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Application of Foreign Law in Matters of Conflicts of Laws

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Abstract: *Foreign law in private international law means the law of a State other than the State of the court seised, which may be applicable to a legal relationship with foreign elements (i.e. a relationship with links with several States). In other words: when a case has elements of a connection with more than one State (e.g. different citizenships of the parties, place of conclusion of the contract in another State, property located in another country), the court deciding the dispute must determine which law applies. That law may be: its own law (lex fori) - the law of the State where the case is heard - or the foreign law - the law of another State, indicated by the rules of private international law as applicable to the legal relationship. Foreign law governs the substance of the legal relationship (e.g. validity of the contract, its effects, contractual liability). The Romanian court must identify, know and apply it as if it were its own law (subject to public policy). It should be noted that foreign law is not optional - if the conflict rules refer to it, the court is obliged to apply it.*
The application of foreign law in private international law means that the court of one State applies, on the merits of the case, the law of another State, as indicated by its conflict rules. The essential characteristics of the application of foreign law are: it is mandatory - the court applies the foreign law as its own law, if the conflict rules designate it; the court is required to establish and prove the content of the foreign law; the application is made in compliance with domestic public policy (if the foreign law contravenes fundamental principles, it is set aside); it does not concern procedure - it remains governed by the law of the forum (lex fori). We conclude briefly that the application of foreign law is the use of the legal rules of another State to settle the substance of a legal relationship with foreign elements.

Keywords: *law; conflicts; lex loci; lex fori.*

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Introduction

"The foreign law is never applied by a Romanian court by its own force, but only because a Romanian legal norm refers to the foreign law and only to the extent permitted. Thus, the application of foreign law is imposed on the judge only because the law of the forum, through its conflicting rules, orders or permits it, with all due consideration for this expression of sovereignty" (Popescu, 1994). Thus, according to this definition, the application of foreign law by Romanian courts is a process controlled and mediated by the conflicting rules of Romanian private international law. This process reflects the sovereignty and autonomy of the Romanian state, which decides, by means of its own legal rules, to what extent and how the foreign law is applied, ensuring that fundamental values and national public order are protected.

According to the Latin expression, *lex causae* designates the law applicable to a situation in which elements of foreignness are present, that is to say a situation giving rise to a conflict of laws. Lex causae can be the law of the country whose jurisdiction resolves the conflict (lex fori) or a foreign law.

We mention that, *lex causae*, depending on the territorial configuration, can have different meanings. In the case of unitary states, it coincides with the system of law of the respective state (e.g. Romanian law, French law, etc.) In the case of federated states, it designates the system of law of the state in which the respective legal relationship is located (e.g. Nevada, Georgia, Texas - in the USA) (Aniței, 2022). The Romanian Civil Code regulates the legal relations with foreign elements that have their origin in domestic law. The main problem consists in the fair application of this law as there are various situations. Also, in order for the foreign law to be applied as lex causae, it is necessary that the Romanian conflict rule refers to it.

Firstly, a distinction must be drawn between the ways in which legal relationships are regulated. In domestic law, these legal relationships are governed by the very rule of domestic law itself. In private international law relationships, the application of foreign law is carried out according to the elements of foreignness present, the law of the forum having a subsidiary character in this situation (Trocan, 2019).

Second, in private international law, the lex causae is the issue on which the court must give a just and equitable solution in accordance with the law in force.

Application of the law in conflict of laws

The application of foreign law is an act of the will of the forum state (lex fori), not an act of subordination to the sovereignty of another state. Foreign law is not in itself binding on the territory of another State. It can produce legal effects only because the law of the forum state (lex fori) allows it to do so. The conflict rules in domestic (Romanian) law choose from among several possible laws (Romanian or foreign) the law that will govern the legal relationship with a foreign element (e.g. different nationality, residence in another state, place of conclusion of the contract, etc.). When the Romanian State decides, through its own law, to apply the foreign law, it does not cede sovereignty, but on the contrary exercises its sovereignty, since the State considers that, in the interest of a good regulation of the international legal relationship, the application of the foreign law is more appropriate. The Romanian court does not do a "favour" to the parties or to the foreign state. It has an obligation to correctly apply foreign law under the conditions established by Romanian law. This follows from the conception of Romanian private international law, not from international politeness. A state cannot unilaterally extend its jurisdiction. But it may consent to apply foreign law on its own territory, if it considers that this serves its legal order and interests. In other words, the application of foreign law on the territory of the forum is the very raison d'être of private international law. It is an indispensable condition for the establishment of private international law relationships. Since the law is the most pronounced expression of a State's sovereignty, the application of foreign law on the territory of the forum's law is of particular importance in theory and, above all, in practice, not only in legal but also in political terms. No State can of its own free will apply the laws of its own country to the territory of another State. But any State, insofar as its interests permit, may allow the laws of another State to be applied on its territory. In this situation foreign law is applied, not because it so decides, but only because its application is expressly and implicitly consented to by the lex fori (Florea, 2022). The correct application of foreign law within the limits and under the conditions established by the "lex fori" constitutes for the law of the forum a legal obligation which it has itself assumed as part of a conception of law and not by virtue of international courtesy.

