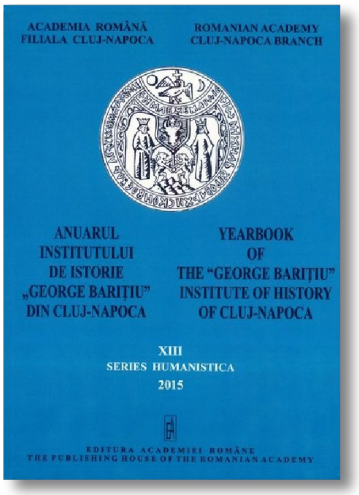

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DREPT

THE LAW APPLICABLE IN THE CIVIL INTERNATIONAL LITIGATION. THE TAKING OF EVIDENCE. TRANSMISSION AND SERVICE OF DOCUMENTS

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Résumé. *Selon la règle de principe, le litige avec élément d'extraneité est gouverné par lex processualis fori. Si l'instance judiciare constate qu'elle est compétente, on appliquera la loi roumaine, en ce qui concerne les aspects de procédure, mais non pour la solution au fond du litige. Les conditions de l'action civile sont soumises à différentes lois: la loi nationale des parties pour la capacité processuelle, la loi du fond du rapport juridique pour la qualité processuelle, la loi du fond du rapport juridique pour l'objet et pour la cause de l'action.*

Devant les instances roumaines, les parties sont traitées de manière égale, selon les principes de la légalité, de la disponibilité, de l'oralité des débats, de la continuité et de la publicité, de la bonne-foi, du droit à un procès équitable, du droit à la defense. La condition processuelle de l'étranger connaît certains particularités. Les étrangers bénéficient, sur le fondement des rapports conventionnelles ou sur le fondement de comitas gentium, de reduction des taxes qui font l'objet des dépenses de procédure.

Les réglementations européennes et nationales prévoient les formes de la coopération internationale: l'assistance judiciare et la notification des actes judiciares et extrajudiciares. La modalité principale d'obtenir des preuves à l'étranger est la commission rogatoire. La commission rogatoire internationale en matière civile et commerciale est une procédure par laquelle l'autorité judiciare d'un État est solicitée par l'autorité d'un autre État, pour accomplir des actes de procédure. La communication ou la notification des actes se déroulent entre les autorités indiquées par les normes juridiques européennes ou par les agents diplomatiques, consulaires ou par les fonctionnaires mentionnés dans la loi.

Mots clé: *procès civil international, loi applicable, preuves, communication des actes, nouveau Code roumain de procédure civile, réglementations européennes.*

An. Inst. de Ist. „G. Barițiu" din Cluj-Napoca, Series Humanistica, tom. XIII, 2015, p. 207–260

1. PROCEDURAL LAW OF THE FORUM. NOTION, FOUNDATION, TERMINOLOGY

Notion, foundation

The civil international lawsuit is governed by the *lex processualis fori*, unless other express provisions exist. *The New Code of Civil Procedure* (NCCP)[1] institutes the general rule according to which a Romanian court shall apply its own procedural law as law of the forum (the law of the seised court).

A distinction is necessary from the outset: the procedural aspects fall under the incidence of the procedural law of the forum, while the legal relation with an extraneous element is governed, in effect, by the law applicable according to the rules of conflict of the forum. If the Romanian court establishes its jurisdiction to settle the private international lawsuit, it shall only make use of Romanian law with regards to the aspects of procedural law, not in settling on the merits of the dispute as well. As far as the settlement on the merits of the dispute is concerned, the system of rules of conflict is applicable, which, in turn, determines the applicable law. The applicable law (*lex causae*) can be either the law of the forum or the law of a foreign country (Prescure & Savu, 2005, p. 247). Therefore, the distinction operates between the aspects of procedural law (*ordinatoria litis*) – governed by the law of the forum, according to article 1087 of the NCCP – and the aspects of substantive law (*decisoria litis*) governed by the law applicable by a Romanian court, as the seised court, to the rules of conflict. The Romanian law is also in charge of determining the procedural or substantial nature of litigation (article 1088 of the NCCP).

Therefore, the principle of the application of *lex fori* is, as emphasized doctrinally (Leş, 2013, p. 1369), unanimously accepted and entirely justified. This is a crucial rule, included in national legal systems and international conventions[2].

Lex fori regulates[3] the principles governing the proceedings (availability, active role etc.) and the rules concerning the form of documents, trial dates, incidents, debates, judgment; the forced execution complies with the law of the state where it is carried out. The application of *lex fori* to *ordinatoria litis* is only incidental to procedural documents[4] drafted in the forum country, not to documents drafted abroad as well. The latter documents are governed, through rogatory

[1] We indicate, through this acronym, the New Code of Civil Procedure, which entered into force in 2013.

[2] For instance, the Hague Convention of 1954 on civil proceedings (Romania adhered to it in 1971), stipulates that, in matters of rogatory letters, the courts act in accordance to their own national laws regulating the necessary formalities.

[3] See Ungureanu, Jugastru & Circa (2008, p. 248).

[4] See Ungureanu (1997):

Therefore, the civil lawsuit would be inconceivable without procedural documents, as they shed light, in their entirety, on the true legal relations between the litigating parties. Consequently, it could be stated that, in the same way the documents and dispositive facts represent the very substance of legal life, procedural documents make up the essential frame work of the civil lawsuit (p. 11).

commissions, by two *leges fori*: that of the place where the proceedings are held and that of the place where the document is to be drafted (Ungureanu, 1997, p. 11).

"The applicable norms of procedural law are those of the country where the proceedings are held, even if one of the parties is foreign"(Filipescu, 1999, p. 491). This principle is well established and well justified. In the case of Romanian law, it was first introduced by Law no. 105/1992 concerning the regulation of relations of private international law (article 159).

> Procedural rules display a certain technicality and rigor that places them close to the field of mathematics. They are rules routinely applied by courts to all manners of litigation brought before them, including those with an extraneous element. It would be difficult to conceive of a national court to apply the procedural rules of another state. If that were the case and, as it has very suggestively been put, the national judge would become a "foreign magistrate (Leş, 2013, p. 1369)".

It is absolutely true that the application of the law of the forum addresses a general interest of the state where the court is located and that it avoids some difficulties inherent to the application of the rules of procedure belonging to a foreign legal system.

The exceptions to the application of *lex fori* take into account the substance of legal documents, certain requirements or legal institutions.

Terminology

Lex fori is synonymous to the law of the forum (Cornu, 2006, p. 635) – the law of the court seised and the law of the court charged with settling the litigation.

The law of the forum should not be confused with the national law, which governs the law of nationality[5] or the law of nationality of the legal person[6]. Moreover, it does not overlap with the territorial law, which is applied to geographical location of assets. However, the restrictions of the aforementioned laws are not strict, since multiple interferences are ascertained between them. The *lex fori* implies neither nationality, nor territory, although it intertwines aspects of both. Jurisdiction of the court seised lies with a certain state, and territory and nationality are crucial for the existence of state entities. Nevertheless, in the case of international litigation, the court may apply a law that is valid in another country, outside of its jurisdiction, in the same way in which it can apply a national law that is not the law of the citizens of the state of the court seised. In the case of *lex fori*, the emphasis is not placed on territory or nationality, but on the court charged with settling the litigation.

Occasionally, in context, the expression "national law" is used to designate the *lex fori*. However, this synonymy does not apply in this case. The term

[5] Nationality is an "entirely legal tie", connecting the individual to the state (Lochak, 1988, apud Carlier, 2008, p. 21, footnote no. 27).

[6] For terminological restrictions, see Carlier (2008, pp. 16–24).

"national law" is not rigorous enough, although, in applying the *lex fori*, the court is, in effect, applying the national law. With reference to legal relations with an extraneous element, "national law" is the established expression concerning conflicts of national laws (interprovincial or interregional). The conflict of internal laws is the conflict between the laws of the states where several legal systems coexist. It is the case of states with provinces or regions having different laws and the case of federal states, where every member state has its own legal system. Additionally, the law of the forum acquires an additional nuance compared to national law (Carlier, 2008, p. 20), since it refers precisely to that law governing the jurisdiction charged with settling the litigation.

There is a neologism, *lex forisme*, defined as "the tendency to favor the application of the law of the forum" (Niboyet & de Goufre de la Pradelle, 2007, apud Carlier, 2008, p. 19) circulating in parallel to the aforementioned terms.

2. THE APPLICATION OF FOREIGN LAW TO THE CIVIL INTERNATIONAL LAWSUIT

Grounds for applying the foreign law. The character of the taking into account of the foreign law

According to articles 1087–1092 of the NCCP, in civil international lawsuits, a Romanian court shall apply either the Romanian law, as law of the court seised, or the foreign law where explicitly stipulated.

Romanian law governs, in principle, the trial proceedings and the competence to stand trial. The foreign law may be applied to some aspects of the civil action if the substantive law applicable to the legal relationship refers to the foreign law in question. These are the provisions of article 1089 of the NCCP: "the parties in a lawsuit, the object and the cause of the action in the civil international lawsuit are established in accordance with the law governing the legal relation under investigation". Where the rule of conflict of the forum points to the foreign law, it is granted jurisdiction and the foreign law is applied as *lex causae*[7].

The evidence attesting the legal documents is governed by the provisions of the foreign law designated in the law chosen by the parties: admitting evidence is subject to the law where the events have occurred abroad; marital status and the force of evidence of marital status documents are governed by the law of the place where the cited document has been drafted, namely the foreign law, if the document has been drafted abroad. The kinds of publicity are those provided by the legal system of the state where the operation took place.

[7] The application of the foreign law as *lex causae* means determining the legal effects according to this law for the case under investigation. "Foreign law" designates the foreign legal system in its entirety, including laws, usages, customs etc.

The presence of the extraneous element may determine the application of the foreign law. The court of the forum applies the foreign law because its own conflict of laws allows it[8]. Foreign law is not applied on grounds of its own authority, but only in the circumstances and to the extent provided by the de *lex fori.* Applying the foreign law in the state of the forum by virtue of its authority would infringe on the principle of state sovereignty. In fact, every state, in the exercise of its sovereignty, decides under what circumstances and to what legal relationships is the foreign law to be applied. In that same vein, it has been said (Radu, 1939, p. 217) that the authority of a foreign law within the country of the court seised does not have an original character, but a derived and borrowed one.

The application of foreign laws poses specific problems, both theoretical, regarding the grounds for applying the foreign law and practical, with regards to establishing the content of the foreign law and its interpretation. The court of the forum has its own procedural system at its disposal, which it applies by virtue of the *jura novit curia* principle and the rules contained by the European instruments. European regulations contain similar procedural rules, which are applied primarily, directly and immediately in the Member States.

In a preliminary stage, the court of the forum will determine the applicable law according to its own rules on conflict of laws. If the application of the foreign law is established, the next stage is examining the foreign law in question. The court shall first decide upon the content of the foreign law and then proceed with its verification, in order to ensure its applicability. For instance, if incompatibility exists between the content of the foreign court and the fundamental principles of the court of the forum, the foreign law shall not be applied.

The status of the foreign law within the civil international lawsuit

Introduction

The need to examine the status of the application of the foreign law arises from the fact that the court of the forum is placed outside the foreign legal system. The court of the forum is sometimes facing the situation of applying foreign legal rules due to the fact that the national rules on conflicts of laws or the European rules (uniform) demand it. The *jura novit curia* rule only works in relation to the legal system of the forum (system that also includes the international treaties ratified by the country of the forum) and in relation to the European legal cooperation instruments in civil and commercial matters. The court of the forum is not compelled to know the rules of the foreign law. As mentioned previously (see Niboyet, & de Goufre de la Pradelle, 2013, p. 456–457), it would be unrealistic to presume that the

[8] The forms of application of foreign laws are: the application of the foreign law as *lex causae;* the situation where the foreign law is a condition for the application of the law of the forum; when the foreign law is included in a contract between the parties.

court of the forum is familiar with the content of the laws of different legal systems – that would be, objectively speaking, impossible. Therefore, it is crucially important to determine the status of the foreign law in connection to the court of the forum. The conceptions regarding the foreign law have varied in time and, consequently, the role played by the courts and the parties in the civil international lawsuit have differed depending on the understanding of the foreign legal rule that was considered either an element of fact, or an element of law.

The status of considering the foreign law

Doctrine has promoted several theories that address and explain differently the status of the foreign law in connection to the law of the forum. Here is a summary:

a) *The theory of acquired rights* or the Anglo-American school. The supporters of this theory employ the notion of "acquired rights" in order to advocate the idea that the application of the foreign law in the country of the forum implies the fact that the court of the forum only considers the foreign law in order to ensure the protection of rights acquired abroad. In other words, the court does not apply the foreign law, but only consults it in order to verify the existence of rights acquired in another state. The rights secured validly in another country influence the state of the forum because they follow their bearer wherever she/he might be (for instance, the application of the law of domicile to aspects concerning the status and capacity of natural persons or the assessment of harmful consequences in accordance with the law of the country where they occurred)[9];

b) *The Italian school.* Departing from the duality national legal order – international legal order, Italian authors have stated that the national legal system is exclusive. Paraphrasing Roberto Ago (1936, p. 302), national legal order is exclusive in the sense that the legal character is restricted to only what it includes. The explanation for applying the foreign law lies in the fact that it is encompassed in the legal system of the forum (hence the name "the theory of reception of international law"). Incorporating the foreign law is understood in two ways: material reception (the foreign rule is virtually adopted into the law of the forum and therefore loses its foreign character); formal reception (the foreign law is included into the national legal order, but it maintains its original sense and value attributed by the legal system that created it). At the same time, the reception theory ignores the rule on conflict of laws; the purpose of this norm is to determine the applicable law, not to help create substantive rules similar to foreign ones or to adopt foreign norms. Material reception has been, rightfully, considered "contrary to common sense", while formal reception was deemed "exceedingly artificial" (Derrupé , 1995, p. 81);

c) *The theory of applying the foreign law as an element of fact.* The foreign law is considered an element of fact, in contrast to the law of the forum, which is

[9] See Audit and de Avout, L. (2013), p. 289, and also Goodrich (1927), p. 10; Wigny (1932), p. 162 and following; Hanotiau (1979), p. 7 and following.

perceived as the sole element of law included in the case under investigation. The court of the forum merely applies what is allowed "in fact" abroad; it is situated outside the foreign legal system and only applies the foreign law because it is compelled by its own rule on conflict of laws. Foreign law loses its normative character and is reduced to a simple fact that occurred abroad.

