

RELATIONS OF PRIVATE INTERNATIONAL LAW-BETWEEN TRADITION AND MODERNITY

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Abstract: *We realize our approach, on the development of private international law reports, in the Romanian civil law in the context of a genuine legislative reform made through the entrance into force of the new Civil Code and the new Code of Civil Procedure. The monistic conception which fundamentis this reform assumes that in our legal system, the new Civil Code represents the common law for the relations of the private life. This established that to the appurtenance of the traditional civil law to be added the other branches of private law which in one way or another belonged once to the civil law. Among these, the regulations from the sphere of private international law, occupy a very special place. Also concerning the analyzed relations, we find that the “return to the queen” of the rules of private international law, much improved, qualitatively and quantitatively. Of the several articles of the old Civil Code which served as a source of regulation to the regulations of private international law by capitalizing the traditional institutions in this way, vigorously sustained by doctrinal opinions and solutions of jurisprudence, has been coagulated the frame of our first law of private international law 105/1992. This law was absorbed by the new Civil Code, in the Book VII, suggestively entitled “Provisions of Private International Law”. In the power of tradition, a number of principles and institutions of private international law have survived. Others however have experienced substantial changes. Therefore one speaks about a review and completion on behalf of modernization of the existing Romanian private international law. Between the natural reflex of conserving the traditional resisting elements and the need to modernize this area, are part the efforts of the Romanian legislator to update and complete the existent provisions, in line with the latest developments at the international and European level.*

Keywords: *legal relations with foreign elements; monistic conception; legislative reform; private law; common law*

1. GENERAL REMARKS

Among the reasons which forced the relocation and reassessing of the traditional institutions of civil law we mention as priorities:

- The essential political, economical and social changes spent in the almost 150 years from the adoption of the Civil Code.
- The need to bring back to “queen” and the reunification of this code with institutions which belonged once and which were abandoned in the favor of some independent branches of law and which are returning enriched by assimilating the contemporary European values, of those of the European integration in particular.

Through the institutions mentioned there are also those belonging to the private international law, strongly influenced by the complex and significant physiognomy of the reports forming norms of the private international law.

The specific of the private international law report is imprinted by the presence of extraneous elements that make possible its link with multiple systems of law or laws in different countries. Therefore is raised the question of identification from multiple concurrent regulations of that which will govern the legal relationship as a whole or on certain areas.

The sources of such regulations are primarily in the intern law, each state regulating by its own the reports of civil law with foreign elements. The intern character of the norms of private international law does not exclude the international sources which aim the treaty, convention or the international agreement, the customs with the same character which regulates the problems of private international law.

We find therefore a dualism of the sources of private international law to which is being added a specific method of regulation, indicating two ways to solve the problems related to:

- the conflicting rules, only of this law branch which indicates only the competent law without providing an appropriate practical solution;
- the way of the material or substantial norms which is directly applicable, in direct relations with the foreign element.

Also regarding the private international Romanian law we can notice that the return to the “queen”¹ of the specific regulations, far improved. The Civil Code of 1864 contained summary regulations of this kind. Only one item (art.2) served as a source of the dispositions of private law with a foreign element. From the analysis of the regulations of this field we can see that in general the legislative background was poorer than other branches of law. Therefore the main source of the provisions of this kind in solving the conflicts of laws was represented by the judicial practice.” Even the appearance of the first norms of solving the conflicts of laws was the work of the lawyers of time which were seeking solutions to the problems raised by the course of social development.” (Filipescu, 2005: 73)

The change of the political regime after 1990 imposed the need to harmonize the private international law provisions with the latest evolutions at the national, Community and international level. The efforts of the Romanian legislator resulted in the adoption of the first uniform regulation of private international law. It is the Law 105/1992 about the reports of private international law which proclaimed the independence of the private international law from the other branches of law. As shown, the mentioned law was absorbed by the new Civil Code which demonstrated a return in its space, with an improved content, adapted to the new requests imposed by the dynamics of the social life and the Romanian state status of European member. In the legal doctrine there has been raised the question whether through this has been made a reform or just an update. A

¹ I say “return to the queen” because in the our first Law of private international law, which offered a special regulation to the legal relations with foreign elements absorbed by the new Civil Code, has used the traditional institutions of Romanian private international law based on a few articles from the old civil Code (especially art.2)

clear answer in this way will be provided by the judicial practice of this area. As for us, we choose for the review in behalf of modernization of the existing private international law.

