EDITURA LUMEN în elita editurilor românești

Available online http://lumenpublishing.com/journals/index.php/jls

e-ISSN: 2067-8509; ISSN-L: 1841-6195

Jurnalul de Studii Juridice

Year X, No. 3-4, December 2017, pp. 25-43

THE CONVENTION FOR CHOOSING THE APPLICABLE LAW – A CONSTRUCTION SPECIFIC FOR THE RELATIONSHIPS OF PRIVATE LAW WITH FOREIGN ELEMENT

Călina JUGASTRU

DOI: https://doi.org/10.18662/jls/11

Covered in:
CEEOL, CrossRef, CrossCheck, Index Copernicus, Ideas RePeC, EconPapers, Socionet

©2017 The Authors & LUMEN Publishing House

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. *Jurnalul de Studii Juridice, XII*(3-4), 25-43. https://doi.org/10.18662/jls/11

https://doi.org/10.18662/jls/11

THE CONVENTION FOR CHOOSING THE APPLICABLE LAW – A CONSTRUCTION SPECIFIC FOR THE RELATIONSHIPS OF PRIVATE LAW WITH FOREIGN ELEMENT[1]

Călina JUGASTRU[2]

Abstract

The legal relationships with foreign element generate the need to designate the law applicable in the conflict of laws. The national conflictual right and the European regulations govern the two complementary mechanisms for determining the law of the cause. Choosing the law by the parties gives expression to the subjective determination that, for some matters, is the rule, and for others, is the subsidiary solution. The recourse to the localization criteria of the applicable law signifies the objective determination of the law and contains variants that always lead to the identification of the lex causae.

The method of concretizing the will of the parties is the choice convention of the applicable law, a concept specific to the private international law. The substantive requirements, the form requirements and the possibility of changing the chosen law are aspects expressly regulated by the national law and by the European norms.

Keywords:

the conflicts of laws right, lex causae, subjective determination, the convention for choosing the applicable law

1. General considerations

An original legal figure, the convention for choosing the applicable law is a vehicle of the will of the parties to which the legislator frequently refers in the relations with foreign element. Sometimes it represents the form of concretizing the main way of determining the applicable law (when the will of the parties "makes" the rule in that matter), other times it represents the expression of the secondary principle of identifying the *lex causae* (in relation to the objective location of the applicable law). In all cases, the convention for choosing the applicable law represents the capitalization method made by the parties of the legal relationship, the freedom conferred by the law for exploiting the right which they prefer.

The substantial norms (internal law) do not regulate this type of convention, as the only applicable law, in the non-foreign relationships, is

[1] The Romanian version of the article was published in the journal *Universul Juridic*, no. 11/2016.

[2] Prof. PhD. "Lucian Blaga" University of Sibiu, Faculty of Law.

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

the Romanian law. The applicable law choice pact only claims its place in international private relations, with the legal status of contracts, with the specific notes induced by the conflict rules. For unilateral acts, the designation of the applicable law is made by the unilateral act author's statement.

The convention for choosing the applicable law *is the will agreement whereby the parties designate the law applicable to the legal relationship with foreign element or through which they modify the law chosen.*

The headquarters of the matter is the national law, the European law and, to the extent permitted by law, non-state law bodies. For example, Rome I provides that the parties may make use of provisions contained in appropriate legal instruments, as long as they are adopted at some point in time - the case of the Principles of the European Contract Law.

The Romanian International Law regulates the convention for choosing the law applicable to various matters, from the family status to legal acts and inheritance. We notice that the current Civil Code has multiplied the matters in which the parties designate the law. Some provisions have been modeled after European standards. For example, in regard to the possibility of choosing the law applicable to the dissolution of marriage, provisions were taken from Regulation no. 1259/2010 which implemented a strengthened cooperation form in the field of the law applicable to divorce and separation (entered into force in June 2012). As a term of comparison, Law no. 105/1992 (the old regulation of the legal relations of private international law) did not agree to the choice of the law applicable to divorce. The solution that this law established in the case of marriage dissolution and legal separation was the application of the law which governed the personal and patrimonial relationships between spouses (the common national law and, in the absence of common citizenship, the law of the common spouses' domicile - article 22 in conjunction with article 23, article 20, paragraph 1[3]).

The Convention of Choice is present both in the context of the non-patrimonial relations and in the patrimonial legal relations. The applicable law choice pact is an institution circumscribed to the conflict of laws. The international civilian process knows the choice of the forum, that is to say, the agreement which has as its object the designation by the parties of the competent jurisdiction. The procedural-civil provisions (both in the new regulation, in force since 2013, and also in the previous regulation) provide

[3] The common national law or the law of the spouses' common domicile continues to regulate the effects of marriage if one of the spouses changes their nationality or domicile, as the case may be (article 20, paragraph 2 of Law no. 105/1992).