The consequences of applying the foreign law as an element of fact are particularly interesting:

- the court of the forum is not compelled to apply the foreign law by default and the parties are responsible for evincing the evidence;
- proceeding to interpret the foreign law, the court of the forum is compelled to respect its interpretation given by the country of origin. It is worth mentioning that international jurisdictions (for instance, the EUCJ) have systematically refused to interpret national laws[10].

This thesis has been vehemently contested, even in countries where it was established. The main criticism was that, as it is predicated on the exclusivity of the legal system of the forum, it has a fictitious character: the same law is regarded as an element of fact in the country of the forum, while the state that originated it views it as an element of law;

d) *The theory of applying the foreign law as an element of law.* The foreign law is applied when it is determined as the law of the forum, but without losing its foreign character. The foreign legal rule does not become an integral part of the law of the forum, so that there are differences between the application of the foreign law and the application of the law of the forum.

The consequences of applying the foreign law as an element of law are:

- the court of the forum determines the applicable law *ex officio* and, together with the parties, establishes the content of the foreign law;
- certain foreign legislations provide a system of guarantees aimed at ensuring the correct application of the foreign law, the same as in the case of applying their own, national, laws.

Proving foreign law

The court needs to be convinced by the evidence adduced. Proving is limited to the elements of fact (legal documents and dispositive facts taken *stricto sensu*) of the litigation. As remarked before, "the court brings the law, while the parts shall produce the facts, namely the evidence (*da mihi facta dabo tibi ius*). It is not necessary to prove the law, as the court is assumed to be familiar with it (*jura novit curia*)" (Ungureanu & Munteanu, 2013, p. 133).

These remarks are absolutely true for the civil national lawsuit. In the case of the civil international lawsuit, the presumption of the court being informed of the foreign law does not operate. A distinction needs to be made regarding the

[10] Regarding this question, see Batiffol & Lagarde (1983, p. 530, no. 328).

application of the *jura novit curia*[11] principle to Romanian law[12] and to foreign law. Romanian law stipulates the application of the rule solely to Romanian law: "The party citing a foreign law may be compelled to prove its content" (article 2562 paragraph 2 civil Code); "The court shall be informed by default of the laws in force in Romania" (article 252 paragraph 1 of the NCCP).

Nevertheless, we note the exceptions, where applying the law is not imperative to the court. The customs, rules of conduct and practices established between the parties shall be proven, according to the law, by the party citing them. Local regulations and precepts (considered to be implied presumptive clauses) shall be proven by the party citing them only upon court request (article 255 paragraph 3 of the NCCP). The party concerned is responsible of proving all the texts that are not published in the Official Journal of Romania or in another way stipulated by the law, conventions, treaties and international agreements applicable in Romania that are not comprised in legal texts, together with the Customary international law. Those legal provisions contained in classified documents may be proven and consulted only in the conditions stipulated by the law (article 252 paragraphs 2 and 3 of the NCCP).

Concerning this latter matter, we feel the need to emphasize the fact that the text of the NCCP is consistent with international documents (the Universal Declaration of Human Rights, the International Pact on Civil and Political Rights) and the internal texts (Constitution – article 31, Law no. 182/2002 concerning the protection of classified information, 2002 – articles 2–3).

Romanian law uses the mixed system[13] of collaboration between the body of jurisdiction and the parties. The burden of proving the foreign law is shared between the court or arbitrator and the parties in the litigation with an extraneous element.

The NCCP regulates the possibility, not obligation, that the court is informed by default of the foreign law: "The court may have knowledge, by default, of the law of a foreign state, provided that it be cited. Proving the foreign law is done according to the provisions of the civil Code regarding the content of the foreign law" (article 253).

The court or the arbitration court[14], based on its active role, shall take, by default, all the necessary measures to establish the content of the competent foreign

[11] The syntagm *jura novit curia* comes from the adage *nemo censetur ignorare legem*. If no one can use the excuse of not knowing the law, *a fortiori,* the court may certainly not make use of such an excuse, as it is the body charged with serving justice in the name of the law. "The principles of law are clearly not subject to proving; they are included in the law" (see Deleanu & Deleanu, 2000, p. 168).

[12] The *jura novit curia* principle can be explained not only by the notoriety of laws passed in a state, but also by the essence of its jurisdictional function – that of applying the law to concrete cases. In the process of applying the law, the court enjoys absolute independence: the parties are allowed to plead their cases, they may request the application of a certain rule or an interpretation thereof, but, in the end, it is the court that passes judgment – see Leş (2014, p. 746).

[13] Regarding the systems charged with establishing the content of a foreign law known internationally, see Filipescu and Filipescu (2007, pp. 156–158).

[14] It has been emphasized that the word "court" as present in the Civil Code has a generic meaning. It is equally applicable to any authority charged with applying the foreign law, such as a notary public, administrative body etc. (Lupaşcu & Ungureanu, 2012, p. 89).

law. In this sense, it may order, *ex officio*, the submitting of any evidence it may deem necessary.

Therefore, the court has the possibility, but not the obligation, to request the parties' assistance in establishing the content of the foreign law. The interested party, by virtue of the principle of availability, may cite the foreign law by default.

Different countries use different systems with regards to proving the foreign law before the court of the forum. Where an explicit provision is missing, the point of view of jurisprudence has varied with time regarding the answer to the question "Is the court of the forum obliged to apply the foreign law by default, or is that optional?"

Proving is exclusively the responsibility of the parties where the foreign law is accepted as an element of fact. More explicitly, the party whose claim is predicated on the foreign law is charged with proving that law (case *Bisbal*, 1959)[15] and the court is not obliged to apply the foreign law by default. This solution has been established in the French law, which also put forth the argument that the provisions of the Code of Civil procedure (in force at that time) did not allow the court to consider by default circumstances that presented an extraneous element as long as the parties did not cite the foreign law. The current French Code of Civil procedure allows the court to examine *ex officio* facts not cited by the parties and to confront them with any facts that may lead to settling the trial – including extraneous elements, which are useful in determining the truth – which the parties have omitted to include (the parties' domicile, office, nationality etc.).

This system of charging the parties with proving the evidence, which, at times, can be difficult or excessive, has been "tempered" by jurisprudence via the subsidiary function of the law of the forum: in case one party is objectively unable to prove the foreign law, its claims shall not be overruled and the law of the forum shall be applied (case *Thinet*, 1984).

Another variant has been adopting a different solution depending on the nature of the rights in question. As regards the rights unavailable to the parties, the party making a claim that is regulated by the foreign law is also charged with proving it; if that is impossible, the claim is automatically rejected. However, in matters of rights available to the parties, the party claiming that the application of the foreign law in the country of the forum would lead to a different decision than that prompted by applying the law of the forum is charged with proving said foreign law; if that is impossible, the law of the forum is applied. Solutions have varied over time, even within this dichotomy – unavailable rights/ available rights.

Currently, most legal systems accept that the court is charged with establishing the foreign law, in agreement with the parties to the litigation. It is, of course, in the parties' best interest to convince the court by proving the foreign law

[15] The rule has been issued by the French Court of cassation in the following wording: where a conflict of laws exists between French law and a foreign law and the applicable law is the foreign law, the parties are charged with proving that law (Niboyet & de Geouffre de la Pradelle, 2013, p. 458).

that substantiates their claims. At the same time, the court plays an active role in shedding light in the case and has at its disposal a variety of methods of proving the foreign law. Normally, the parties resort to affidavits of foreign law – documents issued by the public authorities of the foreign state, or even a professional providing consulting services on foreign law and remunerated by the parties. In turn, the court may order a specialized expertise, as it has at its disposal institutional solutions it can use in order to prove the foreign law. The main instruments used in matters of civil and commercial judicial cooperation are the European Convention on Information on Foreign Law and the European Judicial Network. They both provide the court with the opportunity to be informed of the content of foreign law and also its interpretation in the state of origin[16].

Means of establishing the content of foreign law

According to article 2562 paragraph 1 of the Civil Code, the content of the foreign law is established by the court through attestations issued by the bodies of the enacting state, via an expert certification or in another adequate way.

In practice, Romanian courts and arbitration courts make use of legal compendiums, jurisprudential compendiums (these are "direct" means), as well as proving means obtained from the authorities or representatives of the foreign state in Romania: certificates issued by the Ministry of Justice of the concerned state, affidavits of foreign law, attestations issued by notaries public and the chamber of commerce, certificates released by the embassies and consulates of the foreign state in Romania, information from branches of religious organizations situated in Romania (these are the "indirect" means). Additionally, Romanian courts may seek expert advice and request assistance from Romanian authorities, such as the Ministry of Justice, the Ministry of Foreign Affairs or law faculties[17].

For instance, the Ministry of Justice of Romania uses certificates of legislation in order to provide information requested by foreign judicial authorities. It conveys to ministries of justice of other states information regarding national law in civil and commercial matters, as well as in the field of civil proceedings and judicial organization for determinate legal cases.

With regards to the probative value of evidence coming from abroad, it should be assimilated, in principle, to that provided by Romanian law. According to a ruling of the former Arbitration Commission of the Chamber of Commerce and Industry of the Socialist Republic of Romania (R.S.R.[18]), if the proof lacks an official character, it shall be regarded as true *juris tantum,* meaning until proven otherwise.

[16] For a broad description of these issuse, see Clavel (2012, pp. 142–143).

[17] For additional examples of evidence used by Romanian courts, see Căpățână and Ianculescu (1979, pp. 3–10).

[18] Ruling no. 53/26 February 1985.

European cooperation instruments in matters of the taking of evidence Regulation (EC) no. 1206/2001

Regulation (EC) no. 1206/2001 has been adopted in order to facilitate the process of establishing the content of the foreign law concerning cooperation between the courts of Member States regarding the acquiring of evidence in civil and commercial matters.

The scope of the regulation is the process of obtaining evidence in civil and commercial matters. Its application is restricted to claims referring to evidence that is not intended for use in judicial proceedings, commenced or contemplated. This regulation shall apply to the following two situations: when the court of a Member State requests the competent court of another Member State to take evidence, or when the court of a Member State requests to take evidence directly in another Member State.

European Convention on Information on Foreign Law (1968) and the Additional Protocol (1978)

The Convention establishes a system of exchange of information on foreign law between the judicial authorities of the Contracting Parties, but not limited to such information. The scope of the Convention is the mutual supply of data concerning their law and procedure in civil and commercial fields, as well as judicial organization. Through the Additional Protocol, the scope of the Convention has been extended to also comprise criminal law and criminal Procedure. Regarding the functioning of the information system, the Contracting Parties are empowered by the Convention to establish a body charged with transmitting and receiving information. A request for information shall include the judicial authority that emanates it, as well as the nature of pending litigation, with the possibility of annexing copies of documents pertinent to settling the case. Where the request for information is not issued by a judicial authority, it must be accompanied by a favorable decision made by the judicial authority that approved it. The body receiving the request for information may issue the reply itself, or it may forward the request to another state or private body qualified to reply. The State that received the request may deny information in two cases: if the litigation that prompted the request for information infringes upon its interests and if the reply would be liable to infringe upon state sovereignty or security.

Failure to prove foreign law

According to the provisions of principle of article 2562 paragraph 3 of the civil Code, in case of failure to establish the content of the foreign law within a reasonable time frame, the Romanian law is applied.

No additional justifications for the subsidiary application of Romanian law have been made, except for the legal text argument:

- litigation cannot remain unsettled on grounds of the court not being informed of the foreign law or because the legal provisions are considered insufficient;
- it is relatively presumed that, by accepting the jurisdiction of a Romanian court, the parties have also accepted the application of Romanian law as secondary, where the content of the foreign law cannot be determined[19].

3. THE LAW APPLICABLE TO CIVIL INTERNATIONAL LITIGATION – ACCORDING TO THE NCCP

Legal action

Introduction

The civil action is one of the most important institutions of civil procedure, without which exercising the subjective rights would often be hard to imagine (Leş, 2014, p. 244). Being a Synthesis-concept and a relatively autonomous nation, legal action must be delimited both by subjective law and the writ of summons[20].

Within the European Union, great diversity exists with regards to summons – meaning the procedural document through which legal action is initiated. Regardless of designation, the standards differ, even at European regulation level. The filing, notification and content of writs of summons are analyzed differently in the context of national legislation. Consequently, there are differences concerning the recognition and enforcement of decisions within the Member States. Regulating legal action in cross-border cases has been proposed (Fricero, 2009, pp. 192–211)[21], by means of a directive establishing the nominal rules applicable by Member States.

The conditions of application of legal action are governed by different laws[22]. The procedural capacity of the parties is subject to their respective national law. "The procedural capacity of the parties, the object and the cause of the action in a

[19] The solution of subsidiary application of the law of the forum is also known in other legal systems. The Court of cassation stipulates this solution for matters of rights both available and unavailable to the parties. See French Court of cassation, first civil division, case *Aubin*, 28 June 2005, commercial division, *Itraco*, 28 June 2005 (for the rights available to the parties), rulings cited after Courbe & Jault-Seseke (2007, p. 1751 and following); for rights unavailable to the parties, see French Court of cassation, first civil division, ruling on 21 November 2006, apud Courbe and Jault-Seseke (2007, p. 1751 and following).

