

Determination of the law applicable in international civil cases

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Abstract

The general provisions on the conduct of international private law trials are contained in Title II of Book VII of the Civil Procedure Code entitled “The law applicable in international civil trial”.

Other provisions on the procedure of international private law trials are contained in the specific regulations that are part of the European Union law.

The general rule is that the law of the forum is applied.

Keywords: *international civil trial; applicable law; law of forum; locus standi of the foreigner; evidence regime.*

1. General notions regarding the law applicable in international civil trials

“European civil procedural law” represents an integral part of “international civil procedural law”, bringing together the provisions governing the procedural aspects entailed by the international character of civil litigations.

The regulations applicable to the international civil trial are contained in Book VII of the Civil Procedure Code - entitled “International Civil Trial” (Articles 1050-1118).

The matters covered by these provisions are:

- The international jurisdiction of Romanian courts,
- The law applicable in the international civil trial;
- The effectiveness of foreign rulings;
- International arbitration.

The need to settle international jurisdiction stems from the fact that the courts of a state can not be competent for all international disputes. Also, each state decides which foreign rulings will be recognized and enforced on its territory and under what conditions.

Obtaining evidence or notification through the courts/persons abroad requires the consent of the state where the evidence is to be obtained or the act notified. In principle, the regulation of these issues is a matter of the national states, under the principle of national sovereignty.

The European states that joined the European Union have agreed through the Act of Accession to apply with priority the community law in the national territory.

Besides internal law and European Union law, there are many sources of international law, bilateral and multilateral conventions, which also aim to regulate the issues arising in international disputes.

The general provisions on the conduct of private international law trials are contained in Title II of Book VII of the Civil Procedure Code entitled "International law applicable in international civil trial" (Articles 1068-1078).

Law no. 189/2003 on international judicial assistance in civil and commercial matters also includes regulations on the procedure of international private law trials.

Within the European Union, there were adopted the following rules applicable to the cases of international private law:

a) – Council Regulation (EC) no. 1348/2000 of 29 May 2000 on the notification of judicial and extrajudicial documents in civil and commercial matters (European rules on notification);

b) - Regulation (EC) no. 1206/2001 of 28 May 2001 on the cooperation between the courts of the member states on evidence-taking in civil and commercial matters.

The regulation regarding the obtaining of evidence is divided into three chapters:

- Chapter 1 (General Provisions) is limited to the description of the scope, initiation of direct cooperation between courts, as well as the designation of a central authority for each member state and determining its responsibilities.

- Chapter 2 contains five subchapters on material provisions: sending the letters rogatory (Part 1), receipt of letters rogatory (Part 2), obtaining evidence by the requested court (Part 3) direct taking of evidence by the court applicant (Part 4) and expenses (Part 5).

- Chapter 3 (Final provisions) contains practical rules and determines the relationship with other conventions and the entry into force.

c) – Council Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings (EU Insolvency Regulation; j. of. ce of 30 June 2000 I160/1)

d) – Council Directive 2003/8/EC of 27 January 2003 on facilitating the access to justice in cross-border cases, by establishing minimum rules concerning the free legal aid in such cases.

e) – Council Decision of 28 May 2001 on the organization of a European network in civil and commercial matters;

f) – Council Decision of 25 May 2000 on a community network of mono-state public institutions for the extra-judicial resolution of disputes in matters of consumer contracts.

2. The general rule of application of the law of forum in international civil trials

2.1. Justification for the application of the law of forum

Under the provisions of Article 1073 of the Civil Procedure Code, in the international civil trial the court applies the Romanian procedural law, unless provisions express otherwise [1]. In addition, Article 1074 provides that the classification of a problem as being of procedural law or substantive law is done under the Romanian law, unless there are legal institutions without correspondent in Romanian law.

These legal provisions enshrine the jurisdiction of the law of forum on the matter of the procedure. This legislative competence of the law of forum in terms of procedure is also provided in the legislation of other states, as well as in several international conventions.

The application of law of the forum is based on the following considerations [2]:

- Courts must defend in their activity the values that are considered essential by the state they are part of;
- The judging procedure is an activity carried out by the courts on behalf of the state, which sets the legal rules applicable;
- Procedural rules should respond to the general interest as conceived by the state;
- The acts of procedure are located in the territory of the state where the court belongs;
- Fundamentals of public utility, meaning to avoid difficulties in applying foreign procedural law;
- The forms of procedure depend on the laws of the state on behalf of which the court operates.

“Lex fori” is intended, in principle, to govern the procedural aspects of the trial (“litis ordinataria”).

The literature raised the issue whether there are exceptions to the principle of applying the law of forum in matters of procedure, the solutions being different.

Along with other authors [3], we consider that for a better understanding of this issue, there should be considered the concepts of enforcement of foreign law and consideration of foreign law, as well as the conflict of laws in space and in time and space.

