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Conflict Rules on Contractual Obligations in Romanian Private International Law

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Abstract

In the present paper, I have analyzed the Law applicabile to contractual obligations under Regulation (EC) No. 593/2008. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice, the parties can select the law applicable to the whole or to a part of the contract.To the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract shall be determined concordantly with this Regulation.

Key Words: *Conflictual norm, Conflict rules, Contractual obligations in civil and commercial matter, Special contracts, lex voluntatis, the law chosen by the parties, ROME I.*

Introduction: The term of the rule L*ex Voluntatis*

The competent law to control the background conditions and the effects of the contract is *lex contractus*.
Lex contractus can be *lex voluntantis*, that is, the law chosen by the parties on their basis free will or the law determined by the conflictual norm, when *lex voluntatis* is missing.
According to the dispositions of the art. 2637 para. 1 C. Civ., "the background of the legal act is assessed by the law chosen by the parties or, as appropriate, by its author".
Lex voluntatis is the expression, in private international law, of the principle of autonomy of will of the parties or the principle of contractual freedom, which generally governs the substance of the legal act. Due to this criterion, the parties can assign the content of the judicial document or they can determine the law system applicable to their document, as *lex causae*.
Lex voluntatis applies both to unilateral legal documents and to bilateral ones, i.e. contracts. The will of the parties can be demonstrated only within the limits permitted by law. Thus, where Romanian law has the attribute of *lex fori*, this law determines the conditions in which the parties can carry out the freedom of choosing the contract law.
Regarding the choice of the law applicable to the document, this must be express or it must result indubitably from its content or from the circumstances (art. 2637 para. 2 C. Civ.).
Furthermore, the parties can choose the law applicable to the totality or only to a certain part of the legal document (art. 2637 para. 3 C. Civ.).
According to art. 2637 para. 4 C. Civ. "the agreement regarding the choice of the applicable law can be changed after the signing of the document. The modification has a retrospective effect, without being able to:

a. infirm the force of the document ,
b. reflect on the rights gained meanwhile by the parties."

According to art. 2637 C. Civ., when the parties did not choose the law applicable to the legal document, "the legal document could be governed by the law of the state wherewith the legal document presents the closest connections, and if this law cannot be identified, the law of the territory where the legal document was concluded will be applied.

It is considered that there are connections with the law of the state where the debtor of the characteristic performance or, as applicable, the author has, at the date of conclusion of the document, by case common residence, the stock-in-trade or the registered office."
From the legal dispositions mentioned in art. 2637 C. Civ. it results that, when the parties did not choose the law applicable to the legal document as *lex voluntatis*, the court of law will objectively locate the legal document in order to establish which law systems have connections with that particular legal act.
As a conclusion, we can keep in mind the idea that, in what concerns the law applicable to the legal document, the parties can, by free will, choose this law (*lex voluntatis*), and when the choice is missing, the jurisdiction agency will objectively locate the legal document in order to determine, depending on connection points, which law system will be applied to that particular legal act.

The law applicable to contractual obligations according to the Regulation (EC) no. 593/2008 (Rome I)

The Area of Application of the Regulation

According to art. 1 of the Regulation, the present regulation applied to the contractual obligations in civil and commercial matters, when there is a conflict of laws (*by conflict of laws we understand the situation in which to a judicial rapport with an extraneity, are suscebtible to be applied two or more laws which belong to different law systems, systems with whom the judicial rapport presents connection through the foreing element*) (D. Berlingher, 2012, pp 22).
The regulation does not apply, especially in fiscal or administrative matter (art. 1 para. 2, para 3, ROME I).
Also, the present regulation stipulates that the law applied through it is valid no matter if it is the law of a state member (art. 2 – universal application, ROME I).

The Law Applicable To the Contract

Art. 3 from the Regulation states that, in that which concerns the law applicable to the contract, the enforcement is *lex voluntatis*.
Thus, the contract is settled by the law chosen by the parties (Heiss H., 2009, pp. 1-16). In that which concerns the choice, this must be express or to result with a reasonable degree of certainty from the contractual clauses or from the circumstances of the case.
Through their choice, the parties can select the law applicable to the whole contract or only to a part thereof (art. 3, para 1, ROME I).