[20] The "action" designates the whole range of procedure recourses, established and guaranteed by law, through which the subject of law may, and sometimes is obliged to assist the competent body in order to sanction a certain legal situation. When that "competent body" is a jurisdictional body, a legal action is generated. Where the subjective law or the protected legal interest is established and preserved, broadly speaking, by the rules of civil law, the legal action is "civil" (Deleanu, 2013a, p. 251). For the distinction civil action – writ of summons, see Perrot (2008, p. 430).

[21] Regarding the content of the writ of summons in Italy, see Biondi (2009, pp. 162–177).

[22] Concerning the notion and the importance of civil action, see Leş (2014, pp. 244–247).

civil international lawsuit are established in accordance with the law governing the legal relationship under investigation". The NCCP reaffirms the former private international law regulation concerning the law applicable to civil actions.

Procedural capacity

Procedural capacity is a condition of promoting and exercising the legal action. It is predicated on its ability to be used, "being familiar to all individuals possessing a certain maturity, in order to realize its significance and the consequences entailed by participating in the legal life" (Leş, 2014?, p. 255).

The ability to take legal action is governed by the national law and the NCCP does not distinguish between natural persons and legal persons, or between the ability to use and the ability to exercise. The provisions of the NCCP are correlated with the provisions of the civil Code, which details the aspects concerning national law in matters of the status of the natural person and the organic status of the legal person.

Lex nationalis is, depending on the case, the law of nationality (or the law of habitual residence) or the law governing the nationality of the legal person. The justification for the application of national law, when discussing procedural capacity, is evident. The ability to be a party of and stand trial represents the procedural aspects of the civil capacity to use and exercise (Ungureanu et al., 2008, p. 250). It is, therefore, natural for procedural capacity to follow, generally, the same law as civil capacity.

For natural persons, national law is *lex personalis*. The main binding point is nationality[23], so that the issue of capacity falls under the incidence of the state whose citizenship the natural person holds. Nationality is the most intimate connection between individual and state, founded on birth or naturalization and therefore the legislator's option is natural. Where a person has multiple nationalities, the applicable law is that of the state whose nationality she/he holds and with which she/he has the closest connections, especially by way of habitual residence. If a person holds no nationality, the reference to national law must be understood as made to the law of the state where the individual is habitually resident. Consequently, habitual residence[24] appears to be, in this context, a necessary condition for the natural person with multiple nationalities.

In the case of stateless individuals, explicit provisions exist, according to which their procedural capacity is governed by Romanian law (article 1082 of the NCCP).

Habitual residence also serves as a binding point for refugees, unless otherwise stipulated in special provisions or international conventions ratified by Romania.

With regards to civil capacity, explicit provisions exist in the civil Code, in the sense that it is governed by the national law of the natural person, unless special or derogatory provisions are applicable (article 2572 paragraph 1 civil Code).

[23] Determination and proof of citizenship are done in accordance with the law of the state whose nationality is claimed.

[24] Habitual residence is in the state where the person has her/his main residence, even if registration formalities have not been fulfilled.

Relating to the procedural capacity to act, the NCCP establishes that a party that does not exercise its procedural rights cannot stand trial unless represented (the case of being unable to be a party to legal proceedings), assisted (the case of restricted ability to take part in legal proceedings) or authorized (by a competent court or administrative authority, applicable to procedural acts of enforcement).

For legal persons, procedural capacity is governed by the national law, meaning the law of the state whose nationality is held by the entity in question. The civil Code contains provisions concerning the civil capacity of the legal person – provisions also applicable to its procedural capacity in international litigation.

Article 2580 paragraph 1 expounds the rule applicable to the civil capacity in legal relationships with an extraneous element: "The organic status of legal persons is governed by its national law". The notion of "national law" in understood as the law of the state whose nationality is held by the legal person (article 2568 paragraph 1 civil Code). The "nationality" of the legal person is the nationality of the state where it has established its head office. Therefore, the office established in accordance with the articles of incorporation is relevant in determining the nationality of the legal person. For instance, legal persons located in Romania are considered Romanian legal persons and are governed, from the point of view of procedural capacity, by Romanian law, as national law.

A difficulty concerning the determination of the law applicable to the procedural capacity of a legal person may arise in case it has offices in several countries. In this case, the reference point is the real office, described as the main center of directing and managing the business, even if the decisions made by the legal person are prompted by directives issued by shareholders or associates located in other countries. In this latter case, determining the national law may be subject to renvoi. If foreign law, established in accordance with the provisions of article 2571 civil Code (case that clarifies every hypothesis), is subject to renvoi to the law of the country under which the legal person has been constituted, the applicable law is the law of the latter state.

The scope of national law is represented by issues connected to the capacity of the legal person – some aspects being mentioned, as examples, in article 2581 civil Code[25].

The procedural capacity of dismemberments of legal persons is subject to different laws. **A branch** founded by the legal person in another country complies with the national law of the parent legal entity. This solution is explained by the fact that a branch results from the extension of activity of the legal person to an office lacking legal status, deemed permanent and having its own management and equipped to enable the conduct of legal relationships with third parties[26]. We consider the situation to be identical for other types of branch dismemberments,

[25] There are no differences between the present and the old regulation in what respects the law to be applied to a legal person. The same link points, with the same wording, are taken into consideration.

[26] Article 2580 "Law applicable to organic status" is commented in Rohnean (2012, p. 1069).

even if they have a different name (agency, subsidiary etc.), on condition that they lack legal status. **The procedural capacity of a branch** is subject to the law of the state where it established its office, regardless of the law applicable to the legal person that founded it o (article 2580 paragraphs 2 and 3 civil Code).

For foreigners (natural person or legal person), the regulations present in the NCCP ("Civil international lawsuit") interfere with the provisions applicable to the national civil lawsuit and with the provisions of special laws[27].

For the foreign natural person unable to be a party to legal proceedings or with a restricted ability to be party to legal proceedings, who has not received, in accordance with her/his own national law, representation or assistance, provisions are made for the possibility of appointing a temporary special curator in charge of ensuring a swift trial.

Some clarifications concerning the wording of the legal text are required. Articles 1085–1086 of the NCCP corroborate with the provisions of article 58 of the NCCP, which regulates special guardianship in national law.

The court may also appoint a special curator to assist stateless individuals, for the same reasons as for foreigners, without imposing the condition of reciprocity[28]. In both situations (foreigner, stateless), the appointment of a special curator is temporary, until a legal representative is designated.

Other situations where a special curator may be appointed are: conflict of interests between the legal representative and the party being represented; the legal person or an entity lacking legal status (created in accordance with the law), summoned to stand trial, does not have a legal representative (article 58 corroborated with article 56 paragraph 2, articles 1085–1086 of the NCCP). In the latter case, the legal person must be the defendant in the trial; the assistance provided by the special curator ceases upon appointment of administration bodies representing the legal person. Together with other authors (Zidaru, 2013, pp. 180–181), we consider that in order for a special curator to be appointed, it is necessary for the party to not have an appointed legal representative, not a conventional representative. The administrative bodies that conduct relationships with third parties in the name of and on behalf of the legal person also serve as legal representatives for the legal person or entity deprived of legal status.

Locus standi

The *locus standi* refers to the "ability to take legal action". It is intimately connected to the litigious legal relationship and it is therefore logical that it be

[27] G.E.O. no. 194/2002 regarding legal standing of foreigners in Romania (published in the Official Journal no. 421/5.06.2008, with subsequent amendments) defines the stateless person as being the foreigner bearing no nationality (article 2 section b).

[28] The lawmakers deemed it necessary to mention stateless persons explicitly in order to avoid any possible interpretations, although, broadly speaking, a stateless person is also a foreigner (Deleanu, 2013b, p. 777).

examined in accordance with the *lex causae*" (Ungureanu et al. 2008, p. 251). In the understanding of the NCCP, the *locus standi* represents the identity of parties and subjects of the litigious legal relationship as it is deferred to court (article 36). The plaintiff is, obviously, charged with justifying the legal action and also with proving it, both actively and passively. The content of *locus standi* is connected to the circumstances in fact or in law that grant a person the possibility to take part in legal proceedings (Leş, 2014, p. 265).

According to article 1089 of the NCCP, *locus standi* is governed by the law regulating the merits of the legal relationship deferred for trial. The same law also governs aspects concerning the lack of legal standing, as well as the transmissibility of legal standing. *The exception of lack of legal standing* is an absolute defense on the merits; it may even be cited by the court by default. The solution is rejecting the action on grounds of being initiated by a person lacking legal standing, or against a person lacking legal standing[29]. *Transmission of legal standing* is done according to the law or based on an agreement between the parties. Throughout the hearings in a lawsuit with an extraneous element, the rights and obligations of the parties may be transmitted from a party to another person, unrelated to the litigation until then. In all cases of transmission of legal standing, the acquirer takes over the trial at the stage of its development reached at the moment of transmission, because as of that point in time, she/he substitutes the transmitter.

Object and cause of the legal action

Just as a taking legal action without litigating parties is unconceivable, it is also impossible to initiate proceedings without making a concrete claim (the object of the action) and without the legal foundation of the right of the plaintiff, namely establishing the legal grounds for that right (the cause of the action)[30].

According to article 1089 of the NCCP, the object and the cause of the action are governed by the law applicable to the merits of the litigious legal relationship. Consequently, this law also governs the conditions of the object of civil action. **The object** must be determined, lawful and feasible. **The cause**, or the goal of a legal action, must be lawful: "the reasons or circumstances that prompted the decision to make a legal claim or organize a legal defense"(Radu, 1994, apud Leş, 2014, p. 276) must follow the confines of legal regulations.

In examining the object and the cause of legal action in the civil international lawsuit, the provisions concerning public order of private international law shall also be considered. Where the law deemed applicable to the merits of the legal

[29] It is crucial not to mistake the lack of legal standing for lack of grounds for taking legal action. In the latter case, the court shall determine the inexistence of the right claimed, while in the case of an action filed by a person lacking legal standing, the right exists but the action had not been opened by its bearer. In this sense, see Ciobanu (2013, p. 99).

[30] For explanations regarding the elements of legal action, see Stoenescu and Zilberstein (1983, p. 236 and following).

relationship deferred for trial is contrary, by its contents, to fundamental principles of the country of the forum, it shall be removed and replaced with the law of the forum, by virtue of the positive effect of public order of private international law. The application of provisions concerning public order of private international law is relevant for both the object and the cause of the action. The conditions of the object and the liceity of the cause are established in connection to a foreign law, compliant with public order of litigation with an extraneous element.

Interest

Interest must be determined, vested, personal, innate and current, according to article 33 corroborated with 32 paragraph 1 section d) of the NCCP. The interest[31] is a general condition that must be fulfilled by any civil lawsuit, both when initiating legal action and when drafting other procedural documents. In civil litigation with an extraneous element, just like in civil national lawsuit, interest is a subjective matter, analyzed both from the perspective of the plaintiff and the defendant (Leş, 2014, p. 151).

There are no legal solutions for matters of interest in terms of law applicable to civil international lawsuit, as they depend on how interest is perceived, either as an issue related to the merits of the case, or connected to the functioning of justice. This subjectivity also existed in the former regulation, as Law no. 105/1992 did not contain any clarifications.

The difficulty in determining the law applicable to legal interest stems from the problem of qualifying this manifestation of civil action. According to article 1088 of the NCCP, the qualification of an issue as pertaining to substantive law or to procedural law is done in accordance with Romanian law. However, referring the matter to the Romanian civil procedural law does not clarify the issue, nor does it provide the solution. Moreover, the NCCP does not contain any explanations in this sense, while doctrine is not unanimous in qualifying the interest to take legal action. The same problem also applies to litigation with an extraneous element, where the question of qualification persists – it is carried out according to national law, namely the Romanian law. Qualification is important since it determines the applicable law: seen as a matter related to the merits of the case, the interest is subject to the substantive law governing the legal relationship; nevertheless, seen as a procedural matter, the interest is governed by the law of the forum.

Some legal texts consider interest to be a matter related to the merits of the case, as it addresses the party's immediate practical need of justifying the initiation of judicial proceedings (interest may be material, patrimonial or moral) and, consequently, *lex causae* is applied. The plea of lack of interest is a substantive

[31] „«Pas d'intérêt, pas d'action» dit un vieux brocard sans cesse répété. Les tribunaux ne sont pas institués pour donner des consultations purement théoriques ou pour délibérer sur des questions académiques: si de toute évidence, la question soumise au juge ne présente aucun intérêt pour celui qui la pose, l'action fait défaut" (Perrot, 2008, p. 428).

procedural exception because it concerns the exercise of the right to take action (Filipescu & Filipescu, 2007, p. 445). In line with the application of *lex causae*, it is considered that interest serves as some sort of procedural appendix of the claim submitted for trial and consequently it must be analyzed in connection to the judicial activity (Ungureanu et al., 2008, p. 252). The alternative point of view considers that the requirement that interest be innate and current has a procedural nature and therefore subject to the law of the forum (Căpățână & Ștefănescu, 1985, p. 184).

4. THE FOREIGNER – PARTY IN A CIVIL INTERNATIONAL LAWSUIT

Before Romanian courts, foreigners and stateless individuals enjoy the principles established by top-tier normative acts. The NCCP regulates the guiding principles of the civil lawsuit, namely those essential rules that determine the structure of the trial and govern the entire judicial activity (Leș, 2014, pp. 48–49). The principle of legality, equality of treatment, availability, good faith, the right to a fair trial, the right to defense, the principles of orality, in-person hearings, continuity and public availability, they all substantiate the procedural condition of the foreigner in civil litigation with an extraneous element. In the context of the principle of equality of treatment, there are certain particularities worth mentioning. Foreign nationals benefit, on grounds of conventional legal relationships or based on the *comitas gentium*, from certain facilities regarding some procedural expenses.

