# LEGAL RELATIONS IN PRIVATE INTERNATIONAL LAW

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**Abstract.** *International relations established between different categories of persons presuppose the existence of specific legal regulations, meant to secure legal order to this effect. Such international relations are expressed both in legal relations between states as subjects of public international law, and in relations between natural and legal persons pertaining to other states. In this article we presented a few general considerations regarding legal relations with foreign elements, established between natural and/or legal persons, as subjects of private law, as well as regulation methods for legal relations with a foreign element.*

**Keywords**: *legal relation, foreign element, conflict regulation, regulation methods*

## 1. Introductory considerations

International relations established between different categories of persons (natural and/or legal persons) presuppose the existence of specific legal regulations, meant to secure legal order to this effect.

Such international relations are expressed both in legal relations between states as subjects of public international law, and in relations between natural and legal persons pertaining to other states.

Private international law governs legal relations with a foreign (extraneous) element[1], established between natural and/or legal persons as subjects of private law.

[1] Etymologically speaking, the term 'extraneous' stems from the Latin *"extraneus"* meaning "foreign", "from the outside"

The relations of private international law are civil, trade and other relations of private law with a foreign element.[2]

This provision of the Civil Code requires some observations. Thus, first of all, the term "other relations of private law" refers to relations in matters of family law, intellectual property, labor, international trade, as well as relations of civil procedure. The listing provided by law is declarative in nature and may be supplemented with other legal relations involving some institutions under private law.[3]

Secondly, there are areas of law that regulate legal relations of both private and public law. A good example in this respect is labor law, where the relations of private law are mainly those concerning the contract of employment.

Finally, not every legal relation with a foreign element forms the subject of private international law, but only legal relations of civil law – broadly speaking – comprising one or more foreign elements.

**2. The foreign element**

The foreign (extraneous) element is the main element through which legal relations of private international law are distinguished from other legal relations. Although the foreign element is a component of a legal relation which is located abroad or under the incidence of a foreign legal system, it is not an element of structure of the legal relation, in the sense of the general theory of law, added to the other three (parties, content and object)[4].

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[2] Art. 2557 para. 2 of the Romanian Civil Code, Book VII – Provisions of private international law. (Law 287 of 17 July 2009 on the Civil Code was republished in the Official Gazette no. 505 of 15 July 2011 and became effective on 1 October 2011)

[3] See, in this respect: Ion P. Filipescu, Andrei I. Filipescu, *"Tratat de drept internaţional privat"*, revăzută şi adăugită, Universul Juridic, Bucureşti, 2005, pp. 20; Dragoş A. Sitaru, *"Drept internațional privat. Partea generală. Partea specială – Normele conflictuale în diferite ramuri și instituții ale dreptului privat"*, Editura C.H. Beck, Bucureşti, 2013, pp. 4 et seq.

[4] Augustin Fuerea, *"Drept internaţional privat"*, Ediţia a II-a revăzută şi adăugită, Universul Juridic, Bucureşti, 2005, pp. 19

In the absence of a legal definition, the foreign element has received relatively close doctrinal definitions. Thus, for example, "a foreign element is a circumstance in fact due to which a legal relation is connected with two or more systems of law"[5], or "a foreign element is a circumstance in fact which occurs in connection with one or more of the elements of structure of a legal relationship and which has the ability to bring into question the possibility of enforcing a foreign law"[6], or "a foreign element is a circumstance in fact, diverse in nature, which is connected to a legal relation of private law, and which gives that legal relation a character of internationality"[7].

The definitions contained in the literature converge on the idea that a foreign element is a circumstance in fact which connects the legal relation to one or more systems of law that are likely to be enforced.

As far as we are concerned, we believe that the foreign element is *a circumstance in fact connected to elements of a legal relation, due to which one or more systems of law can be applied to that legal relation*.

Taking as reference the structural elements of a legal relation, a foreign element can consist of the following[8]:

**a. relative to the subjects of the legal relation**

In connection with the subjects of the legal relation, the following may be foreign elements:

– for natural persons: citizenship, domicile, habitual residence and, in some systems of law, religion (e.g., a Romanian citizen and a foreign citizen conclude a contract for the sale and purchase of a movable object in our country);

– for legal persons: nationality, location, trade fund, place of registration, etc. (e.g. a company, as a Romanian legal person, enters into a contract with a foreign firm).

