

## THE LEGAL NATURE OF THE CISG PROVISIONS FROM THE PERSPECTIVE OF ROMANIAN PRIVATE INTERNATIONAL LAW

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### **Abstract:**

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is the main uniform substantive regulation at international level, applicable to commercial sales with a foreign element, and, according to Art. 1, point 1, it becomes applicable when the parties are domiciled in different contracting states or when the rules of private international law lead to the application of the law of a contracting state.

Since, in the case of legal relationships with a foreign element, the application of the substantive rules is usually subsequent to the conflict rules, the correlation between the provisions of the CISG and the rules of private international law (the conflict rules) is obvious in the second mentioned hypothesis. Instead, the situation is not as simple in the first hypothesis as long as the application of the provisions of the CISG no longer presupposes the prior incidence of the conflict rules.

Starting from this observation, the present scientific approach aims to qualify the provisions of the CISG in order to place them in the mechanism for determining the applicable law established by the rules of private international law. The research has as its starting point the rules of Romanian private international law, but its conclusions have the vocation to be extended to other legal systems that embrace the same legal concepts.

**Keywords:** CISG, private international law, overriding mandatory rules (rules of necessary application), choice-of-law rules

### **1. Introduction**

It is commonly accepted in private international law that the substantive rules applicable to a legal relationship with foreign element, such as that arising from a contract for the international sale of goods, are identified with the help of conflict-of-law rules. The latter allow the determination of the applicable legal system (*lex causae*), from which the appropriate substantive rules will be taken. In contractual matters, the applicable law (*lex contractus*) is established in Romania with the help of the conflict-of-law rules contained in the Rome I Regulation<sup>1</sup>. According to them, the contract is governed by the law chosen by the parties, and in the absence of such a law, by the law of the state in whose

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<sup>1</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), published in OJ L 177 of 4.7.2008.

territory the seller has his habitual residence at the date of its conclusion (art. 3 para. (1) and art. 4 para. (1) letter a) of the Rome I Regulation<sup>2</sup>.

The *lex contractus*, thus determined, will regulate the substantive conditions necessary for the valid conclusion of the contract, its effects, its execution and contractual liability, as well as the extinction of contractual obligations (art. 10 and art. 12 of the Rome I Regulation).

Exceptionally, art. 9 of the Rome I Regulation allows the direct application of certain substantive rules belonging to the law of the forum – the rules of immediate application – without first going through the reasoning for determining the *lex causae* described above.

This is the context in which arises a question about the legal nature of the rules contained in the United Nations Convention on Contracts for the International Sale of Goods (hereinafter abbreviated CISG), adopted in Vienna on 11 April 1980 and to which Romania acceded by Law no. 24/1991<sup>3</sup>. The Convention is one of the main sources of international trade law, currently counting almost 100 States Parties<sup>4</sup> and contains substantive rules applicable to the contract for the international sale of goods, i.e. legal rules governing the formation of the contract, its effects (the rights and obligations of the parties), the liability of the parties for non-performance of contractual obligations, as well as the exemption from liability. According to Art. 1 para. (1) of the CISG, its provisions become applicable in two cases: a) when the parties are domiciled in different Contracting States or b) when the rules of private international law lead to the application of the law of a Contracting State. Also, Art. 6 of the CISG allows the parties to exclude, in whole or in part, the application of its provisions or to modify their effects.

If the second hypothesis of application of the CISG (i.e. when the *lex causae* is the law of a contracting state) is based on the general mechanism of determining the material rules incident to a legal relationship with a foreign element, the same cannot be said about the first one (i.e. when the parties are based in different contracting states). The reason why the present research aims at the legal nature of the CISG rules and, consequently, their positioning in the system of private international law is thus highlighted.

## 2. Methodology

In relation to their subject matter, the CISG rules are clearly material rules, the normative act analyzed not having the purpose of regulating the contract for the international sale of goods (and) from a conflictual point of view.

This qualification does not, however, explain the application of the CISG rules in the first hypothesis described above, except in the case where these legal rules could be qualified as rules of immediate application.

Therefore, the present study aims to identify the defining conditions of the rules of immediate application and to verify whether they can be validated in the case of the CISG rules. A foreseeable difficulty from the very beginning of the research is represented by the provisions of art. 6 of the normative act which, as we have shown above, allow the parties to exclude all or part of the CISG provisions or to modify their effects.

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<sup>2</sup> According to Art. 3 para. (1), “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 part only of the contract.”. According to Art. 4 para. (1) lit. a), “(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence”.

<sup>3</sup> Published in the Official Gazette no. 54 of March 19, 1991.

<sup>4</sup> Romania acceded to the CISG by Law No. 24/1991, published in the Official Gazette No. 54 of 19 March 1991. For a list of the States Parties, see: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en)

### 3. The concept of "rule of immediate application"<sup>5</sup>

According to art. 9 par. (1) of the Rome I Regulation, "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation".