The principle of equality of treatment

The provisions of the Romanian Constitution represent the main basis of this principle. Justice is served equally and without any obstacles, for any individual: "Any person may appeal to justice for the defense of her/his legitimate rights, freedoms and interests. No law shall limit or infringe on the exercising of this right" (article 21 paragraphs 1 and 2 of the Constitution).

The equality of the parties in the civil lawsuit has been divided, from the point of view of the doctrine (Deleanu, 2013a, pp. 213–214), into two elements: equality of the parties in their procedural relationships with the court (guaranteed by court impartiality and its active role) and *inter partes* equality – guaranteed by the recognition of the same procedural rights and the establishment of the same obligations, according to the parties' procedural capacities. This latter aspect refers to the possibility of the parties to contradictorily discuss the elements of fact and law of the case, as well as to guaranteeing the right to defense. In this context, equality before the court is crucially important because, as mentioned above, it requires a set of conditions (Leș, 2014, pp. 59–60): legal proceedings shall be carried out by the same bodies, following the same procedural rules, for both Romanian citizens and foreign nationals or stateless persons; the same procedural

rights shall be granted to all parties, without any distinctions; the court is charged with ensuring a balance between the parties' procedural capacities, being held to inform the parties of the trial dates, procedural steps, rights they are entitled to etc.

Equality of legal treatment is firmly established in the opening articles of the NCCP: "In the civil lawsuit, the parties are guaranteed the exercise of their procedural rights, equally and without discriminations" (article 8). This principle is cited throughout the NCCP and is particularly important in matters of civil litigation with an extraneous element. Before Romanian courts, foreign nationals enjoy the same rights and procedural obligations as Romanian citizens and Romanian legal persons, respectively.

In similar terms, provisions regarding free access to justice, as well as equal treatment before the law, without privilege or discrimination, are present in Law no. 304/2004 concerning judicial organization[32].

From the perspective of civil international lawsuit, the term "foreigner" includes both natural persons and legal persons and the Code is explicit in this regard. Stateless individuals fall in the same category as foreigners, towards whom the procedural provisions (procedural capacity to act, fees, procedural expenses, free legal counseling, exemption from judicial bail, special curator) are applied without requiring the condition of mutuality. In fact, it becomes apparent, from the sum of Romanian regulations, that equality of treatment is not specific only to the procedural area, but it also includes the merits of legal relationships.

Romanian legislation is not confined to simply establishing the principles, but it also institutes the corresponding *procedural guarantees*. The law grants foreigners and stateless persons who do not understand or speak Romanian the right to be informed of the documents and evolution of the case, as well as the right to address the court and put forward conclusions, via an authorized translator[33] (unless no provision to the contrary exists – article 18 paragraph 3 of the NCCP). Throughout the proceedings, the parties have the right to be assisted by a lawyer, chosen or appointed by default (article 24 paragraph 2 of the Constitution). The parties, Romanian nationals or foreigners, have the right, throughout the duration of the trial, to be represented or, depending on the case, assisted, in accordance with the law. The right to defense is guaranteed (article 13 paragraphs 1 and 2 of the NCCP complies with the Constitutional provision guaranteeing the right to defense throughout the trial).

[32] This law has been republished in the Official Journal of Romania, Part I, no. 827/13 September 2005. "Any person may resort to justice to safeguard her/his rights, freedoms and lawful interests in exercising her/his right to a fair trial (article 6). No law may restrict access to justice. All persons are equal before law, without privileges and discriminations. Justice is served equally for all, regardless of race, nationality, ethnic origin, language, religion, sex, sexual orientation, beliefs, political affiliation, wealth, creed or social condition or any other discriminating criteria" (article 7).

[33] All civil lawsuits are conducted in Romanian and the petitions and procedural documents are drafted only in Romanian.

Costs of proceedings. Public legal aid for foreigners

Foreign nationals, present before Romanian courts as parties in civil international lawsuits, are subject to tax breaks and exemptions, as well as reductions of costs of proceedings, under the same circumstances as Romanian citizens. This fact requires the condition of reciprocity with the state where the possible recipient of said tax breaks and exemptions is resident or a citizen of. An important provision of the NCCP concerns guarantee deposits (article 1084). The plaintiff, a foreign citizen or foreign legal person may not be held to make a guarantee deposit or be obliged to any other guarantees prompted by him/it being a foreigner or not having the domicile or office in Romania. The same condition of reciprocity is necessary.

Foreign natural persons are eligible to receive the public legal aid provisioned by the G.E.O. no. 51/1998. The petition for receiving public legal assistance, filed by citizens of Member States of the European Union or by persons domiciled or habitually resident in a Member State other than Romania, shall be lodged, together with the documents supporting the claim, with the central authority of the Member State where the petitioner is domiciled or habitually resident, or with the Romanian central authority, or directly with the Romanian court that has jurisdiction in settling such petitions[34]. Where the claim is filed with the Romanian central authority, this authority has the obligation to forward said claim to the competent court. The Romanian central authority for matters of public legal assistance is the Ministry of Justice.

Foreign nationals and stateless persons domiciled or habitually resident in Romania may receive free legal counseling from the Romanian central authority, in order to obtain legal assistance in cases where the court of another Member State of the European Union has jurisdiction or to enforce a decision in another Member State of the European Union, under the provisions of the laws of that State. The Romanian central authority assists the petitioner by ensuring that her/his claim[35] is accompanied by all additional documents required by the competent authority of the petitioned State. The Romanian central authority has the obligation to forward the petition and the (translated) additional documents to the receiving authority of the Member State within 15 days from receiving said official papers. The Romanian central authority

[34] The petition is filed with the court competent in settling the case for which assistance is requested; in case of public legal aid requested in order to enforce a decision, the petition falls under the incidence of the court charged with the enforcement. The petition and the supporting documents are filed translated into Romanian.

[35] The Romanian central authority is in charge of translating the petition and the necessary additional documents. Translation is made into: the official language of the petitioned Member State or in one of the languages of that State that corresponds to one of the languages of the institutions of the Community, or in one of the languages accepted by the petitioned Member State, in accordance with the Directive (EC) no. 8/2003 concerning the improvement of the access to justice in cross-country litigation by establishing a set of common minimal rules regarding the legal aid that may be granted in such litigation.

may refuse to forward a petition for legal assistance in another Member State if that petition is clearly unfounded or if it exceeds the scope of the legal cooperation agreement in question. In case the petition for legal assistance is denied by the competent authority of the petitioned Member State, the Romanian central authority shall require the petitioner to reimburse the costs of translation.

Legal assistance is free for foreigners to the same extent and in the same conditions as for Romanian citizens (on a reciprocity basis). The court has the possibility to prevent delays in litigation. In cases where the representation or assistance of the foreigner deprived of legal capacity or with limited legal capacity has not been ensured in accordance with her/his national law (the person in question was not appointed a representative), the court may appoint a temporary special curator (article 1083 paragraph 2, article 1085 of the NCCP).

The condition of reciprocity must definitely not be regarded as an infringement on the equality of treatment guaranteed by law to the parties in a trial. On the contrary, it is a confirmation of equal treatment; otherwise, it would seem incomprehensible for a foreigner to enjoy the same rights as a Romanian citizen before Romanian courts, while a Romanian national would be subject to discriminatory rules before the courts of the foreigner's state of origin or domicile (Zilberstein, 1977, pp. 99–100).

The regime of taking evidence

In general, evidence, or proof, represents the means of persuasion necessary in order to establish the existence or inexistence of a juristic act or a dispositive fact, giving rise to rights and obligations (Ungureanu & Munteanu, 2013, p. 133). In its narrow sense, the word "evidence" designates the means used for taking evidence (Cornu, 2006, p. 702).

The regime of evidence is analyzed differently, depending on the aspect in question. The NCCP has kept (with minor changes) the provisions of Law no. 105/1992, meaning that certain aspects fall under the incidence of the law governing the merits of the litigious legal relationship, while others are subject to the law of the forum, namely the Romanian law. In certain situations, the autonomy of will of the parties takes precedence, since the parties may agree on the evidence they intend to use prior to initiating the legal action.

Burden of proof

The law governing the merits of the legal relationship is the law applicable to introducing evidence. The party making a claim throughout the proceedings is charged with proving it: the plaintiff has the obligation to prove the existence of the document or fact generating rights and obligations. Once the plaintiff has successfully proven her/his claim, the burden of proof is passed on to the defendant, if she/he is willing to either reveal certain flaws or obstacles that prevented the materialization of the claimed right, or to introduce other juristic acts or dispositive facts that have

modified, restricted or nullified the right proven by the plaintiff. In the case of legal presumptions, the burden of proof is reversed, in the sense that the facts presumed by the law are considered proven in favor of the party citing the presumption and the other party is held to prove the contrary (except for cases of absolute presumption; Cornu, 2006, p. 702).

Doctrine is unanimous in deeming the *lex causae* as the law best suited to govern the burden of proof. This solution is also confirmed by European regulations in matters of contractual obligations (Rome I) and in matters of extra-contractual obligations (Rome II).

Object of taking evidence

The object of taking evidence is determined differently, depending on the claims to be proven – juristic acts or dispositive facts. The object of taking evidence (Leş, 2014, p. 744) is represented by the documents and facts generating rights and obligations – documents and facts that triggered the conflict between the parties.

The Rule

The NCCP stipulates that, in matters of proving **juristic acts** (article 1090 paragraph 1), the law chosen by the parties is the applicable law, where such choice is permitted by the law of the place where the legal document had been signed (except for the categories of documents or facts subject to explicit and distinct provisions in the Code). Therefore, *lex voluntatis* is the main binding point for proving juristic acts and for granting force of evidence to the ascertaining certificate. Additionally, objective localization is employed. If autonomy of will is not exercised (either because the parties did not make use of the right to chose the law applicable to proving the juristic act they had drafted, or because the law of the place where the document had been signed does not allow the parties to choose the law applicable to proving their act), the law applicable is one that can always be determined – the law of the place where the juristic act has been signed. Consequently, it becomes apparent that, together with a subjective criterion (autonomy of will), the NCCP also includes a second, objective, criterion (*lex loci actus*)[36].

We notice the significant role played by the autonomy of will according to the new regulations of Romanian civil procedural law. Currently, will is the main binding point, while the *lex loci actus* is only applied secondarily. Under the provisions of Law no. 105/1992, the two binding points had equal standing, being used alternatively. The parties were allowed to choose between the law of the place where the juristic act had been signed and the law they had selected to be applied to taking evidence.

[36] Article 161 of the former regulation read: "The evidence for proving a juristic act and the force of evidence of the ascertaining certificate are those stipulated by the law of the place where the juristic act has been signed, or the law chosen by the parties, if they had the right to choose it".

For proving **dispositive facts**, the applicable law is the law of the place where they have occurred or where they were committed. Article 1090 paragraph 2 of the NCCP governs licit dispositive facts and torts.

The process of probating juristic acts and dispositive facts contains *two cases where Romanian law is always applicable*. They are the following:

- evidence other than that stipulated by the law chosen by the parties or the law of the place of signing the document or the law of the place where the dispositive fact has occurred or was committed can also be submitted;
- testimonial evidence and presumptions or the court[37] are allowed, even in situations where this evidence would not be admissible according to the foreign law established as applicable.

Exception

As an exception to the rule of autonomy of will, civil status and the strength of evidence of documents attesting civil status are always governed by the law of the place where the cited document had been drafted (article 1090 paragraph 4 of the NCCP).

Submitting evidence

The process of submitting evidence is governed by Romanian law, as law of the forum. Being a complex activity, specific to courts, taking evidence can obviously only be governed by the law of the forum.

The procedural effects of a court judgment and its *res judicata* authority follow the law of the forum (Deleanu, 2013b, p. 780; Filipescu & Filipescu, 2007, p. 447). The law of the forum determines if the authority of *res judicata* concerns only the operative part of the judgment, or its corollaries as well.

Lex fori governs the procedural steps and the trial dates, proceedings and appeal against the judgment of the court. There are no explicit provisions regarding the assessment of evidence in the applicable law. However, as it is part of the proceedings, namely the formation of the court's intimate conviction (gauging witness sincerity or the consistency between the witness statements and the other evidence), this matter is governed by the law of the forum (Filipescu & Filipescu, 2007, p. 447; Zilberstein, 1977, p. 94).

Supralegalization of official documents

According to the NCCP, the supralegalization of official documents is performed where no provisions applicable primarily exist (article 1064 of the NCCP). It refers to international treaties that Romania is part of, in which case supralegalization is performed in accordance with their provisions.

[37] According to article 327 of the NCCP, presumptions are the consequences drawn by the law or the court from a known fact, in order to determine an unknown fact.

Supralegalization according to the NCCP

Public documents drafted or legalized by a foreign authority or a public agent may be submitted to Romanian courts only if they are supralegalized. Supralegalization implies following the specific procedure, according to the provisions of article 1092 paragraphs 1 and 2 of the NCCP[38]. Supralegalization is performed hierarchically, by the administration of the state of origin and then by that of the diplomatic mission or of the agent of the Romanian consulate, in order to certify the authenticity of the signatures and seal applied on them.

Administrative supralegalization is subject to the procedure established by the state originating the document and is followed by the supralegalization performed by the consular office or the diplomatic mission in that state, or by the consular office or the diplomatic mission in Romania of the state of origin – regardless of situation, by the Ministry of Foreign Affairs.

With regards to documents drafted or legalized by Romanian courts, supralegalization is performed, on the Romanian side, by the Ministry of Justice and the Ministry of Foreign Affairs, in this order.

Situations where supralegalization is not necessary

Exemption from supralegalization is only possible if such provisions are made in the law, in international treaties that Romania is part of or on grounds of reciprocity (article 1092 paragraph 3 of the NCCP).