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[5] Ioan Macovei, *"Drept internaţional privat în reglementarea Noului Cod civil şi de procedură civilă"*, Editura C. H. Beck, Bucureşti, 2011, pp. 4

[6] Ovidiu Ungureanu, C. Jugastru, A. Circă, *"Manual de drept internaţional privat"*, Editura Hamangiu, Bucureşti, 2008, pp. 7, Dan Lupaşcu, Diana Ungureanu, *"Drept internaţional privat"*, Universul Juridic, Bucureşti, 2012, pp. 12-13

[7] T. Prescure, C.N. Savu, *"Drept internaţional privat"*, Lumina Lex, Bucureşti, 2005, pp. 24

[8] I. P. Filipescu, Andrei I. Filipescu, *op.cit.*, pp. 22-23; Augustin Fuerea, *op. cit.*, pp. 19-20; D. A. Popescu, M. Harosa, *op. cit.*, pp. 124-126; T. Prescure, C. N. Savu, *op. cit.*, pp.. 25-26; I. Macovei, *op. cit.*, pp. 10-12

**b. relative to the object of the legal relation**

Regarding the object of the legal relation, a foreign element is the foreign location of the property (movable or immovable) or which, although situated in the country, is subject to a foreign law (e.g., the property of a foreign embassy in Romania).

**c. relative to the content of the legal relationship**

Regarding the content of legal relation, the rights and obligations of the parties shall be determined according to the competent law governing the legal relation. They are materialized in concrete elements in fact which, when placed abroad or under the incidence of a foreign law, are also foreign elements[9].

Thus, the following may be foreign elements:

– the place of conclusion of the legal act within the meaning of *negotium juris* (e.g. a Romanian company signs a contract abroad with a foreign firm for the provision of services by the latter on the territory of our country);

– the place of preparation of the ascertaining document (*locus regit actum*) – within the meaning of *instrumentum probationes;* (e.g. the place of preparation of the ascertaining document can be a State other than that in which the agreement of will was reached)

– the place where a contract is to take effect (*locus executionis* or *locus solutionis);*

– the place of an illegal act causing injury - *lex loci delicti commissi (*for instance, a Romanian citizen is injured in an accident on the territory of a foreign state)

– the place of occurrence of the injury – *lex loci laesionis* – when it is different from the place of the offense;

– the place of where dispute is resolved (e.g., two spouses, foreign nationals, require a divorce before a Romanian court);

– the authority that issued the judgment or arbitral decision is a foreign authority.

In connection with the foreign element, it should be noted that it is not a distinct element of the legal relation along with the subjects, content and object, but is a part of them.

[9] Dan Lupaşcu, Diana Ungureanu, *op. cit.*, pp. 13

**3. Characters of a legal relation with a foreign element**

The legal relationship with a foreign element has the following characters:

a. it is established between natural or legal persons; the State may be a party to such a legal relation with a foreign element, but not in the quality in which he participates in a legal relation of public international law. Thus, some states conclude in their own name, as subjects of civil law, contracts of technical/scientific and economic cooperation with companies from other states, gaining the quality of contracting party[10];

b. it contains an element, whereby it is connected to several systems of law;

c. it is essentially a civil law relation *lato sensu*, that is, it can include a commercial, labor, civil procedure relation[11], or any other relation of private law as required by art. 2557 of the Civil Code. As such, this category does not include legal relations with a foreign element in matters of public law (criminal law, financial law, administrative law, etc.). The explanation resides in that such relations cannot give rise to a conflict of laws, since the parties on a position of legal subordination to each other, with the element of state authority acting as the holder of sovereignty (*jure imperii)*[12].

**4. Regulation methods for legal relations with a foreign element**

The regulatory method is the specific means by which the state provides the conduct required of the parties to the legal relation.

Legal relations with a foreign element (legal relations of private international law) can be regulated in different legal systems, in several specific ways, namely:

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[10] States are, in principle, main subjects of public international law, but they can also be subjects of civil law, thus acting, *jure gestionis*, and not *jure imperii*.

