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HOW DO WE QUALIFY PRIMARILY THE CONCEPT OF "DOMICILE" OF THE INDIVIDUAL IN ROMANIAN PRIVATE INTERNATIONAL LAW?

Nadia-Cerasela ANITEI¹

Abstract

In order to make the primary qualification of the concept of "domicile" in Romanian private international law it is necessary to take into account the scope of the concept of residence in Romanian domestic law.

This article aims to study and analyze the instrument of the institution "domicile" the following legislation: Article 86-Article 97 Civil Code; Chapter IV (art.26- 41) of the Emergency Ordinance no. 97/2005 on the records, domicile, residence and identity documents of Romanian citizens republished (2011); Government Decision no. 516/2009 amending Government Decision no. 839/2006 regarding the form and content IDs, the sticker on the book of their residence and property. Decision no. 516/2009; the provisions of Emergency Ordinance no. 194/2002 on foreigners in Romania republished (in 2011) and the provisions of Government Emergency Ordinance no. 102/2005 on the free movement of citizens of member states of the European Union and European Economic Area (republished in 2011) in order to derive the Romanian qualification of the notion "domicile of the individual".

Keywords:

the domicile of the individual Romanian citizen, the domicile of the individual foreign citizen, the domicile of the individual foreign citizen in Romania, the "domicile" of the individual EU citizen.

Preliminary remarks

The topic of this paper obliges us to take into account the primary qualification of the concept of domicile, especially as this concept is used both by the rules of international competence and by the applicable special or conflictual material rules.

According to Article 2558 paragraph (1) the new Civil Code, the primary qualification is always made according to the Romanian law, namely according to the notions used, by the Romanian law system. However, two observations should be made: first, the term "law institution" should be interpreted *lato sensu*, including the legal notions, and the second that exceptions of paragraphs (2), (3), (4) and (5) are of strict interpretation. Also, the qualification of a matter as of procedural or substantive law is done

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according to the Romanian law. (M.V. Jakotă (1997):210; D. Lupascu (2012): 68-70; O. Ungureanu. C. Jugastru. A. Circa. (2008):86; N.C. Dariescu (2008):11-16; N-C Anitei (2013):1-5).

2. How is the domicile of the individual regulated in the Romanian common law? N-C Anitei (2017):249-252).

2.1. What do we mean by the notion of domicile of the Romanian citizen as individual in Romanian law

Under Romanian law until the entry into force of the new Civil Code in 2011, the domicile of the individual was defined by Article 13 of Decree no. 31/30 January 1954 *regarding natural and legal persons as "where it has its permanent or main residence". On the basis of this article, the doctrine defined the individual's domicile as the dwelling that fulfils cumulatively the following two criteria: it is stable and it is the main one.* (Tr., Ionaşcu (1963):141; P., Andrei (1977):28; D., Lupulescu. A., M., Lupulescu. (2002):98).

In the doctoral thesis *"Patrimonial relations between spouses in Romanian private international law"*, (N.C. Dariescu (2008):11-16) defended in 2007, when the domicile was regulated in Article 13 of the Decree no. 31/1954 which ordered "the domicile of an individual is where it has its main or principal place of residence" we show *that the domicile of the individual is the dwelling that fulfils cumulatively the following two criteria: it is stable and it is the main one* (Tr., Ionaşcu (1963):141; P., Andrei (1977):28; D., Lupulescu. A., M., Lupulescu. (2002):98). We also show that the contemporary Romanian law emphasizes the feature of the main dwelling of the individual to the detriment of the permanence of the dwelling.

At present, although Decree no. 31/1954 has been repealed and the definition of domicile is regulated in Article 87 Civil Code and Article 27 paragraph (1) of Government Emergency Ordinance no. 97/2005 *on the registration, domicile, residence and identity papers of Romanian citizens* republished (in 2011) the traditional definition of domicile provided by the legislation has been revised in the sense of removing the criterion of permanence and remained only the criterion of the main dwelling.

Article 87 of the Civil Code states that "The domicile of the individual for the exercise of its civil rights and freedoms is where it declares its principal dwelling." It can be seen from this article that the domicile of the individual is defined as the place where the main dwelling is where the individual exercises its civil rights and freedoms.

Article 27 paragraph (1) of Government Emergency Ordinance no. 97/2005 *on the registration, domicile, residence and identity papers of Romanian citizens*

republished (in 2011) stipulates "*The domicile of the natural person is where it declares its main dwelling*". From these provisions, we notice that the individual's domicile is the place where it declares its main dwelling.

From the corroboration of the provisions of Article 87 Civil Code with Article 27 paragraph (1) of Government Emergency Ordinance no. 97/2005 republished, ***the domicile of a natural person is defined as the place where it declares its main dwelling and where it exercises its civil rights and freedoms.***

By corroborating the provisions of Article 86 (2) Civil Code and the provisions of Article 26 paragraph (2) of Government Emergency Ordinance no. 97/2005 republished, we observe that Romanian citizens as individuals can at the same time have only one domicile even if they have more houses.

