sets out the criteria for disclosure of information. For example, parties to the transaction must take into account the competence of the counterparty in this field, assess its costs of obtaining the necessary information and whether it has other means of obtaining such information, and be aware of the importance of such information for the counterparty.

Many national civil law codes have borrowed the negotiation rules contained in the UNIDROIT Principles. As a result of this migration of rules from international commercial law to national civil law, regulatory standards from the international environment have spilled over into a wider range of domestic private relations. For example, the Lithuanian Civil Code incorporates a provision that negotiations are to be conducted in accordance with the principle of good faith[15], similar to Art. 2.1.15 of the UNIDROIT Principles. Significantly, when resolving a dispute between two Lithuanian construction companies, one of which had broken off negotiations just before the contract was signed, the local court referred not only to the norm of the domestic Code but also to the relevant Article of the UNIDROIT Principles and commentary thereon[16]. This approach demonstrates the universality of this document and its crucial importance and effectiveness, including for the internal contractual relations of merchants.

Courts have been known to rely on the UNIDROIT Principles to fill in gaps in national law and imperfect judicial practice on negotiation obligations. In 2008 (*i.e.*, before the principle of good faith was introduced into the Russian Civil Code), the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry (ICAC) dismissed the claim by the Russian Gazprom JSC against the Moldovagaz JSC (a Moldovan company) to recover debt under the gas supply contract. Among other things, the arbitration pointed out that the principle of good faith and fair dealing, defined in international commercial relations as a fundamental principle (here the ICAC referred to paragraphs 1–3 of the Commentary to Art. 1.7 of the UNIDROIT Principles), should be extended to the conduct of the parties throughout their relations, starting from negotiations on contract conclusion and

[15] Civil Code of the Republic of Lithuania. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495 [Accessed 23rd February 2023].

[16] Supreme Court of Lithuania 3K-3-38/19-01-2005. UAB "Vingio kino teatras" v. UAB "Eika". Available at: http://www.unilex.info/principles/case/1181 [Accessed 23rd February 2023].

ending with the stage of settling differences arising during the performance of the contract, *i.e.*, at the pre-trial stage[17].

It is known that the UNIDROIT Principles rarely appear as the applicable law in the total volume of international commercial contracts (only in 0.6 per cent of cases) (Schwenzer, 2016:67). It is much more common for parties to request arbitrators to take into account relevant authoritative international acts in addition to national law when applying to arbitration. In 1996, for example, the International Court of Arbitration of the International Chamber of Commerce heard a dispute between a television equipment supplier from the U.S. and a telecommunications cable manufacturer from the Middle East. The parties entered into a preliminary bidding agreement which required that a cable supply contract be negotiated in good faith in the event that the supplier's bid for the position of general contractor for a telecommunications expansion project was successful. The parties did not agree on the applicable law. After a series of fruitless attempts to reach a consensus, the claimant decided to terminate the preliminary agreement. The respondent, among other requirements, asked the arbitral tribunal to take into consideration the basic principles of the law of international commercial contracts, as set out in the UNIDROIT Principles. The arbitral tribunal upheld this request and, referring in particular to Art. 1.1, 1.3, 2.1.15 of the above document, ordered the parties to return to the negotiation process and to reach a result within the parameters laid down in the parties' provisional agreement.

The uniform acts of international commercial law provide examples of the most favoured business practices. However, they remain documents of an advisory nature, and their legal effect largely depends on the will of the counterparties. As a rule, the provisions of such acts do not bind either party to an international commercial relation (unless the parties have agreed otherwise) or the forum hearing the dispute.

Regulation of pre-contractual relations in PIL uniform acts

Despite the need to harmonise cross-border private law relationships, there is still a strong tendency in PIL to *nationalise* them: it is to the advantage of those involved that their relation is subject to a particular legal order (Bonell, 2018:17). This is also convenient for judges: from the perspective of the ordinary judge, a contract or contractual breach is primarily covered by the regulation of a particular legal system (Novoselova, 2014).

