

THE BURDEN OF PROOF OF FOREIGN LAW IN ROMANIAN PRIVATE INTERNATIONAL LAW

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Abstract

*Unlike Romanian law, the foreign law that constitutes the *lex causae* is not known to the Romanian court and, therefore, resolving the dispute involves establishing its content. To this end, the provisions of Article 2.562 of the Romanian Civil Code provide for the sharing between the court and the parties of the burden of proof of the foreign law.*

Starting from the aforementioned legal provision, the present scientific approach aims to first analyze the foundations of this division of roles, in other words to establish why the burden of proof does not fall on a single actor (the court that is called upon to apply the foreign law or the party that invoked it).

Secondly, the balanced nature of this division will be investigated, in order to establish whether, in reality, the burden of proof may end up affecting one of the participants in the civil process more strongly (i.e. the litigant).

Finally, the consequences that will arise in the event of a party's failure to fulfill its obligation to prove the content of the foreign law will be examined.

Regarding the aspects indicated above, the theoretical assessments will also take into account the recent judicial practice of Romanian courts in this matter.

Keywords: foreign element, *lex cause*, foreign law, burden of proof, international civil procedure.

1. Introduction

According to art. 2.562 of Civil Code:

"(1) The content of the foreign law shall be determined by the court by means of attestations obtained from the State bodies which enacted it, by the opinion of an expert or by some other appropriate means.

(2) A party invoking a foreign law may be required to prove its content ..."¹.

The cited legal provision assigns the burden of proving the foreign law to both the court and the parties, but the wording used is different: if the court "establishes" the content of the foreign law, the parties "may be obliged" to prove it².

The difference in regulation observed constitutes the starting point of the present study, which will examine the extent to which a normative solution that aims to establish a balanced relationship in the matter of the burden of proof of foreign law can turn into its opposite.

To this end, it is necessary first to test whether the legal norm has by itself the vocation of balance, and then to analyze the reason why the legislator considered it necessary to share the burden of proof between the court and the parties.

Only then, the investigation will bring into question the temptation of imbalance, in other words the extent to which the application of the legal norm can lead to a relief of the court to the detriment of the party who may be obliged to prove the foreign law. To this end, the consequences of the party's failure to comply with the obligation entrusted to it will be studied, with reference to the practice of the courts.

2. The foundations of the solution established by the legal norm

In order to understand the reason why the legislator decided to share the burden of proof of the foreign law between the court and the parties, a few premises are necessary.

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¹ For a general analysis of this legal provision, see I. Macovei in Fl. A. Baiaș, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Codul civil. Comentariu pe articole*, 3rd edition, C. H. Beck Publishing House, Bucharest, 2021.

² See, in the matter, D. Al. Sitaru, *Drept internațional privat Partea generală. Partea specială – Normele conflictuale în diferite și instituții ale dreptului privat*, C. H. Beck Publishing House, Bucharest, 2013, p. 84.

First of all, the application of conflicting rules³ is mandatory in the case of legal relationships with a foreign element, an aspect established by article 8 of the Civil Code, according to which "in the case of legal relationships with a foreign element, the determination of the applicable civil law shall be made taking into account the rules of private international law contained in Book VII of this Code". It follows, therefore, that the substantive Romanian law contained in the first six books of the Civil Code or in special normative acts are not automatically applied to these legal relationships (these derogating from the substantive provisions of the Romanian law, and not from the rule of priority application of conflicting rules). The reason for removing the immediate incidence of the Romanian substantive norms in the analyzed case is that, through the elements of foreignness it contains, the legal relationship acquires an equal link not only with the Romanian legal system, but also with those to which these elements lead. The existence of such links makes inexplicable a possible preference for Romanian material norms, to the detriment of foreign ones. Thus, for example, a contract concluded in France between two companies of Romanian and German nationality respectively has equal links with each of the three legal systems (French, Romanian and German), which entails a vocation for their identical application. In this way, the private international law norm (conflict rule) becomes the legal instrument that allows an *inter pares* option.

In the second place, since the application of conflicting rules is mandatory in the case of legal relationships with a foreign element, the impact of the legal system indicated by them (*lex causae*) cannot be optional either. Specifically, through the mechanism described, the *lex causae* can be Romanian law or a foreign law. In the first case, Article 252 of the Civil Code establishes a presumption of knowledge of the law by the Romanian court, so that proof of the law is no longer necessary (Article 251 of the Civil Code). On the other hand, in the second, as is natural, such a presumption no longer operates, and it is necessary to prove its content according to art. 253 of the Civil Code in conjunction with art. 2.562 of the Civil Code.

