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GENERAL CONSIDERATIONS ON QUALIFICATION IN PRIVATE INTERNATIONAL LAW

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GENERAL CONSIDERATIONS ON QUALIFICATION IN PRIVATE INTERNATIONAL LAW

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Abstract

A conflict regulation consists of two structural elements, namely: the content of the conflict regulation and the connection of the conflict regulation. Notions by which such elements are determined do not have the same content in different legal systems. For this reason, it is necessary to determine their meaning, since the competent law to regulate that legal relation also depends on how a qualification is made. Qualification is an issue of private international law. Thus, for example, it is possible that a certain legal notion has one meaning in one legal system, and a different meaning in other legal systems. In this article we analysed the concept of qualification, factors determining qualification, forms of qualification, the law according to which qualification is made, conflict of qualifications, as well as qualification under Romanian law.

Keywords:

Qualification, conflict of qualifications, foreign element, conflict regulation, lex fori.

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1. Introductive considerations

To determine the law applicable to legal relations with a foreign element, one must establish the law connected with that relation. Thus, in any situation where a jurisdictional authority is vested with resolving a dispute with a foreign element, which is likely to be applied two or more foreign legal systems, the conflict regulation of the forum[2] (i.e. of the court) will be used, applying the law designated by this regulation. But, like other legal rules, conflict regulations are classified into different categories depending on the issues they address (for example, conflict regulations on individuals, on property, on contracts, on inheritance, on family relations etc.). In this case, the question is: what is the conflict regulation pertaining to the legal system of the forum which must be applied to that legal relation?

Such a choice involves, on the one hand, the interpretation of the specific case, in order to establish the applicable conflict regulation, and on the other hand, the interpretation of the latter's content and connection[3].

In the process of its application, the conflict regulation must be confronted with the concrete legal relation between the parties, which is the factual situation, in order to see the content or connection of the conflict regulation corresponding to that legal relation. To achieve this goal, it is necessary that they be qualified[4].

2. The concept of qualification, the factors determining qualification and forms of qualification

A conflict regulation consists of two structural elements, namely: *the content of the conflict regulation* and *the connection of the conflict regulation*. These structural elements can be determined using legal notions. Thus:

[2] The term „forum" stems from the Latin "*forum"*, stems from the Latin "*forum"*, which means a public square in ancient Rome, where the political, religious and economic life of the city was concentrated and where trials were judged (1). Authority, court, body of the state (2). (Dicţionarul explicativ al limbii române)

[3] D. Lupascu, D. Ungureanu, *Drept international privat,* Universul Juridic, Bucuresti, 2012, pp. 68

[4] Qualification is an operation which is generally known in all branches of law. For example, in civil law, an issue may be raised of whether a legal act is an act of sale and purchase or a contracting act; in criminal law, whether an offense is an offense of murder or manslaughter. The interpretation of legal definitions in internal law is necessary in order to determine the legal status of a contract, a crime, etc. (See, for more detail, S. Deleanu, *Drept international privat. Partea generală*, Universul Juridic, Bucuresti, 2013, pp.98-99)

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- *the content of the conflict regulation* is determined using such notions as marital status, capacity, form of the document, inheritance of movable property, obligational relation etc.[5]

- *the connection of the conflict regulation* is determined using notions such as "the place of conclusion of the contract", "the place where the harmful act occurred", "the place of performance of the contract" etc.[6]

The notions which determine *the content* and *connection of the conflict regulation* do not have the same content in different legal systems. For this reason, it is necessary to determine their meaning, the reality to which they relate or which they contain.[7]

a. **The concept of qualification**

Qualification can be defined in two ways, starting from the conflict regulation to the factual situation or vice versa, from the legal relation to the conflict regulation. Thus:

- starting from the conflict regulation to the factual situation[8], qualification is the logical-legal process of determining the exact and full meaning of legal notions used by the conflict regulation, in order to determine whether a legal relation is included or not in these terms. Qualification thus presupposes the establishment of the meaning of an individual's state and capacity notions, formal conditions of contract, etc.

- starting from the legal relation to the conflict regulation[9], qualification is the interpretation of a legal relation (of a concrete factual situation), in order to determine the "content" and "connection" of the conflict regulation that includes that factual situation.

