

Application and Consideration of Foreign Law

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Abstract: *Though seemingly trite, the common question of "what law applies?" can often be a thorny issue. This article analyses the application of foreign law within the framework of Romanian private international law, offering a presentation of the legal mechanisms and doctrinal principles governing such application. Questions of law relating to facts are properly reserved to the judge for disposition. But a preliminary question, relevant to the phase or phases of trial, is often presented to the court. While most questions of law fall within a legal framework of national law, some – conflicts cases – must be answered independently of the nation-state or domestic legal system. The law of a foreign jurisdiction may govern an issue or in its absence, international law. When such questions arise, their resolution is complicated. The paper elaborates on the conceptual meaning of lex causae, outlining its different interpretations based on territorial jurisdiction, legal system structures, and sources of law, including statute law, case law, and religious law. Starting from the legal provisions, the paper presents the regulation forms of the application of foreign law in Romania, as well as rules of jurisdiction. By means of legal theory, statutory references, and pragmatic illustrations, the paper offers a thorough grasp of the rationale, scope, and constraints of applying foreign law in Romanian legal practice, so augmenting the larger debate on legal pluralism and transnational legal interactions.*

Keywords and JEL Classification: *private international law; conflict of laws; foreign law; lex causae; applicable law*

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1. Introduction

The concept of foreign law is essential in the field of international law, being a central element for understanding the interactions between the legal systems of different states. A foreign law refers to the totality of legal norms that regulate relationships and behaviors outside the jurisdiction of a given state, which implies both written and unwritten legislation, including customs and general principles of law that can influence legal decisions. The definition of a law as foreign is made according to the territorial criteria; it is classified as foreign when it applies outside the area of competence of the state in question. This concept becomes more relevant in the context of globalization, when transnational transactions are increasingly frequent and require a deep understanding of the legal divergences between the various jurisdictions.

The relations between law and the State are built and implemented by each State. The evolution of international law made the other States interested, alongside the role of local law of a foreign State on the territory of another State. Therefore, each State has special rules about foreign law, including the matter of illicit foreign law application. The application of a foreign law upon the Romanian territory is a special matter of international public law, as well as domestic law, or public law. Controlling foreign law is a legal matter which has consequences upon the law regarding proof. Each State may consider favorable or unfavorable a foreign law, and limit or prohibit its effects upon national territory or require an offence to apply in a stricter manner. Any approach must consider aspects of the State application of foreign law established, because it can determine serious inconsistencies in legal order, enforcement and management of the judicial system efficiently.

Nevertheless, notice that both approaches are necessary within a legal culture by complying with the general limits derived from international public law. A collective approach is being analyzed by different writers because of its compatibility with interests and development prospects. The application of a foreign law upon the territory of Romania is warranted. The validity of private law dispositions must be controlled. Also, the application of statutes of foreign states contrary to Romania's constitution, public order or morals shall be inadmissible. The national law of a State concurs with international law, unless the general principles of international law from the Constitution of Romania provide lesser limits. Romania's authority relates to foreign private law applicable upon Romania's territory. The supreme norms of jurisdiction law take the place of competent court jurisdiction and relation of rights and obligations. The application of foreign law in Romania must be related to the term "application" taken in a broad sense.

The law strictly limits the cases of application of foreign law and clarifies the proof of foreign law. One of the conditions related to the proof of foreign law by the party

of the trial refers, on the one hand, to the necessity of knowing the characteristics of the foreign law and on the other hand to the possibility of the court in charge of setting the dispute ascertaining the foreign law content.

2. Legal Framework Governing Foreign Law

The principles of the application of foreign law are essential for understanding the interactions between the legal regulations of different jurisdictions. Among them, two fundamental principles are autonomy of will and public order, which, together, constitute the basis by which courts or competent authorities determine the applicability of foreign rules in the specific context of a legal dispute or an international legal relationship.

The Foreign Law Act (FLA), Law No. 105/1992, regulates the application of foreign law in Romania. In terms of kinship, applicable law (content) and jurisdiction, the FLA gives priority to international treaties or the regulation of the applicable law in special legislative acts, with respect to nationality, obligations, acts of civil status, etc. (Goga, 2007). Thus, the phrase in the domain of international treaties and in the domain of special laws complements the generic title of the FLA. The application of the FLA under conditions of reciprocity is also limited, with respect to legislative acts in the civil domain of the state, in accordance with the first sentence of art. 2 of the FLA.