In that which concerns the express choice of the law applicable to the contract, this can be done through the insertion of a clause in the contract which will refer to the law applicable to that particular contract.
As regards the tacit choice of the law applicable to the contract, it results, with a reasonable degree of certainty, from the contractual clauses or from the circumstances of the clause. For the appreciation of the tacit choice with all the parties, the jurisdictional agency will analyze the subjective or objective elements of the contract. The subjective elements are intrinsic to the contract (for example, they refer of the parties' usage, the contracting parties' utilization of some legal institutions or terms specific to a certain law system etc.), whereas the objective ones are related to the nature of the contractual relations (e.g. the parties refer, after concluding the contract, to the law of a certain state in the contents of an additional document to the contract, the invocation by the recliner – of the law of a certain state and its implicit acceptance by the culprit etc.) (Dragoș A. Sitaru, 2013, pp 342-343).

Also, the parties convene, at any moment, to conform the contract to another law different from the one it was governed before. Any modification done by the parties regarding the applicable law, which intervenes after the signing of the contract, does not bring any harm to the validity of the form of the contract, and does not negatively affect the rights of third parties (art. 3 para 2, ROME I).

From the stipulations mentioned in this paragraph it follows that, based on the autonomy of the principle of will of the parties, these can change at any moment from their initial choice regarding the law applicable to the contract, and the contract can be conformed to a law different from the one previously chosen to govern the contract (Ioan Macovei, 2011, pp 199-200). The modification of the law applicable to the contract, established after concluding the contract, has a retroactive effect. The retroactive effect of the modification of the law is limited in the sense that the new law applicable to the contract, while it operates beginning on the date of concluding the contract, cannot bring any harm to the validity of the contract, nor can it bring any harm to the rights gained by the parties until the date of choosing the new law.

With reference to this settlement, appointed in art. 3 para 2 from the Regulation, the Romanian Civil Code follows the European Regulation, stipulating that "the agreement concerning the choosing of the applicable law can be modified after signing the document. The modification has a retroactive effect, without being able to:

a. infirm the validity of its form; or
b. bring any harm to the rights gained meanwhile by the third parties" (art. 2637 para. 4 C. Civ.).

According to art. 3 para 4 of the Regulation, "when all the relevant elements for the proper situation, at the moment when the choosing takes place, are in another country than the one from which the law has been chosen, the choice made by the parties does not bring any harm to the enforcement of the stipulations of the law from that country, hence it cannot be waived through agreement".

This legal stipulation refers to the situation when the parties have chosen as law applicable to the contract a law system that is different from the one in the area which has all the "relevant" elements of that contract (to deal with the situation when the only connection point of the contract with the foreign law chosen by the parties is given by their will to situate that contract under the incidence of that law).
In this situation, the choice of the parties can not be infirmed, but the solution lies in the fact that the respective contract will be committed to the imperative regulations from the law system in which its relevant elements are put. Thus, through this regulation, the public order of the law system with which the contract has an objective connection is guarded. *Per a contrario*, the other regulations of the law chosen by the parties remain applicable (Dragoș A. Sitaru, 2013, pp 348).

The solution is also the same for the regulation included in art. 3 para 4 from the Regulation, which states that: in the case of all the relevant elements for that situation, at the moment when the choice takes place, there is one or more member states, the choosing by the parties of an applicable law, different from the one of a member state, does not bring any harm to the proper application of the directives of the community law system, from where it cannot be waived through agreement, such as they have been transcribed in the competent law court of the member state.

The Law Applicable To the Contract in the Absence of the Law Chosen by the Parties

According to point 19 from the preamble of the ROME I Regulation, when the parties do not determine the law applicable to the contract, "this should be determined in accordance with the rule specified for that particular type of contract. Where the contract cannot be categorized as being one of the specified types or where its elements fall within more than one of the country where the party required to effect characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorized as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity."
As the law applicable to the contract was not chosen according to art. 3 from the Regulation, the law applicable to the contract is determined as follows:

a. A contract for the sale of goods shall be governed by the law of the state where the seller has his habitual residence.

b. A contract for the provision of services is governed by the law of the state where the service provider has his habitual residence.
c. A contract relating to a right in immovable property or to a tenancy of immovable property shall be governed by the law of the state where the property is situated.
d. A tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the state where the landlord has his habitual residence, provided that the tenant is a natural person and has is habitual residence in the same country.
e. The franchise contract shall be governed by the law of the country where the beneficiary of the franchise has his habitual residence.
f. The distribution contract shall be governed by the law of the country where the distributor has his habitual residence.
g. A contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined.
h. A contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined in the art. 4 para 1 point 17 from the Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law (art. 4, para 1, let a-h ROME I).

