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CONSIDERATION ON THE LEGAL REGIME APPLICABLE TO INTERNATIONAL TOURISM CONTRACTS

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Abstract

Upon conclusion of an international tourism contract, the contracting parties - one of which (the beneficiary) acts as the consumer – are facing legal difficulties, which are addressed by this study from the perspective of the interference between the national law and the European Union law. Thus, one of the primary issues considered herein is that concerning the determination of the applicable law based on which the rights and obligations of the contracting parties are to be established. Secondly, this study examines the applicable procedural rules in the case where a Romanian court is requested to settle a dispute arising from an international tourism contract. Finally, the study deals with the hypothesis where a dispute arising from such a contract is settled by a foreign court, and in particular with the effects of the judgment given by the foreign court on the territory of Romania. The above mentioned issues are the grounds behind this research on the legal status of international tourism contracts, in addition to the fact that, despite the rich contractual practice in the field under consideration, the amount of specialized literature on this subject is rather limited.

JEL Classification: *K33, K41*

INTRODUCTORY CONSIDERATIONS

The Concept

In Romania, the legal basis governing the subject matter of this study is the GO no. 107/1999 regarding the marketing of package travels (republished in the Official Gazette of Romania No 448 of 16 June 2008) transposing the provisions of Council Directive 90/314 / EEC of 13 June 1990 on package travel, package holidays and package tours (published in OJ L 158 of 23 June 1990). Order no. 1387/2015 issued by the Minister of Economy, Trade and Tourism (published in the Official Gazette No. 122 of February 17, 2016) has approved the contract for the marketing of tourism packages.

A tourism contract (referred to by the relevant Romanian legislation as the „contract for the marketing of package travels) is defined by Article 1 of the GO no. 107/1999 as the agreement between the travel agency and the tourist, whereby the tourist buys a package travel and the travel agency issues the tourist payment and travel documents. The package travel contains a combination of at least two of the following services: transport, accommodation and other services unrelated to the former ones (such as: meals, spa, recreation etc.). The duration of the services must exceed 24 hours or include one overnight stay.

The tourism contract acquires an international dimension when it contains an external element. As the specialized literature specifies, the external element is that part of the legal rapport (in this case of the legal relationship born under the tourism contract) which occurs in a foreign country or falls under the incidence of a foreign law; while the external element is not a distinct structural element of the legal rapport, aside from the subjects, content and object, it may nevertheless be a part of any of these components (Buglea, 2013, p. 7, Filipescu, Filipescu, 2007, p. 21, Lupascu, Ungureanu , 2015, p. 13; Sitaru, 2013, p. 1). Consequently, the international character of the contract may be given in particular by the foreign nationality or the residence in a foreign country of any of the contracting parties or by the place where one or more contractual obligations is/are to be performed.

Methodology

By examining the legal status of the international tourism contract, this paper seeks to:

- determine the applicable law establishing the rights and obligations of the contracting parties;
- establish the applicable procedural rules in the event that a Romanian court is called upon to settle a dispute arising from an international tourism contract;
- Identify the effects in Romania of a judgment by which a foreign court resolved a dispute deriving from an international tourism contract.

THE LAW GOVERNING INTERNATIONAL TOURISM CONTRACTS

Legal basis

The law applicable to international tourism contracts should be determined according to the provisions of Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I Regulation), published in OJ no. L177 of July 4, 2008. Article 2 of the aforementioned regulation enshrines its universal application, which renders irrelevant any possible distinction as to whether the extraneous elements are located in a Member State or in a third State or, as appropriate, whether they are governed by the law of a Member State or of a third State.

The law of the country where the consumer has his/her habitual residence

Since one of the parties to the contract, namely the tourist, is a consumer (for the purpose of both the Council Directive 90/314 / EEC and the GO No. 107/1999), it follows that the law applicable to the international tourism contract should be established in accordance with Article 6 of Regulation (EC) No. 593/2008, according to which the contract shall be governed by the **law of the country where the consumer has his habitual residence,** provided that the following conditions are met cumulatively: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence (e.g. through a branch or agency) or by any means (e.g. by advertising broadcast on television stations from the country where the consumer has his habitual residence), directs such activities to that country or to several countries including that county, and b) the contract falls within the scope of such activities. We believe that this latter condition is not fulfilled in the case where the travel agency has a wider scope of business and where activities other than tourism are directed to the county where the consumer has his habitual residence.

