Jurnalul de Studii Juridice

Year XIV, No. 1-2, June, 2019, pp. 1-8

THE LAW APPLICABLE TO THE NULLITY OF ADOPTION IN ACCORDANCE WITH S.2610 ROMANIAN CIVIL CODE

Nadia Cerasela ANIȚEI

DOI: <https://doi.org/10.18662/jls/37>

Covered in:

CEEOL, CrossRef, CrossCheck, Index
Copernicus, Ideas RePeC, EconPapers,
Socionet

THE LAW APPLICABLE TO THE NULLITY OF ADOPTION IN ACCORDANCE WITH S.2610 ROMANIAN CIVIL CODE¹

Nadia-Cerasela ANITEI ²

Abstract

The article aims to study the law applicable to the nullity of adoption in terms of the following regulations: S.2.610 of the Romanian Civil Code with the marginal title "The law applicable to nullity", which states: "The nullity of adoption is subject, under the substantive conditions, to the law applicable to the substantive conditions, and for the non-observance of the formal conditions, the law applicable to the form of the adoption."

The article aims to answer the following questions:

- 1. What is the law applicable to the nullity of the background of adoption?*
- 1. What is the law applicable to the nullity of the formal conditions of adoption?*

Keywords:

Adoption; the law applicable to the nullity of the substantive conditions of adoption; the law applicable to the nullity of the formal adoption conditions; the Roman Civil Code.

¹ Article presented at the 11th INTERNATIONAL CONFERENCE "EXPLORATION, EDUCATION AND PROGRESS IN THE THIRD MILLENNIUM" 18th April 2019, Organized by: "DUNĂREA DE JOS" UNIVERSITY OF GALAȚI, ROMÂNIA FACULTY OF LEGAL, SOCIAL AND POLITICAL SCIENCES JURIDICAL, ADMINISTRATIVE, SOCIAL AND POLITICAL RESEARCH CENTER, UNIVERSITE PARIS-EST CRÉTEIL, FRANCE CENTRE D'ÉTUDES DU DÉVELOPPEMENT INTERNATIONAL DES TERRITOIRES (CEDITER), THE STATE UNIVERSITY "BOGDAN PETRICEICU HAȘDEU" CAHUL, REPUBLIC OF MOLDAVIA, ROMANIAN CROSS-BORDER INSTITUTE FOR INTERNATIONAL STUDIES AND CRIMINAL JUSTICE SCIENCES EUROPEAN DOCUMENTATION CENTER "DUNĂREA DE JOS UNIVERSITY", <http://www.fsisp.ugal.ro/assets/documente/events/Book%20abstract%202019.pdf>

² PhD Univ. Prof. Faculty of Law, Social and Political Sciences, Dunărea de Jos University, Galați, Romania e-mail: nadia.anitei@ugal.ro; ncerasela@yahoo.com

1. What is the law applicable to the nullity of the substantive conditions of adoption?

The nullity of the adoption regarding the substantive conditions is provided by S.2610, part (I) of the Civil Code, which states: "*The nullity of the adoption is subject, for the substantive conditions, to the laws applicable to the substantive conditions*".

The law applicable to the substantive conditions of the adoption (N.,C., Anitei, (2018) :17-20) is regulated by S.2609 C as follows: "*The substantive conditions required for the conclusion of the adoption are established by the national law of the adopter and the one to be adopted. They must also meet the conditions that are mandatory for both, established by each of the two national laws mentioned. (paragraph 1) The substantive conditions required for the spouses to adopt together are those established by the law which governs the general effects of their marriage. The same law also applies if one spouse adopts the other's child. (Paragraph 2) "*

The nullity of adoption regarding the substantive conditions from the perspective of the Romanian private international law will consider the following situations:

1. The national law as the law applicable to the nullity of the substantive conditions necessary for the conclusion of the adoption for both the adopter and the adoptee;

2. The law applicable to the nullity of the substantive conditions necessary for the conclusion of the adoption in case of the spouses who adopt together *but also if one of the spouses adopts the child of the other spouse;*

3. Romanian law as the law applicable to the nullity of the substantive conditions of the adoption.

1.1. The national law as the law applicable to the nullity of the substantive conditions necessary to conclude the adoption for both the adopter and the adoptee

From the provisions of S.2607 (1), thesis (I), Civil Code corroborated with S.2610, part (I) Civil Code we observe that the law applicable to the nullity of the adoption for not fulfilling the substantive conditions at the conclusion of the adoption for both for the adopter and the adoptee will be the national law of each in the matter of nullity of the substantive conditions.