The Hague Convention on 5 October 1961

Regarding official documents to be used among the Member States of the Hague Convention of 1961, the exemption from supralegalization is applied[39]. The scope of the Convention is represented by official documents drafted in one Member State and submitted in another Member State. This category contains documents emanating from an authority or a public servant of a state jurisdiction, including those emanating from the Ministry of Justice, from a court clerk or a judicial executor; administrative documents; notarial documents; official statements (those referring to mentions of registration, appointment visas with certain date, legalization of signatures on documents under private signature).

Documents drafted by diplomatic or consular agencies and administrative documents directly related to commercial or customs operations do not fall under the incidence of the provisions of the Convention.

[38] Supralegalizing official documents has also been expressly regulated in Law no. 105/1992, in similar terms (for details on the former supralegalization procedure, see Filipescu & Filipescu, 2007, p. 448).

[39] Romania adhered to this Convention by Law no. 142/2004 concerning the amending of article 2 of G.E.O. no. 66/1999 on the adhesion of Romania to the Convention on suppressing supralegalization of foreign official documents, adopted in The Hague on 5 October 1961, published in the Official Journal no. 421 from 11 May 2004.

In the understanding of the Hague Convention, supralegalization is only necessary where diplomatic or consular agents of the country where the document will be used certify the veracity of the signature, the capacity in which the signatory of the document has acted or, depending on the case, the identity of the seal and stamp from the document. Consequently, only the application of the apostille[40] is necessary, which is issued by the competent authority of the country emanating the document. However, according to the Convention, this formality shall not be required when it is eliminated or simplified or when the laws, regulations or customs in effect in the state where the document will be submitted, or an agreement between two or more Contracting States removes or simplifies it, or when it is exempt from supralegalization.

Bilateral treaties exempting from supralegalization

Romania is a member of international bilateral conventions that regulate the exemption from supralegalization of official documents (Belgium, Austria, Poland, Russia, Bulgaria, the Czech Republic, Moldova, Hungary, Ukraine etc.; see "Lista statelor cu care România a încheiat tratate", n.d.). For instance, the treaty ratified with Belgium (1976) stipulates that documents emanating from the judicial authorities of one of the two states and bearing their seal, as well as documents certifying the date, the signature or the conformity to the original, are exempt from any legalization when they are to be used in the other state[41]. The bilateral Treaty ratified with Austria (rectified in 1969) stipulates that documents issued by a court or administrative authority of the Contracting States, within the limits of their jurisdiction and bearing the official signature and seal, shall have the same evidentiary status as official documents before courts of law and administration of the two states. This regulation also includes other documents that, according to legal provisions of the Contracting States, have the same probative power as official documents.

5. INTERNATIONAL LETTER OF REQUEST

A few special mentions are necessary regarding submitting evidence through Letters of Request (Căpățână & Ianculescu, 1982). Letters rogatory (national or international) are procedures derogating from the principle of directness, according to which the taking of evidence is carried out by the court trying the case. Within

[40] The apostille is applied directly onto the document or onto an extension of the document, according to the model present in the Annex of the Convention. The apostille may be drawn in the official language of the issuing authority. The content of the apostille may also be translated into a second language, but the title shall always be written in French ["Apostille (Convention de la Haye du 5 octobre 1961)"]. All issued apostilles are filed in a special register, kept by the competent authorities of each Member State.

[41] However, in practice, the apostille is still required.

the civil international lawsuit, the letters rogatory are enacted by the provisions of international treaties and by Union law. As a rule, the law applicable to the Letter of Request is that of the state where it is carried out.

The international Letter of Request in civil and commercial matters is the procedure through which a state's judicial authority is petitioned by the judicial authority of another state to draft up certain procedural documents – chiefly the taking of evidence regarding commenced or contemplated litigation. The international character of the Letter of Request stems from the fact that the requesting court and the petitioned court belong to different states.

It is, in fact, a matter of delegation of duties from the requesting (soliciting) authority onto the petitioned (solicited) authority. The petitioned court is not allowed to issue judgment in the sense of settling litigation, since such aspects are of the exclusive competence of the investigating court (Jacotă, 1976, p. 267) and such a delegation of jurisdiction would be unacceptable.

The procedure of letters rogatory has not always been present in private international relations. In fact, up to the point where they were regulated by national legal systems and conventions between states, the taking of evidence in the territory of another state had been subject to international courtesy. In litigations with an extraneous element, the *comitas gentium* had played the role of promoting friendly interstate relations and the ensuring the states' vested interest to contribute to the adequate administration of justice[42].

The object of the Letter of Request may be to obtain documents, witness hearings, interrogations, on site investigations, the performing of examinations, the acquiring of documents or information aimed at settling a case (such as, for instance, obtaining photographs or extracts from documents) etc. The Ministry of Justice of Romania keeps a copy of all petitions for performing investigations addressed by Romanian courts to courts/ authorities of Member States. Additionally, it keeps a copy of the evidence received by Romanian courts following the taking of the proper steps.

The taking of evidence by means of international letters rogatory is subject to Regulation no. 1206/2001. This regulation is applied to relationships between Member States, except for Denmark. The provisions of the Hague Convention of 1970 concerning the taking of evidence in civil or commercial matters are applicable to relationships with the Kingdom of Denmark.

The provisions of Regulation no. 1206/2001 prevail over other provisions contained in various bilateral and multilateral agreements or arrangements concluded by the Member States and in particular the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in relations

[42] In this sense, see Filipescu and Filipescu (2007, p. 439); Căpățână and Ianculescu (1982, pp. 41–42); Rizeanu, (1982, pp. 56–61).

between the Member States party thereto. Member States are allowed to maintain or conclude agreements or arrangements in order to further facilitate the taking of evidence, provided that they are compatible with the aforementioned Regulation[43].

The taking of evidence in relationships between the Member States of the European Union (European Law)

The taking of evidence in civil or commercial matters. Regulation (EC) no. 1206/2001 of the Council of 28 May 2001

The scope of the regulation. As an introduction, it is worth noting that the facilitation and acceleration of cooperation between Member States in terms of the taking of evidence is one of the essential objectives of consolidating the space of freedom, security and justice. In a special reunion that took place in 1999, the Council of Tampere established, in the final document[44], a series of proposals concerning the field of civil procedural law and forced execution. Under this umbrella, a series of new rules had been discussed, concerning the taking of evidence, temporary measures, demands for payment and hearings, all aimed at facilitating the access to judicial cooperation in civil and commercial matters.

The necessity of adopting Regulation no. 1206/2001 originated from the absence of an imperative legal document binding the Member States (preceding the Regulation, the Hague Convention of 1970 on the taking of evidence in civil or commercial matters was only applicable to 11 of the Member States of the European Union). The transmission of evidence or the effective and direct participation to judicial or extrajudicial proceedings imply celerity, especially in matters of cross-border affairs. The provisions of civil procedural law of the national systems were insufficient and therefore adopting an instrument that would facilitate the access to evidence between courts of different states was indispensable. The Regulation has set two objectives: simplifying cooperation between states and accelerating the taking of evidence to a relatively satisfactory level.

The two objectives are carried out through specific activities.

Simplifying cooperation follows two vectors: the court of a Member State requests evidence by filing a petition with the competent court of another Member State, and the permission granted to a court of a Member State to collect evidence directly in the territory of another Member State.

In the first case, the court of a Member State requests the competent court of another Member State to carry out an investigation. The application must concern the taking of evidence for commenced or contemplated litigation.

[43] Article 21 paragraph 1 and 2 of Regulation no. 1206/2001.

[44] For more information regarding the conclusions expressed at the Tampere reunion, see "Propos introductifs par Monsieur Jacques Isnard" (2009, pp. 10–23).

The second case concerns the direct and effective participation of the petitioning court of a Member State in the taking of evidence in the territory of another Member State.

The cooperation established by the Regulation makes use of the following instruments available to the states:

- *the European Judicial Atlas in civil matters* (n.d.), containing information on the body receiving the requests for the taking evidence (central bodies, competent authorities), the medium of transmitting information, the communications of Member States (concerning the official language and, where applicable, other accepted languages; the medium of receiving the documents);
- *10 forms (A–J),* listed in the Annex to the Regulation and available on the *European e-justice Portal* (n.d.). The forms cover: requests for the taking of evidence; acknowledgement of receipt of the deposit or advance; notification concerning the request for special procedures and/or for the use of communications technologies; request for direct taking of evidence etc.;
- *the practical guide* to the application of the Regulation, prepared by the services of the European Commission and the European Judicial Network in civil and commercial matters. A manual detailing the use of equipment specific to videoconferences has been drafted in order to offer information aimed at supporting magistrates in the taking of evidence.

The acceleration of the taking of evidence implies stipulating a term of 90 days, calculated from the moment of receiving the request. Any delays must be notified and justified, according to article 15 of the Regulation. Also for celerity, the Regulation allows the courts to make use of the fastest adequate means, while respecting the conditions regarding the legibility and reliability of the transmitted documents.

Formalities prior to the taking of evidence

The procedure established by Regulation no. 1206/2001

The body responsible for receiving/ transmitting the requests. Each Member State shall draw up a list of its competent courts, indicating their territorial jurisdiction and, where applicable, their special jurisdiction. Each Member State shall designate a court that would serve as a central body responsible for supplying information to the courts, finding solutions to problems that may arise from transmitting the requests, forwarding requests to the competent courts. A federal State, a State in which several legal systems apply or a State with autonomous territorial entities shall be free to designate more than one central body. *Standard forms*. The standard form is an effective instrument, mandatory in the process of

taking evidence. In order to guarantee the highest degree of clarity and judicial certainty, the standard form[45] shall be drawn up in the official language of the requested Member State, or in another language accepted[46] by the Member State in question. It is worth mentioning that, in general, the entire procedure takes place in the official language of the requested Member State. Where the requested Member State has more than one official language, any of the official languages of the place where evidence is to be taken may be used. Alternatively, any other language that the requested Member State has indicated it can accept may be used.

The request and all documents attached to the request shall be exempted from authentication or any equivalent formality. However, the documents necessary for the taking of evidence shall be translated into the language in which the request had been drawn up. The methods of transmitting requests and documents are those accepted by the requested Member State. Those methods need to be appropriate, so that the documents maintain the accuracy of their content and all the mentions they include remain legible.

Transmission of requests. The court shall acknowledge the receipt of the request within 7 days from receiving it. Where the request does not comply with the conditions governing the drafting of requests, the requested court shall make a note of it in the confirmation document. Non-compliance refers to issues related to the language in which the documents were drawn up and their methods of transmission.

The requested court shall inform the requesting court of any non-compliance issues concerning the form and content of the request. The non-compliant and/ or missing parts shall be indicated as accurately as possible to the requesting court within 30 days from receiving the request. Where the payment of a deposit or advance is necessary, that shall be communicated to the requesting court, while also including information about the method of payment.

In case the requesting court transmits the request to the wrong requested court, the latter court shall forward the standard form to the competent court of the requested Member State, while also notifying the requesting court of this action.

[45] The request must contain a series of information concerning the requesting and, where appropriate, the requested court, the names and addresses of the parties to the proceedings, the nature and subject matter of the case (with a brief statement of the facts), a description of the taking of evidence to be performed. Where the request is for the examination of a person, the request shall include: the identification data of the person(s) to be examined, the questions to be put to the person(s) to be examined or a statement of the facts about which she/he is/ they are to be examined. Where appropriate, the request will also include: a reference to a right to refuse to testify under the law of the Member State of the requesting court; any requirement that the examination is to be carried out under oath or affirmation *in lieu* thereof, and any special form to be used; any other information that the requesting court deems necessary. Where the request is for any other form of taking of evidence, the documents or other objects to be inspected (article 4 paragraph 1 letters e and f of the Regulation).

[46] Every Member State indicates the official language or languages of the institutions of the European Community, other then its own, acceptable for form completion.

Carrying out the taking of evidence

The taking of evidence by the requested court

The requested state executes the request according to its own legal system within 90 days from receiving the request. If the requested court is unable to execute the request within 90 days, it shall proceed to inform the requesting court via the special form in the Annex. Obviously, stating the reasons for the delay, as well as the estimated time necessary for executing the request shall be included.

The court requesting the examination may choose a special procedure required by its own legal system and the requested court shall comply, with two exceptions: when said procedure is incompatible with the law of the requested state, or when major practical difficulties in carrying out the examination exist. The requesting state shall be notified of the existence of these impediments via the special form included in the Annex of the Regulation.

The rapid transmission of requests of examination justifies the use of all appropriate means. With regards to the technical means involved in carrying out the examinations, the request may also concern the use of communications technologies, such as modern means of long-distance communication, the legal text mentioning video conferencing and telephone conferencing.

The parties and their representatives have the right to be present at the examinations. The presence of the parties and, where applicable, the representatives, must also be compatible with the legislation of the state of the requesting court. According to the Regulation (article 12), the prepresentatives of the parties are the members of the judicial personnel designated by the requesting court, in accordance with the law of the Member State. The requesting court may also designate, in accordance with the law of its Member State, any other person, such as, for instance, an expert.

The request of examination in the territory of a foreign state shall include a notification regarding the participation of the parties and/or their representatives. Information may be transmitted not only via the initial request, but also at any other appropriate time. The requested court is charged with establishing the conditions under which the parties and their representatives may participate and shall notify them, including with regards to the time when and place where the taking of evidence shall be performed.

Where necessary, in executing a request, the requested court shall apply the appropriate coercive measures in the instances and to the extent as they are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned.

Refusal to execute the taking of evidence ensues where:

- the request does not fall within the scope of this regulation;
- the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary;

- the requesting court does not comply with the request of the requested court to complete the request within 30 days after the requested court asked it to do so;
- a deposit or advance asked for in accordance with Article 18 (3) is not made within 60 days after the requested court asked for such a deposit or advance.

Execution may not be refused by the requested court solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it [article 14 (3) of the Regulation].