In the context of incomplete substantive regulation and lack of comprehensive conventional regulation, conflict-of-law rules "may all be relevant in the fight against inequality" (Michaels & Ruiz Abou-Nigm, 2021:320). In judicial and arbitral practice for international commercial disputes resolution, the conflict-of-law method continues to be favoured over non-state substantive regulation (Getman-Pavlova, 2023:59). Underlining the importance of conflict-of-laws for a contract, foreign scholars note: "the connecting factor linking a contract to the law of a particular country can help to increase

[17] ICAC at the RF CCI. Ruling No. 18/2007 of 8 February 2008.

income growth … and in reducing inequalities of outcome … or can have the opposite effect" (Michaels & Ruiz Abou-Nigm, 2021:326).

In this regard, it is important to discuss examples of international legal practice dealing with the conflict-of-laws in pre-contractual relations. A special role in the unification of international conflict-of-laws for the pre-contractual phase has been played by the European Union Regulation No. 864/2007 On the Law Applicable to Non-Contractual Obligations (Rome II, the Regulation)[18] that entered into force in 2009. "For the first time in the history of private international law" (Zykin, Asoskov, & Zhyltsov, 2021:495) it provided a solution to the conflict-of-law issue on the law applicable to business negotiations preceding the conclusion of a contract. It should be reminded that this document is addressed to the Member States of the European Union, but its rules are of a sufficiently universal nature to be used by other subjects of private international law.

The scope of the Regulation covers breaches that are not subordinate to the parties' agreement to negotiate and do not relate to promises made at the pre-contractual stage (Hage-Chahine, 2012:489–490) (this is the scope of another European regulation[19]). Rome II rules cover situations concerning breach of the duty of disclosure, breakdown of contractual negotiations, as well as other bad faith conduct directly affecting the course of business negotiations[20]. To such other circumstances which are subject to Rome II conflict-of-law rules, researchers include the conduct of the parties which affects the formation of contractual terms during negotiations and (or) form a substantial misunderstanding of the contractual terms for the counterparty, laying grounds for its invalidity or disrupting the conclusion of the contract (Hage-Chahine, 2012:494–495).

The intention of the drafters of the Regulation was to provide an opportunity to diverge from the various doctrinal positions of individual European countries and to create an instrument that helps to resolve with greater probability the conflict-of-law problem of determining the applicable law in pre-contractual disputes. Following the practice of the European Court of Justice[21] and aiming to enhance legal certainty, the authors of Rome II depart from the traditional "two-step" scheme (Hage-Chahine, 2012:465) for resolving the conflict-of-law problem adopted in continental legal systems. The Regulation initially qualifies pre-contractual relations as a type of non-contractual obligations because the regulation of pre-contractual liability is placed in the section on non-contractual obligations. This approach by the European legislator allows the enforcer to resolve the dispute more expeditiously and proceed directly to

[18] 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). Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864 [Accessed 23rd February 2023].

[19] We mean Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 On the Law Applicable to Contractual Obligations (Rome I). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008R0593&qid=1677607481953 [Accessed 23rd February 2023].

[20] Recital 30 of the Rome II Preamble.

[21] Case C–334/00 Fonderie Officine Meccaniche Tacconi SpA v H Wagner Sinto Maschinen-fabrik GmbH (HWS) [2002] ECR I–7357, JCP 2003 I 152 obs G Viney, Defr 2003 no 13 obs R Libchaber. Available at: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-334/00 [Accessed 23rd February 2023].

establishing the law applicable to legal relations without having to deal with the issue of qualification.

Under Article 12 of the Regulation, the law of the concluded contract (*lex contractus finalis*) or the law that would have been applicable if the contract had been concluded (*lex contractus putativus*) applies in priority to non-contractual obligations arising out of respective business negotiations, which, incidentally, does not depend on whether a contract has been concluded.