Also, according to art. 2.566 par. (1) of the Romanian Civil Code

<sup>1</sup>, according to which: "The mandatory provisions provided for by Romanian law for the regulation of a legal relationship with an element of foreignness shall apply with priority. In this case, the provisions of this book<sup>2</sup> regarding the determination of the applicable law shall not apply".

Based on the indicated legal provisions, the immediately applicable norm has been defined in Romanian specialized literature as that substantive norm, belonging to the legal system of the court seized, which, given its high degree of imperativeness, applies with priority to a legal relationship with an element of foreignness having a certain point of connection with the country of the forum, removing the conflicting norm from application (for developments, see: Sitaru, 2013, p. 20; Macovei and Dominte, 2021, p. 3.022; Dariescu, 2023, p. 35; Buglea, 2013, p. 33, Ungureanu, Jugastru and Circa, 2008, p. 52; Filipescu and Filipescu, 2008, p. 40).

From the aforementioned definition, the following conditions of the rule of immediate application can be extracted (for developments, see Stănescu, 2022, pp. 461-462):

- a) the rule of immediate application is a substantive rule;
- b) the rule of immediate application belongs to the legal system of the court seized;
- c) the rule of immediate application applies to a legal relationship with a foreign element that has a point of connection with the country of the forum;
- d) the rule of immediate application has an imperative character, removing the conflict rule applicable in the matter.

### 4. The test of the rule of immediate application with regard to the CISG rules

According to the established working method, I further analyze the fulfillment of the defining conditions of the rule of immediate application in the case of CISG rules.

#### 4.1. The condition that legal norms are some material

I have already shown that this condition is met, the CISG rules regulating the contract for the international sale of goods from a substantive point of view (namely its formation, its effects, contractual liability and causes of exoneration from liability), and not from that of determining the applicable law.

#### 4.2. The condition that the legal norms belong to the law of the court seized

The foundation of private international law is the rule of equality of legal systems with a vocation to apply in the case of a legal relationship with a foreign element, a rule that determines that the choice of one of these (which will effectively govern the legal relationship) is made on the basis of an objective criterion represented by the conflicting norm.

The norm of immediate application therefore represents an exceptional situation, which removes this equality, imposing the substantial solution established by the legal norms of the forum. The justification for such an exception is found in the realm of the importance of the regulated social relations from the perspective of the legislator of the forum, determining his option to sacrifice the

<sup>5</sup> An expression used alternatively is that of "overriding mandatory provisions"

<sup>1</sup> Law no. 287/2009 on the Civil Code, republished in the Official Gazette no. 505/15 July 2011.

<sup>2</sup> The Civil Code represents the common law in terms of regulating private law relationships in the Romanian legal system, and Book VII is its subdivision devoted to the rules of private international law.

principle of equality of legal systems in favor of the direct regulation of the solution he considers desirable.

Referring to the CISG norms, it can be observed that they are included in an international convention to which Romania is a party, and, according to art. 11 para. (2) of the Romanian Constitution "Treaties ratified by Parliament, according to the law, are part of domestic law".

Consequently, this second condition is also met, the material norms analyzed being part of the law of the forum.

#### **4.3. The condition that the legal norms regulate a legal relationship with a foreign element of that has a connection with the state of the forum**

Since the hypothesis analyzed is that of the application of the CISG according to art. 1 letter a) of this normative act, namely when the parties have their registered offices in different contracting states, it results that the legal relationship to which the provisions of the Convention are applicable is one arising from a sales contract with a foreign element. Moreover, according to art. 1 paragraph (2) of the CISG, in order to attract the incidence of the Convention, it is necessary for the parties to be aware at the date of conclusion of the contract of the circumstance that their registered offices are located in different contracting states.

The connection with Romania as the state of the court seized is necessary, otherwise the Romanian courts cannot establish their international jurisdiction to resolve a dispute arising from the aforementioned contract. Thus, according to the Brussels 1 Bis Regulation<sup>3</sup>, applicable when the defendant has his domicile or registered office on the territory of a Member State of the European Union (Stănescu, 2023, p. 34), international jurisdiction is attracted by the presence in the country of the forum of the defendant's domicile or registered office or, in the case of disputes arising from sales contracts with a foreign element, by the location in Romania of the place of execution of the obligation to deliver the sold good<sup>4</sup>. The Romanian Code of Civil Procedure<sup>5</sup>, applicable when the defendant's domicile or registered office is located on the territory of a third state, retains the same connecting points that attract the international jurisdiction of Romanian courts, adding, alternatively, the location in Romania of the place of conclusion of the contract<sup>6</sup>.

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<sup>3</sup> Regulation (EU) No 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 (Brussels 1 bis Regulation), published in OJ L 351, 20.12.2012.

<sup>4</sup> According to art. 4 para. (1), "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

According to art. 7 para. (1), "A person domiciled in a Member State may be sued in another Member State: a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered".