Subsequent to executing the taking of evidence, the requested court shall transmit the proof of execution of the request to the requesting court. Where documents necessary for the examination were transmitted, they shall be returned.

Direct taking of evidence by the requesting court

The taking of evidence by the requesting court is regulated by article 17 of the Regulation. This procedure permits the direct taking of evidence, without intermediaries, by the persons designated by the requesting court (members of the judicial personnel, expert or another person). Unlike the previous procedure (where the examination is performed by the requested court), the taking of evidence is carried out without the need for coercive measures. Any gathering of evidence may be carried out directly only on a voluntary basis.

The request is submitted to the central body or the specially designated authority of the requested state, along with the completed forms included in the Annex. Direct taking of evidence may only take place if it does not imply any coercive measure. Where the direct taking of evidence implies that a person shall be heard, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

The request for direct taking of evidence is executed within 30 days. The reply to the requesting court shall include information regarding the acceptance of the request and the conditions in which the examinations would take place. A court of the requested Member State may take part in the performance of the taking of evidence in order to ensure compliance with legality.

The request for direct taking of evidence *may be refused* in three cases: the request does not fall within the scope of the Regulation; the request does not contain all of the necessary information pursuant to article 4 of the Regulation; the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.

The requesting court carries out the taking of evidence in accordance with the law of its Member State, except for the case where the body or competent authority

of the requested state has established other conditions that it had communicated to the requesting court, according to article 17 (4) of the Regulation.

Costs associated with the taking of evidence (article 18 of the Regulation)

Where the requested court raises the issue of reimbursement of taxes or costs, according to the legislation of its Member State, the requesting court, under the obligation of the parties to bear the costs according to the law of its Member State, shall ensure the reimbursement without delay of the following categories of expenses:

- fee paid to the expert;
- fee paid to the interpreter;
- costs occasioned by the execution of the request according with the special procedure governed by the law of the Member State of the requesting court;
- costs occasioned by the execution of the request by means of communications technologies (teleconferences, videoconferences etc.).

The Application of Regulation no. 1206/2001. Issues/Difficulties

Some **positive aspects** of applying the Regulation are establishing a time limit for executing the request of the requesting court and the introduction of mandatory standard forms in the Annex. Establishing the time limit of 90 days was aimed at reducing the time necessary for the taking of evidence compared to the period previous to the entry into force of the Regulation. It is worth pointing out that there are situations where this time limit is exceeded, subject to the nature of the case and the kind of evidence that needs to be gathered; however, such cases represent a minority.

Additionally, stipulating the mandatory use of standard forms is an important instrument of accelerating and, especially, simplifying the procedure of taking evidence in civil and commercial matters.

Real difficulties are posed, however, by the diverse interpretations of the terminology of the regulation. "Civil and commercial matters", "evidence", "court", are all terms that have frequently caused problems for the authorities charged with the application of the Regulation. For instance, the notion of "evidence" has been discussed contradictorily, especially in terms of DNA and blood sampling, as well as in the context of expert assessment concerning cases involving family relations.

In the same way, it is necessary to improve the functioning of the mechanism promoted by the Regulation. This is, in fact, the element of novelty compared to the Hague Convention: the procedure of direct transmission of requests for the taking evidence between the courts of Member States. A study carried out at a European Commission level showed insufficient understanding of the Regulation in the Member States. Direct contacts between courts are not used, while requests are executed late, which entails delays in settling the lawsuits.

European Convention on Information on Foreign Law (1968) and the Additional Protocol (1978)[47]

The Convention of 1968 sets up a system of gathering information on foreign law and procedure by the judicial authorities of the Contracting States, without it being considered prime. The scope of the Convention covers civil procedure, commercial law and judicial organization. The Additional Protocol extended the scope of the Convention to criminal law and criminal procedure.

Regarding the functioning of the informational system, the Contracting Parties are empowered by the Convention to establish a body of transmitting and a body of receiving information. The information application shall contain the judicial authority emanating the request, as well as the nature of the pending case, with the possibility of attaching copies of documents necessary in settling the trial. Where the request is not drawn up by a judicial authority, it shall be accompanied by the decision of that authority authorizing it. The receiving agency that has received a request for information may either draw up the reply itself or transmit the request to another State or official body to draw up the reply. The requested State may refuse to take action in two situations: if its interests are affected by the case giving rise to the request, or if it considers that the reply might prejudice its sovereignty or security.

Access to information concerning foreign law is facilitated by the provisions according to which the reply must be furnished as rapidly as possible (article 12 of the Convention). However, if the preparation of the reply requires a long time, the receiving agency shall so inform the requesting foreign authority and shall (to the extent possible) indicate, at the same time, the probable date on which the reply will be communicated.

The taking of evidence in relationships with non-Member States of the European Union (the taking of evidence according to conventional law)

The scope of conventional law

Regulation no. 1206/2001 is applied to relationships between Member States. In civil and commercial matters subject to it, the application of the Regulation takes precedence over any bilateral or multilateral conventions that may exist between Member States. However, the Regulation stipulates explicitly that it is not opposed to the concluding of agreements or arrangements between Member States, as its ultimate goal is to further improve cooperation in the field of taking evidence. The sole condition imposed by the Regulation is that any such agreements, existing or contemplated, be compatible with its provisions.

In relationships with non-Member States, several categories of sources are applied: the first is conventional law and the bilateral and multilateral treaties,

[47] G.R. no. 153/1991 concerning the adherence of Romania to the European Convention on Information on Foreign Law, signed in London on 7 June 1968 and to the Additional Protocol to the Convention, signed in Strasbourg on 15 March 1978, was published in the Official Journal no. 63 bis of 26 March 1991.

respectively. The Hague Convention of 1970 and the Hague Convention of 1954 are the main agreements regulating international rogatory letters in civil and commercial matters.

Where the instruments of conventional law are unavailable, states may use the principle of reciprocity in order to be able to take evidence in civil international litigations.

The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters[48]

The aim of this Convention is the taking of evidence and the performing of other judicial acts through Letters of Request. The procedure regulated by the Convention does not apply to evidence that is not intended for use in judicial proceedings, commenced or contemplated. Additionally, the expression "other judicial acts" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures (article 1). The Convention makes explicit provisions regarding certain procedures that are only regulated in some of the Contracting States. Romania, for instance, accepts Letters of Request concerning the procedure known in *common law* as the *pretrial discovery of documents,* to the extent in which this expression designates the taking of evidence (the *in futurum* investigation).

The Letter of Request operates between Contracting States[49] and may only be used for commenced or contemplated litigation. In Romania, the Ministry of Justice is the central authority designated to receive and transmit Letters of Request. After receiving the Letter of Request, the Ministry of Justice carries out the international compliance verification and submits the request directly to the competent central authority of the requested state. Where the requested central authority is not competent to execute the Letter of Request, it shall be submitted promptly and by default to the competent judicial authority of the same state, to execute it in accordance with the provisions of its own law. Under the provisions of reciprocity, the execution of the Letter of Request shall not give rise to any reimbursements of costs, except for those incurred from translating the Letter of Request and any attached documents and the fees paid to interpreters and experts.

The execution of the Letter of Request is subject to the applicable law of the requested state. Upon petition from the requesting authority, a special procedure may be followed, but only to the extent in which the special procedure is not incompatible with the law of the requested state or if its execution is not possible, either due to judicial customs of the requested state, or due to practical difficulties.

If the competent central authority has been informed, the members of the judicial personnel of the requesting state may be present at the execution of a Letter of Request.

[48] Romania has adhered to this Convention by Law no. 175/2003, published in the Official Journal no. 331/15 May 2003.

[49] The updated list of Contracting States can be visited on the web-page http://www.hcch.net/index_en.php?act=status.accept&mid=514 (link valid on 12 June 2014).

The international Letter of Request *may be refused in the following circumstances*:

- the execution of the Letter does not fall within the functions of the judiciary;
- the execution may prejudice the sovereignty or security of the requested state. Assessment is at the discretion of the requested state.

The refusal to execute occurs if the person concerned cites an exception or an interdiction to give evidence established either by the law of the requested state, or by that of the requesting state and mentioned in the Letter of Request or, where applicable, attested by the requesting authority upon request from the requested authority.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

The only provisions of the Hague Convention that Romania has stated its reserve are those concerning the taking of evidence by diplomatic officers, consular agents and commissioners. Romania has only accepted the provisions regulating the taking of evidence referring to the nationals of the state it represents and with respect to a pending procedure before a court of the required state (article 15 of the Convention). The reserves concern the taking of evidence regarding the nationals of the state of residence or the nationals of a third party state, on the subject of a pending procedure, before the court of a state that they represent, as well as those referring to the taking of evidence by commissioners.

Additional methods of taking evidence[50]

A series of bilateral treaties concluded by Romania with states that had not ratified the Hague Convention of 1970[51] stipulate the possibility of taking evidence through international Letters of Request carried out via the ministries of justice.

In certain cases, either the Hague Convention of 1970, or the bilateral convention may be applied, depending on the option selected by the Contracting State. This choice is available in relationships between Romania and third-party states, non-Members States of the European Union, which are Contracting Parties of the Hague Convention of 1970 (and have accepted the adherence of Romania) with which bilateral treaties/ conventions have been concluded in the field of judicial assistance in civil or commercial matters (China, Turkey). Where the bilateral treaty is applied, the Letter of Request shall be executed in full compliance with the provisions of the treaty.

In the absence of any legal instruments, bilateral or multilateral, legal assistance in civil or commercial matters is offered under the title of international

[50] See the webpage of the Romanian Ministry of Justice: http://www.just.ro/Sectiuni/ Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Ob%C5%A3inereadeprobe%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Ob%C5%A3inereadeprobenonUE/tabid/745/Default.aspx (page visited on 12 June 2014).

[51] For instance, Algeria, North Korea, Cuba, Morocco, Mongolia, Moldova, Serbia, Syria, Tunisia.

courtesy, but under the provision of reciprocity. Requests for legal aid made by foreign judicial authorities, concerning the taking of evidence by way of Letters of Request referring to natural or legal persons domiciled or registered in Romania, are to be submitted by the Romanian Ministry of Justice to the foreign judicial authorities using the diplomatic (consular) method. The foreign authorities decide on the execution of these Letters of Request.

6. TRANSMISSION AND SERVICE OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS

Transmission and service of documents in the European space

The new Regulation (EC) no. 1393/2007[52] on the transmission or service in the Member States of judicial and extrajudicial documents in civil or commercial matters establishes measures in the field of civil judicial cooperation, aimed at the adequate functioning of the internal market.

This normative act regulates several channels of transmission of judicial or extrajudicial documents: agencies specially designated to transmitting/receiving; diplomatic officers or consular agents and postal services or, directly, by judicial personnel or other persons designated by the law.

Transmitting and receiving agencies

Accelerating the transmission of judicial and extrajudicial documents between the Member States implies establishing improved procedures of communication and service of documents. The necessity to adopt this Regulation[53] has been a direct consequence of the fact that the application of the provisions of the old regulation, dating back to the year 2000, had not been entirely satisfactory, although it did contribute, in general, to improving the transmission of documents throughout the European Union.

Optimal collaboration in international litigation is essentially dependent on the efficiency and celerity of the transmission of documents between the states involved with extraneous elements. Also, in order to ensure the efficiency of procedures, the situations where service/communication may be refused are listed separately.

The provisions of the Regulation concern only *civil or commercial matters*, with exceptions explicitly mentioned. Consequently, the Regulation shall not extend to judicial or extrajudicial documents concerning revenue, customs or administrative matters. It is also not applicable to matters of liability of the State

[52] The Regulation applies between all Member States of the European Union including Denmark, which confirmed its intention to implement the content of the Regulation by means of a declaration.

[53] The conclusions regarding the situation subsequent to the application of the regulation of the year 2000 were presented in a report drawn up in 2004 at the behest of the European Commission.

for actions or omissions in the exercise of state authority (*acta iure imperii*). The application of the Regulation is refused when the residence of the addressee to be served is unknown.

Transmission shall be direct, using *rapid means*, seeking to reduce the period of time and costs of circulating judicial and extrajudicial documents. At the same time, the transmitted documents shall be easily legible, true and faithful regarding the content and protected by confidentiality. Therefore, a period of serving/ communication of up to a month from the moment of receiving the documents is considered optimal for accomplishing the objective of the Regulation. In normal conditions, a period of a few days is sufficient for fulfilling the formalities.

The documents shall be transmitted[54] after completing the standard forms, in the *official language of the Member State addressed*. If there are several official languages, each of them may be used. Each Member State shall indicate the official language or languages of the institutions of the European Union other than its own that is or are acceptable to it for completion of the form. Receiving the documents is confirmed as soon as possible; where completing or correcting the request to service or transmit is necessary, the sender-State is urgently notified. The documents may be returned if they do not fall under the incidence of the scope of the Regulation or if the transmitted documents do not comply with the required conditions.

The Regulation designates special bodies charged with serving and communicating the documents. *Transmitting and receiving agencies* (namely public servants, authorities, or other competent persons) exist in the territory of every Member State in order to transmit and receive, respectively, judicial[55] or extrajudicial documents. The tasks of transmitting/receiving documents may be fulfilled by the same agency, if the Member State so decides. A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one such agency. Each Member State shall provide the Commission with the following information: the names and addresses of the receiving agencies, the geographical areas in which they have jurisdiction, the means of receipt of documents available to them and the languages that may be used for the completion of the standard form set out in the Annex. All transmitting agencies located in the territory of one Member State are coordinated by a central authority[56], responsible for supplying information to the transmitting agencies, seeking solutions to any difficulties that may arise during transmission of documents for service and forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency.

[54] The transmitted documents are exempt from taxes and any other equivalent formality.

[55] The Romanian authorities charged with transmitting judicial documents are the Romanian courts, which may send documents directly to the receiving authorities of Member States.

[56] The Romanian central authority is the Ministry of Justice. The European civil Atlas (n.d.) in civil matters permits the identification of central authorities of every Member State.