As stated in Article 3 of the Rome I Regulation governing European cross-border contractual relations, counterparties have autonomy of will as to the choice of law for their contract. But this principle allows more sophisticated (and often more affluent) individuals and corporations to move between legal systems in ways that preserve, consolidate or increase capital (Pistor, 2019). It should therefore be accepted that the widespread recognition of party autonomy as the main conflict-of-law ground in PIL has the effect of increasing, or at least maintaining, the level of inequality, but not reducing it (Michaels & Ruiz Abou-Nigm, 2021:327).

If the parties have not agreed on the applicable law, the special conflict-of-law rules apply, depending on the type of contract (Articles 5-8 of Rome I). If these criteria fail to be applied, the contract shall be deemed to be governed by the law of the country where the party decisive for the content of the contract has its habitual residence. If the applicable law could not be determined even in this way, or if the choice of law made in this way proves to be incorrect for a number of reasons set out in the Rome I Regulation, the closest connection principle shall apply.

Western jurists have raised well-founded doubts about the above approach in terms of its suitability to ensure equality of positions of the contracting parties. The European conflict-of-law approach has been criticised for tilting the balance too easily in favour of the stronger party: the seller, the contractor, *etc*. This will do nothing to reduce inequality. Basically, the fact that the Rome I conflict-of-law rules do not refer to the place of performance of the contract, but to the place of habitual residence of the performing party (for an entrepreneur – to the principal place of business; for a legal entity – to the place of central administration) may have such negative consequences (Michaels & Ruiz Abou-Nigm, 2021:329). The point of reference is usually the location of the person at the time the contract is concluded.

In this regard, experts call for improvement of the conflict-of-law rules on contracts so that the category of *close connection* also includes the jurisdiction in which the contract is performed and, in doing so, courts shall take into account the view of the weaker party to the dispute on this issue (Michaels & Ruiz Abou-Nigm, 2021:346). In addition, the establishment of *close connection* should involve a wider range of factors related to the contract, including the applicable law for other closely related contracts (contractual supply / value chain), the law that typically governs the contractual relations of merchants in the industry, *etc*. The possibility of such a choice should be enshrined in the law. It would be right to extend this logic to pre-contractual relations as well.

It is fair to point out that the drafters of European PIL instruments, to a certain extent, sought to accommodate the interests of the less protected parties to the contractual (and, hence, the pre-contractual) relations by stating the following: "as regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules"[22]. However, this refers to a *legally* weaker party to the contract: a consumer, a person entering into an adhesion contract, an employee, *etc*., as Rome I elaborates on the specifics and limitations of the choice of applicable law particularly for these parties to legal relations, without directly extending this approach to a wider range of cases of *actual* inequality in cross-border commercial relations. It should also be borne in mind that for Rome I, the primacy of the parties' choice of law[23] as reflected in the text of the contract, which generally (almost always) takes precedence over other conflict-of-law clauses, is fundamental.

In this regard, it is important to give judges more room for manoeuvre in choosing the law governing the relations of the contracting parties, taking into account the need to protect the interests of the *de facto* less protected party to commercial negotiations. We believe that such approach should be extended to cases of an imposed choice of law applicable to a contract where the real will of one of the parties has not been duly considered. In the European Union, for example, judicial discretion is limited by the well-known concept of the *closest connection* and even this margin is framed very cautiously in European law[24]. We are convinced that expansive approach would contribute to ensuring equality of positions in cross-border relations in Russian legal enforcement practice as well.

If, despite the very wide range of connecting factors, it is not possible to determine the applicable law on the basis of a contractual reference, the applicable law for pre-contractual relations (and for pre-contractual liability) is determined according to the rules that are used for torts.

Rome II does not explain what specific circumstances may prevent the court from determining the applicable law based on the contractual provisions. It is highly probable that the rather detailed system of rules designed to determine the governing law of the contract generally leaves very little room for such an outcome[25]. However, contemporary European court and arbitral practice demonstrate experience to the contrary. Thus, in a pre-contractual liability dispute between an Italian company (claimant) and a Slovenian company (respondent), heard in 2018, the Italian court decided that it was not possible to determine the applicable law to the parties' negotiations by reference to contractual provisions. The dispute concerned the legal consequences of non-conclusion of a joint venture (cooperation) agreement between the claimant and the respondent for the construction of a storage terminal at a port in Slovenia. The respondent proposed to conclude such an agreement by inviting the claimant to jointly participate in a tender

[22] Recital 23 of the Rome I Preamble.

