



ORIGINAL PAPER

About the jurisdiction and the application field of the *lex pavilionis* in the Romanian legal system

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Abstract:

The law of the flag represents the legal link based on registration, between the ship and the territory of a state, respectively the legal system of that state. A ship has only one flag. The competence of the flag law is a very broad one, given the fact that the space of ships is considered an extension of the national territory of the state in which it was registered. This is why flag law governs such a vast category of legal issues relating to ships. Thus, the regime of ships and aircraft, considered as goods, is governed by the *lex pavilionis*. In this sense, the flag law has jurisdiction over: the ways of acquiring real rights over ships, the ways of transferring and extinguishing these rights, the real guarantees established over ships and their legal regime, the claim rights established in connection with ships. At the same time, the law of the flag also governs the regime of goods on board ships and aircraft and which are closely related to their normal operation, the forms of publicity required in most legal systems regarding the rights established on ships. Also, the law of the flag is applied whenever an act is drawn up on board the ship regarding the external form of the act, when the intervention of a public authority is necessary for the validity of that act. The law of the flag governs, as a rule, the regime of legal acts occurring on board ships, but also the delict committed on the high seas. Regarding the law that applies to the facts that occurred on board the ships, if the ships were in internal maritime waters, the applicable law will be distinguished according to whether or not the external environment was affected.

Keywords: *the lex pavilionis, ship registration, real rights to ships.*

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Specific Legislation on Maritime Transport. The Romanian legislation in the field of transport, domestic legislation, consists of a series of normative acts - laws, ordinances, resolutions, orders, methodological norms - a vast legislation, but which has the drawback of not being synthesized into a single Transport Code, as in the legislation of other states. This situation makes it difficult in judicial practice to quickly obtain information for a specific type of transport, due to inaccessibility to complete and comparative information between transports and poses, on the legislative level, the risk of dual regulation of the same legal issue.

The maritime transport sector is no exception in this regard. Thus, Romania is a signatory to several international conventions in the field of navigation safety, largely adopted under the auspices of the United Nations, the International Maritime Organization, the United Nations Environment Program and is also a signatory to various regional and bilateral conventions related to this domain.

Domestic regulations. In Romanian law, navigation activity is regulated by O.G. no. 42/1997 on naval transport. After the entry into force of O.G. no. 42/1997 on civil navigation, an ordinance that replaced regulations from the communist period, legal regulations in the field were supplemented with legal provisions aimed at ensuring optimal conditions for naval transport activities. O.G. no. 42/1997 on naval transport was amended and supplemented by the provisions of O.U.G. no. 74/2006.

These normative acts include, in addition to technical provisions, legal provisions. The aforementioned legal provisions aim to organize a global system of authorization and licensing and to establish facilities to promote international maritime transport (Căpățină, 2000: 7-8). Maritime law is not regulated in the new Civil Code because a Maritime Code was intended to be adopted.

International regulations. Given the characteristics of maritime transport, of ships moving on long routes that cross national borders, maritime transport is subject to regulations from international conventions:

- International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 1926;
- International Convention for the Unification of Certain Rules concerning the Arrest of Sea-going Ships, Brussels, 1952;
- London Convention for the Facilitation of International Maritime Traffic, 1965;
- United Nations Convention on Carriage of Goods by Sea - "Hamburg Rules", Hamburg, 1978;
- International Convention on Search and Rescue at Sea, Hamburg, 1979;
- Convention on the Law of the Sea, Montego Bay, 1982;
- International Convention on Salvage, London, 1989.

European Community acquis in maritime transport. Romania's accession to the EU has created a particular situation (Caraiani, 2006: 152-155), in that the European Community acquis in the field of maritime transport was adopted by our country as well. Thus, in the field of policies regarding maritime transport, there is a vision similar to that of the EU.

Community maritime transport benefited from specific and detailed regulations, especially in recent years. This is justified by the fact that this sector, along with the agriculture sector, is essential in achieving the basic community objectives.

Community regulations on maritime transport have been adopted since 1977, chronologically, their evolution can be summarized in four important stages,

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materialized in a series of regulations, directives, decisions, recommendations, or resolutions (Manolache, 2003: 524-528).

The first stage can be identified as the one that addressed a series of common problems such as:

- establishing a consultation procedure on relations between member states and third countries on maritime issues and on action on these issues in international organizations (Decision no. 77/587:1977);
- recommending the ratification of international conventions regarding navigation safety (Recommendation no. 78/584: 1978);
- control and reduction of pollution caused by hydrocarbons discharged at sea;
- activities of third countries in the field of maritime cargo transport (Decision no. 78/774: 1978) etc.