<sup>5</sup> Law no. 134/2010 on the Code of Civil Procedure, republished in the Official Gazette no. 247 of 10 April 2015.

<sup>6</sup> According to art. 1.066 para. (1), "Subject to situations where the law provides otherwise, the Romanian courts are competent if the defendant has his domicile, and in the absence of domicile, his usual residence, respectively his principal office, and in the absence of the principal office, a secondary office or goodwill on the territory of Romania on the date of filing the application".

According to art. 1.081 para. (1) point 2, "Romanian courts are also competent to judge disputes in which: (...) the place where a contractual obligation arose or had to be performed, even if only in part, is in Romania".

Consequently, the third condition mentioned is also met, the CISG rules being applied, by hypothesis, to a legal relationship with a foreign element, and the connection of the legal relationship with Romania being a premise for the application of the convention by the Romanian courts.

#### **4.4. The condition that legal norms have an imperative character, eliminating conflicting forum norms**

Mandatory legal norms are generally defined as imposing on the parties a certain conduct from which there can be no derogation (Boroi and Anghelescu, 2012, p. 12). In relation to this definition, as I anticipated above, an obstacle at first sight insurmountable for the qualification of CISG norms as rules of immediate application is represented by art. 6 of the Convention, according to which: "The parties may exclude the application of this Convention or, subject to the provisions of art. 12, derogate from any of its provisions or modify their effects".

At first glance, it can be argued with conviction that, obviously, some legal norms that allow the parties to derogate from their provisions cannot have an imperative character.

Upon closer analysis, however, it is possible that such a thesis loses its firmness.

Thus, it should not be forgotten that the perspective from which this research is undertaken is that provided by private international law. Or, as we have already shown, it starts from the premise of the equality of legal systems with a vocation to provide the material norms applicable to a legal relationship with a foreign element, equality whose guarantor is the conflicting norm. In special situations, justified by the importance of a legal relationship for the legal system of the court seized, the norms of immediate application challenge the principle of equality and implicitly the vocation of foreign material norms to regulate a legal relationship with a foreign element and impose on it the material solution prescribed by the law of the forum.

It means, therefore, that, in reality, the imperativeness of the rule of immediate application relates to the relationship between it and the conflicting rule, the former having an imperative character to the extent that it does not allow the application of the latter. Now, if we refer to the provisions of art. 1 para. (1) letter a) of the CISG, we find that the provisions of the convention become applicable for the simple fact that the legal relationship presents a qualified foreign element, namely the location of the parties' headquarters in two different contracting states. By force of art. 1 para. (1) letter a), a certain set of substantive rules becomes directly applicable (specifically, the set of legal rules represented by the CISG), removing the application of the conflicting rule that constituted the guarantor of the equality of legal systems with a vocation to apply to the legal relationship. Now, such a direct forced application of some substantive rules cannot prove anything other than the imperative character of the rule that imposes it, namely art. 1 para. (1) letter a) of the CISG.

In this context, the provisions of art. 6 of the CISG, mentioned above, cannot change the conclusion stated since the parties, by their will, can only establish other material rules applicable to the legal relationship, derogating from those provided for by the CISG. Regardless of whether or not they exercise this right, their will does not disrupt the application of the provisions of art. 1 para. (1) letter a) which continue to exclude the incidence of conflicting rules.

Consequently, the fourth condition is also met, the CISG rules having an imperative character in the hypothesis provided for by art. 1 para. (1) letter a), in the sense that they irreversibly remove the conflicting rule of the forum and directly govern the substance of the legal relationship with a foreign element.

### **Conclusions**

The analysis carried out leads to the conclusion that the CISG rules have a different nature depending on the way in which they become applicable to a legal relationship with a foreign element.

Thus, in the hypothesis envisaged by art. 1 para. (1) letter b), the CISG provisions become applicable as a result of the fact that the applicable law is the law of a contracting state. This highlights

the rule in private international law according to which the legal relationship is governed by the substantive rules contained in the legal system indicated by the conflicting rule. Consequently, the CISG rules have, in this case, the legal nature of substantive rules belonging to the *lex causae*.

On the other hand, in the hypothesis envisaged by art. 1 para. (1) letter a), the CISG provisions become applicable because the parties are domiciled in different contracting states. In this situation, the application of the conflicting rule no longer precedes that of the substantive rules. It follows, therefore, that the CISG rules will no longer have the legal nature of substantive rules contained in the *lex causae*, for the simple fact that the determination of the applicable law no longer constitutes a condition for their application. Becoming incidental as soon as the condition provided for by art. 1 para. (1) letter a), the CISG rules acquire in this hypothesis the nature of rules of immediate application. Finally, the circumstance that, according to art. 6 of the CISG, the parties may remove the provisions of the Convention from application does not change the conclusion stated since the will of the parties determines only the applicable substantive rules, without being able to reactivate the conflicting rule removed by art. 1 para. (1) letter a).

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