2.2. How do Romanian citizens change / establish their domicile?(NC Anitei (2017):249-252)

Studying the provisions of Article 86 (1) Civil Code and the provisions of Article 26 paragraph (1) of Government Emergency Ordinance no. 97/2005 republished, we find that the Romanian citizens, except for the specific cases stipulated by the law, have the right to establish or change freely their domicile in the country or abroad.

The provisions of Article 89 paragraph (2) of the Civil Code show that the establishment or change of domicile will take place only when the individual moves in that place with the intention to have the main dwelling there.

Paragraph (1) of Article 89 Civil Code states that "*the establishment or change of domicile shall be made in compliance with the provisions of the special law.*"

In Article 28 paragraph (1) of Government Emergency Ordinance no. 97/2005 republished the following documents are specified in order to prove the address of domicile:

a) documents concluded under the conditions of validity provided by the Romanian legislation in force regarding the housing title;

b) the written declaration of the host, the natural or legal person, to receive someone in space, accompanied by one of the documents referred to in letter a);

c) the declaration on the applicant's own responsibility, accompanied by the check of the public order police officer certifying the existence of a real estate, the fact that the applicant actually resides at the declared address, for the natural person who cannot present the documents referred to in (a)

and (b); for minors and individuals under the ban, the declaration is given and signed by parents or their legal representatives;

d) the document issued by the mayors, showing that the applicant or the host, as the case may be, is entered in the Agricultural Register.

From the provisions of Article 39 of Government Emergency Ordinance no. 97/2005 republished, it is the obligation of the natural persons who change their domicile to ask for the registration in the real estate book of the new home within 15 days after the move. Also, these persons have the obligation to present themselves with the identity card at the request of the person in charge of the real estate book, for the update the real estate book.

From the provisions of paragraphs (2) and (3) of Article 28 of Government Emergency Ordinance no. 97/2005 republished we find that at the request of the Romanian citizens, the Community public service of the person on the jurisdiction of which the last place of residence is registered in the identity document of the applicant is obliged to communicate the data regarding the domiciles in Romania to the respective person and any mention regarding the civil status, as of January 1, 2000, within two working days, and for the data before the year 2000, the term of communication of the data regarding the Romanian domiciles by the respective person is of maximum 20 days.

In the situation of individuals in accordance with the provisions of Article 34 paragraph (1) of the Government Emergency Ordinance no. 97/2005 republished *"who have no identity card and are admitted or received for care or accommodation in social protection units, re-education schools or other institutions they may be issued identity papers in which they register their domicile or the residence at the address of the respective institution."* By using the verb "to be able" we observe the institutions that care or accommodate people in social protection units, re-education schools or other institutions, are not obliged to take the necessary steps for the natural persons who live in such institutions to have an ID.

As an exception to paragraph (2), the same Article stipulates the obligation of institutions that care or accommodate persons in social protection units, in re-education schools or in other institutions to immediately notify the police unit in the area in which they operate, which collaborate with the community public service for the identification of persons in order to establish the identity of individuals who have no identity card and are admitted or received for care or accommodation in these institutions only if for objective reasons the identity of such persons cannot be established .

In accordance with the provisions of Article 35 of Government Emergency Ordinance no. 97/2005 republished in the situation where it is found that the mention in the identity document of the natural person regarding the domicile settlement was made on the basis of a document which was subsequently cancelled, found to be null, forged or falsified, the data regarding that domicile are null as of right. The communication of nullity on the establishment of the domicile of the natural person concerned to the Community public service of persons is made by the authority which has declared the nullity of the mention of the establishment of the domicile of the natural person concerned. Also the nullity of the mention of the identity document of the natural person regarding the establishment of the domicile can be ascertained by the court, ex officio or as a result of the notification by D.E.P.A.B.D., of the community public services for the registration of the persons or of the interested persons.

2.3. What do we mean by the minor's domicile?

From the provisions of Article 92 paragraph (1) it is observed that in the case of a minor who has not acquired full capacity of exercise, its domicile is at its parents or at one of the parents to which it resides steadily but subject to the observance of the conditions provided by the law.

It is clear from the provisions of paragraph 2, sentence I of the same article, that the guardianship court establishes the child's domicile when the parents have separate domiciles and it is not clear at which one of them it will have its domicile under the condition of listening to the parents and the child if it has reached the age 10 years, deciding according to the interests of the child.

From the second sentence of the same paragraph and article, we note that the minor is presumed to have a domicile at the parent to whom it lives permanently until the final judgment is ruled.