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

that, in the matters expressly mentioned, the parties have the prerogative to designate the competent jurisdiction that judge the foreign-element dispute.

The Convention for choosing the applicable law is one of the forms of expression of the will autonomy in the foreign element relationships. Not always the freedom of will takes a contractual form. For example, the will of the founders of a legal person is sovereign (within the limits of the law) for establishing its registered office in a particular state. In turn, the location of the headquarters in the territory of a given state confers the nationality of the legal person, a circumstance which attracts the submission of the organic statute to the law of that state.

2. The convention for choosing the law applicable to the matrimonial regime

2.1. Choosing the matrimonial regime in the Romanian and European law

The convention for choosing the law of the matrimonial regime is a common problem of the national and European law. The Romanian law regulates the ways of designating the law of the matrimonial regime in article 2590-2592 from the Civil Code. The European law of matrimonial regimes contains current solutions for the spouses' patrimonial relations. In July 2016, the set of rules related to the patrimonial effects of the registered partnerships and matrimonial regimes was enacted: Regulation no. 1103/2016 concerning the implementation of an enhanced cooperation in the field of competence, applicable law, recognition and enforcement of decisions in the matrimonial regime matter and Regulation No. 1104/2016 concerning the implementation of an enhanced cooperation in the field of competence, applicable law and recognition and enforcement of decisions in the patrimonial effects of the registered partnerships. At the request of some Member States, the two forms of enhanced cooperation have been established, which will apply directly and compulsorily within those States. The consolidated forms are methods of cooperation opened to all Member States, subjected to any conditions of participation set out in the authorization decision (Anitei (2015/No1):40-55).

At the level of the matrimonial regime, the regulations give effect to the will of the parties, as there are two rules: the free choice (and within the limits of the law) of the matrimonial regime; designating the law applicable to this regime, by using the options provided by the legislator.

The matrimonial regime has a special status within the patrimonial effects of the marriage with a foreign element. It represents the most

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

complex segment in the organization of the patrimonial family life and resonates perfectly with choosing the law by the recipient-spouses of the matrimonial regime. The freedom of the spouses (or future spouses) to prefer a particular matrimonial regime (from the regulated regimes) "prolongs", in the relationships with foreign element, with the freedom to designate for this regime a law which would govern it. It is an extension of the autonomy of will - from the substantive law, in the private international law.

Unlike the matrimonial regime, the other component (this time, a static component) of the patrimonial effects of marriage is not covered by the freedom of choice of the applicable law. The imperative primary regime (Florian (2015):281), meaning the set of rules from which spouses cannot derogate, irrespective of the regime chosen, is usually subjected to some expressly indicated laws. The Romanian law, for example, subjects the spouses' primary regime to a set of rules, determined in cascade: the law of the common habitual residence of the spouses; the law of the joint citizenship of the spouses (in the absence of a common habitual residence); the law of the place where the marriage was celebrated (in the absence of the spouses' common citizenship). By way of example, the rights of the spouses over the family dwelling, as well as the regime of some legal acts over this dwelling, are governed by the law of the place where it is located (Article 2589, paragraphs 2 and 3, of the Civil Code).

2.2. The Romanian law

The Romanian Civil Code contains two texts that refer to the law applicable to marriage-derived relationships. The first text is intended for the general effects of marriage, including the personal effects and the imperative primary regime (the latter being designated through the words "the patrimonial effects of marriage [...] from which the spouses cannot derogate, irrespective of the matrimonial regime chosen by them" - article 2589, paragraph 2). Separately, article 2590 concerns exclusively the matrimonial regime, under the law applicable to it through the manifestation of the will of the parties. The rule of subjective determination is completed with the provisions regarding the location of the matrimonial regime.

The Convention for choosing the law applicable to the matrimonial regime will indicate the applicable law. If the Romanian law is *lex fori* (according to Article 2558, paragraph 1 of the Civil Code), **the law applicable to the matrimonial regime may be one of the following** (article 2590 of the Civil Code):

a. a. *the law of the State in whose territory, at the time of the election, the habitual residence of any of the spouses was located.* Between the two laws - the law of the habitual residence state at the time of the election and the law of the habitual residence state after the election - the old law will be

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

preferred in order to resolve the mobile conflict of laws. The habitual residence has the legal status of main dwelling of the individual, even if the registration formalities have not been carried out for this dwelling; the criteria for determining the habitual residence are indicated by art. 2570, par. 2 of the Civil Code.

b. b. *the law of the state of which any of the spouses is a national, at the time of concluding the convention for choosing the law*. The citizenship taken into account is that from the time of designating the applicable law, even if, after that moment, the spouse in question acquires the citizenship of another state. The mobile conflict is truncated by applying the old law[4]. Determining and proofing the citizenship (Anitei (2015):115) respects the law of the state whose nationality is invoked (article 2569 of the Civil Code);

c. c. *the law of the state of the first common habitual residence of the spouses after the marriage was celebrated*. The third choice option is identifiable according to the first common habitual residence of the spouses after marriage, even if this point of contact undergoes changes after the marriage is celebrated. It will apply, for the matrimonial regime, the solution of the old law.