The second stage is the one that marks, this time, the drafting of an essential legislative instrument that will later become a benchmark in the community legislative process: Regulation no. 954 of May 15, 1979 regarding the ratification by member states or their accession to the United Nations Convention on a Code of Conduct for Maritime Conferences.

The next stage began in 1986 and materialized in a set of regulations on maritime freight transport:

- Regulation no. 4055/86 for the application of the principle of freedom to provide maritime transport services between member states and between member states and third countries;
- Regulation no. 4056/86 which establishes detailed rules for the application of articles 85[81] and 86[82] of the Treaty to maritime transport;
- Regulation no. 4057/86 on unfair pricing practices in maritime transport;
- Regulation no. 4058/86 on concerted action to protect shippers' free access to maritime transport.

The more recent stage resulted in the adoption of other legal instruments in maritime matters such as:

- encouraging measures that favor the training of highly qualified sailors;
- free movement of services, competition, unfair pricing policies, and free access to sea trade;
- reporting formalities for ships arriving or departing from community ports;
- ship armament conditions;
- organizing the working time of sailors;
- short-distance sea transport, etc.

Regarding the issue of legal standards in maritime transport, there is a problem with the conflict between community law and national law. The conflict between community law and national law is resolved by the provisions of art. 148 para. (2) of the Constitution of Romania: "as a result of accession, the provisions of the constituent treaties of the European Union, as well as other community regulations with mandatory character, take precedence over contrary provisions of internal laws, respecting the provisions of the accession act".

The legal regime of the ship - the specific means of transport for maritime transport. According to the current regulations (O.G. no. 42 of 1997: art. 8), the ship is the means of navigation used for carrying out transport activities and other water services.

In other words, the concept of a ship includes maritime, river, and other inland navigation vessels, including small vessels, as well as floating equipment such as dredgers, elevators, floating cranes, and others of the same type, whether they have propulsion or not.

Also, the ship includes installations, machines, and engines that provide propulsion or produce another mechanical action, with the mechanisms and means necessary for transmitting this action, all objects necessary for navigation, various maneuvers, ship safety, human life rescue, pollution prevention, communications, hygiene, and operation according to the ship's purpose, even when they are removed from the ship for a limited time, as well as provisions.

According to O.U.G. no. 74/2006 for amending and supplementing O.G. no. 42/1997 on naval transport, ships are considered:

- maritime and inland navigation vessels of any type, propelled or unpropelled, navigating on the surface or submerged, intended for the transport of goods and/or people, fishing, towing, or pushing;
- floating installations such as dredgers, floating elevators, floating cranes, floating grabs, and the like, with or without propulsion;
- floating constructions that are not normally intended for movement, such as floating docks, floating piers, pontoons, floating hangars for ships, drilling platforms, and the like, floating lighthouses;
- recreational vessels.

The legal regime of means of transport is subject to different laws depending on whether they have a flag or not. Thus:

- a) ships are governed by the flag law they fly – *lex pavilionis*;
- b) for transport means that do not have a flag, the law of the organic status of the transport company to which the respective vehicles belong is applied.

The law of organic status represents the law of its headquarters and has the same role as the flag law in the case of ships and aircraft, that is, the one that gives nationality to the respective means of transport. In the field of private international law, the freedom to choose the conflict rule is not directly consecrated: the organic status of the legal entity will be governed by its national law. However, the will's autonomy transpires in the overall operations of establishing the legal entity, with repercussions in private international law because associates or shareholders have the freedom to decide which state's territory the headquarters will be located. By choosing it, they indirectly designate the law that will apply to the legal person's status because nationality is given by the law of the state on whose territory the headquarters are located. (Jugastru, 2016).

Article 2620 of the Romanian Civil Code provides that the transfer, establishment, and extinction of real rights over a means of transport are subject to the flag law they fly, goods that are permanently on board and technically equip it, and claims for expenses incurred for technical assistance, maintenance, repair, or renovation of the means of transport.

Acts and legal facts related to civil navigation are usually subject to the flag law – *lex pavilionis* (Sitaru, 2001: 484-487).

Nationality. According to the legal provisions in the field, the provisions of O.G. no. 42/1997 as amended by OUG no. 74 of 2006, ships have the nationality of the state whose flag they are authorized to wear. In our country, the Government of Romania, through the Ministry of Transport, grants the right to fly the Romanian flag or can order its suspension or withdrawal.