Both the previous regulations and the improved ones of the new Civil Code are based on the peculiarities of this new category of legal relations which aim the object of regulation and the specific method to which we referred earlier.

Firstly it is bounded the scope, and namely: the reports of civil law with foreign elements (seen in the broad sense of the term of civil law), so as to cover the entire area of private law. Till the adoption of the new Civil Code, these relations have met a special regulation given by the Law 105/1992, which capitalized the Romania institutions of private international Law, based on several articles of the old Code, especially on the article 2. While these articles were mentioning only the fundamental principles of international law, has been reached through a substantial contribution of the judicial doctrine to an adaptation of these few articles to the global demands of spiritual and material values to where we were inevitably enrolled.

As a general trend that can be drawn from an overview of Book VII of the new Civil Code, is the preservation of the many traditional solutions of private international law. In terms of goods has survived to the review the principle “*lex rei sitae*” on the condition and capacity of the person –the “*lex patria*” principle; the form of legal act is still subjected to the rule in many respects “*locus regit actum*” ”*lex voluntatis*” the principle of autonomy reappears with an expanded scope not only to the consecrated areas but also in others such as that of a succession (art.2634); family (patrimonial regime – art.2590; divorce – art.2597) maintenance obligations (art.533); fiducia (art.2659).

So we cannot talk about a new private international law, but an update, and addition to the existing provisions, a review on behalf of modernization of our old Civil Code.

Moreover, the legislature reveals its intent to integrate the special regulation of the Law 105/1992 of the new Civil Code. Of course, where appropriate the legislature harmonized the provisions of the law with the new conception of the code upon some institutions (such as that of family). Therefore in the new regulations of private international law are reflected the latest evolutions at the European² and international³ level of this field.

² In respect of contractual obligations, for example the art.2640 refers to the EU regulation in this regard. It is the 1980 Convention of Rome which was replaced by the Regulation no.593/2008 concerning the applicable law of the contractual obligations (Roma I). In a similar manner, the art.2641 concerning the law applicable for the non contractual obligation refers to the regulations of the EU law which at large are provided by the Rome II Regulation (no.593/2008). And other articles of the Book VII of the new Civil Code sent to EU law. In terms of obligations for example the art.2612 refers to the EU law, in particular to the Regulation no. 4/2009 on jurisdiction, the applicable law and the enforcement of decisions and cooperation in matters of maintenance. Till the entry into force there are still applicable the art.34 and 35 of Law 105/1992.

³ Internationally we reminded the efforts of the Hague Conference on Private international law, which if did not succeed so far to elaborate an international convention with universal jurisdiction to offer uniform regulations concerning the international trade agreements, served so far as a source of inspiration for the regional regulations such as: the Rome Convention (1980) which came into force in 1991, regarding the

Some clarifications are required in connection with the subject of regulation of the Book VII of the new Romanian Civil Code and its subsidiary character of its content. As for the sphere of the relations with foreign elements that form the regulatory object of the book, it is important for this the art.2557 al.2 which states that “in the book the reports of private international law are: civil relations, commercial relations and some other private law reports with a foreign element.”

At a first sight it seems that the sphere of the relations with foreign elements was considerably restricted and we do not find the family relations and the labor law. They might be among “other private relationships” to which the end of the par.2 of art.2567 is referring to. We wonder if for a greater precision of the legislature these should be expressly mentioned. But if in the relations of family with foreign elements the doubt is wasted, given the new conception of the Code shaped in the area of “family” we cannot say the same things for the employment relationship.

The internal labor relations (or with foreign elements) did not find their regulation in the new Civil Code. There is an article in this Code (2640, par.1) which refers to the Regulation no.593/2008 of the (EC) concerning the law applicable to contractual obligations, which included provisions related to the individual labor contract. It is the first clue that the reports of the labor law with foreign elements fall under Book VII, there where the regulation is insufficient. Therefore these other reports with foreign elements may be: family reports, labor reports, reports of the status of the person etc.