2.3. Remarks regarding the Convention for choosing the law of the matrimonial regime:

1. *The parties of the Convention for choosing the applicable law are either spouses or future spouses*. The agreement may be concluded before marriage, at the time of marriage celebration or during marriage (article 2591, paragraph 1 of the Civil Code). Even if the law-choosing pact is concluded by the future spouses, the effects will occur from the date of concluding the marriage, as the matrimonial regime is grafted on marriage. Both choosing the matrimonial regime, before marriage, and choosing the law applicable to the matrimonial regime, before marriage, produces effects from the date of marriage.

2. *The object of the choosing convention is to designate or modify the law applicable to the matrimonial status of the spouses*. In a modern legislative note, the Romanian law is the advocate of the mutability of the law applicable to the matrimonial regime. In the extranet relationships, the mutability of the matrimonial regime is accompanied by the possibility that allows the spouses to prefer a law other than the one initially chosen. As long as they can return to the chosen regime (on the grounds that the patrimonial relations are

[4] The text retained from the previous legislation of the foreign-element relations exploits citizenship, expressing the special legal connection between a state and a individual, regardless of the legal way in which citizenship is acquired.

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

optimally organized under another matrimonial regime) they have the freedom to make changes in the law applicable to the matrimonial regime. The mutability of the applicable law is stated in the European law (the new Regulation no. 1103/2016) and, in close terms, in the new Romanian Civil Code.

Changing the option for the legislative competence may take place at any time, in compliance with the validity requirements of the form of the convention of choice of the law (article 2591, paragraphs 1 and 3 of the Civil Code). The newly elected law only produces effects for the future, if the spouses have not stated otherwise. Under no circumstances may the amendment of the applicable law affect the rights acquired by third parties, a matter expressly provided by art. 2591 paragraph 3 of the Civil Code.

3. *The form conditions* are governed, at the choice of the parties, by the law applicable to the matrimonial regime or by the law of the state in whose territory the choosing convention is concluded. The written form is required *ad validitatem*. Choosing the law must be expressed in the written contract and dated by the parties, or it is indisputable to result from the clauses of the matrimonial convention.

Applying the Romanian law for the matrimonial regime requires compliance with the form demands that this law provides for the validity of the matrimonial convention.

4. The agreement of the parties for choosing or modifying the law of the case, for the matrimonial regime, *is either a document distinct from the matrimonial convention or a clause within it*. In the latter case, choosing the law is necessary to be express or must result without a doubt from the wording of the matrimonial convention (article 2591 paragraph 2 of the Civil Code).

5. *The option of the spouses is not always explicit. Sometimes, it has to be deduced from circumstances or through interpretation*. For example, there are difficulties in identifying the will of the parties, in the matter of the confessional personal status. The will (supposedly common, of the spouses) bears upon the ensemble the religious status, which is indivisible and has a personal and a patrimonial side. One of the decisions criticized in the doctrine belongs to the French Court of Cassation, which attributed to the act concluded by the parties on the occasion of marriage, the value of an express choice of the law applicable to the matrimonial regime. In fact, the act in matter, which was indispensable for the valid conclusion of the marriage, had only effects in succession matters (Burreau, Muir, Watt (2014):299). Instead, if the law is designated in a clear manner, at the time of marriage celebration, being recorded in the replies given by the spouses to the civil status officer's inquiries, the choice of the law respects the legal procedure(Burreau, Muir, Watt (2014):299).

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

2.4. Regulation no. 1103/2016 for implementing an enhanced cooperation in the field of competence, applicable law, recognition and enforcement of the court decisions in the matrimonial regime matters

The consolidated form recently adopted by a number of member states establishes a cooperation on the matrimonial regimes domain[5], meant to provide married couples with the necessary legal certainty and foreseeability as regards to the day-to-day management of their assets and the liquidation of the matrimonial regime, following the separation of the spouses or the death of one of the spouses.

Basic rule in the context of Regulation no. 1103/2016, **the designation of the applicable law** has the effect of not differentiating according to the nature or location of the goods, in such a way that they are optimally administered, according to the laws with which the spouses have a close connection, in the virtue of their habitual residence or citizenship relationship. Precisely in order to facilitate the organization of the spouses' patrimonial relationships, **changing the law applicable to the matrimonial regime** is at their discretion, with no retroactive effect (unless the spouses have expressly stipulated the retroactivity) and without bringing prejudice to the rights acquired by third parties.