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Ships flying the Romanian flag are of Romanian nationality and cannot sail under another state's flag.

Identification Elements of a Ship. The identification elements of a ship are considered to be: its name or registration number, its home port or the ship's location port, the nationality of the ship given by the flag it is entitled to fly, its own tonnage, and its own registry class.

The home port or the location port of the ship is defined as the fixed connection point of the ship, where all the information related to the ship is gathered. As a rule, a commercial ship is listed in the records of a port on the territory of the state whose flag it flies, and as an exception, ships of a country that does not have a coastline can also be registered abroad.

Specialized literature equates the home port to the domicile of a natural person or the headquarters of a legal entity, in the sense that it has the same meanings for the ship as the domicile for the natural person, respectively the headquarters for the legal entity.

The ship has its own nationality expressed through its flag, in the sense that the nationality is given by the country where it was registered.

The ship's tonnage represents an individualizing element of the ship, indicating its dimensions, but especially its transport capacity.

The registry class attests to the quality of the ship; by classifying it, proof of its safety condition is provided.

About the Competence and Scope of the Flag Law in the Romanian Legal System. As mentioned before, ships have a nationality expressed through a flag. They take on a specific nationality, which is given by the country where they were registered or enrolled, flying the flag of that country. Therefore, ships are governed by the law of the flag they fly (*lex pavilionis*).

Flag Law. The flag law represents the legal connection based on registration, between the ship and the territory of a state, respectively the legal system of that state. A ship has only one flag.

Competence and scope of the flag law. The competence of the flag law is very extensive, given the fact that the space of the ships is considered an extension of the national territory of the state in which it was registered. This is why the flag law governs such a vast category of legal issues related to ships.

Thus, the regime of ships and aircraft, viewed as assets, is governed by *lex pavilionis*. In this sense, the flag law has jurisdiction over: the ways of acquiring real rights over ships, the ways of transferring and extinguishing these rights, real guarantees constituted over ships and their legal regime, rights of claim established in connection with ships.

Also, the flag law governs the regime of goods on board ships and aircraft and which are closely related to their normal operation, the forms of advertising requested in most legal systems regarding rights established over ships. The good in the process of being transported is subject to the law of the state from which it was dispatched. The law (Romanian Civil Code: art. 2.618) provides three exceptions to the law of the place of dispatch of the good: when the interested parties have chosen, by their agreement, another law, it thus becomes applicable; if the good is stored in a warehouse or placed under seizure under precautionary measures or as a result of a forced sale, in these cases being applicable, during the deposit or seizure, the law of the place where it was

temporarily relocated; if the good is among the personal ones of a passenger, it is, in this situation, subject to its national law. In our legislation, the precautionary seizure of ships is regulated by art. 960-969 Civil Procedure Code. These provisions also contain rules regarding the seizure of goods on board a ship (Leș, 2021:597-599; Ghiță: 2017: 170).

Also, the flag state law applies whenever an act is drafted on board the ship regarding the external form of the act, when the intervention of a public authority is necessary for the validity of the respective act.

The flag state law generally governs the regime of legal facts occurring on board ships, but also the offense produced in international waters. Referring to the law that applies to facts that occurred on board ships, in cases where these ships were in internal maritime waters, a distinction will be made regarding the applicable law depending on whether the external environment was affected or not. If the external environment was affected, the law of the injured territory will apply as *lex loci delicti commissi*, and if the external environment was not affected, *lex pavilionis* will apply.

According to art. 2621 of the Romanian Civil Code, which establishes the scope of the flag state law (Baiaș, Chelaru, Constantinovici, Macovei, 2012: 2587), “the flag state law or the state of aircraft registration mainly governs:

- a) the powers, competencies, and obligations of the ship's commander;
- b) the employment contract of the crew, if the parties have not chosen another law;
- c) the ship owner's liability for the actions and acts of the commander and crew;
- d) property rights and guarantees on the ship or aircraft, as well as forms of publicity.”

The legal status of the ship's commander in Romanian legislation (O.G. no. 42 of 1997, amended by OUG no. 74 of 2006: art. 72-77, 82, 87). The ship's commander exercises command on the ship and for this purpose is invested with authority over all persons on board the ship and fulfills the duties assigned to him according to the provisions of national legislation, instructions of the owner or ship operator, and international agreements and conventions to which Romania is a party. He represents the owner or ship operator in their relations with the authorities.