The criteria based on which the habitual residence of the natural person (the tourist) is to be determined are not uniformly defined by Regulation (EC) No. 593/2008, for which reason the private international law rules within the jurisdiction of the notified court become applicable. Thus, if the Romanian court is notified, then, according to Article 2570 (1) and (2) of the Romanian Civil Code, the habitual residence of the natural person is in the country where the person has his main domicile, even if he or she has not fulfilled the registration formalities provided by the law. In determining the main place of domicile of a natural person, data about his or her personal and professional circumstances, indicating his or her sustained ties or intention to establish such ties with that particular country, should be taken into account.

Finally, if the tourist-consumer changes his/her habitual residence (which leads to a mobile conflict of laws), then, for the purposes of determining his or her habitual residence, the relevant point in time shall be the time of the conclusion of the tourist contract (according to Article 19 (3) of Regulation (EC) No. 593/2008).

THE LAW OF THE COUNTRY WHERE THE TRAVEL AGENCY HAS ITS HABITUAL RESIDENCE

Where the conditions listed above are not fulfilled, the legal status of the travel contract will no longer be governed by the law of the country where the tourist has his /her habitual residence (a derogatory legal provision, designed to protect the tourist, in his/her capacity as a consumer), but by the law of the country where the travel agency has its habitual residence, according to the rules established by Article 4 of Regulation (EC) No. 593/2008. Thus, according to the definition given in the preamble of this study, the tourism contract may be regarded as a contract for the provision of services, meaning that the contract shall be governed by the law of the county where the provider of the services (in this case, the travel agency) has its habitual residence, as stated under Article 4 (1) (b) of Regulation (EC) No. 593/2008. Because the travel agency is a legal person, its habitual residence shall be the place of central administration (Article 19 (1) of Regulation (EC) No 593/2008.

Lex voluntatis

Regardless of the distinctions described above, insofar as we are dealing with a contract, the provisions of Article 3 of Regulation (EC) No. 593/2008 shall apply, according to which the parties may choose the applicable law (*lex voluntatis*). The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. The parties may choose the law applicable to the whole or to a part of the contract and they may agree any time after the conclusion of the contract to change the law to be applied, provided only that the change shall not prejudice the formal validity of the contract nor adversely affect the rights of third parties.

For the purpose of Article 3 Regulation (EC) No. 593/2008, the parties may choose to apply to the contract only the national law, and not the a non-State rules of law/principles; however, the latter may be incorporated into the contract insofar as it is validated by the law applicable to the travel contract, in the absence of the parties' manifesting their free will (Sitaru, Bantaş-Văduva, 2016, p. 92).

With regard to the scope of the parties' freedom of choice in selecting the law applicable to their contract, although apparently the Regulation (EC) 593/2008 does not contain limitations, certain restrictions are established, designed to prevent fraud when choosing the applicable law (Sitaru, Bantaş-Văduva, 2016, p. 95). These restrictions are regulated in different manners, depending on whether or not the contract falls within the scope of Article 6 of Regulation (EC) No. 593/2008, as follows:

- if the contract is not regarded as a consumer contract (and therefore it does not come under the scope of Article 6 of the mentioned regulation), Article 3 stipulates that, when choosing a law other than that of the country where all other elements relevant to the situation at the time of the choice are located, the parties may not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. Also, in the hypothesis above, if the law chosen by the parties is the law of a non-Member State of the European Union, the choice of the parties should not prejudice the provisions of the EU law, including those transposed into the law of the country where the notified court has its venue (Article 6 (3) and (4) of Regulation (EC) No 593/2008.
- Where the contract is regarded as a consumer contract, Article 6 (2) of Regulation (EC) No. 593/2008 stipulates that the choosing of the law may not have the result of depriving the consumer of the protection afforded to him by provisions of the law of the consumer's country of residence.