2.2. The scope of the law of forum

2.2.1. The standing and the qualification of the claim

The standing or the locus standi and the qualification of the claim are regulated by the provisions of Article 1075 of the Code of Civil Procedure, according to which the standing of the parties, object and cause of action in international civil proceedings shall be determined according to the law governing the substance of the legal relation brought to trial.

a) - The locus standi (“legitimatio ad causam”) is a basic condition that must be met for a person to be party to the proceedings [4].

The difference between the capacity and the stand is that, while the procedural capacity is determined in general or for a certain category of persons, in accordance with common law, the stand concerns the possibility of a person to take part in a trial as plaintiff or defendant and is determined by the particular conditions being fulfilled, the parties being obliged to legitimize their right to sue in court [5].

The lack of locus standi is invoked by way of procedural exception in rem [6], being sanctioned with the rejection of the action.

The transmission of locus standi consists of passing the stand from the person who owns it to another person who acquires the active or passive legitimacy to continue the procedure [7].

The law that governs the transmission of the locus standi is the law governing the substance of the litigious legal relation (“lex causae”).

The transmission of the locus standi may be legal when it obeys the law (e.g. succession) and conventional when it follows an agreement between one party and a third party (for example: assignment of receivables, debt assumption, sale or donation of the property in dispute).

b) The object of action is a prerequisite in the civil trial, along with the locus standi and cause of action.

The object of the action means the plaintiff's concrete claim (assuming the subjective right on the respective object).

The object of the action must be lawful, possible and determined.

c) The cause of Action ("causae petendi") consists of its legal basis, representing a substantive element of the civil action.

The subject matter and cause are the objective elements of the action, while the parties represent its subjective elements.

The cause of action ("causae petendi") should not be confused with the cause of the legal relation or of the discussed obligation ("causae debendi") [8].

2.2.2. The evidence regime

The Code of Civil Procedure contains detailed regulations on the evidence regime, since evidence represents a central institution in the international civil trial [9].

A. The law regulating the evidence [10]

Under the provisions of paragraph 1 of Article 1.076, the evidence to prove a legal act and the probative value of the confirmation of document are those provided by the law agreed by the parties, when the law of the place where the legal act is concluded grants them this freedom. Without this freedom, or when the parties do not use it, the law of the place where the legal act is concluded is applied.

With regard to civil status documents and their proving power, Article 1076 paragraph 4 provides that the evidence of marital status and the proving power of the civil status acts are governed by the law of the place where the cited document was drawn.

B. Carrying out the Romanian law. Invoking public order in international private law.

The provisions of Article 1076 paragraph 3 constitute public order norms in international private, law removing from enforcement the law shown in paragraphs 1 and 2.

Under those provisions, the Romanian law will be carried out (regarding the evidence to prove a legal act and the evidential value of the document, and regarding the evidence of facts), if it accepts other evidence than those provided by the laws in

paragraphs 1 and 2. The Romanian law is also applicable when it allows testimonial evidence and presumptions of the court, even if such evidence is inadmissible according to the foreign law declared applicable.

The provision contained in paragraph 5 represents a unilateral conflicting norm indicating that the evidence-taking is done under Romanian law.

C. Superlegalization of official documents

The issues concerning the superlegalization of official documents are governed by the provisions of Article 1078 of the Code of Civil Procedure [11].

The official documents drawn up or certified by a foreign authority may be used before the Romanian courts only if they are superlegalized, administratively and hierarchically further by the diplomatic missions or consular offices of Romania, thus ensuring the authenticity of signatures and seals on them.

The administrative superlegalization is subject to the procedure established by the state of origin of the document, followed by the superlegalization performed either by the Romanian diplomatic mission or consular post from the state of origin, or by the diplomatic mission or consular post of the state of origin in Romania and, further, in both cases, by the Ministry of Foreign Affairs.

Exemption from superlegalization is permitted under the law, under an international agreement to which Romania is part of or on a reciprocal basis.

The superlegalization of documents issued or authenticated by Romanian courts is performed, on behalf of the Romanian authorities, by the Ministry of Justice and Ministry of Foreign Affairs, in that order.

2.3. The locus standi and the rights of the parties in the trial

2.3.1. The law applicable to the locus standi

According to Article 1068 of the Code of Civil Procedure, the locus standi of each of the parties in the trial is governed by its national law. The locus standi of the stateless person is governed by the Romanian law.

This regulation supplements the provisions of Article 2572 of the Civil Code regarding the personal status of natural persons. Both texts use the general term of capacity, without containing distinct regulations regarding the capacity of utilization, the standing, and the capacity of exercise, the right of standing.

The procedural standing (“*legitimatio ad processum*”) is applying, at procedural level, the standing from civil law and consists in the ability of a person to be part of the trial, of acquiring rights and assuming obligations at procedural level.