The variants available to spouses or future spouses are: the law of the state of their habitual residence or of one of them; the law of the state whose citizenship is held by any of the spouses or future spouses. It will be taken into account the connection points which exist at the time of the conclusion of the agreement.

The European normative act emphasizes the importance of concluding the Convention for choosing the law applicable **under the informed consent of the parties**, through a document dated and signed by them. The electronic document is assimilated to the written document if it allows for a durable recording (storage) of the content. **Any additional form requirements** provided by the law of the member state in which both spouses have their habitual residence at the time the agreement is concluded must necessarily be respected. If, at the date of concluding the agreement,

[5] The term "matrimonial regime" is understood as an "autonomous concept" and should include not only the rules from which the spouses cannot derogate, but also any other optional rules to which the spouses may agree, in accordance with the applicable law, as well as any implicit rules of the applicable law. This includes not only the patrimonial conventions specifically and exclusively provided by certain systems of national law in the case of marriage, but also any patrimonial relationships, both between spouses and with third parties, which result directly from the matrimonial relationship or from its dissolution" (recital 18 of the Regulation).

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

the spouses have their habitual residence in different member states which lay down different form conditions, it is sufficient to comply with the form requirements of one of those states. Also, if at the date of concluding the agreement, only one spouse is habitually resident in a member state which provides additional form conditions, those conditions shall be complied with.

3. The Convention for choosing the law applicable to the juridical act

In the matter of the juridical act, both the Romanian private international law and the European standards, regulate choosing the law applicable to the substantive conditions. If, in the case of contracts, the method of subjective designation of the applicable law is the agreement of the parties, in the case of the unilateral act, the choice belongs solely to the author and there is no question of a choice convention of the applicable law. With regard to unilateral acts, choosing the law takes place by the author's statement.

The Romanian law has express provisions, with reference to the unilateral act and the contract (article 2637). The European regulation is based in Regulation no. 593/2008 concerning the law applicable to contractual obligations.

3.1. Designating the law applicable to the unilateral juridical act

3.1.1. The provisions of the Civil Code – article 2637 of the Civil Code (Rohnean, (2012):1170-1172)

The designation of the applicable law operates for the substantive conditions and must be express (with the *lex causae* indication) or must indisputably result from the content of the act or from circumstances. The manifestation of will in the sense of designating the law of the unilateral legal act is a provision included in it or it is a separate act (which, in turn, is a unilateral act of will). The author may resort to the designation of the law for the entire act or may be limited to *lex causae* for a part of the act. Different parts of the unilateral act may be subjected to different laws, or, a part may be governed by a law, and the other may remain under the empire of objective localization[6]. The return of the author to the initial election (changing the applicable law) is subjected to the two requirements shown in

[6] The objective location of the act involves applying the law with which the act has the closest connections, or, if the closest tie to the closest links cannot be identified, *locus regit actum* shall be applied).

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

art. 2637 par. 4 letter a-b: to not infirm the validity of the form of the act; to not bring prejudice to the rights of third parties.

In the matter of inheritance, the Civil Code has an express provision. According to article 2634, a person may choose, as law applicable to inheritance, in its ensemble, the law of the state of whose citizenship it has. The substantive conditions of the declaration for choosing the applicable law are subjected to the right chosen for governing the inheritance. As regards to form, the requirements for the cause of death must be complied with. The declaration for choosing the law applicable to inheritance may be subjected to change or may be revoked, provided that such operations can be carried out with respect to the provisions for the cause of death.

3.1.2. Choosing the law applicable to contractual obligations (Audit (2013):807-808; Clavel (2012):533-535)

The national international private law refers to the provisions of the European law.

Regulation no. 593/2008 deals with contractual obligations and regulates two ways of determining the law of the contract: the choice of the parties or location based on objective criteria (Rus (2016)). Designating the law applicable by the parties is the **rule**. Contractual freedom includes a dimension specific to relationships with foreign element, concretized in the possibility of choosing *lex causae*, meaning the law of the contractual relationship.

Specifications concerning the convention for choosing the contract law:

a. "*The contract is governed by the law chosen by the parties*". Freedom to choose the applicable law concerns the whole act or only a part of it. The designated law has a universal vocation, in the sense that it will be applied without distinction as it is the law of a member state or the law of a third state.

b. *The choice of the parties must result with a reasonable degree of certainty, from the terms of the contract or from the circumstances of the case.*

c. At any time, *the applicable law may be changed by the parties*, without bringing prejudice to the validity of the form of the contract or to the rights of third parties.

d. *The limitations brought on the parties' option are mentioned in art. 3 par. 3 and of the Regulation.* We are talking about legal provisions with imperative character with regard to the relevant elements for the legal situation in question. The first limitation concerns the situation where all the relevant elements, at the time of making the choice, are in a state other than the one