Member States may designate several central authorities, in the same conditions in which they can designate more transmitting or receiving agencies.

Procedural rules vary from one Member State to another and therefore, the *date of service* is different, depending on the Member State in question. In principle, the date of service of a document shall be the date on which it is served in accordance with the law of the Member State addressed. However, where according to the law of a Member State a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be that determined by the law of that Member State.

The service of judicial documents coming from a Member State shall not give rise to any payment or reimbursement of taxes or costs for services rendered by the Member State addressed. However, the applicant shall pay or reimburse the costs occasioned by: the use of a particular method of service and the recourse to a judicial officer or to a person competent under the law of the Member State addressed.

Other means of transmission and service of judicial documents

The Regulation stipulates that judicial and extrajudicial documents may be transmitted or served following direct, diplomatic or consular channels. Where postal services will be used, the service of documents shall be carried out by registered letter with acknowledgement of receipt or equivalent.

Any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed.

Writs of summons are crucially important to the regulation and therefore special provisions have been included. When the defendant did not enter an appearance, while the writ of summons (or equivalent document) had been transmitted to another Member State, the court shall hold passing judgment until it can determine the reasons (article 19). The court shall establish if the document had been transmitted or served in accordance with the methods prescribed by the internal law of the Member State addressed for service of documents in domestic actions upon persons who are within its territory, or if the document was actually delivered to the defendant, or to her/his residence by another method provided for by this Regulation. Regardless of what the case may be, it is imperative to determine if the service or the delivery was effected in sufficient time for the defendant to organize her/his defense. Where these conditions are complied with, any Member State is free to establish that the judge may give judgment, even if no certificate or service of delivery has been received, if all the following conditions have been fulfilled: the document was transmitted by one of the methods provided for in this Regulation; an adequate period of time has elapsed since the date of the transmission of the document; no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

Transmission and service of judicial and extrajudicial documents in relationships with non-Member States of the European Union

In relationships with these countries, the provisions of international treaties ratified by Romania are applied, instead of the provisions of the Regulation (EC) no. 1393 of 2007.

Romania has signed the *Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, adopted in The Hague on 15 November 1965*[57]. In relationships between Romania and Member States, Regulation (EC) no. 1393/2007 takes precedence over this Convention, while in relationships with non-Member States, the aforementioned Convention is applied.

According to article 2(a) of the Law of Adherence, the Ministry of Justice is the central authority in charge of receiving from and transmitting abroad the applications for transmission and service of judicial or extrajudicial documents in civil or commercial matters. Romanian diplomatic officers and consular agents shall transmit or serve judicial and extrajudicial documents in the territory of Romania only to citizens of the Member State they represent [article 2 (c)].

The procedure of transmitting documents is governed by the laws of the state addressed and by the methods provided by this law, concerning the transmission or service of documents drafted up in that State regarding the addressees located in the territory of the concerned State. As an exception, a special procedure indicated by the applicant may be used, but only so long as it does not infringe on the laws of the state addressed. The provisions of this Convention are applied only when the address of the addressee is known.

In addition to the method established by the Convention, documents may also be transmitted or served to the authorities of another Contracting State by consular or, in extraordinary circumstances, by diplomatic channels. Application to service documents shall only be refused if its execution would infringe on the sovereignty or security of the State addressed [article 13(1) of the Convention]. In case the law of the State addressed requires exclusive judicial jurisdiction or does not allow the taking of legal action for the object that the application is predicated on, that does not represent grounds for refusal to execute.

Writs of summons or similar documents are governed by the same provisions of Regulation no. 1393/2007 applicable to the service of subpoenas.

The transmission of judicial and extrajudicial documents in relationships with non-Member States who had also not adhered to the Hague Convention of 1965 is governed by *the provisions of other treaties* concluded between these states (Morocco, Syria, Tunisia etc.) and Romania, respectively, or *the rules of international courtesy*. In this latter case, the channels used shall be diplomatic or consular, to the extent in which reciprocity is ensured.

[57] Romania had adhered to the Convention by Law no. 124/2003 (Official Journal no. 265/ 16.04.2003).

7. SPECIAL PROCEEDINGS AND THE APPLICABLE LAW

Insolvency

The system of proceedings established by Regulation (EC) no. 1346/2000

The growing number of legal entities belonging to Member States that conduct economic activities outside their national borders has brought about the need for a European normative instrument that would accelerate proceedings, making them more effective and efficient. The discussions initiated by the European Commission in 2012 regarding the viability of Regulation no. 1346/2001 have been predicated on public consultation and on studies carried out by institutions and experts and were aimed at improving the levers of uniform regulation and of cooperation in matters of insolvency.

The proposals to revise the Regulation were ultimately designed to extend its scope, to redefine certain terms that had posed problems to the application of the Regulation (such as, for instance, "the center of main interests", expression that proves extremely important in determining jurisdiction), to publish judgments issued in cases of cross-border insolvency, to establish the status of creditors from other Member States of the European Union and aspects regarding the insolvency of a group.

The scope of this Regulation includes collective insolvency proceedings that entail the partial or total divestment of a debtor and the appointment of a liquidator. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings that provide services involving the holding of funds or securities for third parties, or to collective investment undertakings[58]. These proceedings are governed by special regulations and national control agencies have at their disposal some relatively extensive levers of intervention.

The Regulation sets out an original system of insolvency proceedings[59], aimed at overcoming the limitations generated by national legislations. This system creates a hierarchy of proceedings, combining them into two models, that of universality and that of territoriality. From the perspective of universality, the central proceedings of the Regulation have an extraterritorial mandate, reaching all of the debtor's assets, regardless of the Member State(s) in which they may be located. Additionally, a series of territorial proceedings assist and complete the main one, working in conjunction, in order to ensure the winding-up of the debtor's assets.

The proceedings instituted by the Regulation comprise a set of rules applicable in order to coordinate the measures to be taken with regards to the assets of insolvent

[58] This Regulation does not apply to groups of companies. However, some key-concepts need to be determined, as they have considerable consequences in determining jurisdictional competence, the applicable law etc. Doctrinal discussions are amplified by the lack of clarifications in the body of the Regulation (see Bouillot, 2010).

[59] For detailed explanations, see Audit and de Avout (2013, pp. 964–965 and p. 977).

debtors. The purpose of these provisions is to avoid the transfer of assets from one Member State to another, in pursuit of more favorable judicial proceedings.

Member States have at their disposal two types of proceedings: main insolvency proceedings (collective proceedings), defined individually for each Member State, and secondary proceedings, which may be opened concurrently with the main proceedings. The insolvency proceedings included in the Regulation do not necessarily require the intervention of judicial bodies. From a terminological point of view, the term "court" does not only designate a court of law, but it also refers to any other person or body empowered, under national legislation, to open insolvency proceedings. The time of the opening of proceedings is the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.

The main insolvency proceedings are centered on the Member State in whose territory the debtor has her/his center of main interests. These are universal proceedings that include all of the debtor's assets, regardless of the Member State(s) in which they are situated[60]. "The center of the main interests" (*centre des intérêts principaux*) designates the place where the debtor conducts the administration of her/his business on a regular basis. It obviously corresponds to the registered office, of which there can only be one for any entity involved in insolvency proceedings. In order to make available a few terminological clarifications, the EUCJ has repeatedly ruled on prejudicial questions brought before the court. The debtor's "center of the main interests" was the subject matter in actions such as *Eurofood* (2006), *Staubitz-Schreiber* (2006), *Interedil* (2011), which made it apparent that the notion under discussion is autonomous and should be interpreted in a uniform fashion, exclusively from the prism of Union law, without making use of national legislations. These decisions issued by the Court are useful and welcome, since the interpretation of this expression may lead, hypothetically, to radically different solutions. Had it been granted, for instance, that the center of the main interests be interpreted according to the legal systems of the Member States, the differences between those systems would have represented an obstacle in the path of the unification of insolvency law at a European level (Minne, 2012, pp. 62–63).

Secondary insolvency proceedings[61] may be initiated in the Member State where the debtor has an office, noting that the effects of these proceedings are limited to the assets situated in the territory of that particular Member State. These proceedings are subsequent to the opening of the main insolvency proceedings and they pursue a different objective, generally that of protecting local interests. In some cases, the debtor's assets are too complex and cannot be managed in bulk, or

[60] The "Member State in which assets are situated" shall mean: the Member State within the territory of which the property is situated (for tangible property); the Member State under the authority of which the public register is kept (for property and rights ownership of or entitlement to which must be entered in a public register); the Member State in whose territory the third-party debtor has her/his center of the main interests (for claims) – article 2 of the Regulation.

[61] See the text of the Preamble to the Regulation, points 17–20.

the differences between the legal systems involved are too great and may generate difficulties, stemming from the ramifications derived from the legislation of the state of the opening of proceedings and reaching the other States where assets belonging to the debtor are located. It is precisely in order to avoid the occurrence of such situations that the liquidator, as part of the main insolvency proceedings, may request the opening of secondary insolvency proceedings, aimed at an adequate asset management.

The efficient management of the debtor's assets and, by implication, the efficiency of the provisions of the Regulation, is conditioned by the coordination of all proceedings taking place concurrently. Consequently, the liquidator plays and essential role and cooperation throughout proceedings is indispensable.

Where the debtor's center of the main interests is located in the territory of a Member State, the courts of another Member State have the jurisdiction to initiate insolvency proceedings against said debtor only if she/he has an office in the territory of the latter Member State. Such proceedings are territorial and they generally follow the main insolvency proceedings. As an exception to this rule, territorial insolvency proceedings may be initiated prior to the opening the main proceedings in the following cases:

- the main insolvency proceedings cannot be opened in the Member State where the center of the main interests is located because of the conditions laid down by the law of that Member State; and
- where the opening of territorial insolvency proceedings is requested by a creditor who has her/his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Law applicable to insolvency proceedings

The law applicable is the *lex fori concursus*, namely the law of the State of the opening of proceedings (the Member State within the territory of which such proceedings are opened), regardless of whether main or secondary insolvency proceedings are being discussed.

The scope of the applicable law shall determine: against which debtors insolvency proceedings may be brought on account of their capacity; the assets that form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings; the respective powers of the debtor and the liquidator; the conditions under which set-offs may be invoked; the effects of insolvency proceedings on current contracts to which the debtor is party; the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending; the claims that are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings; the rules governing the lodging, verification and admission of claims arising after the opening of proceedings; the rules governing the distribution

of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off; the conditions for and the effects of closure of insolvency proceedings; creditors' rights after the closure of insolvency proceedings; the person/persons to bear the costs and expenses incurred in the insolvency proceedings; the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

The opening of main insolvency proceedings by the court of a Member State that is recognized in another Member State allows the initiation of secondary insolvency proceedings by a competent court of the latter Member State without examining the debtor's insolvency. The rule is that the secondary insolvency proceedings are subject to the law applicable of the Member State within the territory of which the main insolvency proceedings are opened. The opening of secondary proceedings may be requested by the liquidator appointed in the main insolvency proceedings or by any other person or authority empowered to request the opening of insolvency proceedings in accordance with the law of the Member State within the territory of which the opening of secondary proceedings is requested. It is possible that the law of the Member State within the territory of which the opening of secondary proceedings is requested may set the condition that the debtor's assets be sufficient to cover, either in whole or in part, the costs and expenses of the proceedings; the court seised with such a request may require the applicant to bear a part of the costs or to provide appropriate security.

Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure herself/himself. Closure of the secondary proceedings by a measure referred to above shall not become final without the consent of the liquidator in the main proceedings; failing her/his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the proposed measure.

As an exception, main insolvency proceedings may be opened subsequent to secondary proceedings, but only by applying the limitative conditions included in article 36 of the Regulation.

As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States. Any creditor who has her/his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

The methods of information and the content of the claim are detailed in articles 40–42 of the Regulation.

The Regulation contains **special rules regarding the law applicable**, concerning several explicitly mentioned cases. For instance, the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. The relative effects of the debtor's rights regarding immovable assets, ships or aircraft subject to registration in a public register are governed exclusively by the law of the Member State under the authority of which the registers are kept. The effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market. Lastly, the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

International successions

Regulation no. 650/2012 makes extensive provisions regarding the law applicable to international successions. The provisions of this Regulation come into force in August 2015.

The law applicable to successions is, in general, the law of the Member State where the deceased was habitually resident at the moment of her/his passing. The law of another Member State shall be used, secondarily, if it is established that the deceased was, at the moment of death, "manifestly more closely connected" to a State other than the State where she/he has had her/his habitual residence. This subsidiary application ensues from the phrasing of the legal text: "Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1 (the law of the State of habitual residence), the law applicable to the succession shall be the law of that other State" [article 21(2)].

The provisions of this Regulation are conceived and correlated is such a way as to ensure, as a rule, the application of the law of the authority hearing the succession. In fact, this is the role played by such legal instruments, which are activated when, for instance, the deceased had chosen the law of the Member State whose nationality she/he possessed as the law applicable to succession. We are referring to, in this sense, to the choice of forum or to the *forum necessitatis*).

In relation to a State that has two or more systems of law or sets of rules applicable to different categories of persons in respect of succession, any reference to the law of that State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules,

the system of law or the set of rules with which the deceased had the closest connection shall apply (article 37 of the Regulation).

A few **clarifications** are necessary: the cases generated by the situations of fact are extremely diverse compared to the provisions of the legal norm. The freedom of movement and, consequently, the growing mobility of nationals gives rise to situations that do not automatically match a predetermined pattern. In such circumstances, it becomes impossible to simply and clearly establish that the case in question requires the application of the habitual residence as the connecting factor or that it becomes necessary to use the syntagm "manifestly more closely connected" (connection between the deceased and a certain Member State to be determined by means of this expression used by European legislator).