[23] Recital 11 of the Rome I Preamble.

[24] Recital 16 of the Rome I Preamble states that "the courts should … retain a degree of discretion to determine the law that is most closely connected to the situation".

[25] Leading domestic scholars assert that the need to resort to tort connecting factors may arise in extremely rare cases. See, e.g..: (Zykin, Asoskov & Zhyltsov (eds.), 2021:502).

organised by the construction client. In this case, the Court determined the applicable law in tort (Article 12(2) of the Rome II Regulation), which was the law of the claimant's country, *i.e.*, Italian law[26].

Under Article 12(2) of Rome II, the court may use any of the following tort criteria to determine the applicable law: (1) the law of the country where the damage occurs; or (2) the law of the country where, at the time the legal fact giving rise to the damage occurs, both parties have their habitual residence (for natural persons) / place of central administration (for legal entities) / place of business (for individual entrepreneurs), or (3) the law of the country with which the non-contractual obligation arising out of the contract negotiation is more closely connected than that specified in the preceding items. The court's choice is limited to these provisions; it may not take the initiative to choose any other law to better protect the weaker party in the negotiations. European courts tend to give preference to the first item, selecting the applicable law according to the place where the damage occurred (Zykin, Asoskov, & Zhyltsov, 2021:503).

The existence of a tandem of contractual and tort references to regulate pre-contractual agreements involves a rather complex process of searching for a suitable legal order and does not introduce the required legal certainty. The European approach also has other features that may reinforce inequalities. Thus, since the three tort clauses of Article 12(2) of Rome II are connected in the list by conjunction "or", it may ultimately lead to a situation where one party in order to establish the most favourable law, argues that the law to be applied to the contract cannot be established (or that its application to the pre-contractual relations would be contrary to their substance) and speculates on the tort criteria that are most favourable to it. This was the case in the Italian and Slovenian dispute described above, where the Italian court, supporting the arguments of the claimant, the Italian company, found no basis for applying the contractual statute to the pre-contractual relations and upheld the choice of Italian applicable law, defining it as *lex loci damni*, in the absence of any other factual basis than the claimant's allegations of alleged damage suffered at its domicile[27].

Under the Regulation, the court may determine, at its discretion, the applicable law most favourable to the weaker party, but the court may only use such law where the parties have chosen the applicable law to govern the pre-contractual relations. If the negotiators have not made a choice, the court is strictly bound by the conflict-of-law rules of Article 12(2) Rome II.

Another international instrument addressing the conflict-of-law issues at the pre-contractual stage is the Principles on Choice of Law in International Commercial

[26] Tribunale di Udine del 10 Agosto 2018, N. 1011. Case details are provided in the Study of the British Institute of International and Comparative Law on the Rome II Regulation (EC) 864/2007 On the Law Applicable to Non-Contractual Obligations, dated 04 October 2021, 319–320. Available at: https://op.europa.eu/en/publication-detail/-/publication/11043f63-200c-11ec-bd8e-01aa75ed71a1/language-en/format-PDF/source-282482931 [Accessed 23rd February 2023].

[27] Study on the Rome II Regulation (EC) 864/2007 On the Law Applicable to Non-Contractual Obligations, dated 04 October 2021. *Op. cit*.

Contracts (the Principles)[28]. As an act of non-state unification, the Principles are of a recommendatory nature. They are structurally similar to the UNIDROIT Principles (Zykin, 2016:76).

The choice of law applicable to the pre-contractual stage is very briefly formulated in the document: there is only one short subparagraph (g) of Article 9(1) devoted to pre-contractual relations. This rule extends the effect of the law chosen by the parties in the contract to include "obligations existing before the conclusion of the contract". It is worth noting that the Principles cover only a small proportion of issues related to regulation of contractual obligations in international commercial relations and do not address the issue of choice of law in the absence of an agreement by the parties, which significantly diminishes their importance.

