Conflict of Laws Aspects of Consumer and Labour Contracts

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1. Introduction

Modern legal systems accord particular attention to labour and consumer contracts, as a so called, "weaker" party participates in both of them. In labour contracts this is an employee as he is somewhat subordinated to an employer; while in consumer contracts the weak party is a consumer as it is presumed that the recipient of goods or services, as well as a debtor in credit relations are placed in an unfavourable position compared to the other party due to inexperience and financial factors. This necessitates the adoption of imperative provisions of special social protection to guarantee the interests of these parties by the state.

The purpose of this article is not a discussion of how the state manages the protection of the interests of the above "weaker" party in domestic private relations. In this case we are interested in the relations, which are made more complex by a foreign element, when one of the parties of relations is a foreigner and consequently it is necessary to establish the legislation of which country is to regulate a dispute that may arise with respect to the contract in such a manner as to secure the rights of a consumer and an employee guaranteed by the law.

In European Community law particular attention is accorded to the solution of these problems both at the level of substantial lawmaking and conflict of laws regulation. The Rome Convention of 1980 On the Law applicable to Contractual Obligations[1] sets forth the special conflict of laws provisions for consumer and labour contracts, which provide for different regulation as compared with the other types of contracts.

The Georgian Law on Private International Law[2] regulates conflict of laws aspects of contractual law and pays certain attention to consumer and labour contracts, given the above specificity. It should be mentioned that the Rome Convention played a particular role in the development of this Law, which is manifested in the reception of the Convention's provisions in our legislation to a certain extent.[3] In this article we shall discuss to what extent the Convention provisions on consumer and labour contracts are reflected in respective rules of the Georgian Law.

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[1] For the official text see the Official Journal (O.J.), 1980, No L266/1.

[2] The Law came into force on 1 October 1998.

[3] *Gamkrelidze*, The Georgian Law on Private International Law: Basics and Short Overview, Georgian Law Review, 1998, II and III Quarters, 25.

2. Consumer Contract

2.1. Consumer Contracts according to the Convention

Article 5 of the Rome Convention covers the procedure of determination of the applicable law in consumer contracts in the cases of choice of law and absence of choice.

Primarily, it should be mentioned that a contract is presumed to be a consumer one when its object is the supply of goods or services or provision of credit by a party acting within the scope of trade or profession; the other party of the contract is a final consumer.

A person who supplies goods or provides professional services, may act as a consumer as well, though in this case the receipt of goods, services or credits should not be related to his trade or profession. Notwithstanding this, in such a case the special rule of Article 5 shall not apply – when the other party did not know and could not have known about this.[4]

The rules provided for by Article 5 extend to credit sales as well as to cash sales, but sales of securities are excluded. At the same time the scope of application of Article 5 extends to an insurance contract as far as the latter falls within the scope of the Convention itself.

Article 5 II concerns the problem of choice of law in consumer contracts and specifies the provision of Article 3[5] for this type of contract. Namely, under this paragraph the parties are free to choose the applicable law. However, a choice of law made by the parties shall not have the result of depriving the consumer of protection afforded to him by the mandatory rules of the law of a country in which he has his habitual residence. The operation of this rule depends on one of the following three conditions:

- seller has to take all necessary steps for the sale of goods or services in the country where the consumer has his habitual residence;
- seller or his representative (an agent) has to receive an order from a consumer in the country, where the latter has his habitual residence;
- consumer has to travel from the country, where he has his habitual residence to another country to buy goods and give his order there to the seller, provided the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

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[4] *Giuliano and Lagarde*, Report on Convention on the law applicable to contractual obligations, O.J. No. C282, 31.10.1980, comments on Article 5.

[5] Article 3 of the Convention regulates the choice of law in contract in general.