The provisions of Article 92 paragraph (3) The Civil Code establish the exception, namely that the minor's domicile may be at the grandparents, other relatives or dependents, with their consent in the exceptional situations provided by the law.

Article 4 of the same article establishes that the domicile of the minor is at its legal representative in the situation in which only one of its parents represents it or where it is under guardianship.

The provisions of Article 27 paragraph (2) of Government Emergency Ordinance no. 97/2005 republished stipulate that the minor's domicile is at its parents or at the parent, as the case may be, at its legal

representative or at the natural or legal person to whom it is entrusted, but the minor must live there permanently.

Article 93 Civil Code considers the special situation of the child, which is temporarily or permanently deprived of the protection of its parents and subject to special protection measures, and who is at the institution, the family or the persons to whom it was placed in the cases provided for by law

Also, the provisions of Article 27 paragraph (3) of the Government Emergency Ordinance no. 97/2005 republished establishes that the domicile of the natural person placed under the prohibition at its parents or at that of the parents, as the case may be, at its legal representative or at the natural or legal person to whom the placement is entrusted, but the minor must live there permanently.

It is noted that the provisions of Article 27 paragraph (2) and paragraph (3) of the Government Emergency Ordinance no. 97/2005 republished, maintain the criterion of domicile permanence, although this criterion of permanence in the new regulation of the Civil Code is no longer foreseen.

2.4. What do we mean by the domicile of the person placed under guardianship?

Article 94 of the Civil Code states that "domicile is at the custodian if a curatorship has been instituted on the property of the missing person, the domicile is at the custodian but only in the case of the extent to which it is entitled to represent it."

According to Article 95 Civil Code as for the case when a special curator was appointed to administer succession assets, those called for inheritance have their domicile at the custodian but only to the extent that this one is entitled to represent it.

2.5. What do we mean by professional domicile?

From the provisions of Article 96 we retain that the natural person operating an undertaking has its domicile where it is declared to be the main dwelling but also to the place of that undertaking only if it exercises the patrimonial obligations that were born or are to be executed at the place of the undertaking.

2.6. What do we mean by the chosen domicile?

According to Article 97 paragraph (1) Civil Code if persons want to conclude a legal document, their domicile may be where they choose their

domicile for the purpose of exercising the rights or the fulfilment of the obligations arising from that document. Paragraph (2) of the same article stipulates that the choice of the domicile by the parties to the legal document is not presumed, but must be made in writing.

2.7. How is the tax domicile of the individual defined? (NC Anitei (2017):249-252)

The provisions of Article 31 paragraph (1) stipulates that the tax domicile of the natural person in the case of tax receivables administered by the central fiscal body (NC Anitei (2017):249-252) shall be understood as:

a) the address where they have their domicile, according to the law, or the address where they actually live, if different from their domicile;

(b) where the natural person carries on an economic activity independently or has a liberal profession, the place of business or the place where the main activity is actually carried on.

From paragraph (2), sentence I of the same article notes that the address where the natural person is domiciled we mean the address where the natural person has its main and permanent dwelling (the expression "it uses it continuously" defines permanence) living there for more than 183 days, in a calendar year and without considering the interruptions of up to 30 days. The second sentence does not consider the address where the individual lives in the situation in which it lives in that place for the exclusive purpose of visiting, vacation, treatment or other similar purposes but not more than one year.

The provisions of Article 39 paragraph (1) Tax Procedure Code show that the tax domicile in the case of tax receivables administered locally by the local tax body is the domicile governed by the common law.

2.8. How do we register / change the tax residence of the individual?

From the provisions of Article 32 paragraph (1) Code of tax procedure it is noted that where the domicile of the natural person is different from the tax domicile by the taxpayer's / payer's application for registration / change of the tax domicile, together with supporting evidence of the information contained therein, is registered / modified by the central fiscal body.

From the provisions of paragraph (2) of the same Article, the application for registration / modification of the tax domicile shall be filed with the central fiscal body in the territorial jurisdiction of which the tax domicile is to be established. The application shall be settled by the central fiscal body within 15 working days from the date of its submission, by

issuing the decision to register / change the tax domicile to be communicated to the taxpayer / payer.

The decision to register / change the tax domicile whenever it finds that the tax domicile is different from the common law domicile and the taxpayer / payer has not filed a request for change of the tax domicile shall be issued ex officio by the competent fiscal body.

The provisions of Article 32 paragraph (4) Code of tax procedure stipulate that "*the date of registration / change of the tax domicile is the date of communication of the decision to register / change the tax domicile.*"

It follows from the provisions of paragraph (39) of the Tax Code that the application for registration / change of the tax domicile is filed with the local tax authority in the territorial jurisdiction the tax domicile is to be established.