For example, if two people of different nationality conclude a civil marriage in the country of one of them and, after a while, the spouse holding

[5] For instance, in art.2572 para. 1 of the Civil Code, which provides that the "status, capacity and family relations of individuals are governed by their national law ...", the expression "status, capacity and family relations of individuals" constitutes the content of the conflicting regulation

[6] In art. 2633 of the Civil Code, for example, which states that "inheritance is subject to the law of the state on whose territory the deceased had their habitual residence at the time of death", the term "habitual residence" helps us determine the competent law

[7] I. P. Filipescu, A. I. Filipescu, *Tratat de drept internațional privat*, revăzută și adăugită, Universul Juridic, București, 2005, pp. 83-84

[8] See also Ovidiu Ungureanu, C. Jugastru, A. Circă, *Manual de drept internațional privat*, Editura Hamangiu, București, 2008, pp. 86, S. Deleanu, *op. cit.,* pp. 99

[9] See also A. Fuerea, Drept internațional privat, Ediția a II-a revăzută și adăugită, Universul Juridic, București, 2005, pp. 45, Dragoș A. Sitaru, Drept internațional privat. Partea generală. Partea specială – Normele conflictuale în diferite ramuri și instituții ale dreptului privat, Editura C.H. Beck, București, 2013, pp. 58.

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the nationality of the State where the marriage was concluded demands a divorce, whereas the other spouse alleges nullity of marriage on the grounds that, under his/her national law, the marriage had to be concluded in a religious form, the court will be obliged to establish whether the civil or religious character of marriage is a formal or substantive condition. In the event that it is a formal requirement, the court will consider the conflict regulation according to which the form of marriage is governed by the law of the State on whose territory it is officiated. If, however, it is regarded as a substantive condition, it shall apply the conflict regulation according to which the substantive requirements for marriage are determined by the national law of each of the future spouses.

b. **Factors that determine qualification**

The operation of qualification is imposed by the following factors:

- the notions and terms contained in the conflict regulation have different meanings in different legal systems[10];

- some legal systems have legal notions or institutions unknown to other systems, such as: the legal institution called "trust"[11]in English law, the notion of "aufhebung"[12] in German law etc.;

- legal systems use different methods to achieve the same result. For example, gratuitous juridical acts are subject to different legal requirements;

- different legal systems place the same situations within different categories or notions, as in the case of breaking the engagement, which can be considered as related to either tort liability, or contractual liability.

c. **The forms of qualification**:

Qualification can be classified as follows:

Primary qualification is that which determines the competent law, in the sense that the competent law to govern a certain depends on how a qualification is made. Primary qualification is, therefore, a matter of private international law. For example, it is possible for a certain legal notions to

[10] For example, the notion of "domicile". Thus, in English law a person is domiciled in the place where they intend to settle permanently, and in other legal systems, domicile is the place where a person has stable residence.

[11] The legal institution of trust in English law (i.e. the relation whereby a person called settlorconveys an item to another person, called trustee, with the requirement for the latter, invested with ownership of the item, dispose of it for the benefit of a third-party beneficiary, designated the settlor).

[12] The notion of "aufhebung" designates causes for dissolution of marriage which had existed prior to its conclusion.

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have one meaning in Romanian law, and a different meaning in other legal systems[13].

Secondary qualification is that which does not influence the competent law to govern the legal relation. This qualification is made after primary qualification has been performed, thus determining the competent law to govern the legal relation.[14]

3. Conflict of qualifications. Notion

Structural elements of a conflict regulation can have the same meaning in the legal systems that relate to a legal relation with a foreign element. But if the same legal notion has different meanings in the legal systems applicable to a legal relation with a foreign element, a conflict of qualifications ensues.

A conflict of qualifications can be defined as the situation that exists when the notions used by the conflict regulation are qualified differently by legal systems that are in conflict (which can apply to a legal relation with a foreign element).[15] For example, the state's right to collect the vacant inheritance existing on its territory can be qualified as a right of inheritance, succession subject to the law of succession (*lex succesionis*), or as an original right of the state arising from its sovereignty, in which case the law of place where the property is located will apply; or, the domicile of a natural person, in Romanian law, is at the place where the person has their stable residence, whereas in English law, the domicile is at the place where the person intends to settle permanently, and therefore is close to citizenship in terms of stability.