In the case of the first precondition it is sufficient for a seller to advertise his goods or services in the country of habitual residence of the consumer by any means, which is provided for this specific country. The case, when, for example, a German consumer gets familiarised with an advertisement in American publications, even if they are sold in Germany, does not fall within the scope of application of this paragraph unless the advertisement appeared in special editions of the publication intended for European countries.[6]

The second precondition repeats the first one to a certain extent. However, there is a difference – in this case the initiative of the conclusion of a contract belongs to a consumer, irrespective of whether any advertisement is made by the consumer. The sole precondition is the seller to receive the order in the country of habitual residence of consumer. According to the text the representative (agent) is equalised to the seller.

The third condition was introduced in the text deriving out of the practice, which exist in certain regions. This case does not fall within the coverage of first two conditions because neither consumer nor seller take any actions for the conclusion of a contract in the country where consumer has his habitual residence.

In this respect travel logically implies not only the case, when the seller himself takes care of the transportation of the consumer, but also the cases, when he may arrange the journey through third persons (with the help of a special transportation company).

Under Paragraph 2 a choice of law made by the parties to a consumer contract shall not have the result of depriving the consumer of protection afforded to him by the mandatory rules of the law of a country in which he has his habitual residence. Here the attention should be paid to the essence of mandatory rules. As far as the purpose of the Article concerned is the protection of a weak party, the mandatory rules logically should mean special legislation on consumer protection.[7] However, the concept of mandatory rules in this provision should not be limited to special legislation on consumer protection and should also cover the rules which refer, for example, to securing competition in trade. The latter guarantees the protection of the rights of the public in general and of individuals in particular.[8]

In the light of the protection of consumer rights, mention should be made of the case, when according to Article 3 the law of the chosen country provides for such mandatory rules, which secure the higher level of protection as compared with that of the mandatory rules of the country of the consumer's habitual residence. In this case it is logical for the consumer to have the opportunity to apply the most favourable law.[9]

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[6] *Giuliano and Lagarde*, Report. Comments on Article 5.
[7] Here it is meant, for example the rules, which concern the quality of goods, special rules on cancellation of a contract, etc.
[8] See: *Kaye,* The New Private International Law of Contract of the European Community, 1993, 210.
[9] Ibid.: 213.

The same consideration should presumably apply to Article 7[10] as well. In this case it also should be the right of the consumer to choose the most suitable scheme of regulation (on the one hand, that of the country of his habitual residence and on the other hand, the mandatory rules, secured by Article 7).

Article 5 III contains the provision, which is similar to the regulatory mechanism embodied in Paragraph 2 and concerns the applicable law in the case of absence of choice. This provision excludes the regulation envisaged by Article 4[11] and declares the law of the country of consumer's habitual residence as the applicable law with respect to consumer contracts. However, this is only in the case of the presence of the preconditions listed in Paragraph 2.

Paragraph 4 provides for two exemptions, which do not fall within the scope of application of Article 5: 1) a contract of carriage and a contract for supply of services (where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence).

The first type of contract implies only those contracts, the purpose of which is carriage and, for example, provision of a sleeper on a train shall not be considered as a separate service. As for package contracts, which provide a combination of travel and accommodation for an inclusive price, they fall within the scope of application of Article 5 by virtue of Paragraph 5. However it should be mentioned that a part of such a contract (at least the smallest one), concerning either travel or accommodation, should commence on the territory of a country of customer's habitual residence. Otherwise, when such a contract commences on the territory of another country, the restrictions under Article 4 shall apply.

2.2 Article 38 of the Georgian Law (in Combination with Articles 35 and 36)

The Georgian Law regulates conflict of laws aspects of consumer contracts with less precision. Moreover, the regulatory mechanism, provided for by Georgian Law differs in principle from that of the Convention.

The only provision which concerns the guarantees of the "weaker" party of the contract, is Article 38 (Imperative Norms of Social Protection). This Article covers two similar, from the point of view of social protection, contracts – consumer and labour.