From the above-mentioned regulations it follows that when the parties did not choose the law applicable to the contract according to art. 3 from the Regulation, the applicable law is determined according to the specific type of contract. Thus, in most of the cases listed in art. 4 para. 1 let. a, b, d, e, f, the order determines the enforcement of the law where the debtor of the performance has his habitual residence. In the other cases, i.e. for let. c, let. g, let. h, the regulation refers us to the law of the country the contract has the closest connection to (Magnus U., 2009, pp. 27-50).
When to the contract does not apply the stipulations of art. 4 para. 1 from the Regulation or when the elements of the contract would apply more to let. a-h, the contract is governed by the law of the country where the contracting party has its habitual residence and who makes the characteristic performance (art. 4 para 2, ROME I).

As opposed to art. 4 para 1 from the Regulation, in which the debtor is customized by types of contracts, para 2 of the same article refers to the law of the country where the debtor of the characteristic performance resides, so its customization will be done by the jurisdictional agency.
The European regulation does not qualify the term of "characteristic performance", but from the interpretation through analogy of the conflictual solutions adopted in art. 4 para 1 from the regulation, one can deduce which will be the characteristic performance for all contract types which are not covered by the first paragraph. Thus, through characteristic performance of the party which on the strength of a translation property contract alienates a personal property or a right, or the representation of the party which, on the strength of lease or other similar contracts, makes available to a person, on a limited period of time, the usage of a good, or the performance of the bailsman in the contracts with assurance designation (Dragoș A. Sitaru, 2013, pp 364-365).
If from the ensemble of circumstances of the case, it results without ambiguity that the referred-to contract obviously has a closer connection with a country other than the one mentioned in para 1 or 2, the law of that other country shall apply (art. 4, para 3, ROME I).
The situations to which this paragraph refer, which justify the connection of the contract with another law system, other than those stipulated in para 1, para 2, will be established by the jurisdictional agency. Also, point 20 from the preamble of the present regulation, stipulates that "where the contract is manifestly more closely connected with a country other than that indicated in art. 4 para 1 and para 2, an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken of whether the contract in question has a very close relationship with another contract or contracts", in this situation, the jurisdictional agency can enforce the same law to both contracts.

Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country to which it is most closely connected (art. 4, para 4, ROME I).
The enforcement of this law, when a choice is missing, is also stipulated by the art. 2638 para I from the Romanian Civil Code. The directives of the conflictual norm from the art. 2638 Civil Code have at para. 2 the qualification of the term "of closest connection". Thus, it can be considered that there are connections with the law of the state where the debtor of the characteristic representation has, at the date of concluding the act, his common residence, registered office or stock-in-trade.

The Law Applicable to Some Special Contracts According to the Regulation (EC) no. 593/2008 (ROME I)

Contracts of Carriage (art. 5, ROME I)

When the law applicable to the contract was not chosen by the parties by their will, the applicable law shall be the law of the state where the carrier has his habitual residence, on the condition that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery, as agreed by the parties, is situated, shall apply (art. 5, para 1, ROME I).
If the law applicable to a contract for the carriage of passenger has not been chosen by the parties, the applicable law shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties can choose, as law applicable to a contract for the carriage of passengers, in accordance with art. 3 from the Regulation, only the law of the country where:
- the passenger has his habitual residence; or
- the carrier has his habitual residence; or
- the carrier has his place of central administration; or
- the place of departure is situated; or
- the place of destination is situated.

When the applicable law is missing, and it results without hesitation from the ensemble of the circumstances of the case that the referred-to contract has a closer connection with another country than the one previously mentioned, the law from that other country is enforced (Nielsen, P. A., 2009, pp. 99-108).

Consumer Contracts (art. 6, ROME I)

The contract concluded with a sole trader in a design which can be considered as not being connected with his professional activity ("the consumer") with another person, who acts in exercising his professional activity ("the professional"), is governed by the law of the country where the consumer has his habitual residence, on the condition that the professional:
- conducts his commercial or professional activities in the country where the customer has his habitual residence; or
- by all means directs his activities towards the country in question or towards several countries, including the one mentioned, and that contract refers to the area where those activities are conducted.