As the comparative analysis shows, the most progressive regulation is found in another legally non-binding instrument, the Convention on the Choice of Law Applicable to Contracts for the International Sale of Goods, concluded in the Hague in 1986 (Hague Convention)[29], which never entered into force[30]. In contrast to the earlier instruments we examined, the Hague Convention, in Article 8, struck a different balance in the contractual statute. As in other PIL acts, the starting point (in the absence of parties' choice) is the law of the *seller's* place of business. However, the Hague Convention breaks the generally accepted model by stating that if the contract expressly provides that the seller shall deliver the goods to the buyer's place of business, the law of the *buyer's* country applies. The Explanatory Report to the Hague Convention notes that this rule was introduced at the suggestion of the Algerian delegation, whose representatives argued that it was "the only achievement of developing countries, which are often buyers and prefer the law of the buyer to apply, at least in certain cases" (Von Mehren, 1987). Thus, the Hague Convention stands out from other PIL instruments in that it does not always uphold the position of the stronger party, which is often the seller. This approach has the potential to lead to a more equal treatment of negotiating parties and to a more balanced legal outcome.

This suggests that the potential of PIL to ensure equality of positions in contract negotiations has not been fully exploited. The unified European conflict-of-law regulation of pre-contractual liability places a strong emphasis on the autonomy of will of the parties, which may not always benefit a weaker negotiator, and the ability of courts

[28] The Hague Principles on Choice of Law in International Commercial Contracts (formally approved on 19 March 2015, by the Members of the Hague Conference on Private International Law). Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=135 [Accessed 23rd February 2023].

[29] Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=61 [Accessed 23rd February 2023].

[30] This article leaves out other international conflict-of-law instruments and initiatives in this regard, which need to be explored separately. These are the U.S. Restatement (Second) of Conflict of Laws (1971) and the proposed draft U.S. Restatement (Third) of Conflict of Laws, the Inter-American Convention on the Law Applicable to International Contracts (1994), OHADAC Draft Model Law of Private International Law (2014), the draft African Principles on the Law Applicable to International Commercial Contracts (2020).

to exercise their discretion is significantly limited by law. The *soft law* rules on choice of law in international commercial contracts provide some guidance for legal localisation of business contacts prior to the conclusion of the main contract, but their regulation of pre-contractual relations is either incomplete or not supported by legal force and therefore ineffective.

Where the parties have not independently and freely chosen the applicable law, the equality of bargaining power for each party should be as important as legal certainty, but this equality should not be allowed to depend entirely on it. In other words, conflict-of-law rules should not refer too strictly, for example, to the law of the habitual residence of the party effecting the characteristic performance in contractual relation. Other facts, indicating that a different legal system is more appropriate in the circumstances, should also be taken into consideration (for example, the law of the place of *performance* for a contractual conflict-of-law rule, or the law most favourable to the weaker party which governs other contracts in the supply chain or the law of the place of negotiations if the contract has not been concluded or its future content is uncertain, *etc*.). Moreover, this choice must give certain value to the view of the weaker party to negotiation on the matter in question. The Hague Convention offers a more equitable choice for such situations.

Finally, in exceptional cases where inequality is nevertheless created by the use of available conflict-of-law rules, States may resort to public policy and qualify certain domestic or international legal norms protecting the weaker party as rules of direct application (mandatory rules) or refuse to apply certain foreign legal norms by virtue of public policy. However, this method equalises the position of the parties *ex post*, and in this sense it is less convenient and much less predictable than the law ensuring equality in *ex ante* bargaining. It seems that references to public policy should be relied upon as a measure of last resort to counteract negotiating inequalities.

