1 PRIVATE INTERNATIONAL LAW AS A SEPARATE BRANCH OF SLOVAK LEGAL ORDER

1.1 Introduction

There is no doubt that PIL is very important part of (almost) each legal order worldwide. Its position in legal order differs from state to state. In some countries, PIL is considered as a part of civil law while in other countries it is separate branch of respective legal order. PIL is also part of Slovak legal order. It has its own position, subject matter, sources and rules. Aim of this chapter is to analyse Slovak PIL as a part of Slovak legal order. Our ambition is to assess its origins, its historical development and its current regulation (in particular its subject matter).

Taking into account goal of the chapter, we would also like to confirm hypothesis that Slovak PIL was created from its beginning as a separate branch of legal order with more or less stable definition of its subject matter.

1.2 Origins of Slovak private international law – principle of territoriality and principle of personality

Internationalisation of social relations increasingly brings situations where a particular private law relationship has link to several legal orders at the same time. Such a link arises when elements relevant to the situation have link to several countries (legal orders). It could be illustrated by following example: *Slovak citizen concluded a sales contract with Czech citizen. The contract was concluded in Vienna*. Here, elements relevant to the situation have link to Slovakia, Czech Republic and Austria. Such a situation has to be distinguished from situations of purely domestic (national) nature where all elements have relation to one country (legal order). Example: *Slovak citizen concluded a sales contract with another Slovak citizen. The contract was concluded in Bratislava*. In this model situation, all elements relevant to the situation have link to Slovakia only.

Link to several legal orders at the same time could be a result of various situation. In majority of situations is link to several legal orders caused by presence of a foreign element (international element) in a private law relationship. Under the notion "foreign element" (synonymous "international element") we have to

understand such an element of private law relationship, which has link to different country (legal order) than other elements of the relationship.[1]

Foreign element in private law relationship is an indisputable sign that such a relationship has link to several legal orders at the same time.[2] However, as it was indicated above, private law relationship may also acquire link to several legal orders as a result of other situations. At this place, it is worth to mention at least expression of will of parties to private law relationship of purely national nature (agreement on application of a foreign law). Example: *Czech citizen concluded a sales contract with another Czech citizen. The contract was concluded in Prague. At the same time, they agreed that their contract shall be governed by the Slovak law*. In this model situation, contract as such is of purely domestic nature. However, due to expression of will of parties to the contract it acquires link to Czech law and Slovak law at the same time.

From theoretical perspective, link of private law relationship to several legal orders (at the same time) could be explained through two coexisting principles – principle of territoriality and principle of personality. Such principles, connected with every legal order and (more or less) with every legal branch, are fundamental principles defining the scope of legal order and / or legal branch.[3]

In accordance with the principle of territoriality, laws of a country are binding on all entities (natural persons, legal persons, etc.) located in the territory of that country. Exception to this rule are so-called extraterritorial persons. Example: *Slovak legal order binds equally Slovak citizens, Austrian citizens, Czech citizens, etc. While they are located in the territory of the Slovak Republic.* Principle of territoriality applies to both public law branches as well as private law branches.

Under the principle of personality, laws of a country are binding on all citizens of that country, wherever they are. It means that citizens of the country will be subjects to the legal order of that country even when they are abroad. The same applies to all legal persons with particular link (e. g. seat located) to said

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1 LYSINA, P., HAŤAPKA, M., BURDOVÁ, K. et al. *Medzinárodné právo súkromné.* 3. vyd. Bratislava : C. H. Beck, 2023, p. 9.

2 Compare with KUČERA, Z., PAUKNEROVÁ, M., PFEIFFER, M., RŮŽIČKA, K., VYBÍRAL, P. *Mezinárodní právo soukromé.* 9. vyd. Plzeň : Aleš Čeněk, 2022, or ROZEHNALOVÁ, N., DRLIČKOVÁ, K., KYSELOVSKÁ, T., VALDHANS, J. *Úvod do mezinárodního práva soukromého.* Praha : Wolters Kluwer ČR, 2017.

3 LYSINA, P., HAŤAPKA, M., BURDOVÁ, K. et al. *Medzinárodné právo súkromné.* 3. vyd. Bratislava : C. H. Beck, 2023, p. 11. See also KUČERA, Z., PAUKNEROVÁ, M., PFEIFFER, M., RŮŽIČKA, K., VYBÍRAL, P. *Mezinárodní právo soukromé.* 9. vyd. Plzeň : Aleš Čeněk, 2022, or BASEDOW, J., RÜHL, G., FERRARI, F., DE MIGUEL ASENSIO, P. *Encyclopedia of Private International Law. Vol. 1.* Cheltenham – Northampton : Edward Elgar Publishing, 2017.

country. Example: *Slovak citizen is bound by Slovak legal order also in the Czech Republic, Germany, USA, Russia, etc.* Principle of personality applies to private law branches only. Its application to public law branches is rather exceptional.