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

whose law was chosen; the choice of the parties does not bring prejudice to applying the provisions of the law of that other country, from which it cannot be derogated through agreement. The second limitation concerns the case where all the elements relevant to the situation in question (at the time of choosing the law) are in one or more member states; the choice of the parties of an applicable law, other than that of a member state, is without prejudice to the proper application of the European norms, which cannot be derogated from through convention, as the case may be, as they have been transposed into the member state of the competent court.

e. *The scope of applying the law designated by the contractors is circumscribed* to the interpretation of the legal act; to executing the obligations derived from the contract; (within the limits of the competence conferred to the court seized) to the consequences of the total or partial non-performance of the obligations, including the assessment of the damage, to the extent that it is regulated; to the settlement of obligations; to the consequences of the nullity of the contract (Sitaru (2013):171-172).

4. The convention for choosing the law applicable to maintenance obligations

The Romanian private international law refers to the European law texts in the matter of the maintenance obligations: Regulation no. 4/2009 concerning *competence, the applicable law, the recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*[7] and the Hague Protocol of 23 November 2007 on *the law applicable to maintenance obligations*[8].

The law applicable to maintenance obligations has an objective or subjective determination. The conflict rules that materialize the manifestations of the will of the parties can be found in the 2007 Protocol (Diaconu (2012):7-20).

Specifications regarding the choice agreement of the law applicable, concluded between the creditor and the debtor (article 8 of the Protocol):

a. *The convention may be concluded only to designate the law applicable to the maintenance obligations arising out of family relationships, kinship, marriage or alliance*

[7] The Regulation applies to all food obligations that have as their source the family, kinship, marriage, or alliance relationships (art. 1 paragraph 1).

[8] The 2007 Protocol was approved through Decision 2009/941/EC of 30 November 2007 regarding the conclusion by the European Community of the Hague Protocol concerning the law applicable to maintenance obligations, published in OJ L 331/17 of 16 December 2009

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

(including the maintenance obligations towards a child, irrespective of the marital status of the parents).

b. The will agreements of the creditor and the debtor *may indicate as applicable:* the law of any state whose nationality one of the parties has at the date of designation; the law of the state of the habitual residence of one of the parties at the date of designation; the law designated by the parties as being applicable or the law that actually applies to their property regime; the law designated by the parties as being applicable or the law that actually applies to their divorce or legal separation.

The mobile conflict has as a solution the law from the date of the law designation, even if prior to the election pact, the party had a different nationality (that is, the party whose nationality is taken as landmark) or even if, prior to the election, the party had another habitual residence (we are talking about the part whose habitual residence was taken into consideration).

c. Through the convention, it may be designated as applicable, the law of one of the member states or the law of a third state. *The chosen law has universal application vocation.*

d. *The convention shall be concluded in writing or recorded on any medium,* so that the information it contains to be accessible and to be able to be used for subsequent reference. The agreement for choosing the law must be signed by both parties.

e. *The convention cannot be terminated* when it concerns the maintenance obligations in respect to a person who is under the age of 18 or an adult who, due to a deficiency or insufficiency of his or her personal capacities, cannot defend its interests. In such cases, it will be applied the law determined in accordance with the other provisions of the Protocol (excluding article 8).

f. Without bringing prejudice to the law designated through the agreement of the parties, *the possibility for the creditor to waive or not the right to maintenance* is governed by the law of the state of its habitual residence at the date of choosing the applicable law. The mobile conflict is resolved by applying the old law, meaning the law of the state on whose territory the creditor's habitual residence is located at the date of the law-election convention. The new law is, in this context, the law of the state of the creditor's habitual residence, a residence established after the designation of the applicable law.

g. The law chosen by the parties does not apply when it would obviously have *unfair or inequitable consequences for either party.* By way of exception, this law will not be removed if, at the time of its designation, the

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

parties have expressed their informed consent and have been fully aware of the consequences of its application.

h. The choice of the parties cannot target the conflict rules. Otherwise, the application of the private international law norms have the capacity to generate retransmission, which could lead to applying a law other than the one designated by the parties. The retransmission mechanism is designed to create a series of references-referrals from a law system to another, until one of the present laws accepts to govern the legal relationship. States, usually, prefer even in the national law, the first degree referral and exclude from the regulation the second degree referral, which complicates the chain of referrals, sometimes far beyond the forecasts of the parties. Or, in the international relationships between individuals, it is preferable the predictability and the legal certainty which confer stability to the private circuit[9].

i. If the law chosen *through convention is clearly contrary to the public order of the forum, its application may be refused* by the forum's jurisdictions (article 13). The Romanian Civil Procedural Code leaves it to the magistrate to refuse the recognition (article 1097 paragraph 1). The fact that the court which delivered the decision has enforced a law other than that which would have been determined by the Romanian private international law (except if the trial concerns the civil status and the capacity of a Romanian citizen), and the adopted solution differs from the one which could have been according to the Romanian law, cannot be detained to refuse the recognition of the foreign judgment.