[11] See, regarding provisions of Romanian Code of Civil Procedure: D. C. Creţ, *Instituţii de drept procesual civil*, vol. I, Editura Casa Cărţii de Ştiinţă, Cluj-Napoca, 2015; D. C. Creţ, *Instituţii de drept procesual civil*, vol. II, Editura Casa Cărţii de Ştiinţă, Cluj-Napoca, 2014.

[12] See, D. A. Sitaru, *op. cit.*, pp. 5.

a. the conflict method or the method of conflict regulations, indicating the competent law to regulate the legal relation with a foreign element;

b. the method of substantive or substantial rules, which is directly applicable to the legal relation with a foreign element;

c. the method of immediately applicable rules, which requires the existence of a special category of laws, of immediate application, which are applied prior to the conflict regulation;

d. the proper law method.

### a. The conflict method or the method of conflict regulations

The method of conflict regulations (conflict method) assumes that in any situation where an authority is vested with jurisdiction to resolve a dispute with a foreign element, to which two or more foreign legal systems are likely to be applied, the conflict regulation of the forum[13], (i.e. of the notified court) will be used, applying the law designated by this regulation. Each legal system has its own system of conflict regulations [14], which does not exclude, however, the existence of such regulations established by way of international conventions.

A number of criticisms have been leveled at this method[15]:

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[13] The term "forum" stems from the Latin "*forum*", which means a public square in ancient Rome, where the political, religious and economic life of the city was concentrated and where trials were judged (1). Authority, court, body of the state (2). (Dicţionarul explicativ al limbii române)

[14] The stipulations of the Civil Code – Book VII Provisions of Private International Law (art. 2557 – art. 2663) are applied in Romania.

[15] See, in this sense: I. P. Filipescu, Andrei I. Filipescu, *op.cit.*, pp. 27-29; Augustin Fuerea, *op. cit.*, pp. 18-19; Sandrine Clavel, "*Droit international privé*", Ed. Dalloz, Paris, 2012, pp. 35-45; Pierre Mayer, Vincent Heuze, "*Droit international privé*", ed. Montchrestien, edition 10, Paris, 2010, pp. 28-40; Kegel, "*Recueil des Cours de l'Académie de Droit international de la Haye"*, 1964, nr. 112, pp. 92 et seq.; Van Hecke, "*Principes et méthodes des solutions de conflitis des lois"*, in *Recueil de Cours de l'Académie de Droit international de la Haye,* 1964, no. 125, pp. 399-400; Goldstein, *"The Law Merchant"*, in The Journal of Business Law, 1961, pp. 12-13; Ph. Francescakis, *"Y a-t-il du nouveau en matière d´ordre public"* in Travaux du Comité français de droit international privé, 1966-1969, Paris, pp. 1-2.

a. the theory of the conflict of laws and the method of conflict regulations have a complex character, and as such raise difficulties in the practical application, especially if takes into account the fact that the distinction between substantive and formal rules varies from one legal system to another;

b. the conflict regulation method ignores the specificity of the legal relation with a foreign element, to which an domestic law is applied, as if the legal relation had a domestic character;

c. it involves uncertainty and unpredictability because of conflict regulations are sometimes not established by law, but by jurisprudence, thus depending on the court that applies them [16].

**b. The method of substantive or substantial rules**

Unlike conflict regulations, which do not regulate legal relations with a foreign element, in substance, but only indicate relevant substantive rules, the latter directly govern the legal relations. In some cases, enforcement of substantive rules requires conflict regulations to declare them applicable[17], or in some cases substantive rules can be directly applied to legal relations, without the need for conflict regulations declaring them applicable.[18]

**c. The method of immediately applicable rules**

This method is a particular form of the conflict regulation method and assumes the existence of a special category of laws, namely those of immediate application[19], and the use of this method is of prior application to the conflict regulation.

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[16] For other criticisms see I. Dogaru, note 28 in *"Principii şi instituţii în dreptul comerţului internaţional"*, Editura Scrisul Românesc, Craiova, 1980.

[17] For example, the 1964 Hague Convention, relating to a Uniform Law on the International Sale of Goods, establishes the substantive rules applicable to the legal relation, but these rules are declared applicable by conflict regulations also established by the Hague Convention.

[18] Thus, in 1930, an international Convention was concluded in Geneva regarding bills of exchange, and this regulation was adopted in the legislation of participating states. In this way, that conflict regulation became a domestic law in those states.