Coexistence of both principles in case of private law branches may lead to situations in which the subject is simultaneously bound by the law of the country in which he performs a legal act (territoriality principle) and by the law of the country of which he is a citizen (personality principle). Example: *Slovak citizen concluded contract in Austria with Austrian citizen.* In this situation, he is simultaneously bound by Slovak law (principle of personality) and Austrian law (principle of territoriality).

As it stems from above stated, coexistence of both principles in case of private law branches gives basis to private law relationships with link to several legal orders at the same time.[4]

Due to their special nature, private law relationships with link to several legal orders require a special treatment, which is different from treatment of private law relationships of a purely national nature.

Firstly, it should be stressed that it is not desirable, and often not even objectively possible, for all legal orders (relating to a private law relationship) to be applied to given private law relationship at the same time. The reason is quite simple. Since the existence of a legal order is one of the manifestations of the sovereignty of the State, each State regulates by its legal order those social relations, which it deems necessary to regulate, in the manner that best corresponds to its own ideas. In practice, it leads to differences in content between different legal orders. Due to such differences, one legal order may regard legal act under consideration as permissible while the other legal order would sanction it as invalid.

Secondly, it is inappropriate for a private law relationship with link to several legal orders to be treated in the same way as a private law relationship of purely national nature. Such an approach would be contrary to the principle of legal certainty, since the assessment of the legal relationship would depend on which State (the courts) would decide on the law relationship.

There is no doubt that link of a private law relationship to several legal orders at the same time requires a special approach. Due to its link to more than one legal order, as the first step it is necessary to determine the applicable law. To that

[4] Compare with CSACH, K., GREGOVÁ ŠIRICOVÁ, Ľ., JÚDOVÁ, E. *Úvod do medzinárodného práva súkromného a procesného*. 2. vyd. Bratislava : Wolters Kluwer, 2018, or KUČERA, Z., PAUKNEROVÁ, M., PFEIFFER, M., RŮŽIČKA, K., VYBÍRAL, P. *Mezinárodní právo soukromé.* 9. vyd. Plzeň : Aleš Čeněk, 2022.

end, states adopted specific rules, mostly of a national nature, which are designed exclusively to regulate private law relationships with link to several legal orders.

1.3 History of Slovak private international Law

Slovak PIL was developed primarily during 20th century. Its historical development has been influenced by five important milestones.[5] These are following:
a) creation of Czechoslovakia;
b) adoption of the first PIL Act;
c) adoption of PILA (as the second PIL Act in Slovak history);
d) creation of Slovakia;
e) membership of Slovakia in the EU.

On a basis of such milestones, historical development of Slovak PIL could be divided into following periods:
a) period before 1918;
b) period from 1918 to 1948;
c) period from 1948 to 1963;
d) period from 1963 to 1993;
e) period from 1993 to 2004 and
f) period from 2004 until today.[6]

1.3.1 Slovak PIL before 1918

During this period of Slovakia was part of Austro-Hungarian Empire. Therefore, in this period we cannot yet talk about Slovak law as such. In Slovakia, Hungarian law was applicable. Of course, Hungarian law contained PIL rules; however, these rules were not codified. They were fragmented in various sources of law. In addition, courts largely applied the customary law, too. It is useful to add that between 1900 and 1915 several attempts to adopt Hungarian Civil Code (containing PIL rules, too) were noticed, but without any tangible success.[7]

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5 See LYSINA, P., BURDOVÁ, K. Slovak Republic. In Verschraegen, B. (ed.) *International Encyclopaedia of Laws: Private International Law*. Alphen aan den Rijn, NL : Kluwer Law International, 2023.

6 Compare with PAUKENROVÁ, M, PFEIFFER, M. *Private international law in the Czech Republic.* 2th edition. Alphen aan den Rijn : Kluwer Law International, 2019.

7 LYSINA, P., ĎURIŠ, M., HAŤAPKA, M. et al. *Medzinárodné právo súkromné*. 2. vyd. Bratislava : C. H. Beck, 2016, p. 172.

6 MODALITIES OF APPLICATION OF PRIVATE INTERNATIONAL LAW RULES

6.1 Introduction

Because of its special structure and purpose, the application of the conflict of law rule raises a number of questions. These questions are addressed by the basic institutes of PIL, such as qualification, renvoi, and the reservation of public policy.