PROCEDURAL RULES APPLICABLE TO LITIGATIONS ARISING OF INTERNATIONAL TOURISM CONTRACTS

International jurisdiction

General. Establishing the international jurisdiction is intended to determine in a global manner the jurisdiction of the courts in a given country to resolve a matter with an external element, rather than to identify the court which is legally and territorially competent to judge in the case. Determination of the material and territorial jurisdiction is a matter of domestic civil procedure law, which logically follows the establishment of the international jurisdiction (Zilberstein, 2001, p. 18 et seq.).

In order to determine the applicable law and, implicitly, the court that is competent to settle the dispute, two criteria must be taken into consideration: (a) the place where the defendant is domiciled; and (b) the possible qualification of the tourism contract as a contract falling within the category of consumer contracts for the purpose of Regulation (EU) Nr. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351 of 20 December 2012).

Application of Regulation (EU) No. 1215/2012. According to the first criterion mentioned above, Regulation (EU) 1215/2012 becomes applicable, if the defendant is domiciled in a Member State (Articles 4-6). The Regulation establishes a common law jurisdiction of the courts of the Member State where the defendant is domiciled (Article 4) and the special (alternative) jurisdiction of the courts of the place of performance of the contractual obligation (for details, see Zidaru, 2017, p. 124 et seq., Stănescu, 2015, p. 46 et seq.). Taking into account also the second criterion, we may first of all notice that the conditions referred to in Article 17 (1) (c) of Regulation (EU) No. 1215/2012 are identical with those established under Article 6 of Regulation (EC) No. 593/2008 with regard to qualification of the tourism contract as a consumer contract. Qualifying the tourism contract as a consumer contract has many consequences, of which some are listed below:

- extends of the scope of Regulation (EU) No. 1215/2012 to cover the cases where the defendant professional is not established in a Member State (Article 6 (1) and 18 (1));
- establishes special jurisdictional criteria: in the courts for the place where the defendant is domiciled or for the place where the claimant is domiciled, if the consumer is the claimant, or exclusively the courts for the place where the defendant is domiciled, if the consumer is the defendant (Article 18);
- allows the parties only a limited choice of jurisdiction (Article 18), so as to protect the consumer from the imposition by the professional of the jurisdiction of the court where the professional is domiciled.

Application of the Code of Civil Procedure. Where the defendant is not domiciled in a Member State and the contract is not a consumer contract for the purpose of Regulation (EU) No. 1215/2012 and the Romanian court is requested to judge in the matter brought before it, then the provisions of the Code of Civil Procedure become applicable.

We note that Article 1080 point 3 of the Code of Civil Procedure establishes the exclusive jurisdiction of the Romanian courts to settle disputes arising from consumer contract that meet cumulatively the following conditions: i) the consumer has his domicile or habitual residence in Romania; (ii) the contract covers the provision of current consumer services for the personal use of the consumer or his family, which are unrelated to his trade, business or profession; and iii) either the supplier has received the order in Romania, or the conclusion of the contract was preceded by an offer or an advertisement and the consumer has executed the necessary documents to conclude the contract (Stănescu, 2016, Pancești, 2013, p. 684). By correlating these conditions with those established under Articles 17-18 of Regulation (EU) No. 1215/2012 it follows that the scope of the provisions of Article 1080 p. 3 of the Code of Civil Procedure is very narrow, being limited to the hypothetic circumstances where the consumer is a defendant who is not domiciled in a Member State (i.e. not in Romania either), but who might have his habitual residence in Romania (Stănescu, 2016).

In the event that the provisions of Article 1080 p. 3 of the Code of Civil procedure are not applicable (in the absence of a consumer contract as defined by this text), the Romanian courts will have jurisdiction under Article 1081 of the Code of Civil procedure, fact that establishes an alternative jurisdiction (called "preferential" jurisdiction by the law) of the Romanian courts, if the place where a contractual obligation has been incurred or should have been performed, even if only in part, is in Romania (for details, see Stănescu, 2016) .