Under this Article "The choice of law shall be considered void if it disregards the imperative norms which have been adopted to protect consumers and employees against discrimination. This rule shall also apply to contracts concerning the supply of movables,

[10] It concerns mandatory rules in general; in detail see: *Zaalishvili* Main Grounds of the Rome Convention on Law Applicable to Contractual Obligations, Georgian Law Review, 2001, 96-97.
[11] Article 4 of the Convention regulates the cases of absence of choice in general in contract.

finance, labour and service[12] provided they have been negotiated and concluded in the country where the consumers and employees habitually reside (have their living place) and where such protective norms are effective."

Without any comparison, it is not clear from the first sentence which imperative norms ("...to protect ... against discrimination") are meant (which restricts the right of choice of the parties (provided for by Article 35)) – the habitual residence of a consumer or that of the other party. This law is somewhat specified in the second sentence and consequently means the law of a country of habitual residence of the consumer.

The analysis of these two sentences does not make clear the sense of the use of the term "also" in the second sentence, as it enables us to arrive to the conclusion that the subject of regulation of the first sentence (consumer contract) differs from that of the second sentence, where the consumer contract is defined as "the agreements concerning the supply of movables, finance, labour and service'.

Attention should be paid to two alternative terms used in the second sentence: "agreed" and "concluded". In our opinion the term "agreed" was not construed as the declaration of will by one party (offer)[13], but rather suggests the declaration of mutual will. It is also difficult to include the certain phase of negotiation of an agreement before its conclusion (pre-contractual relations), as a positive response to an offer is already an acceptance and consequently, should be construed as conclusion of a contract.[14] The Civil Code of Georgia uses the term "agreed" with respect to making a contract and construes it as a declaration of mutual will, which is the starting point for arising contractual rights and obligations for the parties.[15]

Hence it is not clear what is meant under "agreed". Also this term is rather general and may cause problems of qualification in practice.

Article 38 concerns only the case of restriction of the choice of law and is analogous (due to the applied principle) to the regulation, provided for by the Convention in general. As for the absence of choice, this phenomenon is not emphasised at all in the law by any special provision.

Despite this, the core and principle difference of the provisions of the Convention and the Law concerning regulation is that the Convention regards a consumer contract as a special type of relations and there is a special detailed regulation for it. As for the Georgian Law, the lawmaker considered necessary only to separate the case of choice of law and logically, left the consumer contract within the scope of general regulation (Article 36) in the case of absence of the choice.

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[12] The use of this term in such a context will be separately discussed in the chapter on labour contracts.
[13] This is stressed by Article 5 II of the Convention.
[14] Comments on the Civil Code of Georgia, Book 3, 91.
[15] Article 327 of the Civil Code of Georgia.

As a result of this, for example, in the case of an absence of choice, a sales contract made between an Iranian producer (and/or his representative in Georgia) and a consumer residing in Georgia, shall become subject of application of Iranian law, as the most closely connected one to the contract (however, presumably, with the exception of the mandatory rules of consumer protection when Georgian legislation provides for the higher level of protection (under Article 6 of the Law)).

As regards the interrelation between the provisions concerned and Article 6 of the Law (Application of Imperative Norms), the following should be mentioned. Under this Article the provision of the Law does apply to the operation of the imperative norms of Georgian law, irrespective of the law of a country applicable for the regulation of the relations. In the case of consumer contracts (in the absence case of the choice), primarily the application of the provisions of the Law on Consumer Protection[16] is meant.[17] This Law includes the mandatory rules of social protection, implied by Article 6. Apart from this, the mandatory rules, provided by general legislation, are also meant.

It is important to mention that this legal consequence places a Georgian consumer in an unfavourable condition, as in the case of a dispute (and provided the Georgian court has jurisdiction), consumer contract is subject to application of foreign law. Furthermore (and what is more important), Articles 9 and 10 of the Law, which concern the "international competence of Georgian courts" (jurisdiction), do not provide for the authority of considering such disputes in Georgia.[18] A Georgian consumer, who makes a contract (in Georgia) with a party in another country, has practically no legal levers for protecting his right through a Georgian court. The only way is by filing a case with the court of the country, where the other party has his habitual residence or of the location of main administration, but in this case (that itself is related to many practical difficulties), in my opinion, the reference to Georgian mandatory rules by foreign court deems practically very difficult.