Habitual residence is a crucial element of the Regulation: it is the determining factor in establishing both the competent court and the law applicable to the succession. Consequently, the authority dealing with matters of succession is facing a complex task, as it must undertake an assessment of all the circumstances of the deceased's life, while also considering all relevant facts. Special attention shall be paid to the duration and regularity of the presence of the deceased in the State concerned, as well as the reasons for and the conditions of this presence. Once determined, habitual residence represents a real connecting factor between succession and the Member State where competence is exercised and whose law becomes applicable. It serves the purpose of attesting a close and stable connection to the State in question, considering the specific objectives of this Regulation.

Difficulties in establishing habitual residence may arise from different factors. Among the explanations offered through the recitals of the Regulation, a few situations are mentioned that often pose practical problems to establishing this connecting factor. A case in point is the situation where the deceased had gone, for professional or economical reasons (or, more to the point, to work), abroad, sometimes for a long time, but, at the same time, had maintained a close and stable connection with her/his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have her/his habitual residence in her/his State of origin in which the center of interests of her/his family and her/his social life was located. Also difficult, due to its complexity, is the situation where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all her/his main assets in one of those States, her/his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

Manifestly closer connections may exist between the deceased and a State other than that of habitual residence; however, the authority dealing with the succession is required to carry out an attentive and concrete assessment of all the factual circumstances. Where, for instance, the deceased had moved to the State of

her/his habitual residence fairly recently before her/his death and all the circumstances of the case indicate that she/he was manifestly more closely connected with another State, we can conclude that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. The existence of closer connections with a State other than that where habitual residence had been established supports this conclusion. Thus, not only the letter, but also the spirit of the Regulation is complied with, as it is meant to be a real link between the *de cujus* and the State with whom she/he had had the closest connections. However, the European legislator maintains that the manifestly closest connection should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex (recital 25).

Choosing the law applicable to succession[62] shall be expressly mentioned and drawn up as a provision in case of death that designates the law of one of the States whose nationalities the deceased possesses, so as to ensure the connection between the deceased and the State chosen and in order to avoid that a law be chosen in order to defraud the vested expectations of persons eligible for succession.

The main reason why the law applicable to international successions is so thoroughly regulated is legal security, which can only be attained by a proactive and solid knowledge of the recourses made available to Member States by the provisions of Regulation no. 650/2012 concerning the adequate organization of the legal regime of assets in case of death. The law applicable shall govern the succession as a whole, regardless of the nature of the assets and without making distinctions based on their location – in the territory of a Member State or in the territory of a third-party state – in order to ensure legal security and therefore avoid the danger of succession fragmentation. Additionally, this Regulation settles the imperative of predictability of the law applicable to cross-border successions. The Regulation stipulates explicitly that the mechanisms aimed at sanctioning the elusion of law remain in force. With regards to the deployment of the public policy (*ordre public*) exception, it should be determined by considerations of public interest, meaning – as emphasized doctrinally – particular prudence regarding the provisions concerning forced heirship (provisions that mainly deal with the protection of private interests)[63]. No provision of this Regulation shall be refused, unless it is evidently incompatible with the legal order of the forum.

[62] "A person may choose as the law to govern her/his succession as a whole the law of the State whose nationality she/he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality she/he possesses at the time of making the choice or at the time of death" [article 22(1 and 2)].

[63] For detailed explanations regarding international public policy according to Regulation (EU) no. 650/2012, see Oprea (2013).

The European small claims procedure

The premise of adopting Regulation no. 861/2007[64] is the recognition of the growing number of obstacles in the path of obtaining swift and less onerous court judgments in cross-country actions. In spite of the fact that many Member States have introduced simplified civil procedures for small claims in their internal order, costs, delays and complexities connected with litigation do not necessarily decrease proportionally with the value of the claim. Consequently, and as part of the measures taken towards improving cross-border civil judicial cooperation[65], Regulation no. 861/2007 establishes the European Small Claims Procedure.

The objective of this European procedure is to facilitate access to justice, to accelerate the settlement of litigation with an extraneous element concerning small claims and to reduce costs by using the instruments made available by the Regulation. This Regulation shall be applied exclusively to cross-border actions.

Scope. This Regulation shall apply, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2 000 at the time when the claim form is received by the court with jurisdiction, excluding all interest, expenses and disbursements. This method of calculation does not infringe on the court's competence to grant such disbursements, nor does it influence the norms of internal law applicable to calculating interests.

There are some **matters where the Regulation does not apply**, such as: revenue, customs and administrative matters, state liability for actions or omissions in the exercise of state authority; the status or legal capacity of natural persons; rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration; employment law; tenancies of immovable property, with the exception of actions on monetary claims; violations of privacy and of rights relating to personality, including defamation.

[64] Regulation no. 861/2007 concerning the establishment of a European small claims procedure had been amended by Regulation no. 517/2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defense policy and institutions, by reason of the accession of the Republic of Croatia.

[65] Regulation no. 861//2007 has been preceded by other measures, such as: regulation (for instance, Regulation Brussels I, Regulation no. 805/2004 concerning the creation of a European Enforcement Order for uncontested claims, Regulation no. 1896/2006 creating a European order for payment procedure); a program of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (30 November 2000); The Green Paper concerning the creation of a simplified procedure regarding the European payment order and the adopting of measures to simplify and accelerate the settlement of small claims litigation.

Article 3 of the Regulation defines **cross-border cases** as those cases in which at least one of the parties is domiciled or habitually resident in a Member State[66] other than the Member State of the court or tribunal seised. The relevant moment for determining whether there is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction.

The European Small Claims Procedure is an alternative to the procedures regulated by the legislations of the Member States. Regulation no. 861/2007 does away with the intermediary procedures necessary for the recognition and enforcement in the territory of one Member State of judgments issued in another Member State in matters concerning the European Small Claims Procedure. This is a w*ritten procedure*, except for cases where the court deems it necessary to hold oral hearings or for instances where a party so requests (the members of the court have the authority to decide on such a request, which can be either granted or denied, in written form).

The special procedure governed by Regulation no. 861/2007 is commenced by the claimant by filling in the standard claim form and lodging it[67] with the court or tribunal with jurisdiction[68]. All documents shall be served on the defendant, in compliance with the periods of time and the methods expressly mentioned in article 5 of the Regulation. The defendant may lodge a counterclaim – pursuant to the Regulation, a counterclaim is the claim stemming from the same contract or fact as the main claim. The claimant shall submit her/his response to the counterclaim within 30 days, unless the claim exceeds the aforementioned sum (EUR 2000), in which case both claims (the main claim and the counterclaim) shall be settled according to the procedural norms of the Member State where the proceedings are taking place. Since the two claims exceed the scope of the Regulation (because of their value), they shall be settled in accordance with the procedural law of the Member State of the court seised.

In light of the provisions of the Regulation, the simplification of the procedure is also determined by the role played by the court or tribunal. To this end, the preamble stipulates that the court or tribunal should act as soon as possible even when this Regulation does not prescribe any time limit for a specific phase of the procedure. Also, for the purpose of accelerating the procedure, the court may supply procedural information, in accordance with the internal law (recitals 22–23). The understanding of these texts should be correlated with recital 9, according to which this Regulation seeks to promote fundamental rights and takes into account, in particular, the principles

[66] Member State designates the Member States of the European Union, with the exception of Denmark.

[67] The claim shall be lodged with the court or tribunal with jurisdiction or shall be sent to it directly, via postal services or any other method of communication accepted by the Member State where the procedure had been initiated (such as fax, e-mail or any similar methods).

[68] The Member State to whom the claim is addressed is the Member State where the document has been served, communicated or transmitted.

recognized by the Charter of Fundamental Rights of the European Union. The court or tribunal should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing[69] and on the means of taking evidence and the extent to which evidence is to be taken. The court or tribunal shall issue judgment within 30 days from receiving the reply to the oral hearing or after having received all necessary information.

For the same prevailing purpose of ensuring simplicity and efficiency, judgments issued in one Member State are recognized and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

The European order for payment procedure

One of the essential measures for eliminating the causes of insolvency is the establishing of simplified order for payment procedures. The swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for economic operators in the European Union, as late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized enterprises, and resulting in numerous job losses. All Member States have tried, at a legislative level, to establish collective procedures of mass recovery of uncontested claims. However, practice has proved that internal procedures have little to no effect. Furthermore, the procedures currently in existence are frequently either inadmissible or impracticable in cross-border cases.

The Preamble to Regulation no. 1896/2006 that creates a European order for payment procedure[70] addresses this current issue of recovering uncontested international claims. *Brevitatis causa*, adopting the Regulation has been crucial for the removal of imbalances in the functioning of procedural means afforded to creditors in different Member States and, by implication, for the guaranteeing of a level playing field for creditors and debtors throughout the European Union.

The purpose of this Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested claims and to permit the free circulation of European orders for payment throughout the Member States. A European order for payment issued in a Member State and that had become enforceable is considered, in terms of enforcement, as if it were issued by the Member State required to carry out the enforcement. The reason is mutual trust in the administration of justice among Member States, which implies that the court[71]

[69] Oral hearings can also take place through videoconferences or other communication methods, when such methods are available.

[70] This Regulation has been amended twice: by Regulation no. 936/2012 and by Regulation no. 517/2013.

[71] The term "court" designates any authority of the Member State that has jurisdiction in terms of European orders for payment or any other related matters.

of a Member State may assume that all the conditions necessary for the issuing of a European order for payment are fulfilled, before allowing the enforcement of said order for payment in all other Member States, without judicial review of the proper application of minimum procedural standards in the Member State where the order for payment is to be enforced.

Furthermore, the procedure established by the Regulation serves as a complementary and optional instrument that the claimant has at her/his disposal, in the sense that also she/he has the possibility to use the procedure provided by the national law. Consequently, the Regulation does not replace, nor does it harmonize the measures of recovering uncontested claims that exist in the national legislation.

The provisions of this Regulation shall apply exclusively to civil and commercial matters, in cross-border cases, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii).* The Regulation shall also not apply to rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; claims arising from non-contractual obligations (except for cases where they have been the subject of an agreement between the parties or there has been an admission of debt, or where they relate to liquidated debts arising from joint ownership of property).

The procedure regulates pecuniary claims, liquid and payable at the date a European order for payment has been lodged. The use of standard forms provided in the Annex to the Regulation is meant to simplify and accelerate the procedure. Once seised with the claim of European order for payment, the court is obliged to determine as soon as possible, making use of the claim form, if the regularity constraints are met and if the claim is valid. Even in cases where the completion or rectification of the claim is required, the time limits granted by the court shall comply with the imperative of celerity. The Regulation uses the following wording: "Where the court requests the claimant to complete or rectify the application, it shall specify a time limit it deems appropriate in the circumstances. The court may at its discretion extend that time limit". All the time limits mentioned in the Regulation are relatively short, but, at the same time, the regard for respecting the right to present a defense and procedural information becomes apparent. If all the legal requirements are met, the order for payment shall be issued as quickly as possible – typically within 30 days from lodging the claim (any periods of time necessary for the completion, rectification or modification of the initial claim shall be subtracted from the original period of 30 days).

Enforcement of the order for payment may be refused, in the Member State in which enforcement of a European order for payment is sought, in case the European order for payment is incompatible with a judgment issued or with an

order for payment issued earlier in any Member State or third-party state, on the following conditions: the earlier decision or order for payment involved the same cause of action between the same parties; the earlier decision or order fulfills the conditions necessary for its recognition in the Member State of enforcement; the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin[72]. Another reason representing grounds for refusing to enforce the judgment is the fact that the defendant has paid the claimant the amount awarded in the European order for payment. In all cases mentioned above, it is the defendant who needs to request the refusal to execute.

In exceptional circumstances, **execution may be stayed**. Upon application by the defendant, the court may limit the enforcement proceedings to protective measures or make enforcement conditional on the provision of such security, as it shall determine.

The court or authority with jurisdiction in matters of European orders for payment shall not proceed to reviewing the substance of an order for payment issued in another Member State.

European enforcement order for uncontested claims

The notion **"uncontested claims"** refers to all situations where a creditor, absent a contestation from the debtor regarding the nature and amount of a pecuniary claim, has secured either a court judgment against said debtor or an enforcement order that requires the express acceptation of the debtor, be it a court settlement or an authentic instrument. Article 3 of Regulation no. 805/2004 lists the cases where a claim shall be considered uncontested:

- if the debtor has expressly agreed to it by admission or by means of a settlement that has been approved by a court or concluded before a court in the course of proceedings;
- if the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings;
- if the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin;
- if the debtor has expressly agreed to it in an authentic instrument.

The enforcement orders that need to be certified as **European enforcement orders** are court judgments, court settlements and authentic instrument on uncontested claims. Furthermore, the Regulation shall apply to judgments issued

[72] "The Member State of origin" means the Member State in which a European order for payment is issued.

following actions initiated against court decisions, court settlements or authentic instruments certified as European enforcement orders.

The enforcement of orders according to Regulation no. 805/2004 brings undeniable advantages compared to the exequatur procedure stipulated in the Brussels I Regulation, as it does away with the consent of judicial authorities of the Member State of enforcement, which entails the reduction of delays and costs associated to the agreement in question. The removal of judicial supervision is connected directly to the consideration of fundamental rights in civil cross-border litigation. The Preamble to the Regulation mentions the right to a fair trial and the right to organize a defense. Minimum standards guaranteeing these rights should be established for the proceedings that would ultimately lead to the passing of judgment, so as to ensure that the debtor is informed about the court action taken against him with sufficient time in advance and in such a way as to enable him to organize her/his defense.

A decision concerning an uncontested claim shall only be certified as a European enforcement order if the judicial proceedings in the Member State of origin have complied with the minimum standards stipulated by the Regulation. These standards refer to the serving and communication of procedural documents, as well as to informing the debtor about the claim and about the procedural formalities she/he needs to fulfill in order to contest the claim.

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