Conflict and types of conflict rules

We determine that, conflict rules are an essential element in private international law, as they determine the law applicable to a legal relationship with a foreign element. They are legal rules which, without directly regulating substantive legal relationships, indicate the system of law to be applied in the

resolution of a particular case. The conflict rules are structured according to certain connecting factors, such as domicile, nationality, place of conclusion of the legal act or place where the wrongful act was committed.

The conflict rules fall into several categories, each with its own specificities and distinct areas of application. They are essential to ensure fair and just application of the law in cases with foreign elements. *Unilateral rules* specify the scope of application of one's own law without reference to any foreign law. An example is the national law governing protection against acts of violation of the right to a name committed on its territory. *Bilateral rules*, also known as comprehensive conflict rules, indicate the scope of application of both the law of the author's own law and the foreign law. An example of this is the determination of the formal requirements of a juridical act by reference to the law of the place where the act was drawn up. *Cumulative rules* are those which require simultaneous compliance with several systems of law. For example, in the case of consumer protection, a State may require the application of both its national law and the law of the place where the consumer resides in order to ensure a maximum level of protection. *Alternative rules* allow the parties to choose between several applicable laws, giving them flexibility in determining the law to govern the legal relationship. For example, in a contract for the international sale of goods, the parties may agree to be governed either by the law of the place where the seller's seat is located or by the law of the place where the goods are delivered.

We specify that, rem renvo renvoi is a method whereby the court of the State seised may decide to apply the foreign law, which in turn refers back to the law of the forum. It is used to avoid the application of foreign law in complicated cases and to ensure a fair settlement. For example, if a French court is faced with a case of international succession and applies British law, and British law provides that the succession must be governed by the national law of the deceased (which is French), the French court may apply its own law.

Application of conflict rules

In practice, the courts apply their own conflict rules to determine the law applicable to the legal relationship with a foreign element. This means that if a dispute is heard in a particular country, that court will apply its conflict rules to determine the competent law. The correct application of conflict rules is essential to ensure consistency and fairness in the resolution of cross-border disputes, thereby protecting the legitimate interests of the parties involved and promoting international legal stability (Sitaru, 2001).

Conflict of laws methods

Conflict resolution methods are essential to determine which legal system is applicable to a legal relationship with foreign elements. These methods ensure consistency and predictability in resolving cross-border disputes, protecting the rights of the parties involved and promoting international legal stability.

We estabilsh that there is multiple conflict of law methods such as: classical (traditional) method, state-interest method, substantive rules method, the dépeçage method. We briefly present each of them:

The classical method, also known as the traditional method, is the oldest method used in conflict-of-law conflict resolution. It is based on the application of conflict rules to identify the law applicable to the legal relationship. Conflict rules are legal rules which indicate the law to be applied in resolving a particular case without directly regulating the rights and obligations of the parties.

The state-interest method, developed in particular in American law, emphasises the identification of the State which has the greatest interest in the application of its law. This method focuses on the interests of the states involved in the dispute and the relevant public policies.

The substantive rules method involves the direct application of substantive rules of law without recourse to conflicting rules. This method is used in particular in areas where there are uniform substantive rules or international conventions directly governing legal relationships with a foreign element.

The dépeçage method involves applying different laws to different aspects of the same legal relationship. This allows the courts to apply the most appropriate law to each aspect of the case, ensuring a fairer and more equitable solution.

The general principles of law method is based on the application of the fundamental principles recognised in most legal systems, thus ensuring a fair and just settlement of cross-border disputes.