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[16] Parlamentis Utskebani (PU), 30.04.96.

[17] Under Article 1 of this Law the Law on Antimonopoly Activities and Competition should as well be applicable in this field – PU, 17.10.96 and "other normative acts, adopted according to them.

[18] While the Brussels Convention of 1968, as well as the Council Regulation 44/2001 (OJ. L 12 16.01.2001) adopted on the basis of the former, dedicates a special chapter to court jurisdiction over the disputes arising in respect to consumer contracts and accords special jurisdiction to the courts according to consumer's domicile; however this aspect of the issue is somewhat outside the scope of this study and thus, in my opinion, should be examined separately.

3. Individual Labour Contract

3.1 Provisions of the Convention

Individual labour agreements are regulated by Article 6 of the Rome Convention, which actually has practically the same structure as Article 5 - regulating consumer contracts.

Despite this similarity a different factor connecting to the law of a specific country is applied. This, in general, is the law of a country, where an employee habitually carries out his contractual obligations.[19]

Under paragraph 1 of this Article (similar to the regulation of consumer contracts), irrespective of the choice of law, made by the parties on the grounds of Article 3, an employee shall not be deprived of the remedies, guaranteed by the mandatory rules of the law applicable to the contract by virtue of paragraph 2.

First and foremost attention should be paid to the term "individual labour contract". It means the individual labour relations between an employee and an employer and collective agreements do not fall within the scope of application of this Article.

Furthermore, no less problematic is the qualification of the concept of a labour contract in general. A labour contract may be made in any form (either orally, or in writing).[20] As regards the contents, a labour relation means the performance of services for a certain period and under subordination of another party against remuneration.[21] We should as well quote the qualification of a labour contract by the European Court of Justice interpreting the Brussels Convention, under which this contract differs from other contracts in several respects. A labour contract creates continued relations between the employee and the employer, lasting for a certain period. By virtue of these relations the first party falls within the organisational framework of the business of the employer and his activities are connected with the place where the work is done.[22]

Despite the assistance of case law, there still are some deliberations in theory about the difficulties of the qualification in cases when, for example, a contract is qualified as a labour contract under the *lex fori* of one of the EU Member States, while under the law of a non-Member State (which could be applicable to the contract by virtue of the general rules of the Convention) – is not, or *vice versa*.[23]

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[19] Provided for by Article 6 II.
[20] *Giuliano and Lagarde*, Report. Comments on Article 6.
[21] Case No.66/85 Lawrie-Blum v. Land Baden Württenberg, [1987] 3 CMLR 386.
[22] Case No. 266/85 Shenavai v. Kreischer, [1987] ECR 239.
[23] See: *Morse,* The EEC Convention on Law Applicable to Contractual Obligations, 2nd Yearbook of European Law, 107, 1982, 146-149.

Along with that qualification, it is important to clarify the content of the mandatory rules. These are the rules which aim at the protection of an employee and which could not be avoided as a result of the application of the principle of disposition by the parties. Furthermore the mandatory rules mentioned in Article 6 should serve the purpose of protection of an employee and be an integral part of the legal acts regulating the individual labour relation. Thus, these mandatory rules are *lex spacialis* as compared with the regulation under Article 7. However, the provisions concerning industrial safety and hygiene (safety standards) are regarded as special mandatory rules.[24]

The wording from Paragraph 1 secures only the following of the law, chosen on the grounds of Article 3 not to deprive an employee of certain remedies of social protection. Consequently one should not mean that mandatory rules, provided for by Article 6, will automatically replace the chosen law and the mandatory rules, envisaged by the latter. Primarily, it should be established which legal system from among these mentioned secures the higher level of protection for an employee. In many cases it is very difficult to do so. For example, a certain legal system may provide for the reinstatement of an employee without compensation, while under some other legal system – only for the compensation without reinstatement.[25]

Apart from the above challenges it is important to establish whether an employee has the right to choose separate individual mandatory rules of various legal systems, i.e. employ the most suitable and favourable mandatory rules from both legal systems at the same time. The wording of Article 6 does not logically allow one to arrive at such a conclusion. A more acceptable assumption is that if a mandatory regulation of some legal system is considered applicable, it should regulate the overall relations.