This chapter is devoted to the question of how these institutes effect the application of the conflict of rule and to what extent they are relevant for the current PIL.

6.2 Qualification

Qualification[76] is the **first step** in the application of the conflict of law rules, i. e., a classification (subsumption) of a situation (facts) within the scope of the conflict of law rule.[77] Thus, the qualification centres on the scope (referring section)[78] of the conflict of law rule.[79]

In PIL, the **objective** of the qualification is to identify the conflict of law rule applicable to a particular case.[80] Thus, the result of the qualification determines not only the conflict of law rule applicable to the situation but also (subsequently) the applicable law governing the legal relationship in question. *For example, in 2001, a brother (who habitually resident in State X) provided his sister (who habitually resident in Slovakia), who was in a temporary difficult situation, with a sum of money to meet her basic needs. If this situation is classified as a donation,*

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[76] *"Notion qualification is characteristic for the Continental legal systems, whereas notions characterisation or classification are characteristic for the Anglo-American legal systems."* CSACH, K., GREGOVÁ ŠIRICOVÁ, Ľ., JÚDOVÁ, E. *Úvod do medzinárodného práva súkromného a procesného.* 2. vyd. Bratislava : Wolters Kluwer, 2018, p. 54.

[77] ROZEHNALOVÁ, N., DRLIČKOVÁ, K., KYSELOVSKÁ, T., VALDHANS, J. *Úvod do mezinárodního práva sokormého.* Praha : Wolters Kluwer ČR, 2017, p. 91.

[78] The scope of the conflict-of-law rule (referring section) contains general legal notions (e. g., legal capacity, contractual relations) that determine the legal issues and relationships to which the conflict of law rule applies.

[79] ŠTEFANKOVÁ, N., LYSINA, P. et al. *Medzinárodné právo súkromné.* Praha : C. H. Beck, 2011, p. 135.

[80] LYSINA, P., ĎURIŠ, M., HAŤAPKA, M. et al. *Medzinárodné právo súkromné.* 2. vyd. Bratislava : C. H. Beck, 2016, p. 107.

it will be subsumed within the scope of Section 10(1)[81] *PILA, which determines the applicable law to contractual obligations. However, if this situation is legally considered as a maintenance obligation, Section 24a*[82] *PILA, which determines the law applicable to maintenance obligations, applies. Section 10(1) PILA refers to the law whose application corresponds to the reasonable regulation of the relation concerned. Section 24a PILA refers to the law of the state of residence of the maintenance creditor.*

The essence of qualification is expressed by the relationship between the facts **and** legal notions used within the scope of the conflict of law rules **and** the applicable law to which the conflict of law rule refers.[83]

Qualification **is a process** consisting of several stages. **First**, the legal assessment of the facts (the factual situation) is carried out. This legal assessment is carried out in accordance with a particular substantive law and aims at classifying the facts (the factual situation) under a particular legal notion used by the substantive law. **Then**, it is necessary to identify the conflict of law rule in the *lex fori* whose scope covers that legal notion. At this stage, the process of qualification also involves the interpretation of the legal notions contained within the scope of conflict of law rules.[84] In general (and simplistic) terms, the qualification can be said to be complete once the relevant conflict of law rule has been found in the *lex fori*.[85]

6.2.1 Qualification problem

Conflict of law rules do not regulate legal relationships on their own, but together with the substantive rules of the applicable law to which they refer. In the case of two-sided (bilateral) conflict of law rules, the applicable substantive law may be domestic or foreign law.

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[81] Section 10(1) PILA stipulates that absent party choice of the applicable law, their contractual relations are governed by the law whose application corresponds to the reasonable regulation of the relation concerned.

[82] Section 24a PILA stipulates that maintenance obligations of parents in respect of their children are governed by the law of the state of the child's habitual residence. Other maintenance obligations are governed by the law of the state of maintenance creditor's residence.

[83] ROZEHNALOVÁ, N., DRLIČKOVÁ, K., KYSELOVSKÁ, T., VALDHANS, J. *Úvod do mezinárodního práva soukromého.* Praha : Wolters Kluwer ČR, 2017, p. 91.

[84] ROZEHNALOVÁ, N., DRLIČKOVÁ, K., KYSELOVSKÁ, T., VALDHANS, J. *Úvod do mezinárodního práva soukromého*. Praha : Wolters Kluwer ČR, 2017, p. 91.