These methods of resolving conflicts of law are essential to the functioning of private international law, ensuring the fair and equitable application of the law in cases with foreign elements. By using these methods, courts can protect the rights of the parties involved and promote stability and predictability in international legal relations (Briggs, 2013).

Lex loci vs. lex fori

In private international law, conflicts of laws pose a significant challenge, and the concept of lex loci and lex fori play a crucial role in determining the applicable law in a dispute with foreign elements. We must say that, Lex loci and lex fori are two fundamental principles used to identify the applicable law, each with its own specific advantages and applications. Those are two foundational concepts in private international law (also called conflict of laws).

In the following we will make a delimitation of the two principles for better understanding.

Lex loci is a principle that refers to the application of the law of the place where a particular legal event occurred. This principle can be divided into several sub-categories, depending on the nature of the legal relationship:

- *Lex loci contractus*: Lex loci contractus refers to the application of the law of the place where the contract was concluded. This principle is often used to determine the law applicable to the formation and validity of an international contract.
- *Lex loci solutionis*: Lex loci solutionis involves the application of the law of the place where the contractual obligation is to be performed. This principle is frequently used in the case of contracts requiring performance of a specific obligation in a particular place.
- *Lex loci delicti commissi*: Lex loci delicti commissi refers to the application of the law of the place where the tort or delic delict occurred. This principle is essential in tort/delict cases in order to determine the law applicable to the tort.
- *Lex loci rei sitae*: Lex loci rei sitae involves the application of the law of the place where the property in question is located. This principle is frequently used in disputes concerning rights in rem in immovable and movable property.

Lex fori refers to the application of the law of the court hearing the dispute. This principle implies the use of the legal rules of the forum (the place where the trial is held) to settle the dispute.

We determine that there is some advantages of the lex fori principle. Applying the law of the court trying the dispute simplifies court procedures, as judges are familiar with their own law and do not have to interpret or apply foreign laws. The use of lex fori eliminates the need to determine the applicable law by conflicting rules, minimising the risk of conflict of laws and ensuring consistency in dispute resolution. The application of lex fori

can also reduce the costs and length of proceedings as the courts do not have to seek legal expertise in foreign law.

It should be noted that in private international law there must be some limitations of the lex fori principle. Thereby, application of lex fori may be perceived as unfair by parties who expect the law of the place of the legal event to be applied. The law of the forum may offer a different level of protection of rights compared to the law of the place of the legal event, which may create inequalities between the parties. Lex fori cannot be applied if it is contrary to international public policy or the mandatory rules of the other jurisdictions involved.

Lex loci and lex fori are two distinct approaches to resolving conflicts of laws, each with its own advantages and disadvantages. The choice between these principles depends on the specific circumstances of each case and the legal policies of the State involved.

In addition, Lex loci offers predictability by applying the law of the place of the legal event, while lex fori offers flexibility and procedural efficiency by applying the law of the court.

Lex loci promotes consistency in the application of the law and respect for the expectations of the parties, while lex fori can simplify and speed up court proceedings.

An important aspect concerns the protection of human rights. The choice between lex loci and lex fori may affect the level of protection of parties' rights, depending on the differences between the legal systems involved (Briggs, 2013).

Conclusions

*Foreign law must be applied with the interpretation given in the home country. Its correct application depends on how the foreign law is interpreted (*Macovei, 2023).

The interpretation and application of foreign law in a legal system is influenced by the way its legal nature is perceived. In general, foreign law can be considered either an element of fact or an element of law, and this distinction can have significant consequences in a judicial process.

Where the foreign law is regarded as an element of fact, the court may treat it as a mere establishment of the facts relevant to the case, similar to any other factual evidence. From this perspective, the trial court may have sovereign discretion in evaluating and interpreting the foreign law, and its decision may be difficult to challenge on appeal.

In contrast, where the foreign law is regarded as an element of law, the court is obliged to apply it properly, in accordance with the rules and procedures laid down by private international law and national law. In this

case, the court must interpret and apply the foreign law in accordance with its rules and principles.

The decision on the nature of the foreign law as an element of fact or of law may depend on the specific case-law and judicial practice of each State and on the applicable rules of private international law. In general, such a distinction may be important in terms of how the court approaches and applies foreign law in the judicial process, as well as in terms of the standards of review and control in the event of possible appeals.

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