[19] The rules of immediate application are substantive rules, pertaining to the domestic law system of the state of the forum, which, due to their degree of imperativeness, apply with priority to an international legal relation (with a foreign element), when that legal relation has a certain concrete point of connection to the

The method of immediately applicable rules implies the following features:

- it excludes the application of foreign laws and also removes the application of the conflict method;

- the rules of immediate application have a unilateral character, whereas conflict regulations are bilateral in nature;

- the rules of immediate application raise the question of determining their application in space[20], as these rules apply due to their importance and their binding character.

**d. The proper law method**

It was first developed in the common law, and then extended to other legal system[21]. The proper law method is a form of the conflict method, and it assumes that for each legal situation, the applicable law is determined with respect to the factual circumstances and the peculiarities which it presents; the applicable law may therefore differ on the same matter, from one case to another.

It distinguishes itself from the conflict method in that it involves determining the applicable law from one case to another, considering the particularities of each. The choice of law occurs in relation to the points of connection of the case, establishing the most appropriate law for that case[22].

The proper law method is used [23] especially in tort law, contractual relations and the matrimonial regime of spouses.

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country of the forum, thus excluding the conflict of laws and, therefore, the application of any conflict regulation in the case. See, more broadly, D.A. Sitaru, *"Drept internațional privat - Tratat"*, Editura Lumina Lex, Bucureşti, 2000, pp. 38

[20] I. P. Filipescu, A. I. Filipescu, *op. cit.*, pp. 24-26

[21] With regard to the proper law method, see: G. C. Cheshire, "*Private International Law"*, London, 1974, pp. 185; R. N. Graveson, "*Conflict of Laws, Private International Law"*, London, 1974, pp. 400-444 and pp. 563-589.

[22] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, pp. 31. Authors cite the leader case "Babcock v. Jackson" in which, in the conduct of a voluntary transport of people, an accident occurred, raising the problem of legal liability. In the case, both the driver of the automobile and the passenger were from New York; the point of departure and arrival was New York, and the accident occurred in Ontario. The court applied the law of New York State and not that of Ontario State.

[23] For details, see, Y. Loussouarn, P. Bourel, *op. cit.*, pp. 181-187.

The proper law method has some drawbacks in its use, such as[24]:

a. the solution in the case cannot be known before the court vested with resolving the dispute has determined the applicable law. To determine the applicable law, the court will compare the contents of the laws under competition, without considering the criteria of the conflict regulation;

b. the applicable law is determined by comparing the content of laws in conflict, whereas when using the conflict method, the applicable law is determined via the conflict regulation.

An application of the *proper law* method is also established by the provisions of the Civil Code. Article 2565 para. 1 contains a provision that allows the judge, exceptionally, to determine the applicable law, independent of the conflict regulation in the matter[25]. The existence of an exceptional situation is configured on the specific circumstances. Thus, the application of the law determined by the Romanian conflict regulations may be removed if the legal relation has a very distant connection with this law. Independent of the content of the conflict regulation, the law with which the legal relation is most closely connected will apply.

From this rule, art. 2565 para. 2 of the Civil Code recognizes two exceptions:

- this method is not permitted in matters where conflict regulations have a mandatory character (e.g. conflict regulations concerning the marital status and capacity of the person), and;
- when the parties, based on autonomy of will, chose the law applicable to that relation.

**5. Conclusions**

What sets international private law relations apart from other legal relations that are subject to other branches of law is the fact that an foreign element intervenes.

[24] I. P. Filipescu, A. I. Filipescu, *op. cit.*, pp. 32; I. Macovei, *op. cit.*, pp. 13

[25] The solution is also laid down in comparative law: art. 3082 of CCQ, art. 19 of Belgian law, art. 15 of Swiss law.

**The foreign element** is a circumstance in fact due to which a legal relation is connected with two or more legal systems. The foreign element is not a separate element of the legal relation, along with the subjects, content and object, but is a part of them. For example, the object of a contract of sale and purchase which is located abroad, or one of the contracting parties is of a different nationality.

The presence of a foreign element raises the following problems:

- determining the competent court or authority to judge or handle the case;
- indicating the applicable rules of procedure;
- indicating the substantive law that will apply to the legal situation;
- determining the effects of decisions made by foreign authorities.

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