According to the second sentence of art. 2 of the FLA, if the foreign law is contrary to Romania's public order, this foreign law will not be applied. The Romanian court has the obligation to appreciate the contrary effect to public order. The public order, in general, is defined as a set of essential rules that ensure the proper functioning of a state's social, political and economic life (Rusu, 2010). In private international law, the public order is correlated with the principle of respect for public order and morality and comprises those legal normative acts that envisage elementary interests or principles on which the social organization of a state rest. Also consider that the application non-admission and the evaluating parameters of the existence of the contrary effect to public order are stipulated by art. 3 s.a. of the FLA.

Article 11 of Law no. 105/1992 can be analyzed in two separate sections. Firstly, "the foreign law shall apply" regulates the applicability criteria of the foreign law. Secondly, the obligation of reciprocity in applying a foreign rule of law explains the legal consequences of the first section. In the light of that article, the foreign law shall apply only when the reciprocal application of the Romanian law is assured. Reciprocity can be proved either by all means or by the presumption of reciprocity. Consequently, if there is no evidence to prove the existence of the reciprocity, Romanian courts shall refuse to apply a foreign rule of law. Romania renders, for

instance, the same treatment to the foreign "antimonopoly" law, as that provided for by the Romanian antitrust regulation.

2.1. Constitutional Provisions

The Romanian Constitution of 1991 is the supreme law of the country. The provisions of the Constitution can be applied directly by the courts and all State authorities in accordance with their scope as set forth by law. Without completing the relatively exhaustive inventory of the fields in which the Constitution has the character of a law, a legal act "in the strictest sense", it is worth mentioning some key aspects, of both regulatory and procedural nature, which are essential for understanding and/or interpreting and applying the provisions in question. Aspects regarding the direct application of the Constitution are mainly regulated by art. 1 para. (5) and art. 12, which, it is worth noting, circumscribe the scope of application of art. 148 para. (2). In terms of superior authority, the Constitution occupies the highest position within the hierarchy of norms in Romania and establishes the boundaries of the legal order (Matei & Cocosatu, 2008). As a result, all other laws should be in accordance with the Constitution. Otherwise, the nullity is pronounced by the Constitutional Court established by the Basic Law, whose decision is generally binding (art. 1 para. 2). The Ombudsman and the Government can contest the unconstitutionality of laws, decisions of the Senate, of the Chamber of Deputies and local councils, as well as of the actions of the President of Romania, the Prime Minister and ministers, among others. Any person may raise a challenge by claiming the unconstitutionality of the laws and ordinances for the adoption of which the government had invoked the emergency procedure. Art. 124 para. (1) of the Constitution guarantees the right to defence as part of the right to a fair trial. Everyone has the right to challenge the lawfulness of the administrative acts by action submitted to the administrative court, in accordance with the law on administrative contentious. The Dormant Procedures and Deadlines Law is the first decision that a judge should examine, in all cases of administrative contentious. Considering the need for prevention and protection, it must be ensured that the public administration shall refrain from acts of vigilance or repression against the legitimized persons. Any act of the public administration shall be declared null and void by the administrative court if it has been adopted in violation of the law (Silviu Săraru, 2014).

2.2. International Treaties

The cases of international treaties before the Romanian and European Courts mean the consideration of foreign law, particularly the applicable treaties. International treaties shall be applied in Romania according to the Constitutional provisions and applicable decisions of the Constitutional Court. The review of the conditions of priority of international treaties involves the review of the classification of the

international treaty. The general assessment of the convention would delineate the substantive and traditional concept of international treaties, as two-party, convention, elaborated in accordance with the rules. The Domestic jurisdiction of a state would delimitate the scope of Public International law. Regardless of the topic, the allocation of the international treaty to a non-priority category would be equivalent to stating that a provision of European law invoking the applicability of a national statute is to be disregarded in judicial practice by dint of not being a Directive or Regulation. The non-primacy of an international treaty would generate complete legal uncertainty. The conditions of application of international treaties, the principles of international directives or imperative rules of law cannot be amended at the Domestic level. Treaties on matters of great national interest, autonomy, basic structure or values can be invoked in a constitutional claim, but solely. Besides cases of precedence over the Constitution, whereby the European law can apply directly, the order of priority of the application of the law remains fixed and strictly classified.