j. Even when the applicable law provides otherwise, *establishing the quantum of maintenance will be made according to a double requirement*: the needs, respectively, the resources of the parties and any compensation offered to the lender instead of the periodic maintenance payments (article 14).

k. *In the case of the states with pluri-legislative systems*, the Protocol contains explanations on how to understand the law referrals, competent authorities, public bodies, habitual residence and citizenship (article 16). As regards to *lex causae*, this is the law in force in the territorial unit in question. *The interpersonal conflicts of laws* are resolved by applying the state's private international law (article 17). If the state has several legal systems or legal regimes applicable to the maintenance obligations, it is not bound to apply

[9] International conventions, in general, and the European regulations, in particular, expressly state that by "law applicable" to the relationship with a foreign element it is understood the legal system in force in a particular state, with the exclusion of the conflict rules. The referral is thus excluded, being applied the material law (substantive) from the law system designated as *lex causae*.

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

the Protocol for the conflicts arising between those systems or regimes (since they are *internal conflicts*, between the laws of the same state, under article 15).

5. The Convention for choosing the law applicable to the international divorce

5.1. The provisions of the Romanian private international law

By mutual consent, the spouses may choose the law applicable to divorce, among the variants referred to in article 2597 of the Civil Code. The objective determination occurs when the parties have not used the faculty offered by the legislator (or when the convention for choosing the divorce law is not valid). First, in the Romanian private international law, the Civil Code offers the opportunity to examine the content of the eligible laws and to opt for that which the parties consider appropriate to govern the dissolution of marriage (Ungureanu, Jugastru, Circa (2008):222-223). It is a modern, "fair" regulation for the parties that will not submit to a "given", but have the opportunity to seek and choose the optimal solutions for managing the end of the legal relationships generated by marriage.

The method for designating the divorce or legal separation law is **the convention for choosing the applicable law.** Until the date when the competent authority decides to pronounce the divorce - at the latest – the spouses choose, through a written convention, signed and dated by them. The express **form** mentioned by article 2599 of the Civil Code is provided *ad solemnitatem*. By way of exception, the court instance can take note of the parties' agreement concerning the law applicable, until the first term when they were legally cited (the legal provision does not apply when a body other than the court instance has jurisdiction for divorce). The same conditions regarding the form and the time of concluding the agreement must be complied with when the applicable law is modified.

The pact for choosing the law applicable to divorce will include one of the following **solutions**:

a. *the law of the state in whose territory the spouses have their habitual common residence at the date of the Convention.* The old law (from the date the agreement was concluded) will govern the legal report and constitute the solution to the mobile law conflict;

b. *the law of the state of the last common habitual residence, if at least one of the spouses still lives there at the date of the Convention.* The last common habitual residence indicates the law of the last common habitual residence state,

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

meaning the new law in the context of the mobile conflict. The additional condition concerns the *de facto* living, in the respective dwelling;

c. *the law of the state of citizenship of any of the spouses*. In the case of marriage dissolution, the connection point is mentioned after the habitual residence, but it is an alternative to the subjective determination of the applicable law;

d. *Romanian law*. As *lex fori*, the Romanian law is applied, insofar as its provisions agree to the parties.

When changing the applicable law, a new agreement will be able to record the exclusive choice from the set of previously mentioned options. The **legal separation** enjoys the same provisions as divorce, in terms of applicable law - according to article 2602 of the Civil Code.

5.2. Regulation no. 1259/2010 for implementing an enhanced cooperation form in the area of the law applicable to divorce and legal separation[10]

Designed as an instrument that would strengthen the autonomy position of the parties in matters of divorce and legal separation, Regulation no. 1259/2010 enshrines *the universal application of the law designated on its basis*. The spouses are therefore free to indicate as applicable even a law that is not the law of a member state participating in the enhanced form of international cooperation. The declared premise of the area of freedom offered to the parties when choosing the law is the increasing mobility of the citizens, which implies a greater degree of flexibility and legal security. As regards to choosing the law in the method of concluding the convention for choosing the law applicable, it is conditioned by informing the spouses over the content of the national law and over the European norms, including the procedures concerning divorce and legal separation (recital 16). (V.M. Ciobanu, M. Nicolae (2016):1688:1677-1678; Boroi (2016):1016:1009-1011).

The convention for choosing the applicable law is the new feature imposed through the enhanced cooperation way via Rome III. The ability of the spouses to designate, themselves, the law applicable to divorce, through various connection links, has led to the assertion of contractualizing the international divorce (Eskenazi (2016).

[10] JO L 343/10 of December 29, 2010.