The spectrum of duties of a ship commander under the Romanian flag includes: the navigability of the ship, maintaining onboard conditions for safe navigation, ensuring environmental protection, ensuring working and living conditions for the ship's crew. Also, in case of danger, the commander must act to save the people on board, protect the ship and cargo, and keep the logbook and other ship documents safe. He has an obligation not to leave the ship except when there is no real chance of saving the ship.

If a ship flying the Romanian flag is arrested, detained, or seized by the authorities of another state, the commander will immediately inform the nearest Romanian diplomatic mission and the Romanian Naval Authority. Similarly, he must act if the arrest, detention, or seizure of the ship he commands has been revoked.

Any ship commander, regardless of the flag, has an obligation when the ship is stationary or sailing in the navigable national waters of Romania, sailing in the navigable internal waters of other states or in international waters and will make a stopover in a Romanian port, is required to write a report about any event on the ship: collision, damage, pollution, fire, drowning, acts of indiscipline or revolt on board, and similar.

In special situations, the ship's commander has the right to impose exceptional measures on board the ship, depending on the severity of the situation: he can isolate any

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person on board if their actions, even if they do not constitute the elements of a crime, endanger the safety of the ship, persons, or things on the ship. He will also have the obligation to conduct the necessary investigations in cases where elements of a crime provided by Romanian legislation are discovered on board, to grant the accused person the right to defense, to protect her and her properties, to detain her in normal living conditions on board and to hand her over to the competent authorities from the first port of call, along with the documents prepared during the investigation.

According to Romanian law, the captain of the ship has other duties, such as recording in the ship's log acts and events of civil status: births, marriages, and deaths that occur on board the ship. Also, he can certify the will of a person on board when the ship is underway. The certification given by the ship's captain has the same legal value as the certification given by a public notary.

The captain of a ship under the Romanian flag is obliged to assist and save a ship in danger, except when the captain of the ship in danger expressly refuses help or when information is received that help is no longer needed.

Navigational Personnel. According to private international law, in contractual matters, the law of the contract – *lex contractus* – can be *lex voluntatis*, meaning the law chosen by the parties based on their will. When the parties do not use this possibility, they will use objective criteria, established by law or subjective elements intrinsic to the act concluded by the parties of that convention, to designate the law governing that contract. Thus, the flag state's law, according to Romanian law, will govern the employment contract of the navigational personnel, unless the parties expressed their will, opting for another law to govern their employment contract.

According to Romanian law (O.G. no. 42 of 1997, amended by OUG no. 74 of 2006: art. 52), Romanian navigational personnel are represented by all persons, regardless of citizenship, who have a certificate or a capacity certificate, in accordance with legal provisions and who expressly give them the right to perform functions on board ships.

Usually, the crew consists of navigational personnel and auxiliary personnel, and its composition is established according to the type of ship and its destination.

Therefore, any ship flying the Romanian flag is served by a crew that ensures the ship operates in safe and environmentally friendly conditions and performs specific activities on board.

Employment relationships of crew members of ships flying the Romanian flag with their employers are established based on the provisions of Romanian legislation, agreements, and international conventions to which Romania is a party, taking into account the provisions of collective employment contracts and individual boarding contracts. The individual boarding contract, mentioned in special legal regulations but undefined by these, is considered by doctrine (Piperea, 2013: 150) to be, in fact, an individual employment contract, concluded for a fixed term, between an employer and an employee who is part of the navigational personnel. Also, the rights and working and living conditions that must be ensured on board ships flying the Romanian flag are also established in accordance with labor legislation, agreements, and international conventions to which Romania is a party and the provisions of the collective employment contract (O.G. no. 42 of 1997, amended by OUG no. 74 of 2006: art. 67, art. 70).

The shipowner's liability for the acts and deeds of the captain and crew in Romanian legislation (O.G. no. 42 of 1997, amended by OUG no. 74 of 2006: art. 71-

74). Owners of ships flying the Romanian flag are obliged to comply with the provisions of the agreements and international conventions to which Romania is a party, regarding the ship's crews. The ship's captain represents the owner or the ship's operator in relations with the authorities.

Before starting any voyage and during it, the ship's captain must ensure that the ship meets all the conditions for good navigation and, if the ship does not meet these conditions, he must inform the owner or the ship operator, and they are obliged to remedy these irregularities.

Conveyance and establishment of real rights over ships. According to O.G. no. 42/1997 regarding maritime transport, ships belonging to Romanian legal or natural persons can be transferred in ownership or use to other Romanian or foreign legal or natural persons, complying with the conditions imposed by law.