As for the foreign elements, specific to the private international law, this may be: the citizenship of an individual, the nationality of a legal person, the place of birth of the legal report, the place of illegal act, the domicile, the habitual residence or registered office etc.

To illustrate the relationship of the intern and international regulations, including the Community law, it is relevant the art.2557, par.3 of the new Civil Code which states that “the provisions of this Book are applicable as for the international conventions to which Romania is a party, EU law or if the provisions from the special law do not establish a new regulation.”

It is outlined therefore, the subsidiary character of the provisions of the Book VII of the new Code which take effect only in the absence of a conventional or international legal framework. Moreover, in terms of contractual obligations or non-contractual, the Civil Code through the art.2640 al.2 states that “in the matters which fell under EU regulations, are applicable the provisions of this legal act, if not are provided otherwise by the international agreements or special provisions.”

It is illustrative in this regard the Art.2641 par.2 which refers to the law applicable to the contractual obligations which notes that “in the matters which are not covered by the EU rules is applicable the law which governs the legal relationship between the parties, unless is not stated by international or special conventions.”

The subsidiary character results strongly from the possibility given to the parties by the legal report to agree the applicable law, when is allowed. In the shown case the

applicable law of the contractual obligations to which we referred above or the International Convention on the law applicable to international contracts (1994) which came into force in 1996.

will of the parties will prevail only if such a possibility is not exploited, the criteria for determining the applicable law will be specified by the regulations of private international law. These regulations will provide solutions to the arising problems in legal life and in the case in which it is forbidden by law the assigning of the applicable law⁴.

It should be shown that on the application on time of the provisions of the Book VII of the new Code, the Law no.71/2011 for the implementation of the new Civil Code through art.207 expressly states that “it will only e applied in cases decided after the entry into force of the new Civil Code, regardless of the date and place of the legal relationship”.

But if the applicable law under the new rules of private international law of some legal relations arising prior to the entry into force of the new Civil Code would determine unjust consequences, the new regulation will be removed in favor of the previous regulations. Also assuming that the substantial law has suffered changes till its application, will be valid the provisions in force at the date of designation, whether the new Civil Code does not contain provisions contrary to this.

2. THE MODERNIZATION AND SYSTEMATIZATION OF THE RULES OF PRIVATE INTERNATIONAL LAW

The idea of unifying the rules of the private sphere, especially of the civil and commercial law, in the same code is not new. It took shape from the end of the nineteenth century (Vivante, 1893, resumed more vigorously in the twentieth century especially in French doctrine (Lyon – Caen, 1904: 208, Mapeand, 1974: 649). The arguments invoked in this effect were not immune to critics. But in general, the phenomenon is on the line of the historical evolution regulations and found its way in the actual civil Codes⁵ or general laws⁶.

In this tendency of modernization of the civil rights provisions, to ensure a new common frame of regulations for all the areas of the private life, it is also the new Civil Code. Referring to the object and the content of this Code, the art.2 al.2 states: “the present Code is made from a set of rules which constitutes the common law for all the fields to which the provisions refer to.” One of these fields, with a particular specificity is the private international law. Therefore with a justified reason it can be claimed that the adoption of the new Civil Code has responded among other to some actual needs of compatibility with the intern and international regulations. The modernization and the evaluation of the institutions of international private law it is a part of this effort.

There were was necessary, there have been harmonized and completed the regulations of private international law with the provisions of the European Community law or with documents adopted in this regard. Among these documents, a particular

⁴ Are the areas which from well defined reasons, are removed forms the principle of autonomy such as: the status and capacity of a person, the legal status of real estate, the legal form of documents

⁵Are illustrative in this respect the Italian Civil Code (1942), the Civil Code of Quebec (1994), the Dutch Civil Code of 1838 revised in 1992

⁶ Law obligations in Switzerland (1911)

importance presents the drawn up conventions of the Conference of Private International Law in Hague (some even serving as an inspiration source in the design phase).