Convergence of Russian business negotiation legislation with the international uniform acts

Following the 2015 reform, Chapter 28 “The Contract Conclusion” of the Civil Code of the Russian Federation (Russian Civil Code) [31] was supplemented by Article 434.1 Contract Negotiation. If civil law is interpreted systematically, the source of the legal idea of pre-contractual relations in Russia may be found in Article 307(3) of the Civil Code, which enshrines the duty to act in good faith, including in establishing an obligation (Nam, 2019). This clause imposes additional duties on the parties to provide the necessary assistance to achieve the purpose of the obligation, to provide each other with the necessary information, and Article 434.1 of the Civil Code is a development of these duties.

It identifies the same three general grounds – cases of pre-contractual liability as found in the UNIDROIT Principles and in the PECL: namely, non-disclosure of information relevant for the conclusion of the contract or fraud at the pre-contractual

[31] Civil Code of the Russian Federation (Part 1) No. 51-FZ of 30 November 1994.

stage (Article 434.1(2)(1) of the Civil Code), inconsistent conduct of a party expressed in interrupting negotiations at a late stage without valid reason or entering into and continuing negotiations without the intention to conclude a contract (Article 434.1(2)(2) of the Civil Code), and failure to respect confidentiality of information provided to the counterparty (Article 434.1 (4) of the Civil Code). Where Russian law applies to cross-border pre-contractual liability, the court will be guided by the above provisions.

The issues of conflict-of-law search for the proper legal order governing the relations in question are dealt with in Article 1222.1 of the Civil Code (note that this norm appeared before the introduction in the Russian legislation of the institute of pre-contractual liability, which reflects the relative progressiveness of Russian PIL). Following the logic of Article 12 of the Rome II Regulation, Article 1222.1 of the Civil Code establishes that either the law of the contract or the law of the alleged contract applies to obligations arising from bad faith negotiations, depending on whether the contract has been concluded or not. The application of the tort clause is also possible but as a subsidiarily mechanism. Thus, to regulate pre-contractual relations, Russian civil law offers a cascade of conflict-of-law rules generally similar to those contained in supranational European law. At the same time, there are some differences between the Russian and European systems for regulating pre-contractual liability.

In contrast to the European *alternative* model, the Russian Civil Code places tort references for pre-contractual relations in a stricter hierarchical order. This approach, in our view, allows for greater predictability and consistency of legal regulation. Another advantage of the Russian legal order in comparison with the European one is that clarifications by the Russian highest court specifically describe the legal situations which do not allow to determine the law applicable to the contract and – consequently – for which the choice of applicable law should be made based on the tort rather than the contractual model. Paragraph 3 of Item 55 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 24 of 9 July 2019 "On Application of Private International Law Norms by Courts of the Russian Federation"[32] illustrates the situation when the parties negotiating a simple partnership agreement failed to agree either on the applicable law or on the place where the activities of the simple partnership will be conducted. Thus, reaching the second level (law of tort) is possible when the parties' relations are so uncertain that it is impossible to precisely establish the factual circumstances (*e.g.*, the party carrying out the characteristic performance) that would allow to determine the applicable law under the rules of Article 1222.1(1) of the Civil Code. It is likely that such cases will be quite rare. Nevertheless, the example from business practice positively characterises the domestic enforcer and certainty adds to local judicial practice.

However, the Civil Code has one significant disadvantage compared with the Rome II Regulation. If there is a need to apply tort rules, under Article 1219(1) of the Civil Code, the Russian court should first of all refer not to the law of the country where the

[32] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 24 of July 9 2019 "On Application of Private International Law Norms by Courts of the Russian Federation".

damage occurs (*lex loci damni*), as European courts would do in most cases based on the Rome II Regulation, but to the law of the country where the circumstance that gave rise to the claim for damages occurred (*lex loci delicti commissi*). The logic of the European legislator was that in the second case the factors necessary to resolve the dispute relate to different countries, thus creating uncertainty, whereas the connection to the place where the damage occurred is a solution that is fair enough and provides adequate foreseeability (Zhang, 2009:864).