2.3. Domestic Legislation

The Romanian law stipulates that foreign law can apply before Romanian courts if it is the law applicable according to the act or state in question and can allow clauses giving preference to foreign law in contracts draft. The procedural law is exclusively that of the state controlling the court. It is this procedural autonomy that proves most problematic in practice. Some key issues regarding the approach of Romanian law to foreign law have been noticed. First, the invocation of foreign law is left effectively to the parties, most courts appreciating that they cannot instigate the gathering of extra evidence of it, as would happen with domestic law from other tribunals. It has also been shown that more problematic issues sometimes arise in relation to highly complex private international law cases. In principle, foreign law is proved with an ordinary certified translation by a sworn translator. However, this does not work in practice, as transliteration of a foreign legal term does not carry any substantive meaning to a Romanian court, instead of a valid official language translation into Romanian. Instead of one method, various systems exist in the Romanian case law, being often the position that courts can apply foreign law, but on the assumption that in case the parties instigate it. The solutions are also diverging on the issue of the gathering of evidence of the content of foreign law ex officio. On the one hand, an answer to being envisaged could be that foreign law is indispensable for the court to decide over the law applicable to the dispute and therefore must be proved by it. However, on the other hand, it is equally valid an answer to the opposite effect, on procedural grounds.

3. Types of Foreign Law

The application of foreign law in private international law is a fundamental area, given the diversity of legal systems and the complexity of international relations. This application is guided by conflict rules, which determine how the law applicable to a transnational relationship is established, considering the connecting factors. Conflict rules are generally regulated by the legal order of the state that recognizes the development of a particular legal relationship, and these can be articulated according to criteria such as nationality, domicile or place of business. In essence, these rules ensure a coherent and unitary approach to the application of foreign law, a crucial aspect in the management of international disputes and in the prevention of legal conflicts.

In Romania, the application and consideration of foreign law by Romanian authorities can take several forms in the case of Civil Law. In specific cases under the exclusive jurisdiction of Romanian courts, governed by Articles 4-7 of the Romanian Statute of Private International Law, Romanian courts function according to Romanian law, without examining or applying the relevant foreign law. So, also in cases where a foreign foreclosure on a property located in Romania, there are two types of actions that differ regarding foreign law. On the contrary, in the case of annulment of the foreign enforcement order (the action that is the subject of this case analysis), the court's competence is based on the existence of a real estate in Romania. Therefore, the enforcement of the foreign decision of annulment occurs solely according to the Romanian law, without any analysis of the foreign law. Nonetheless, under the umbrella of civil jurisdiction, a refusal to decide on the merits, although some would argue that it is a form autonomous to settle, is still subject to the substantive law of the case that is essentially unexamined by the Romanian courts.

According to the principle of territoriality enshrined in the Romanian Penal Code, the Romanian criminal law applies to the deed produced in Romania, without restraint as to nationality, by any person, unless the deed is provided by the law of another state according to which it is punishable by deprivation of liberty up to 2 years, in which case the Romanian criminal law does not apply (with the exception of cases foreseen by the Penal Code).

The presently applicable legislation does not concern companies due to their lack of legal personality. Therefore, it is necessary to refer to the national law for the nature and other legal relationships of companies, bank operations, and their relations with the National Bank of Romania, activities in the field of commerce, labels, means of propaganda, warrants, negotiable instruments, bills of exchange, venues for public sale, and investment objects. Except for the mention of the counterparts in the identification and classification of the contraventions and the measures to be taken,

the provisions of the law contain no stipulation or situation that merit, as a particular interest, a special mention which could differ from those stipulated in the detailed regulation in this field in other countries.