Article 6 II regulates the absence of choice of law. Under this provision it is applicable: a) the law of the country, in which the employee habitually caries out his work in performance of the contract (*locus laboris*), even if he is temporarily employed in another country and b) if the employee does not habitually carry out his work in any one country, the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of that country should apply.

The first case, *prima facie*, should not cause considerable complications. However a certain problem still exists with respect to the term "habitually carries out", as the criteria for the evaluation of the time period for defining what is "habitual", could be disputed. According to *Key*, there exist two opinions: under one of them a judge, upon qualification of the term concerned, should take account of the intention of the parties about the place of performance of the work at the time of conclusion of a contract; he should also take

[24] *Giuliano and Lagarde*, Report. Comments on Article 6.
[25] *Morse,* Contract Conflicts, North ed.1982, 152-153.

account of the content and volume on the work. According to the other opinion the classification should be based on the actual situation for the moment of origination of a dispute.[26]

Despite such theoretical disputes, in court practice, based on the British example, there is a popular opinion, under which upon qualification of the "habitual performance of work" the court takes account of the set of circumstances and intentions, which prevailed starting from the date of making a contract and during its whole period of existence.[27]

If the identification of the country, in which the employee habitually performs his work is deemed impossible, Paragraph 2.b should apply – the principle of the place of business. This principle, first of all applies the employee working on an oil-rig platform on the high seas, ships and alike.

The above described presumptions (cases) can be rebutted by the last indent of Paragraph 2 similar to the regulation of Article 5 V of the Convention.

3.2 Article 38 of the Georgian Law (the part related to labour contracts)

Similar to the regulation provided for by the Georgian Law, described in the part related to consumer contracts, the same mechanism shall be applicable to labour agreements as this type of contract is regulated by a single article (Article 38 – the case of restriction of the choice of law). As compared with the Conventions, the Law reveals the principal difference in regulation with respect to labour contracts.

The first sentence of Article 38 aims at the application of the imperative norms of a country. Consequently it restricts the will of the parties to choose such a law in a labour contract, which would deprive the employee of social guarantees. In the second sentence of the same Article the application of one and the same conflict of laws rules (place of residence of the "weak" party)[28] to consumer and labour contracts (unlike international practice)[29] results in strange legal consequences.

First and foremost, in the context of labour contracts, it would be reasonable to define what the term "place of residence" means under Georgian law. According to Article 20 I of the Civil Code of Georgia, the place a natural person chooses as his ordinary dwelling is deemed to be the place of residence of the person". This concept consists of two elements: actual (physical) presence at some place, mainly for a period of six months and the

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[26] *Morse,* Consumer Contracts, Employment Contracts and Rome Convention, International and Comperative Law Quarterly, 1992, 41, 1, 17.
[27] Case Wilson v. Maynard Shipbuilding Consultants A.B., 1978 QB 665 (CA).
[28] *Giuliano and Lagarde*, Report. Comments on Article 6.
[29] See: The German Introductory Law to the Civil Code – Article 30; Also: Article 121 of Swiss Federal Law on the International Private Law http://www.umbricht.ch/pdf/SwissPIL.pdf.

person's will to live (permanently) in this place, unlike the term "place of ordinary residence", for the existence of which only the first element is sufficient.[30]

Based on this, for example, if a Georgian employer makes a labour contract in Turkmenistan during his business trip with a person having the place of residence in the latter country (in the case of absence of will of the employee to choose Georgia as the residence place), who is to fulfil his labour obligations in Georgia and quite fairly chooses the Georgian law applicable, the Georgian court, presumably should apply the mandatory Turkmen rules of social protection (and ignore the rules of Georgian law).