It appears that Russian civil law has enshrined a less convenient conflict-of-law provision. As for the pre-contractual stage, it seems extremely difficult, for example, to determine the place of the breach when the parties resolve issues by correspondence, or by means of audio or video calls, but are in fact in different jurisdictions. The priority of *lex loci delicti commissi* does not correspond to the nature of pre-contractual relations and is not seen as the most flexible complement to the main way of determining the law for pre-contractual relations (through the law of contract)[33]. Through adjustments to the Civil Code or the Supreme Court's clarifications to this effect, the Russian court should be empowered to apply a more flexible approach in determining the tort statute for pre-contractual relations.

Conclusion

The search for legal means for resolving the problem of contracting parties' unequal position in the unified international commercial law and the unified private international law ends up in the two complementary areas of normative regulation – substantive and conflict-of-laws – and leads to the following conclusions.

Firstly, we find that there is no international conventional regulation of the pre-contractual stage. The only reference point in this field is the 1980 Vienna Convention, but its scope is limited and there are few rules directly applicable to pre-contractual relations.

Secondly, the informal international instruments of substantive unification in international commercial law offer more developed models for regulating the parties' conduct in cross-border negotiations. The main solution to achieve the balance of counterparties' positions is the institution of pre-contractual liability based on the principle of good faith. However, such acts are not binding and are generally applied by agreement of the counterparties.

Thirdly, the conflict-of-law method for determining the applicable law is crucial in practice to establish the legal consequences of breaches of contractual relations. The combination of substantive and conflict-of-law methods to regulate pre-contractual agreements is intended to provide greater certainty and to contribute to mitigating the unequal position of the parties to the transaction.

Fourthly, in European uniform conflict-of-law regulation, the search for the law governing pre-contractual relationships follows a multi-step algorithm. The conflict-of-

[33] For more information see, e.g.: Marysheva, N.I. (2016) Modern trends of conflicts-of-law regulation of tort liabilities: EU Regulation of 2007 On the Law Applicable to Non-Contractual Obligations (Rome II) and the Russian legislation. Journal of Russian Law. (6), 63–73. (in Russian).

law issue is resolved through a combination of non-contractual statutory qualification of relations and the compromise nature of the regulation (consecutive use of contractual and tort provisions is envisaged). Despite the fact that the conflict-of-law rules of the Rome II Regulation, when *lex loci damni* is applied, make the search for applicable law somewhat difficult, the solutions proposed therein are generally universal enough to regulate the parties' relations.

At the same time, the European approach is not fully capable of providing legal support to the weaker party in negotiations. We appreciate the primacy of the autonomous will of the parties. Nevertheless, it seems that the task of conflict-of-law rules is to provide for a fair resolution of situations where the choice is not equally free for each of the contracting parties, including allowing for deviations from the principle of autonomous will. The weaker party should be protected against the *choice* that is imposed on it and autonomy of will should be allowed only to the extent that the operation of this principle does not undermine or diminish the protection that the less powerful party to the relations would have under the law applicable to the relations in the absence of such a *choice*.

In the absence of choice, the closest connection for determining the applicable law must be established taking into account not only the usual location of the party exercising the characteristic performance, but also other, less traditional factors characterising the *close connection* of the legal relations with the competent legal order: these are the places of performance of future contractual obligations, the applicable law for other contracts in the chain of related arrangements, the place of negotiations, *etc*. The position of the less protected negotiating party on the issue must necessarily be considered in court.

Fifthly, it should be recognised that Russian conflict-of-law regulation of pre-contractual relations and liability is largely in line with the approaches expressed in the uniform acts of international commercial law and, in some matters, domestic law and judicial practice go even further by elaborating important aspects and thereby providing a generally *working* starting instrument for the protection of a party whose rights have been unfairly prejudiced in the course of negotiations. However, the problems in this area described in the context of the European Union law are equally characteristic of the Russian legal reality.

In view of the areas identified to improve legislation and jurisprudence, legal science should raise the issue of inequality of contractors in cross-border business relationships to a new level and undertake conceptualisation and in-depth doctrinal study of the issues in this area.

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