This explains the elements of innovations introduced in the content of Book VII, from which the most important are:

a) Although is not known an explicit definition, the principle of autonomy of will dominates the regulation of Romanian private international law. It is an expression of the tendency which took shape internationally and then in Europe, to give a greater importance to the liberty of the participants to the legal life in what concerns the applicable laws of the private international law reports, with the limits imposed by law or good manners. In the specialized literature it is noted that “the extend of personal autonomy aimed primarily the efficiency of the legal reports without noticing that this will lead to a greater applicability of the foreign law, thing which will raise the expenses of the proceedings (Uliescu, 2011: 459).

The principle which underlies such conflict regarding the contracts since the XIX-th century, being extended to the other legal acts. To these areas were added the content of Book VII and other subjects that the consecrated ones such as: matrimonial regime (art.2500) the divorce (art.1597), the maintenance (art.533), the succession (art.2634), the resent (art.2559) fiducia (art.2659) the claim of stolen or illegally exported goods (art.2615), undergoing transport goods (art.2618).

b) Certain specific institutions of the private international law, meant to solve the problems that the relations of law raises, met some innovations. I the order in which may arise, the institutions mentioned are: qualification, resending, public policy in private international law, fraud law. These are rules meant to help the judge in the qualification activity (of framing the dispute) or in case of resending. According to the new regulations, the resending is excluded in some situations in which the parties have agreed on the applicable foreign law (art.2559) par.3 of the new Civil Code.

c) As for the application of the foreign law, a difficult problem sometimes is that of determining its content. The article 2562 al.1 of the new Civil Code states that in this regard “the content of the foreign law is established by the court with certificates obtained from the bodies of the state which approved it or through an expert’s opinion. The paragraph 2 of the same article adds that “the side which invokes a foreign law may be required to prove its content”.

Inspired by the art.6 of the European Convention of the human rights, art.2562 par.3 states that establishing the content of the law should be realized in a reasonable time. In the case when it is impossible to establish the content the Romanian law is applicable (art.2562 par.3). The reasonable time will be determined from a case to another.

d) The novelty is also the regulation of the art.2563 which states that the interpretation and application of a foreign law will be made according to the existing rules. Also in this case the court will compel the party which invokes the foreign law to prove the interpretation and the application of the law.

e) As it regards the public order must be held, that for the first time the legal definition which has its roots in the art.2564 par.2. According to the mentioned article, the application of the foreign law breaks the public policy of Romanian international law

in the extend when would lead to an inconsistent result with the fundamental principles of the Romanian or European Law. In the shown case, the foreign law which was determined to be applicable by the rules of private international law will be removed in favor of the Romanian law.

f) Without defining fraud law, the art.2564 par.1 shows that on this regard the foreign law will be removed. In other words if the foreign law has become competent by law fraud of the Romanian law, this will be removed making the Romanian law applicable. Fraud law can retain less the attention of the legislative maybe because it occurs rarely. We remind although a new regulation of the Book VII which covers the fraudulent⁷ stolen goods (as regulated⁸ at the Community level on heritage assets).

g) Among the innovative elements of the regulations of private international law, a major significance are those of the habitual residence. It is a concept which replaced the domicile and the residence from the old regulations which extended and deepened in the last two decades, sustained by the regulation of private international law debated at Hague. In the Book VII of the new Civil Code the usual residence is stated in the art.2570 which in the al.1 states that "In the present Book the habitual residence of the individual is in the state in which the person has its main residence, even if din not fulfill all the legal formalities for registration. The habitual residence of some natural person acting in the course of its business is where the person has its main establishment." As for a legal person, the usual residence is in the state in which it has its main establishment, which can be determined after the place the legal person has its central headquarter.