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

5.3. Remarks concerning the choice, through convention, of the applicable law (Audit, d'Avout (213):664-665)

1. *The range of laws available* to apply for divorce and legal separation, includes (alternately):

a. *the law of the state in whose territory the spouses have their habitual residence at the date of concluding the agreement.* The applicable law choice agreement may be concluded with or after the matrimonial convention;

b. *the law of the state in whose territory the spouses had their last habitual residence, under the condition that one of them continues to live in the respective dwelling at the date of concluding the agreement.* The solution for the mobile law conflict is the new law. "The last habitual residence" attracts the application of the law of the state of the last habitual residence, meaning the application of the new law (if the expressed mentioned requirement is also met: one of the spouses, at least, must reside at the last habitual residence at the time of perfecting the convention);

c. *the law of the state of citizenship of one of the spouses at the date of concluding the agreement*. Citizenship, as a point of contact, competes with the common habitual residence, as one of the possible options;

d. *the law of the forum*. Alternatively, the law of the forum is usually the most convenient alternative and is the closest to the spouses, in terms of knowing its content.

2. *The object of the convention is represented by choosing the law that will apply to divorce and / or legal separation, respectively modifying the initially chosen law.* The right that the parties will designate does not apply to matters that are excluded from the scope of the Regulation, according to art. 1 par. 2 letter a-h (the legal capacity of individuals, existence, validity, marriage recognition, annulment of marriage, spouses' names, consequences regarding the patrimonial effects of marriage and parental responsibility, maintenance obligations, fiduciary and succession issues).

Instead, the law designated by the parties applies to the transformation of the legal separation into divorce. In the absence of the agreement of the spouses, the law applicable to divorce is the law that was applied to the legal separation. By way of exception, if the law which was applied to the legal separation does not provide for its transformation into divorce, and the parties have not agreed otherwise, the rules for objective determination of the law will be applied, according to article 8 of the Regulation.

3. *The substantive conditions of the convention for choosing the applicable law* ("the existence and validity of the agreement", article 6) are subjected to the

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

law which would govern the convention, according to the Regulation, if the agreement would be valid. However, in order to prove that it did not express its consent, the spouse in question has an alternative. It may invoke the law of the country where it has its habitual residence at the time of the court's referral. In order to do so, it is necessary, from the circumstances of the case, to result that it would be unreasonable for the aforementioned law (the one referred to in article 6 paragraph 1) to establish the effects of its behavior.

4. *The convention for choosing the applicable law is concluded in writing form and must be dated and signed by both spouses*. The regulation puts the written form and the electronic form on an equal footing, if the latter one allows the durable recording of the content of the document (we are talking about the support that allows the storage of the digital information in the long run).

5. *The time at which the convention for choosing the applicable law is concluded* lies before the referral of the jurisdiction. By way of exception, if the law of the forum allows, spouses may also designate the applicable law in the course of the proceeding conducted before the competent jurisdiction. This provision (article 5 paragraph 2 of the Regulation) also applies for *modifying the applicable law*. The competent jurisdiction notes the consent of the spouses (of law-designating or amending the law) according to the provisions of the law of the forum.

6. *The convention will indicate the applicable law, exclu ding the norms of private international law of the country concerned, thus avoiding the referral (article 11).*

7. The law chosen by the convention of the parties finds its application if it is not manifestly incompatible with the public order of the forum (article 12). A particular application of the public order hypotheses of private international law is regulated by art. 10 of the Regulation. If the lex causae, chosen by the parties (or objectively determined), does not provide for divorce or allows one of the spouses to divorce, because of their belonging to one of the sexes, if it does not regulate equal access to divorce or legal separation, the law of the forum is applied. From the wording of the text of the Regulation it follows that, those provisions that are restrictive, under the above-mentioned aspects, will be removed as inapplicable (the negative effect of the public order in the relationships with foreign element), instead of them, the provisions from the law of the forum will be applied (the positive effect).

8. *The convention for choosing the law is subjected to the rules determined in accordance with article 14-16 of the Regulation, in special situations.* For the state with several territorial units, each having its own legal system or its own set of rules concerning divorce / legal separation, any reference to the law of such a state shall be interpreted as being made to the law in force from the

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

relevant territorial unit. In the case of a state where two or more systems of law or systems of applicable norms to different categories of persons coexist, the referral concerns the legal system determined by the rules in force in that state. In the absence of such rules, the system of law with which one of the spouses or both spouses have the closest links shall apply.

Bibliography

NC., Anitei. (2012). *Dreptul familiei* (*[Family Law)* Hamangiu Publishing, Bucharest.

NC., Anitei. (2015). *Lecţii de drept internaţional privat*, (*Lessons of Private International Law)* Lumen Publishing, Iasi.

NC., Anitei. (2017). *Law applicable to the patrimonial effects of marriage*. Acta Universitatis, Universitatea „Lucian Blaga", Sibiu, nr. 1, Editura Universul Juridic, Bucuresti.