Acquiring and conveying property rights over ships, as well as establishing, transferring, or extinguishing other real rights over them, must be transcribed in matriculation registers or records, which will be kept by the port harbormasters and will also be mentioned on the nationality document or in the ship's logbook. Also, the shipbuilding contract will be transcribed in the shipbuilding registers of the harbormaster within whose jurisdiction the shipyard is located. At the same time, these registers will also transcribe property transfers, as well as the establishment or extinguishment of real rights over ships, occurring until the nationality documents are obtained.

According to legal regulations (O.G. no. 42 of 1997, amended by OUG no. 74 of 2006: art. 15), newly built ships or those acquired from foreign legal or natural persons can sail under the Romanian flag from the time of their launching or from the effective date of the acquisition document, until the release of the nationality document, after being registered in the centralized evidence register of the Ministry of Transportation, with a temporary permit to fly the Romanian flag issued by the departing port's harbormaster – if the ship is in a Romanian port – or by Romania's diplomatic mission – if the ship's departure point is abroad.

However, the launching of newly built ships can only be done with the approval of the harbormaster within whose jurisdiction the operation is carried out, and after the builder presents the authorization issued for this purpose by the classification society that supervised the construction.

Newly built ships in Romania, to be registered in another state, can navigate based on registration documents or a temporary flag-flying permit, issued by the competent authorities of that state.

Conclusions

A legal analysis of the competence and scope of the flag law requires an interdisciplinary approach to this concept, on the one hand from the perspective of transport law, and on the other hand from private international law. The overlap of these two branches of law is predominantly observed in conflicts of laws and arises due to the extraterritorial nature of transport activities. The range of overlap between the two branches covers a series of aspects: conflict rules in contractual matters that indirectly create connections with the transport contract, conflict rules regarding goods in transit, conflict rules regarding means of transport, conflict rules concerning civil navigation - maritime, river, and air, acts and legal facts that occur on board ships or aircraft, illegal acts committed by ships or aircraft or on board that cause external damage, collision of ships or aircraft, assistance and rescue of ships, the incidence of immediate application

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rules of Romanian law (Predescu, 2002: 42-47).

The branch of law that indicates the competent law to govern a legal aspect related to a legal issue that has an external element is private international law, and when the flag law is Romanian law and it is indicated as the governing that legal issue, the content of the legal aspects and how they are resolved are most often ensured by legislation in the field of transport law.

References:

- Baias, Fl.A., Chelaru, E., Constantinovici, R., Macovei, I. (coordinators) (2012). *Noul cod civil, Comentariu pe articole*, art. 1-2664, Bucharest: C.H. Beck Publisher
- Caraiani, Gh. (2006). *Acquis-ul comunitar și politica sectorială din domeniul transporturilor în Uniunea Europeană*, Bucharest: Penguin Book Publisher
- Căpățînă, O. (2000). *Noi reglementări privind activitatea de transporturi navale*, R.D.C. nr. 7-8/2000, Lumina Lex Publisher
- Jugastru, C. (2016), Câteva ipostaze ale autonomiei de voință în dreptul internațional privat, *Studia Iurisprudentia* nr. 4, available online at: <https://sintact.ro/#/publication/151011471?keyword=Drept%20international%20privat&cm=SREST>
- Cotușiu, A. (2015). *Contractul de transport*, Bucharest: C.H. Beck Publisher
- Manolache, O. (2003). *Drept comunitar*, Bucharest: All Beck Publisher
- Pîperea, Gh. (2013). *Contracte și obligații comerciale*, Bucharest: C.H. Beck Publisher
- Pop, L., Popa, I.F., Vidu, S.I. (2012). *Tratat elementar de drept civil, Obligațiile*, Bucharest: Universul Juridic Publisher
- Predescu, B. (2002), *Drept internațional privat*, Craiova: Universitaria Publisher
- Sitaru, D.A. (2001). *Drept internațional privat. Tratat*, Bucharest: Ed. Lumina Lex Publisher
- Codul civil român (The Romanian Civil Code), available online at: <https://legislatie.just.ro/Public/DetaliiDocument/175630>
- O.G. nr. 42/1997 privind transportul naval, available online at: <https://legislatie.just.ro/Public/DetaliiDocumentAfis/11262>
- O.U.G. nr. 74/2006 pentru modificarea și completarea O.G. nr. 42/1997, available online at: <https://legislatie.just.ro/Public/DetaliiDocumentAfis/75725>

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