This connection point is frequently found in areas such as: promise of marriage (art.2587); effects of marriage (art.2589); matrimonial regime (art.2590) divorce (art.2600); inheritance (art.2633); the substance of the legal act (art.2638 par.1).

h) In matters of maintenance, the efforts of modernization have emerged in certain rules that have removed the traditional solution. The art.2612 states that "The law applicable to the obligations of maintenance is determined according the rules of the EU law." The inspiration source is in the EC Regulation no.4/2009 of the EU Council on jurisdiction, the applicable law, the recognition and enforcement of the decisions and cooperation in matters of maintenance⁹. This regulation refers to the Hague Protocol of 23 November 2007 on the applicable law of the maintenance obligations. The mentioned protocol consecrates as a general rule the application of the state's residence law to which are added some special rules. But as shown in the previous, the obligation of maintenance can be subjected to the right that the parties in their autonomy may designate.

i) In matters of succession, the Romanian legislator has used the international and community efforts and achievements. Many of the solutions are already in the phase of project, but they served as a source of inspiration for the new Civil Code. Art.2633 of the Book VII consecrates the rule to which the inheritance is subjected to the law of the State

⁷ Art.2615 of the new Civil Code states that „the claim of a stolen good or illegally exported is subjected at the choice of the original owner, or the law of the state on which the good is situated at the time, or the law of the State where the good is when is claimed.

⁸ The directive 93/17/ EEC of 15 March 1993 on the return of the cultural objects which illegally passed from the territory of a Member State (published in OJ 174 of 27 March 1993).

⁹The regulation entered into force on 11 June 2011.

where the deceased had died, at the time of death, the usual residence¹⁰. It was abandoned in this way the rule that the law applicable to inheritance was that indicated by the nature of goods (movable or immovable).

j) The contractual and non-contractual obligations have been and continue to be a priority and with permanent attention of the legislature. Is the field where have been made the most progress on this field. Numerous conventions have been adopted under the UN auspices, of the International Institute for the Unification of the Private law or the Conference of the International Law at Hague.

The same effort to unify the regulations of this field we see in the European Community area by adopting the Convention regarding the applicable law of the contractual obligations (Rome 19th June 1980)¹¹. In the materialization and detailing of the dispositions of these Conventions, at the EU level were developed two regulations: Rome I Regulation¹² regarding the applicable law of the contractual obligations and the Regulation Rome II on the non contractual obligations¹³.

The fact that has been adopted two different regulations in a matter which is not made without difficulties, generated some controversy. Overall, have been kept the advantages of some modern regulations, autonomous, designed to smooth the roughness and to remove the existing legislative differences.

As for the new Civil Code, the affected area of the obligations with international elements refers both to the law of the contractual obligations as to the law applicable to the non contractual obligations. The art.2640 states that “The law applicable to the contractual obligations is determined according to the EU regulations. In the same manner, the art.2641 refers to the extra contractual obligations adding that the law applicable to these “is determined according to the EU law regulations”. As we can see,

¹⁰ This law will regulate the most important fields of this institution such as: the moment and place of opening the inheritance; the persons destined to inherit; the qualities required to inherit; exercise of the possession of the goods left by the deceased; the obligation of the heirs to bear the liability; the substance of the will; the modification and revocation of a testamentary disposition and the testamentary dispositions; the division of inheritance. It must be shown that the new Civil Code makes the mention that if a heritage is vacant the goods located on the Romanian territory will become property of the Romanian state.

¹¹ Romania became part of the Convention in the Treaty of Accession to the European Communities, ratified by Law 157/2005 published in the Official Gazette of Romania Part I, no.465 of 1 July 2005.

¹² The Rome I Regulation has replaced the Rome Convention (1980) on the applicable law of the contractual obligations, concluded between the Member States of the European Communities at that time. It entered into force in 1991 committing all the EU signatory states. The content of this Convention, completed and improved has formed as an object of regulation for the EC Regulation no.593/2008 regarding the applicable law of the contractual obligations, known as the Rome I Regulation published in the EU Official Journal on 4 July 2008.

¹³ The Regulation EC no.864/2007 of the European Parliament and of the Council of 11 July 2007(Rome II) published in the O.J.199/40 of 31 July 2007 presents a particular importance especially concerning the obligations non contractual made through an unlawful act. Regarding these, the applicable law is that in which the deeds have been committed (art.4 par.1). Beside this main rule, the Rome II regulation contains two exceptional rules applied in two cases. The first case is when the person who made the prejudice and the person claimed to be liable are from the same country. In this case it is applicable the law of that country. The second case refers to the situation when the illicit deed is connected to another country. In these conditions the rule applicable also in other areas is that of the country to which the legal report is more grounded.

in the both cases the applicable law will be identified after the specific regulations adopted at the Community level. So, for the determining the applicable law in fulfilling the contractual obligations will be consulted the Regulation Rome I and for the identifying the applicable law the Regulation Rome II.