However, if, for example, it turns out that Georgian law provides for a longer period of notice for the termination of a contract on the initiative of the employee, than the Turkmen law, Article 6 of the Law on mandatory rules shall apply (provided the dispute is considered by a Georgian court). This is based on Article 1 of the Labour Code of Georgia of 1972[31] , which states, that the Code regulates the labour relations of the employees residing in Georgia with the enterprises, establishments and organisations. However, if we assumes, that the term "reside" means the "place of residence" provided for by the Civil Code the result will be controversial as this means that the above discussed case will exceed the scope of application of the Labour Code and will logically make Turkmen mandatory rules of social protection apply, which are embodied in the labour law of this country.

This should as well be made of the mandatory rules of other type, those that are not regulated by labour law and are included in various labour safety standards, have the nature of mandatory rules and naturally fall within the concept of mandatory rules. Logically, in this case the court will apply the Georgian rules and will not take recourse to Turkmen law.

Naturally, this abstract case, is somewhat exaggerated, but due to the case composition, when all the core elements of the contract are theoretically related to a single country (Georgia), in certain cases, the court is obliged to be guided by the provisions of Article 38, that, to put it mildly, partially ignores the reality.

As for the second important aspect of a labour contract – the absence of choice – this is regulated under Georgian law, similar to consumer contracts. Consequently, Article 36 of the Law should apply, which refers to the law which is most closely connected to a contract (habitual residence of a person carrying out the work). In a labour contract this is a country, in which the employee has his habitual residence. Of course, such an approach is not consistent with the specific character of labour contracts, as the latter, due to its essence is most closely connected with the country, in which the

[30] *Chanturia/Akhvlediani/Zoidze/Ninidze/Jorbenadze* (ed.), Comments on the Civil Code of Georgia, Book 1 (General Provisions of the Civil Code), 2002, 83.
[31] Published in "Umaglesi Sabchos Utskebani" of Georgian Soviet Republic, 1973, 6.

employee habitually fulfils his duties and less closely – with the country of habitual residence, when these two do not coincide.

One more issue, which should be particularly stressed, is that Article 38 mentions the term "service". In my opinion the sequence of usage of this term might cause some misunderstanding. If service is mentioned for the specification of a consumer contract, then it would have been more reasonable to use it after the phrase "supply of movables, financing", that then would have been logically followed by a "labour" contract". The other probable version of the offered sequence is that the service contract within the scope of regulation of this Article together with the labour contract, what is not correct, as this type of contract sufficiently differs from the labour one and consequently should be the object of general regulation. The mechanisms of social protection, provided for by labour law, shall not apply to service contracts (excluding the labour safety standards, which presumably should apply to these relations).

Despite these deliberations, we should support the opinion that what is meant is the first version and this comment is rather technical than essential.

Finally, as regards the jurisdiction of Georgian courts, it would be desirable for the Law to provide for special rules regarding labour contracts.

4. Conclusion

Consumer and labour contacts are the subject of special regulation both at domestic and international level. This conditions the existence of special mandatory rules of social protection in these two fields. However the provision of social protection on a domestic level is not only the priority of a state, but the regulation of such relations complicated with foreign element requires a special approach as well, from conflict of laws.

Such an approach is the reason for these two types of contracts not to fall within the scope of application of general conflict of laws principles and in here the preference is given, in one case, to the law of a country of a consumer's habitual residence and in the other case, to the law of place of the performance of work.

Although Article 38 of the Georgian Law attempts to reflect the above specificity in Georgian legal reality, even as such it still does not achieve the consequences of application of those mandatory rules, the realisation of which is the first priority of the state and what is most important, disregards this specificity through combining these types of contracts under general conflict of laws rules. Thus, the existing legal mechanisms do not provide for the attainment of the main goal of special protection of consumers and employees.

Along with the problems in pure conflict of laws regulation, the procedural problems also emerge and although the issue of the jurisdiction of Georgian court is outside the objectives of this article, in our opinion, the Law requires further elaboration in this respect. However, presumably, if the conflicting part of the Law is revised in future, the issue of changing the respective procedural part will arise logically.