Thirdly, the Romanian court's lack of knowledge of the foreign substantive law (*lex causae*) does not constitute for it a cause that exempts it from the obligation to settle the dispute, remaining applicable the provisions of article 5 para. (1) C. pr. civ., according to which "judges have the duty to receive and settle any request within the competence of the courts, according to the law".

Finally, the jurisdiction of the Romanian courts to settle a dispute with a foreign element (international jurisdiction) is determined according to Title I ("International jurisdiction of the Romanian courts") of Book VII ("International civil procedure") of the Code of Civil Procedure or, as the case may be, according to European Union law (usually the Brussels I bis Regulation⁴). These rules are different from those according to which the substantive law applicable to the disputed legal relationship is determined (and which have their source in the Civil Code, or in normative acts adopted at the level of the European Union, such as the Rome I⁵ and Rome II⁶ Regulations).

In view of the above, the following reasoning can be formulated: the Romanian court legally competent to settle a dispute with a foreign element must apply the conflicting rule in order to determine the law applicable to it; if the law thus determined is a foreign one, the jurisdiction of the Romanian court is not removed, so it will be required to apply it. In these circumstances, the answer to the question "Who bears the burden of proving the foreign law?" is obvious: the one who has to examine the dispute in relation to that law, i.e. the Romanian court. It thus becomes explainable the reason why, according to art. 2.562 para. (1) of Civil Code, "the content of the foreign law shall be established by the court".

On the other hand, however, sometimes the application of foreign law is invoked not by the court, but by one or even by both parties. This is the case when the parties are the ones who have chosen the law applicable

³ The conflicting norm represents that legal norm belonging to the legal system of the court seized that determines the legal system applicable to the legal relationship with a foreign element, among those having such a vocation. Such a vocation belongs to the law of the forum, to the legal systems to which the extraneous elements that the legal relationship presents, as well as to the legal system chosen by the parties lead. For the definition of the conflictual norm, see: D. Al. Sitaru, *Op. cit.*, p. 8, B. M. C. Predescu, *Tratat de drept internațional privat*, Universul Juridic Publishing House, Bucharest, 2025, p. 80, I. Macovei, *Tratat de drept internațional privat*, Universul Juridic Publishing House, Bucharest, 2017, p. 29, C. Dariescu, *Fundamentele dreptului internațional privat*, Universul Juridic Publishing House, Bucharest, 6th edition, 2023, p. 37.

⁴ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in the Official Journal of the European Union L 351 of 20 December 2012. For a commentary on this normative act, see S. Al. Stănescu, *Procesul civil internațional*, 2nd edition, Hamangiu Publishing House, Bucharest, 2023.

⁵ Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), published in the Official Journal of the European Union L 177 of 4 July 2008. For a detailed analysis of this normative act, see T. M. Bantaș-Văduva, *Norme de drept internațional privat în materie civilă și comercială în dreptul european*, Hamangiu Publishing House, Bucharest, 2020, pp. 100-260.

⁶ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, published in the Official Journal of the European Union L 199 of 31 July 2007.

to the legal relationship between them (e.g., the parties can choose the law applicable to the contract they have concluded⁷, the non-contractual obligation⁸, the matrimonial regime⁹, divorce¹⁰ etc.). In such cases, it is to be assumed that, in the event of a dispute, the parties will formulate their claims or, as the case may be, their defences, based on the provisions of the (foreign) law chosen. It is also possible that one or even both litigants rely on the provisions of a (foreign) legal system, even though it has not been the subject of a choice of law convention. It is therefore reasonable to assume that, if the parties have chosen the applicable law or if, in the absence of the choice, they have based their claims or defenses on its provisions, then its content is known to them. Such a presumption determined the legislator that in art. 2.562 para. (2) of Civil Code to provide that "the party invoking a foreign law may be obliged to prove its content".

In conclusion, the two analyzed paragraphs of art. 2.562 of Civil Code establish a balanced division of the burden of proof of the foreign law between the court and the parties. Justifiably, it falls primarily to the court of law because of its obligation to resolve any case (including with an extraneous element) in respect of which it has established its jurisdiction. Exceptionally, the burden of proof may lie with the party who invoked the foreign law, as a result of the presumption of knowledge of it.

3. Possible deviation of the legal norm from the purpose for which it was enacted

In application of the provisions of art. 2.562 para. (2) of Civil Code, the court may instruct the party who invoked the application of the foreign law to prove its content. In such a situation, the reasons set out above justify, on the one hand, the measure ordered by the court, which will no longer itself take time-consuming steps to determine the *lex causae*, and, on the other hand, the cooperative attitude of the party, interested in the resolution of the case under the law which it itself has invoked.