2.7. Presumption of domicile and its proof

According to Article 90 paragraph (1) C in the case where the domicile is not known, it is presumed as domicile the residence of the natural person. From the provisions of paragraph (2) of the same article, if the natural person has no residence, the last domicile where the individual resided is considered domicile and if this domicile is not known, the place where that person is located shall be considered domicile.

According to Article 91 paragraph (1) Civil Code the proof of domicile is made with the particulars contained in the identity card. From the provisions of paragraphs (2) and (3) of Article 91 Civil Code if the identity card does not contain that these particulars or the particulars do not correspond to the reality, the establishment or change of domicile may not be binding on other persons unless the domicile was known by other means by the one to which it is binding.

3. The notion of domicile in different legal systems

In mainland Europe, although domicile has two constituent elements (animus - that is, the intention of the person to establish its domicile in a particular place and corpus - that is, the actual inhabitation of the person in that place) the legal systems impose different requirements for animus and different types of evidence for domicile.

The French Civil Code calls domicile "the main settlement of the individual" (Article 102 paragraph 1)². A new domicile can be acquired

² The full and up-to-date text of the French Civil Code can be found at the following web address:

through a real dwelling in another place united with the intention of setting the main settlement there.

The German Civil Code in Article 7 considers domicile "only the person's permanent dwelling".

Article 23 of the Swiss Civil Code qualifies the natural person's domicile "as the place where it resides with the intention of establishing itself." Unlike the German Civil Code, the Swiss one "prohibits plurality of domiciles, except in case of business domiciles."³

The Italian Civil Code⁴ in Articles 43 and 45 define the domicile as "the place where the individual (or each spouse) has established its principal place of business and interests."

Article 40 of the Spanish Civil Code calls domicile "the habitual dwelling of the individual."

In the UK or in USA there are two types of domicile of the individual:

1. "domicile of origin of the natural person" means the domicile of the father at the time of the legitimate child's birth or the domicile of the mother at the time of the illegitimate child's birth;

2. the "chosen domicile" represents the place where the individual intends to establish itself "for life" and in the U.S. it is the place where the individual intends "to establish [at least for the moment - n.a.] the centre of domestic, social and civil life" (L., I., De Winter (1969):421-422). When the chosen domicile is abandoned, the domicile of origin regains its legal force until the individual chooses a new domicile. Because of this, reputable English specialists considered that the domicile of origin surpassed in stability and durability the citizenship since, until the moment of the death of the individual, it retains the capacity to regain its legal force.

Conclusions

The notion of domicile in private international law is much broader including the meaning of the concept of domicile in the Romanian law

<http://www.legifrance.com/WAspad/RechercheSimplePartieCode;jsessionid=EcWyLEwbFdVHwQ2yP7GTO1G56dF9dV2pdXfNZPaifL.vZbmJP2VRv!-211060648!iwsspad.legifrance.tours.ort.fr!10038!-1!-799303035!iwsspad2.legifrance.tours.ort.fr!10038!-1?commun=&code=CCIVILL0.rcv>.

³The full and up-to-date text of the Swiss Civil Code can be found at the following web address:

<http://www.admin.ch/ch/f/rs/210/index1.html>.

⁴ The full and up-to-date text of the Italian Civil Code can be found at the following web address:

http://www.jus.unitn.it/cardozo/Obiter_Dictum/codciv/Lib1.htm .

system, in the system of European law as well as in the system of international law. From the point of view of common law, the domicile of the individual means the address where the centre of social and economic life of the individual is located. The residence of the person at this address does not have to be permanent, but it must last most of the year.

From the point of view of the tax procedural law through the tax domicile of the natural person in the case of the fiscal receivables administered by the central fiscal body it is the address where the natural person has its main and permanent dwelling (the expression "it uses it continuously" defines the permanence) or the place where it carries out its main activity living there over 183 days in a calendar year, no interruptions of up to 30 days being considered.

By comparing the above-mentioned texts, it is noted that the contemporary Romanian law emphasizes the character of the domicile as main residence of the individual at the expense of the permanence of the dwelling. So in the light of the latest legislative developments in Romania, the natural person's domicile *means the address where the centre of the social and economic life of the individual is situated. The person's residence at this address does not have to be permanent, but it has to take most part of a year.* This is because only the address where the person lives most of the time can be considered the main address (dwelling). Thus, the traditional definition of domicile provided by the Romanian doctrine needs to be revised in the sense of eliminating the criterion of permanence.

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Web

The full and up-to-date text of the French Civil Code can be found at the following web address:

<http://www.legifrance.com/WAspad/RechercheSimplePartieCode;jsessionid=EcWyLEwbFdVHwQ2yP7GTO1G56dF9dV2pdXfNZPaifLvZbmJP2VRv!-211060648!iwsspad.legifrance.tours.ort.fr!10038!-1!-799303035!iwsspad2.legifrance.tours.ort.fr!10038!-1?commun=&code=CCIVILL0.rcv>

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