It should be noted that the conflict of qualifications is solved first, followed by the conflict of laws; therefore, the solution given in the first case determines the solution of the latter.

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[13] If the *handwritten form of a will* is a formal matter of juridical acts, i.e. it falls within the notion *form of juridical acts*, it will be governed by *the law of the place where the will was drawn up*, and if the *handwritten form of a will* is considered as a matter of legal capacity, it will be governed by the *testator's personal law.*

[14] For example, determining whether a contract of sale and purchase has a civil or commercial character, in respect of which the means of evidence are established, is a matter of secondary qualification

[15] See, for more detail, Sandrine Clavel, *Droit international privé,* Ed. Dalloz, Paris, 2012, pp. 39; Bruno Barel, Stefano Armellini, *Diritto Internazionale privato*, Giuffre Editore, Milano, 2014, pp. 63-65; D. A. Sitaru, *op.cit.,* pp. 58-61

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4. The law according to which qualification is made

The main issue that arises in private international law regarding categorization is knowing according to which law the qualification is made and how to resolve a conflict of qualifications.

4.1. Qualification according to the law of the forum (lex fori)

Qualification is usually made according to the law of the forum (*lex fori*). In favour of this view, the following arguments have been crystallized in the literature[16]:

- the rules of private international law pertain to the internal law of each State, therefore, the qualifications considered by the legislator also pertain to the national legal system;

- qualification is an intermediate step in applying the conflict regulation, and primary qualification influences the solution of the dispute;

- if the qualification would not be made according to the law of the forum, the forum would be deprived of any control on the application of foreign law, which cannot be accepted.

Exceptions from the qualification according to *lex fori*

There are some situations in which qualification is not made according to the law of the forum. Accepted exceptions refer to the following:

- *qualification by will of the parties*, to the extent that the parties may choose the competent law to apply to the legal relation, they can decide on the classification;

- *secondary qualification*- as a matter of internal law, it is not made according the law of the forum, but according to the law designated to apply to the legal relation;

- *re-referral* - if accepted, it must also be accepted that the qualification of notions used by the re-referring rule is made according to this law;

- *foreign legal institutions unknown to the law of the forum* - different legal systems recognize legal institutions that are not their own. An example here is the legal institution called "trust" English law, which has no counterpart in the law of countries on the continent, and the legal institution of German

[16] See I. Macovei, *Drept internaţional privat în reglementarea Noului Cod civil şi de procedură civilă*, Editura C. H. Beck, Bucureşti, 2011, pp. 57; S. Clavel, *op. cit.,* pp. 33-34; N. Diaconu, *op. cit.,* pp. 79-80; D.A. Sitaru, *op. cit.,* pp. 62

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law called "aufhebung"[17]. For these legal institutions, in matters of qualification, due consideration should be given of the law governing them;

- *international treaties* - sometimes the notions contained in international treaties are qualified in their very text;

- *citizenship* - it is considered that citizenship is determined in relation to the law of the State whose citizen the person is or claims to be. Article 2568 para. 1 of the Civil Code provides that "the national law is the law of the State whose citizen the person concerned is. The determination and proof of citizenship are made in accordance with the law of the State whose citizenship is claimed." It should be noted that this solution is only accurate if the person holds one citizenship. If the person has two citizenships, one can distinguish the following cases:

- when one of the citizenships is of the forum, then citizenship is determined according to the law of the forum;

- when none of the citizenships is of the forum, either the older citizenship, or the newer one shall prevail, or preference is given to be effective citizenship, or emphasis is laid on the habitual residence the on the person (art. 2568 para. 3-4 of the Civil Code states that "If the person has no citizenship, the reference to national law is understood as a reference to the law of the state where they have habitual residence (para. 3). The provisions of para. (3) are also applicable to refugees, under special stipulations and international conventions to which Romania is a party (para. 4).

4.2. Qualification according to other criteria

Other forms of qualifications or resolution of conflicts of qualifications are known in the literature, based on other laws. The following may be listed to this effect:

a. **Qualification according to *lex causae***[18]

According to this form, the conflict of qualification is resolved according to the he main competent foreign law with respect to a legal relation. In other words, in keeping with this theory, any legal rule is qualified according to the legal system to which it belongs[19].The following arguments have been brought in favour of this theory:

[17] For the definition see footnote 12.