It is not excluded, however, that, in some cases, the party who has invoked the foreign law is not aware of its provisions. This is, for example, the situation when the party applied the conflicting rule that indicated that a foreign law was applicable, directly at the stage of the investigation of the trial (voluntarily or at the suggestion of the court), although, through the procedural documents drawn up in the written stage, it referred only to the provisions of the Romanian law. In such a case, the reason for which art. 2.562 para. (2) of Civil Code was enacted does not subsist. Therefore, forcing the party to prove the foreign law, although it may seem to be in line with the letter of the law, is, in reality, a measure contrary to its spirit.

From the court's perspective, the application of the provisions of art. 2.562 para. (2) of Civil Code in their letter may appear tempting because it transfers to the party who invoked the foreign law the task, not always easy, of undertaking the necessary steps to prove it. These may materialize, as the case may be, in the formulation of requests for information on foreign law and their transmission to the Ministry of Justice under the conditions of art. 30 para. (3) in conjunction with art. 29 of Law no. 189/2003¹¹ or of the London Convention (1968),¹² in identifying an expert to determine the content of the foreign law, in formulating and transmitting requests to the diplomatic representation of the foreign state in Romania or to a chamber of commerce, a commodity exchange, a professional body in the state whose law is applicable in the present case etc.

From the perspective of the party whose burden of proving the foreign law has been established and who does not know/already has access to it, the steps listed above are quite complicated compared to the situation in which they would be undertaken by the court. That is why it is possible that the party will fail to fulfill its obligation. Also, at least on a theoretical level, it is conceivable that the party fails to prove the foreign law with guilt, even though the burden of proof was on it.

A problem that needs to be clarified concerns the consequence of the non-fulfillment by the party, with or without fault, of the obligation to prove the foreign law established according to art. 2.562 para. (2) of Civil Code. At the level of principle, at least the following approaches can be identified:

⁷ Art. 3 of the Rome I Regulation.

⁸ According to Art. 14 of the Rome II Regulation, the parties may choose the applicable law, in principle, after the occurrence of the event causing the damage, but, in exceptional situations, even before it.

⁹ Art. 2.590 of the Civil Code.

¹⁰ Art. 5 of Regulation (EU) no. 1259/2010 implementing a form of enhanced cooperation in the field of the law applicable to divorce and legal separation, published in the Official Journal of the European Union L 343 of 29 December 2010.

¹¹ Law no. 189/2003 on international legal assistance in civil and commercial matters, republished in the Official Gazette. no. 162 of March 3, 2026.

¹² The European Convention in the field of information on foreign law, adopted in London on June 7, 1968, to which Romania acceded by G.D. no. 153/1991 (published in the Official Gazette no. 63 bis of 26 March 1991).

- The application of the Romanian law instead of the foreign law determined by the conflictual rule, according to art. 2.562 para. (3) of Civil Code;
- Sanctioning the party, if it has the standing of plaintiff, by suspending the settlement of the case pursuant to art. 242 para. (1) C. pr. civ.¹³;
- The substitution by the court, pursuant to art. 2.562 para. (1) of Civil Code of the failure (culpable or non-culpable) of the party to prove the foreign law.

The first approach is based on the provisions of art. 2.562 para. (3) of Civil Code, according to which "in case of impossibility to establish, within a reasonable period, the content of the foreign law, the Romanian law shall apply". As is apparent from the legal text cited, the application of Romanian law can only constitute a remedy in the event of the impossibility of proving (within a reasonable time) the foreign law constituting *lex causae* in the present case, justified by the fact that the dispute cannot remain unresolved. Or, obviously, the condition of impossibility of proof is not met for the simple reason that the party, who had the obligation to prove the foreign law according to art. 2.562 para. (2) of Civil Code, did not fulfill it.

The second approach may have the technical advantage of representing an instrument of pressure on the party whose obligation is incumbent according to art. 2.562 of Civil Code. Therefore, situations can be identified in practice in which courts have adopted it. Thus, for example, by the Conclusion of 10 June 2025, the Court of Sector 2 asked the applicant to prove, within 10 days, the German law applicable to an assignment contract, under penalty of suspending the case pursuant to Art. 242 para. (1) C. pr. civ.¹⁴. From the measure ordered, it can also be seen the very short period within which the applicant must fulfill his obligation.

The third approach corresponds, in my opinion, to the balanced solution enshrined by the legislator and which I have analysed above. A brief examination of the case law shows us that the court's replacement of the party's failure to prove the content of the foreign law is sometimes perceived as conditioned by the absence of the fault of the party reviewing the burden of proof, and sometimes as independent of it.