Studying the provisions of the thesis (II) of S.2607 (1) Civil Code corroborated with S.2610, part (I) Civil Code find that if the adopter and the adoptee do not fulfil in addition the special ("mandatory") conditions

established by the national law of each, the law applicable to the nullity of the adoption will be:

- a. The common national law is applicable to the nullity of the substantive conditions of the adoption as well as to the mandatory conditions established for adoption for both the adopter and for the adoptee, both with the same citizenship that concluded the adoption in the Romanian territory. For example, two English nationals have concluded the adoption on Romanian territory and we find that the adoption does not meet the substantive conditions and meets the special ("mandatory") ones or does not meet the substantive conditions, or neither the substantive conditions nor the special conditions ("mandatory") we will apply the English law to the nullity of the substantive conditions of the adoption as well as to the mandatory conditions;
- b. The national law of each of the two spouses is applicable to the nullity of the substantive conditions of the adoption as well as to the mandatory conditions established for adoption for both the adopter and for the adoptee, both with different citizenships if they have concluded the adoption in the territory of Romania. If on the territory of Romania is found that the adopter (French spouses) and the adoptee (Italian) who have different citizenships, but foreign, breached the legal norms regarding the substantive conditions and the special conditions ("mandatory") we will apply regarding the nullity of the substantive conditions but also of the special conditions ("mandatory") established by the national law of each of them, respectively the French law that regulates the substantive conditions of the adoption and the special conditions ("mandatory") and the Italian law that regulates the substantive conditions of the adoption and the special conditions ("mandatory")
- c. The national law of each of the two spouses is applicable to the nullity of the substantive conditions of the adoption as well as to the mandatory conditions established for the adoption and in the situation in which the adopter and the adoptee have different citizenships, of which one is a Romanian citizen and the other a Spanish citizen in the situation in which they have concluded the adoption on the Romanian territory with the non-observance of the substantive conditions but also the mandatory conditions established by the national law of each of them.

1.2. The law applicable to the nullity of the substantive conditions necessary for the conclusion of the adoption in the case of spouses

who adopt together but also *if one of the spouses adopts the child of the other spouse*

From the provisions of S.2607 (2) Civil Code corroborated with S.2610, (I) Civil Code, we notice that in the case of the spouses who have adopted together but also *if one of the spouses has adopted the other's child in the matter of nullity of the substantive conditions, the law that governs the general effects of marriage shall apply*³.

Applying by analogy the provisions of S.2589 Civil Code to the provisions of S.2607 (2) of the Civil Code, corroborated with the provisions of S.2610, part (I) Civil Code we find that the following laws will be applied in order, without being derogated to the nullity of the substantive conditions of the adoption.

1. the law of joint habitual residence of spouses,
and in its absence,
2. the law of joint citizenship of spouses,
and in its absence,
3. the law of the State on the territory of which the adoption was concluded.

Studying the above-mentioned provisions, we observe that we have the following situations regarding the law applicable to the nullity of the substantive conditions of the adoption, both in case of the spouses who adopt together but also *if one of the spouses adopts the child (children) of the other spouse*:

1. The law of joint habitual residence of spouses applies to the nullity of the substantive conditions of adoption in the following cases: a. the spouses have common citizenship (for example, two Moldovan spouses); b. the spouses have different citizens (for example, a spouse is a Moldovan citizen and a spouse is a French citizen); c. Spouses are stateless.

³ The general effects of the marriage from the perspective of the Romanian private international law are regulated by S.2589 with the marginal name "*The law applicable to the general effects of marriage*" states: "*The general effects of marriage are subject to the law of joint habitual residence of spouses, and in its absence, the law of joint citizenship of spouses. In the absence of the joint citizenship, the law of the state on the territory of which the marriage was celebrated applies. (paragraph 1) The law determined according to paragraph (1) applies both to the personal effects and to the patrimonial effects of the marriage that this law regulates and from which the spouses cannot derogate, regardless of the matrimonial regime chosen by them. (paragraph 2) By exception from the provisions of paragraph (2), the rights of the spouses on the family home, as well as the regime of some legal acts on this housing are subject to the law of the place where it is located. (paragraph 3).*"

2. The law of joint citizenship of spouses applies to the nullity of the substantive conditions of the adoption only if the spouses do not have habitual residence (for example, one of the spouses resides in Romania and the other spouse resides in Spain), but they have the same nationality.