N.C. Aniţei, (no. 1/2015). *Romania's involvement in the harmonization of the two proposals for regulation in matters of family relations with foreign element*, in *Acta Universitatis Lucian Blaga*, Iurisprudentia Series.

M., Avram. (2013). *Drept civil. Familia [Civil Law. Family]*, Hamangiu Publishing, Bucharest.

B. Audit, L. d'Avout, (2013). *Droit international privé*, septičme édition refondue, Economica, Paris.

G. Boroi (coordinator), (2016). *Noul Cod de procedură civilă – comentariu pe articole, Vol. II. Art. 456-1134 [The new Code of Civil Procedure - commentary on articles, Vol. II. 456-1134]*, 2nd Edition revised and added, Hamangiu Publishing, Bucharest.

D. Burreau, H. Muir Watt, (2004). *Droit international privé*, tome II, *Partie spéciale*, Presses Universitaires de France, Paris.

V.M. Ciobanu, M. Nicolae (coordinator), (2016). *Noul Cod de procedură civilă. Comentat şi adnotat. Volumul II – art. 527-1134 [The new Civil Procedure Code. Commented and annotated. Volume II - art. 527-1134]*, Universul Juridic Publishing, Bucharest.

S. Clavel, (2012). *Droit international privé*, 3e édition, Dalloz, Paris,.

N. Diaconu, (2012). *Legea aplicabilă obligaţiei de întreţinere cu element străin [The law applicable to the foreign element maintenance obligation]*, in *Annals of the University „Constantin Brîncuşi" from Târgu Jiu*, The Legal Sciences Series, no. 1/2012

N., Diaconu. (2007). *Drept internaţional privat [Private international law]*, University course, Third Edition, Lumina Lex Publishing, Bucharest.

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

I.P., Filipescu. A.I., Filipescu. (2005). *Tratat de drept internaţional privat [Treaty of Private International Law]*, Edition revised and added, Universul Juridic Publishing, Bucharest.

E. Florian, (2015). *Regimul primar [Primary regime]*, in Liber Amicorum *Liviu Pop. Reforma dreptului privat român în contextul federalismului juridic European [*Liber Amicorum *Liviu Pop. The reform of the Romanian private law in the context of the European legal federalism]*, Universul Juridic Publishing, Bucharest.

T., Prescure. C.N., Savu. (2005). *Drept internaţional privat [Private international law]*, Lumina Lex Publishing, Bucharest.

D.A. Rohnean, (2012). *Conflicte de legi [Conflicts of laws]*, in D.M. Gavriş, *Noul Cod civil. Comentarii, doctrină şi jurisprudenţă [The New Civil Code, Commentaries, doctrine and jurisprudence]*, Vol. III, *Art. 1650-2664*, Hamangiu Publishing, Bucharest.

D.-Al. Sitaru, (2013). *Drept internaţional privat. Partea generală. Partea specială – Normele conflictuale în diferite ramuri şi instituţii ale dreptului privat [Private international law. General part. Special part - The conflict rules in different branches and institutions of the private law],* C.H. Beck Publishing, Bucharest.

O. Ungureanu, C. Jugastru, A. Circa,(2008). *Manual de drept internaţional privat [Manual of private international law]* Hamangiu Publishing, Bucharest.

Web

D. Eskenazi, (2016). La contractualisation du divorce international: Application le 21 juin 2012 du Règlement nº 1259/2010 sur la loi applicable au divorce, material consulted at August 20, (http://contentieux-et-resolution-des-litiges.uggc.com/2012/06/19/la-contractualisation-du-divorce-international-application-le-21-juin-2012-du-reglement-n12592010-sur-la-loi-applicable-au-divorce/).

A.D. Rus, (2016) The law applicable to the contractual obligations. Regulation (EC) no. 593/2008 of the Parliament and the Council, in Afaceri juridice europene [European legal affairs], material available on the webpage http://iaduer.ro/?p=1971, available at November 3.

Law

Law no. 105/1992.

Civil Code (2011)

Regulation no. 1103/2016 for implementing an enhanced cooperation in the field of competence, applicable law, recognition and enforcement of the court decisions in the matrimonial regime matters

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11

The 2007 Protocol was approved through Decision 2009/941/EC of 30 November 2007 regarding the conclusion by the European Community of the Hague Protocol concerning the law applicable to maintenance obligations, published in OJ L 331/17 of 16 December 2009

Regulation no. 1259/2010 for implementing an enhanced cooperation form in the area of the law applicable to divorce and legal separation JO L 343/10 of December 29, 2010.

How to cite: Jugastru, C. (2017). The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. Jurnalul de Studii Juridice, XII(3-4), 25-43. https://doi.org/10.18662/jls/11