[85] KUČERA, Z. *Mezinárodní právo soukromé.* 7. vyd. Brno – Plzeň : Doplněk, Aleš Čeněk, 2009, p. 148.

In the legal assessment of the facts (in the context of the qualification process), this legal assessment is based on the substantive law. However, at the time the factual situation is subsumed under a legal notion, it is not known which substantive law will ultimately be determined as the applicable law (which will be known when the conflict of law rule is determined).[86]

If the potentially applicable laws do not coincide in their legal assessment of a given factual situation, **a qualification problem arises**.[87] *For example, under the substantive law of State X, the provision of financial support by the brother to his sister is classified as the fulfilment of a maintenance obligation between siblings, but under the Slovak law, it is considered as the performance of a contractual obligation (donation).*

In addition, a qualification problem may arise where the interdependent parts of a legal relationship are governed by different applicable laws because they are regulated by different conflict of law rules of the *lex fori*. Thus, it is necessary to extract from each applicable law those substantive rules which apply to the relevant part of the legal relationship. In order to achieve this extraction, the relevant substantive rules have to be assessed as to whether they correspond to legal notion within the scope of the conflict of law rule of the *lex fori*. As a result, a qualification problem arises if the legal systems involved differ in this assessment.[88]

To illustrate such a situation, reference can be made to the Opinion of Advocate General Szpunar in case C-558/16 Doris Margret Lisette Mahnkopf[89] *"Various approaches aimed at safeguarding the interests of the surviving spouse upon the death of the other spouse are adopted in the law of individual Member States. To that end, certain legislatures use instruments characteristic of the law of succession by favouring the surviving spouse over the other heirs. Other legislatures rely on approaches relating to matrimonial property regimes, whilst at the same time passing over the spouse as an heir or limiting his or her rights of succession. In situations having links with the law of more than just one state, the law on the succession and the law applicable to matrimonial property regimes are identified by various conflict of law rules. Therefore, determining the applicable law under conflict-of-law rules can lead to the operation of provisions derived from two*

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86 KUČERA, Z., PAUKNEROVÁ, M., PFEIFFER, M., RŮŽIČKA, K., VYBÍRAL, P. *Mezinárodní právo soukromé.* 9. vyd. Plzeň : Aleš Čeněk, 2022, p. 138.

87 KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha : Panorama, 1989, p. 7.

88 KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha : Panorama, 1989, p. 7.

89 Opinion of Advocate General, Mahnkopf (C-558/16, OJ C 30, 30.1.2017) ECLI:EU:C:2017:965, paragraphs 54 to 58.

different legal systems. Those approaches do not have to be coordinated with each other. This can be the source of numerous complications. For example, the law applicable to succession may look after the surviving spouse's property interests through the provisions concerning the spouses s property relationships and the law applicable to matrimonial property regimes can use instruments of the law of succession to that end. It is also possible to foresee the opposite situation, where cumulation of individual approaches may result in the surviving spouse being favoured disproportionately. This is the case where the law affording the surviving spouse particular protection through mechanisms of the law of succession is applied by way of the rules on succession and the law affording that spouse particular privileges as regards apportionment relating to the dissolution of that regime is applied by way of the rules on matrimonial property regimes."

Qualification problem may also arise when a claim based on a foreign legal institution unknown to the substantive law of the *lex fori* has to be decided. For example, Slovak substantive law does not know the legal institution of legitimation of an illegitimate child, and in Slovak law does not have a conflict of law rule for this legal institution.[90]

The qualification problem is connected with the application of two-sided (bilateral) conflict of law rules and does not arise in the case of one-sided (unilateral) conflict of law rules. The specificities of the qualification in the case of international and European Union conflict of law rules will be dealt with separately in the following subchapters.

6.2.2 The solutions to the qualification problem proposed by scholars

The solution to the qualification problem is to determine which substantive law is to be applied to the legal assessment of the factual situation in order to find the relevant conflict of law rule.[91]

In legal theory, the following theories of the solution of the qualification problem prevail: qualification based on *lex fori*, qualification based on *lex causae*, the so-called primary and secondary qualification, functional qualification and autonomous qualification. Other methods of solving the qualification problem are also available, e. g. ad hoc qualification.

[90] KUČERA, Z. *Mezinárodní právo soukromé.* 7. vyd. Brno – Plzeň : Doplněk, Aleš Čeněk, 2009, p. 148.

[91] KUČERA, Z. *Mezinárodní právo soukromé.* 7. vyd. Brno – Plzeň : Doplněk, Aleš Čeněk, 2009, p. 145.