3. The law of the state on the territory of which the marriage was celebrated applies to the nullity of the substantive conditions of the adoption in the following cases: a. The spouses have different residences; b. spouses have different citizenships; c. Spouses are stateless.

1.3. What are the situations in which the Romanian law is applied as the law of the nullity to the substantive conditions of the adoption?

From the provisions of S.2607 Civil Code, corroborated with the provisions of S.2610, part (I) Civil Code it follows that the Romanian law governs the nullity of the substantive conditions of the adoption in the following situations:

1. in the situation where the law of the joint habitual residence of the spouses is in Romania the nullity of the adoption regarding the substantive conditions is governed by the Romanian law in the following cases:

a. spouses have joint citizenship (for example, two spouses of Italian citizenship);

b. the spouses have different citizenships (for example, a spouse is a Moldovan citizen and a spouse is a French citizen);

c. spouses are stateless.

2. in the situation in which the two spouses are Romanian citizens and have different residences (for example one of the spouses resides in Romania and the other spouse resides in Spain) the Romanian law is applied as the law of nullity of the substantive conditions of adoption.

3. In the situation where the Romanian law is the one that governs the patrimonial effects of the marriage if the marriage was celebrated on the territory of Romania, in compliance with the conditions imposed by the Romanian law, this law applies, namely the Romanian law as the law of the nullity of the substantive conditions of the adoption.

From the perspective of the Romanian private international law, the law applicable to the nullity of the substantive conditions of the adoption must also be studied in the light of the following regulations: *the revised European Convention on the adoption of children from Strasbourg*⁴ of 27.11.2008, the

⁴ Law 138 2011 for the ratification of the revised European Convention on the adoption of children, adopted in Strasbourg on November 27, 2008 and signed by Romania in Strasbourg on March 4, 2009, published in the Official Gazette no. 515 / 21.07.2011

*Hague Convention on the protection of children and cooperation in respect of intercountry adoption*⁵ from 29.05.1993 and Law no. 273/2004 regarding the adoption procedure⁶.

From these provisions we observe that regarding the law applicable to the nullity of the substantive conditions of the adoption we will consider:

1. for Romania and the signatory states of the revised European Convention on the adoption of children from Strasbourg, the application as norms of immediate application of the provisions referring to the nullity of the substantive conditions of the adoption, corroborated, where appropriate, with the provisions of S.2.607-2.610 Civil Code, S.453 Civil Code and Law no. 273/2004 as subsequently amended and supplemented;

2. for Romania and the signatory states of The Hague *Convention on the protection of children and cooperation in respect of intercountry adoption*, the application as norms of immediate application of the provisions regarding the nullity of the substantive conditions of the adoption, corroborated, where appropriate, with the provisions of S.2.607-2.610 Civil Code, S.453 Civil Code and Law no. 273/2004 as subsequently amended and supplemented;

3. for Romania and the rest of the states, which are not signatories to any of the conventions, we will apply in the matter of the nullity of the substantive conditions: S.2.607-2.610 Civil Code, S.453 Civil Code and Law no. 273/2004 as subsequently amended and supplemented.

2. What is the law applicable to the nullity of the form condition of adoption (N.,C., Anitei, (2018) :19-41)?

The nullity of the adoption regarding the conditions of form is provided by S.2610, part (II) of the Civil Code, which states: "*The nullity of the adoption is subject.... for non-observance of the conditions of form, the law applicable to the form of adoption.*"

The law applicable to the adoption form is regulated by S.2609 Civil Code as follows: "*The form of adoption is subject to the law of the state on the territory of which it is concluded.*"

Corroborating the provisions of S.2610, part (II) Civil Code with the provisions of S.2609 Civil Code regarding the law applicable to the nullity of the conditions of form of the adoption we have the following situations:

⁵ Law no. 84 of 18.10.1994 for ratifying The Hague Convention on the protection of children and cooperation in respect of intercountry adoption published in the Official Gazette no.298 / 21.10.1994.