Thus, it was held in a case that "the suspension of the trial pursuant to Article 242 of the Civil Code was established in order to give expression to the principle of availability of the trial and is justified, as in the case of obsolescence, by the state of passivity of the applicant in fulfilling the obligations imposed on the applicant. One of the essential conditions for ordering the suspension is that the applicant is at fault for the breach of procedural obligation, and the applicant in the present case has revealed and proven that he has taken all the steps to fulfill the obligation imposed on him. The fact that none of the authorities to whom he addressed the request to communicate a reply and which were obliged to communicate the content of the foreign law to the applicant has not replied cannot operate against the applicant since it cannot be held that the fault belongs to him".¹⁵

In another case, it was considered that "in order to order this case of optional suspension, the following conditions must be cumulatively met: the procedural obligation to belong to the applicant; the obligation of the plaintiff to be established against him during the trial, according to the law; the obligation of the party must be such as to prevent the court from the normal course of the trial; the plaintiff must have been at fault for the breach of procedural obligation. In the present case, the court retains the applicability of the provisions of Article 2.562 of the Civil Code (...). At the same time, it is emphasized that by art. 30 of Law no. 189/2003 (...) the manner of obtaining information on foreign law was regulated. In this regard, it is stated that the Ministry of Justice is the central authority that transmits to the ministries of justice of other states, at their request, information on domestic law in civil and commercial matters, as well as in the field of civil and commercial procedure and judicial organization, for specific judicial cases. (2) At the same time, the Ministry of Justice is the central authority that requests from the ministries of justice of other states information of the kind mentioned in para. (1), at the request of the Romanian courts, for determined judicial cases. Therefore, even if the appellant has not fulfilled his obligations under his charge, in the sense that he has not filed the law of the State of New York, this aspect does not preclude the trial of the case given that the court has the necessary means to find out the content of domestic law, in the sense that it can request the obtaining of this information from the Ministry of Justice, which as the central authority will in turn take steps with the US Department of Justice".¹⁶

¹³ According to art. 242. para. (1) C. pr. civ., "When he finds that the normal conduct of the trial is prevented by the fault of the plaintiff, by failing to fulfill the obligations established during the trial, according to the law, the judge may suspend the trial, indicating in the conclusion which obligations have not been respected".

¹⁴ <https://www.rejust.ro/juris/9846gge8e>.

¹⁵ Court of Appeal of Cluj, Civil Section II, Civil Decision no. 37/30 January 2017 (<https://www.rejust.ro/juris/67ge7435>).

¹⁶ Bucharest Tribunal, Civil Section III, Civil Decision no. 177 of October 23, 2024 (<https://www.rejust.ro/juris/628756g52>).

As far as I am concerned, I consider that the latter solution is the only one able to comply with the balanced solution enshrined in art. 2.562 para. (1) and (2) of Civil Code. Thus, regardless of whether or not a fault of the party who has not fulfilled the obligation imposed on him according to art. 2.562 para. (2) of Civil Code, such conduct cannot lead to the removal of the court's obligation to determine the content of the foreign law in the manner conferred by art. 2.562 para. (1) of Civil Code. As such, on the one hand, the suspension of the resolution of the case cannot occur as long as the burden of proof lies with both the court and the party who invoked the foreign law, and not only the latter. On the other hand, the application of Romanian law is an exceptional solution, incident only in the situation where, objectively, the content of the foreign law cannot be established within a reasonable period, and not when the party whose obligation was incumbent is unable or refuses to fulfill it.

4. Conclusions

Thus, as a result of the analysis carried out, art. 2.562 of Civil Code distributes in a balanced manner the burden of proof of the foreign law between the court of law and the parties. The balance evoked is not equivalent, however, to the establishment of equality in terms of obligations between the two categories of participants in the civil proceedings, but to proportionality with the tasks incumbent on them in terms of the application of foreign law. Therefore, the obligation to establish the content of the foreign law lies primarily with the court which, on the one hand, is also required to apply this law regardless of the position of the parties, as long as the conflicting norm refers to it, and, on the other hand, it is even better placed from the perspective of the instruments it has at its disposal (e.g. direct communication with the competent central authority designated by the Romanian State, respectively the Ministry of Justice). The party's obligation is of a secondary nature, so that any failure to fulfil obligations cannot lead to the removal of the court's burden of determining the content of the foreign law.

It therefore follows that the second paragraph of Article 2.562 of the Civil Code was not enacted by the legislator in order to relieve the court of law of the obligation to establish the content of the foreign law, but only to co-opt the party in the approach that it has to take.

Through these conclusions, the present study aims to contribute to the stabilization of the judicial practice in the matter, while raising new questions regarding how the court can be supported in an often complicated approach, but necessary for the resolution of disputes with a foreign element. Therefore, I consider it necessary to undertake future research with the objective of systematizing the modalities and mechanisms for determining the content of the foreign law.

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