Also, the parties can choose the law applicable to a contract which meets all the previously provided demands, according to art. 3 from the Regulation (Ragno F., 2009, pp. 128-170).

Insurance Contracts (art. 7, ROME I)

For insurance contracts which cover major risks, no matter if the insured risk is situated or not in a member state, as well as for other insurance contracts which cover the risks situated on the territory of the member states, the law chosen by the parties is enforced.

When the enforced law was not chosen by the parties, the insurance contracts are governed by the law of the country where the insurer has his habitual residence. When, from all the circumstances of the case, it clearly results that the contract in question has closer connections with another country, the law of that country is enforced.

In case of a life insurance contract, the parties can choose, according to art. 3 from the Regulation, only one of the following laws:

- the law of any member state where the risk is located at the moment of concluding the contract;
- the law of the country where the insurance policy holder has his habitual residence;
- in the case of life insurances, the law of the member state of which the holder of the insurance policy is a citizen;
- for insurance contracts which cover limited risks to events which intervene in other member states than the one where the risk is situated, the law of the state in question;
- when the holder of the policy from a contract to which the present paragraph is applied carries out a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks related to the activities in question, and they are located in different member states, the law of any of the member states in question or the law of the country where the holder of the policy has his common residence.

When, in the above-mentioned cases, member states give much more freedom as regards the choosing of the law applicable to insurance contracts, the parties can avail themselves of this freedom.

Insomuch as the applicable law was not chosen by the parties, the law of the member state where the risk is located at the moment of concluding the contract would be enforced to these contracts.

For insurance contracts which cover risks for which a member state imposes the mandatory insurance, the following additional norms are enforced:

- the insurance contract does not fulfill the insurance obligation, except when it respects the specific stipulations agreed in connection with the insurance in question by the member state which assesses the obligation. Should the law of the member state where the risk is situated include stipulations opposed to those of the law of the member state which assesses the obligation of concluding an insurance, the latest prevails;
- a member state can establish as, through waiver, from choosing by the parties of the applicable law, the insurance contract will be governed by the law of the member state which assesses the insurance obligation (Gruber, U.P., 2009, pp. 109-128).

Individual Employment Contracts (art. 8, ROME I)

The individual employment contract shall be governed by the law chosen by the parties. In spite of all these, such a choice cannot abridge the employee of the protection given to this according to the stipulations which he cannot waive through convention by virtue of the law which, in the absence of a choice, would be enforced.

When the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country where the employer resides, or when missing, where the employer usually runs his activity in performing the contract. If the employee is temporary hired in another country, it is not considered that he changed his work place.

If the applicable law cannot be determined, the contract shall be governed by the law of the country where the employer unit is located. In the case in which, from the ensemble of circumstances of the case, it results that the contract in question has a tighter connection with another country, the law of that particular country will be enforced (Mankowski, P., 2009, pp. 171-216).

Conclusions

The contractual obligations represent the most important category of obligations derived from legal acts. The conflictual norms concerning this category of obligations are stipulated in the ROME I Regulation, which also constitutes the common law in matter of the law applicable to contractual obligations in

Romanian law. The Romanian civil law, enforced on October 1st, 2011, in art. 2640 para 1, refers to this regulation when it stipulates that the law applicable to contractual obligations is determined according to the regulations of the European Union law.

Para. 2 of the same article mentions that, in matters which are not in the scope of EU legislation, the regulations of the present Civil Code apply, if it is not otherwise stipulated through international conventions or through special regulations. Thus, the conflictual aspects which are not controlled through the Rome I Regulation are brought under the regulations of the conflitual norms from the art. 2637 – art 2639 of the Civil Code.

From the analysis of the legal stipulations of the Rome I Regulation, regarding the law applicable to contractual obligations, we can conclude that:

- on the basis of the autonomy of will principle, the parties can choose the law applicable to the entire contract or only to some parts of it.
- also, the parties can agree, at any moment, to conform the contract to a law different from the one it was controlled by before, and the new law will not bring any harm to the validity of the form of the contract, and will not affect the rights gained by third parties up to that moment.
- in case the parties did not choose the law applicable to the contract, on the basis of the manifestation of will, the applicable law is determined according to the specific type of contract, the jurisdictional agency being the one which will proceed to the objective location of the contract in order to determine, according to the connection points, which law system shall govern the contract.

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