[18] S. Clavel, *op. cit.,* pp. 57-58; J. Elhoueiss, *Retour sur la qualification lege causae en droit international privé,* Journal du droit international, 2005, pp.280; I. P. Filipescu, A. I. Filipescu, *op. cit.,* pp. 89

[19] For example, according to art.2558 para. 3 of the Civil Code, both the movable or immovable nature, and the content of real rights over property, shall be determined in

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- reference to the foreign law through the conflict regulation also entails reference to the qualification of this law

- the foreign law determined by the conflict regulation of the forum should be applied so as to achieve full protection of the subjective rights that it generated.

The following objections have been put forward against this theory:

- until the qualification is made, *lex causae* cannot be known;

- the designation of competent law depends on the given qualification;

- this theory does not deal with concepts through which the connection of the conflict regulation is determined. It also does not specify according to which law the qualification is made, if the legal relation is connected to several legal systems.

b. ***Proper law* qualification**

This method is specific to English law, and according to it the conflict of qualifications shall be resolved sometimes by the *lex fori*, other times by the *lex causae* - depending on the particular case, as judged by the court.

c. **Autonomous qualification**[20]

In this case, the notions used by the conflict regulations are qualified autonomously and independently of the qualification of the same notions given by the internal substantive law of a particular state. The theory of autonomous qualification is applicable in international trade law, in the sense that courts of arbitration may apply an autonomous and national system for resolving conflicts of laws[21].

From the above it can be concluded, in principle, that it is not in all cases that qualification can be made only after the *lex fori* without taking into account the *lex causae*, or according to the *lex causae* by disregarding the *lex fori*.

accordance with the law of the place where they are located, "notwithstanding the provisions stipulating qualification according to the law of the forum (*lex fori*); the law of the place where the property is located (*lex rei sitae*) is, in this case, the *lex causae.*

[20] See I. P. Filipescu, A. I. Filipescu, *op. cit.,* pp. 89, I. Macovei, *op. cit.,* pp. 61

[21] According to art. 7of the *European Convention on International Commercial Arbitration* (ratified by Decree no. 28/15 November 1993), if the parties have not determined the applicable law, the arbiters shall apply the appropriate law in the case.

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5. Qualification in Romanian law

In Romanian law, qualification is usually made according to the law of the forum (*lex fori*). Qualification is not made according to the law of the forum in situations which are exceptions to this method of qualification.

Thus, according to the provisions of art.2558 para. 1 of the Civil Code "when determining the applicable law depends on the qualification to be given to an institution of law or to a legal relation, the legal qualification established by Romanian law shall be considered".

The qualification of a matter as being of procedural or substantive law is made according to Romanian law, as stipulated by art. 1088 of the Code of Civil Procedure.

6. Conclusions

Qualification is the operation of determining the content of the notions used by the conflict regulation, both in terms of its scope of regulation, and in terms of indicating the competent law to govern the legal relation with a foreign element.

Qualification is required by the following factors: notions and terms contained in the conflict regulation have different meanings in different legal systems; some legal systems have legal notions or institutions unknown to other systems; legal systems use different methods to achieve the same result, etc.

The conflict of qualifications arises in situations when the notions used by the conflict regulation are qualified differently by legal systems that are in conflict (which can apply to a legal relation with a foreign element).

Usually, qualification is made according to *lex fori*, but it can be made by other criteria, such as qualification according to the *lex causae*, proper law qualification, or autonomous qualification.

For private international law, qualification is of interest if the competent laws to govern the legal relation with a foreign element have different meanings. The resolve resolution of the conflict of laws depends on how the qualification is resolved. Thus, the effect of qualification is different depending on the element of the conflict regulation being qualified. When the object of qualification is the content of the conflict regulation, the way in which the conflict of qualifications is resolved determines the applicable conflict regulation itself (thus changing the applicable legal system and, therefore, the solution in this case), and when the connection of the conflict regulation is qualified, the way in which the conflict of qualifications is resolved does not influence the conflict regulation, but it determines the applicable legal system, and therefore the solution in this case.

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