The procedural right of standing (“*jus standi*”) is the ability of a person, who has the use of a right, to personally engage and lead the legal process for the recovery of the conflicting right (ability to stand trial) [12]. The right of standing is the direct consequence of the standing. In practice, there are situations where a person has the capacity of utilization, but does not have capacity of exercise.

In this regard, Article 56 paragraph 2 of the Romanian Code of Civil Procedure provides that the persons who do not have the exercise of their rights can not stand in judgment unless they are represented, assisted or authorized in the manner indicated in laws or statutes governing their capacity or organization.

The locus standi of natural persons and legal persons is governed by the “*lex personalis*”.

Unlike the locus standi, the ability of a natural or legal person to formulate defense and conclusions in court (“*jus postulandi*”) is subject to the law of forum, as the functioning of the respective state jurisdiction is of interest [13].

2.3.2. The procedural rights of the foreigner

a) The legal status of the foreigner as a party to the case

The legal status of the foreigner as part of the international civil trial is regulated by the provisions of Article 1069 of the Code of Civil Procedure.

According to these provisions, foreign individuals and legal persons have, under the law, before the Romanian courts, the same procedural rights and obligations as Romanian citizens, respectively Romanian legal persons.

Before the Romanian courts, in international civil trials, foreigners benefit from tax exemptions and reductions and other procedure expenses, as well as from free legal aid, to the same extent and under the same conditions as Romanian citizens, under the rule of reciprocity with the citizenship or domicile of the applicant.

According to Article 1072, the provisions applicable to the foreigner shall apply accordingly to stateless persons, without requiring reciprocity.

b) Exemption from judicial bail (Article 1070)

Under the condition of reciprocity [14], the plaintiff, a foreign citizen or legal person of foreign nationality, can not be held liable to deposit the bail or obliged to other warranty because they are foreigners or do not have the residence or headquarters in Romania.

c) Special curator (Article 1071)

In cases where the representation or assistance of the foreigner who is incapacitated or with limited exercise of capacity was not ensured in conformity with national law, and because of this the trial process is delayed, the court will provisionally designate a special curator.

References:

- [1] The text takes in a modified form the previous provisions contained in Article 159 of Law no.105/1992 according to which, in the cases concerning the relations of international private law, Romanian courts apply the procedural Romanian law, unless expressly stated otherwise. The Romanian law settles whether a certain matter is of procedural or substantive law.
- [2] S. Zilberstein, *Procesul civil international*, Lumina Lex Publishing, Bucharest, 2001, p. 60.
- [3] I. P. Filipescu, A. Filipescu, *Tratat de drept international privat*, Universul Juridic Publishing, 2007, p. 523.
- [4] Regarding the locus standi - Octavian Căpățână, Brândușa Ștefănescu, *Tratat de drept al comerțului international*, Actami Publishing, 1985, vol. I, p. 183.
- [5] S. Zilberstein, *op. cit.*, p.72-73.
- [6] V. M. Ciobanu, *Drept procesual civil*, 1986, p. 254-259.
- [7] S. Zilberstein, *op. cit.*, p. 74.
- [8] I. P. Filipescu, *Drept international privat*, Actami Publishing, 2002, p. 534.
- [9] Through Law no. 175 of 9 May 2003, Romania adhered to the Convention on evidence-taking abroad in civil or commercial matters, adopted in The Hague on 1 March 1970. The Law mentions in article 3 the reserves of non-application of the provisions of articles 16,17,18 of the convention. The Ministry of Justice is the competent central authority in Romania, appointed to receive and transmit rogatory commissions. In conformity with the provisions of Article 2 letter c) of the law, Romania declares that it accepts rogatory commissions for a procedure known in the states of "common law" as "pretrial discovery of documents", to the extent to which this expression means providing evidence ("investigation in futurum").
- [10] The exhibit regime in the international civil trial is regulated by the provisions of Article 1076 of the Code of civil procedure, taking in the previous regulations, contained in Article161 of Law no. 105/1992.
- [11] Taking the previous regulations of article 162 of Law no. 105/1992.
- [12] S. Zilberstein, *op.cit.*, p. 65.
- [13] I. P. Filipescu, A. Filipescu, *op. cit.*, p. 531.
- [14] In principle, in conformity with the provisions of article 2561 of the Civil Code, carrying out the foreign law is independent from the condition of reciprocity. The condition of reciprocity represents an exception and it is expressly stated by the provisions of the law. In Romanian law, the condition of reciprocity is regulated by the provisions of article 2582 of the Civil Code (regarding the recognition of the legal person without patrimonial scope, together with other conditions), and by the provisions of article 1069 and 1070 of the Code of civil procedure (regarding the condition of the foreigner as part of the trial and the exemption from judicial bail).