It should be noted that in both cases for the areas that are not covered by the Community law, will be applied the provisions of the new Civil Code “if through treaties, international conventions or special dispositions there is nothing provided”¹⁴. Likewise for the contractual obligations it can be seen that the applicable law is independent by the law which governs the assembly of the contractual operation, which is determined after the principles of the private international law influenced by the “lex voluntatis”.

As for the contract, as a legal act will be applicable the provisions of the Book VII, Chapter 5 entitled “legal document.” These provisions are strongly influenced by the principle of the autonomy of will, with a significantly expanded scope.

3. CONCLUSIONS

The limited space of this article allowed us to make some brief observations upon the peculiarities of the private international law reports and of the way in which these found its consecration in the Romanian law.

Having as a siege of regulation few articles from the Civil Code of 1964, these reports have formed the object of investigation and regulation of our first law of private international law no.105/1992. The legal norms have been adopted on this way and remain as a reference point and a culmination of the Romanian legislature, to offer a special regulation covering a wide range, especially complex of the law relations with foreign elements. In the developing of the Law no.105/1992 regarding the reports of international private law, have been used the traditional institutions of the Romanian private international law founded on some articles of the old Civil Code, sustained by the specialty practice and doctrine. Through its content, the mentioned law has the right to “proclaim” the independence of the international law from the other branches of law. We wonder, with some other specialist authors if this freedom “redoubt” which regulates the private international law reports, once conquered should not be protected, independent from the regulatory body of the regulatory body of the civil Code. The gesture would not have been a singular one because the most European countries have recently adopted rules of this type and opted for a special regulation, distinct from the civil codes in force.

As I stated earlier, the Romanian legislator preferred the option of incorporating the provisions of private international law in its last Book suggestively entitled

¹⁴ See the art.2640 al 2 and the art.2641 al 2. Art.2640 al 2 states that “in the matters which are not under the incidence of the EU regulations are applicable the provisions of the current code applicable to the legal act if is not provided through international conventions or special dispositions”. So in the shown assumptions will be applied the provisions of the Chapter 5 entitled “Legal Act” (art.2637-2639) of Title II, entitled “ Conflicts of laws” Book VII of the new Civil Code. The art.2641 al.2 states that in “the matters which are not under the EU regulations, will be applied the law which governs the legal relationship existing between the parties, if it is not otherwise stated through conventions, international agreements or by special provisions.”

“Provisions of Private International Law”. These regulations of this book represent the common law (*jus commune*) and will only be applied only if by international conventions to which Romania is a party, through the right of the EU or special regulations, will not decide otherwise. According to the legal norms, it will be determined the applicable law to the relation of civil law with foreign elements. Exceptions are those cases in which the parties of the legal reports agree upon the applicable law when it permitted.

Unlike the previous legislation, in the conception of the new Civil code, the liberty of the parties of the private international report to indicate through their will the applicable law is significantly extended to areas previously removed to this principle.

From an overall analysis of the Book VII of the new Civil Code it may be seen as a general tendency, the conservation of much from traditional solutions of private international law. It takes shape the intention of the Romanian legislator revealed since the explanatory memorandum from the adoption of the new Civil Code to integrate the content of the special law in the body of this Code. Where appropriate, the provisions were harmonized with the provisions of this law with the new Conception of the Code upon some institutions related to the field of private international law. The stated goal was to align the Romanian regulations to the latest evolution at the European level or international. In the face of such realities, some practitioners wonder if the absorbing of the Law 105/1992 by the new Civil Code is on the line of the realized reform or keeping its independence the private international law is subject to a necessary revisions, additions and updates. Several arguments plead in the favor of revision, in the name of modernization, of the existing Romanian private international law.

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