THE COURT PROCEEDINGS PER SE

Firstly, it should be noted that this analysis takes into account the hypothesis where the Romanian court is called upon to the settle a dispute deriving from the international tourism contract. The method of regulating the court proceedings is a mixed one, comprising both substantive law rules and conflict-of-law rules.

Direct regulation through material rules. This method of regulating the court proceedings is specific to the legal instruments adopted at international or EU level and has the advantage of simplifying the task of the courts called upon to apply the law, by relieving them from the obligation to determine the *lex causae*. In terms of their legal nature, these material rules are rules of immediate application, being established to directly guide certain aspects of the civil proceedings, such as the legal status of the evidence adduced (Hague Convention Abolishing the Requirement of Legalization for Foreign Official Documents, adopted at The Hague on 5 October 1961; European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, adopted at London on 7 June 1968; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted at The Hague on 18 March 1970;

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; the Convention on the service abroad of documents judicial and extrajudicial documents in civil or commercial matters, adopted at The Hague on 15 November 1965;

Council Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13

November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ("the service of documents") and repealing Regulation (EC) Council Regulation (EC) No 1348/2000); as such, determination of the applicable procedural law becomes irrelevant. Regulating the court proceedings by material rules represents the exception.

Indirect regulation through conflict-of-law rules. This method of regulating the court proceedings represents the rule and is governed by the following two principles:

The first principle is that according to which procedural rules generally belong to the rule of law of the forum.

This principle is enshrined by Article 1.088 of the Code of Civil procedure, according to which "in the international civil matters the court shall apply the Romanian procedural law, unless otherwise expressly provided". The text contains a unilateral conflict-of-laws rule, whose content encompasses all of the rules of civil procedure applicable by the Romanian courts, and the link to the conflict-of-law rule invariably refers to the Romanian law (*lex fori*). The choice of the law for a unilateral conflict-of-law rule is justified by the priority given to practical imperatives regarding the safety, predictability and speed of the act of justice, in the case where only Romanian court is recognised at the time of the referral of the case only its procedural law, to the detriment of the theoretical imperative of respecting the equality of the existent rules of law, including in terms of the conflict-of-laws rule, and which would have led to the adoption of a bilateral conflict-of-laws rule (of a general reference).

By way of exception, other laws than the *lex fori* apply to the parties' capacity to pursue proceedings, the subject matter and the cause of action in international civil lawsuits (Article 1.090 of the Code of Civil procedure) and to the evidence adduced in court (Article 1.091 of the Code of Civil procedure), and in these cases there are "express contrary provisions" within the meaning of Article 1.088 Code of Civil procedure. Therefore, in the above-mentioned situations the law of the referred court will not longer apply; instead, *lex causae* will be determined in a general manner by means of bilateral conflict-of-laws rules which, depending on their point of contact, may refer to the *lex fori* or to a foreign law

The second principle is that according to which the qualification of a matter as a matter of procedural or of substantive law is usually done according to the Romanian law.

As it has been pointed out in the specialized literature, qualification, as a legal institution that is specific to the private international law, may be defined in two ways: from the conflict-of-laws rule to the legal relation, or from the legal relation to the conflict-of-laws rule (Sitaru, 2013, pp. 57-58, Lupascu, Ungureanu, 2015, p. 69, Macovei, Dominte, 2014, p. 2736). From the first perspective, qualification is the logical-juridical act of defining the exact and complete meaning of the legal notions expressing the content and link of the conflict-of-laws rule, in order to assess whether or not a legal relationship falls within the scope of those notions. From the second perspective, qualification is the interpretation of a legal relationship, designed to establish the content of and the link with the conflict-of-laws rules under which that legal relationship falls.

According to Article 2558 (1) of the Civil Code, **as a rule**, in the Romanian law, qualification is established according to the *lex fori* (the Romanian law, if the Romanian courts are called upon to settle the case). An application of this rule is given by the provisions of Article 1.089 of the Code of Civil procedure.