4. Challenges in Applying Foreign Law

In the light of the tensions apparent over the interpretation of the first condition imposed by the legislature, ambiguities arise on the legal and constitutional dimensions of the conditions governing the reception of foreign law. The silence of the law in this respect does not appear insurmountable through an interpretation that upholds the validity of the condition imposed by the law for the application of foreign law. Alongside it, regulations governing the incompatibility of the foreign law to be applied may also be made use of or the general principles of civil or international law. However, the rules of international law, transposed into the domestic legal order, are not without problems in the Romanian constitutional system. Non-application of these provisions governing the competence of foreign courts, including conditions enabling the determination of law applicable in international civil actions, risks parliament actions being null, but other, strict constitutional consequences can also derive from their non-application. The "act" rendered by courts in breach of either the Romanian or the other foreign law, but incompatibility with determination of law applicable in civil matters under the regulations of international private law in force, continues to have legal effects or produces legal effects. For these reasons, the examination of foreign law and the implied provisions, including compatibility with constitutional order or can also lead to the enforceability of the arbitral award at issue in Romania. The affected party may raise with the president of the court with enforceability jurisdiction either the non-application of the provisions of the foreign law rendered in breach of the provisions of the applicable foreign law, or the incompatibility of the provisions of the foreign law with the Romanian fundamental law and other norms of a similar nature.

As the need to use and enforcing different legal systems and orders has grown, so has the need for attention to the approaches for establishing the operation of those different laws and jurisdictions, which is an aspect of law that can be technical and complicated, but certainly necessary (Diaconu & Andrus, 2011). In the more integrated world, a system of law, which contains several coexisting legal systems, is one probable way to characterize the law of future.

Thus, both the criticism of the application of foreign law and the current challenges emphasizes the need for a dynamic and adaptable legislative framework, capable of responding to the realities and needs of the modern world. Finding a balance

between respecting international law and protecting national interests proves to be both an opportunity and a major challenge for legislators, practitioners and courts. International dialogue and the development of uniform or guiding norms can contribute to resolving these contradictions, thus facilitating the application of foreign law in diverse contexts.

5. Future Trends in the Application of Foreign Law

The future landscape surrounding the application and consideration of foreign law is marked by significant evolutionary trends that compel legal scholars and practitioners to reassess their methodologies and frameworks. As globalization intensifies, the interconnectedness of legal systems is set to deepen, necessitating a fluid adaptation to diverse legal principles and jurisdictions. This ongoing evolution of legislation will likely see the harmonization of certain legal standards, particularly in areas like commercial law, where cross-border transactions will increasingly demand consistency and predictability. Any divergence in the legal treatment of similar issues could adversely affect international dealings, hence legislative bodies may pursue coordinated reforms that address disparities in foreign law recognition.

A democratic state implies an independent, impartial, and efficient justice; for these parameters to be met, the Romanian Justice underwent permanent reforms in the last 35 years. In this respect, it can be firmly claimed that the following targets were pursued and accomplished: the modernization of the judicial system and the statute of the judge, creation of new tribunals, specialized tribunals, courts of appeal, introduction of the informatics system, a series of legislative amendments in civil and criminal matters, and respectively civil and criminal procedure, mediation introduction in adjudicating certain categories of litigations, insuring the access to justice. It is envisaged that any reform undertaken clearly and precisely demonstrates the measures followed to guarantee that the judicial system is an efficient one, answers the necessities of transparency and democracy, strengthening the confidence of the citizens in the justice.

6. Conclusion

In conclusion, the application and consideration of foreign law is a complex yet crucial dimension of contemporary legal practice, particularly in an increasingly interconnected global environment. This process requires a nuanced understanding of how foreign legal systems intersect with domestic norms and regulations. It is essential to recognize that jurisdictions may differ significantly in their legal principles, enforcement mechanisms, and dispute resolution frameworks. Therefore, a principled approach to the incorporation of foreign law not only

enriches the legal discourse but also underscores the importance of legal pluralism in today's globalized society.

The effective application of foreign law hinges on several critical factors, including the principles of comity and legal certainty. Courts must navigate these principles while respecting the sovereignty of other states and maintaining their own legal integrity. This balancing act necessitates a thorough examination of the relevance and applicability of specific foreign laws to the matter at hand. Consequently, legal practitioners are encouraged to adopt comprehensive research methods, leveraging comparative law techniques to ascertain how foreign statutes and case law align with or diverge from domestic legislation. Such diligence is paramount in avoiding legal pitfalls and ensuring that the interests of justice are upheld across borders.

Moreover, as transnational legal issues become more prevalent, the role of treaties and international agreements cannot be overlooked. These instruments often provide frameworks for the recognition and enforcement of foreign judgments, further exemplifying the symbiotic relationship between domestic and international legal systems. The challenges posed by differing cultural contexts, legal traditions, and interpretative methodologies must be addressed, especially in light of the expanding scope of international arbitration and alternative dispute resolution mechanisms.

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