⁶ Applicable form from April 19, 2012 to September 22, 2016, being replaced by republishing in the Official Gazette, Part I no. 739/23.09.2016

1. the foreign law will regulate the nullity of the adoption form in case the adoption was concluded with the non-observance of the formal conditions abroad. For example, if the adoption is concluded in France on the conditions of form and the non-observance of the conditions of form is observed, the law which will govern the nullity of the conditions of form will be the French law;

2. the Romanian law will regulate the nullity of the adoption form in case the adoption was concluded with the non-observance of the conditions of form on the territory of our state.

From the perspective of the Romanian private international law, the law applicable to the nullity of the conditions of form of the adoption must also be studied in the light of the following regulations: the revised European Convention on the adoption of children from Strasbourg, The Hague *Convention on the protection of children and cooperation in respect of intercountry adoption* and Law no. 273/2004 regarding the adoption procedure.

From these provisions we observe that regarding the law applicable to the nullity of the conditions of form of the adoption we will consider:

1. for Romania and the signatory states of the *Revised European Convention on the adoption of children from Strasbourg*, the application as norms of immediate application of the provisions referring to the nullity of the conditions of adoption, corroborated, where appropriate, with the provisions of S.2.607-2.610 Civil Code, S.453 Civil Code and Law no. 273/2004 as subsequently amended and supplemented;

2. for Romania and the signatory states of The Hague *Convention on the protection of children and cooperation in respect of intercountry adoption*, the application as norms of immediate application of the provisions regarding the nullity of the conditions of form of adoption, corroborated, where appropriate, with the provisions: S.2.607-2.610 Civil Code., S.453 Civil Code and Law no. 273/2004 as subsequently amended and supplemented;

3. for Romania and the rest of the states, which are not signatories to any of the conventions, we will apply in the matter of the nullity of the formal conditions of the adoption: S.2.607-2.610 Civil Code, S.453 C civ and Law no. 273/2004 as subsequently amended and supplemented.

CONCLUSIONS

From the perspective of the Romanian private international law, the law applicable to the nullity of the substantive and form conditions of the adoption were studied in terms of the following regulations: S.2.607-2.610 Civil Code, S.453 Civil Code, *the Revised European Convention on the adoption of children from Strasbourg*, *Hague Convention on the protection of children and cooperation*

in respect of intercountry adoption and Law no. 273/2004 regarding the adoption procedure as subsequently amended and supplemented.

REFERENCES:

Articles

Anitei, Nadia-Cerasela. (2018). *Legea aplicabilă condițiilor de fond ale adopției potrivit art. 2607 alin. 1 și alin. 2 din Codul Civil al României* (The law applicable to the substantive conditions of the adoption according to S.2607 (1) and (2) of the Romanian Civil Code) *Revista Moldoveneasca de Drept international si Relatii internationale/ Moldavian Journal of International Law and International Relations/ Молдавский журнал международного права и международных отношений*, no.1-2 pp. 17-20.

http://usem.md/uploads/files/Activitate_%C8%98tiin%C8%9Bific%C4%83_USEM/rmdiri/RMDIRI_2018_Nr_1-2.pdf

Anitei, Nadia-Cerasela.(2018). *Forma adopției în dreptul internațional privat roman* (Adoption form in Romanian private international law), *Revista Romana de Drept privat*, no 3, coordinator Calina Jugastru, Universul Juridic Publishing House, Bucharest, ISBN 1843-2646, pp. 19-41. Available at: <http://www.rmdp.ro/>

Legislation

Law 138 2011 *for the ratification of the revised European Convention on the adoption of children*, adopted in Strasbourg on November 27, 2008 and signed by Romania in Strasbourg on March 4, 2009, published in the Official Gazette no. 515/21.07. 2011.

Law no. 273/2004 *regarding the adoption procedure applicable form* from April 19, 2012 to September 22, 2016, being replaced by republishing in the Official Gazette, Part I no. 739 / 23.09.2016.

Law no. 84 of 18.10.1994 for ratifying *Hague Convention on the protection of children and cooperation in respect of intercountry adoption* published in the Official Gazette no.298/21.10.1994.

Romanian Civil Code adopted by Law no. 287 of July 17, 2009 and republished with amendments on July 15, 2011 in the Official Gazette Part I no. 505-2011.