At least two arguments substantiate this rule (Sitaru, 2013, p. 62): the qualified conflict-of-laws rules are part of the law of the court notified (*lex fori*) and their interpretation must be according to the legal system that contains them (*eius est interpretari, cuius est condere*); establishing the qualification according to another law – the law applicable to the substance of the legal rapport (*lex causae*) - is impossible, simply because, at the time of qualification, the only law that is determined is the *lex fori* (with *lex causae* to be determined only after applying the conflict-of-law s rule that makes the subject of the qualification).

By way of **exception,** the legal notions having no correspondent in the Romanian law may not be qualified according to *lex fori*, but according to the legal system that recognizes such notions. Other law than the *lex fori* also applies to the independent qualification of the notions in European Union law. The reason for which national theoretical or jurisprudential concepts are not applicable is to ensure a uniform interpretation and application of European Union law.

EFFECTS IN ROMANIA OF THE JUDGMENT BY WHICH A FOREIGN COURT HAS SETTLED A DISPUTE DERIVING FROM AN INTERNATIONAL TOURISM CONTRACT

General considerations

Three main effects of a judgement delivered by a foreign court may be recognized in Romania as: *rex judicata*, enforceability *and the probative force.*

The analysis of these effects requires, alike in the case of establishing the international jurisdiction, the

prior determination of the applicable law. Accordingly, depending on the State where the judgment was delivered (whether it is a Member State or a third State), the matter under consideration is governed by Regulation (EU) No. 1215/2012 or by the Code of Civil Procedure (Article 2 (a) of Regulation (EU) No. 1215/2012 and Article 1094 Code of Civil Procedure, respectively).

Effects of foreign judgments under Regulation (EU) No. 1215/2012

According to Article 36 (1) of Regulation (EU) No. 1215/2012, judgment given in a Member State shall be recognised in the other Member States without any special procedure being required. As the specialised literature specifies, recognition is the legal mechanism by which a judgment given abroad acquires the *rex judicata* status in Romania (Filipescu, Filipescu, 2007, p. 450).

Also, according to Article 39 of Regulation (EU) No. 1215/2012, a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

Consequently, both *rex judicata* (as a result of recognition) and enforceability are direct and immediate effects of the foreign judgment. Correspondingly, the defendant's right of defence is guaranteed by granting the defendant the right to bring an action requesting refusal of recognition/or enforceability of the foreign judgment under Article 45 et seq. of Regulation (EU) No. 1215/2012. In this procedure, only the conditions for refusal of recognition / enforcement stipulated by Article 45 may be reviewed, whereas the review of the foreign judgement as to its substance in the Member State addressed is forbidden (Article 52).

The third effect (probative force) is not regulated by Regulation (EU) No. 1215/2012. Consequently, we appreciate that the provisions of Article 1132 of the Code of Civil Procedure are applicable.

Effects of foreign judgments according to the Code of Civil Procedure

Unlike European Union law, the national regulation establishes, by Article 1096 et seq. of the Code of Civil Procedure, a judicial procedure for the recognition and approval of the enforceability in Romania of judgments given by foreign courts (for an analysis of this procedure, see Pancecscu, 2013, Stănescu, 2016).

Finally, according to Article 1108 of the Code of Civil procedure, the foreign judgment delivered by the competent court shall have probative force until proven otherwise, with respect to the findings it contains, if it establishes the requirements that are necessary in order to establish its authenticity according to the law of the country where the court has its seat (for details, see Stănescu, 2016).

CONCLUSIONS

The international tourism contract benefits from the regulations adopted both at European Union level and at national level. This situation may cause difficulties in determining the law applicable to the substance of the legal relationship, the international jurisdiction or the recognition and enforceability of foreign arbitral awards. As we have shown above, the solution is simpler when it comes to determining the applicable law (European Union law applies whenever the application of a conflict-of-laws rule is required); in other cases, though, a more refined analysis is needed, which should take into account the criteria distinguishing between the EU law and the national law.

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