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# The Implementation of the International and European Union Legal System Into National Regulations, in the Context of Globalisation

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**Abstract**

*The following study aims to asses and present the role of the United Nations Organization, the Council of Europe and the European Union, the legal provisions issued by these institutions, as well as the mechanism they posses in order to enforce these provisions, within the development of global and regional law. The present study specifically reffers to the transposition of the international private law and the European Union law into the national regulations and legal systems, the manner in which the implementation is achieved and the relation between the international and the national law. The integration is to be analyzed in reference to the nonregulatory, nonmandatory mechanisms, but also in refference to the national law system, considering the ratification of the treaties by the national legislators. The specificity of the implementation of the European Union law into national provisions is to receive special attention and focus, as the European law prevails over the national law and in relation to the national Constitution, as a mark of the national independence.*

**Key-words**: *international private law, civil law, European Union (EU), The European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), the European Union Treaties, Constitution*

## 1. The integration of timeframe within the legal system, required by the globalisation

The globalisation, as a massive phenomenon of our present days, "can be easily seen firstly in an unprecedented contraction of time and space".[1]

[1] Mihai Bogdan Marian, *Avatarurile globalizării*, Ed. Ideea europeană, Bucureşti,2018, p. 25. See also Joseph E. Stiglitz, *Globalizarea Speranţe şi deziluzii*, Ed. Economica, Bucureşti, 2002, p. 116, 135, 280, 314.

Obviously, given all these conditions, we consider the topic of civil law and its provisions within the context of globalisation as a very complex one. Discussing it implies taking the timeframe into consideration when approaching the legal system, as well the international conventions on private law as sources of law. On the other hand, one should discuss the manner in which the international law and the European law operates on the national legal system, in general, the relation between the international private law and the European Union law, and also the national legal system. The close bond that connects the timeframe and the law has become more and more evident, as the integration of timeframe within the legal provisions by the law-makers ensures the sustainability of the law, as well as the stability and safety of the legal relationships. The safety and stability of the legal relationships is not to be mistaken for immobility. The stability the legal provisions seek implies the integration of time sequence within the process of law-making, within the process of creating and enforcing conventions. The dynamic of social relations, on a national and international level, shows they can no longer be comprised by the old, classic systems of civil law and international private law. The blistering pace of scientific and technological development, which pushed a continuous change and improvement of production, goods transport, movement of persons and workforce, service render and capital flow, especially as a result of Lisbon Treaty issued in 2007, expanding outlets and new markets led to the contract law accomodating very rapidly to every bit of progress international business has to offer, as the competition has become more and more fierce.

Beyond the European area, the trend of correlating contract terms when it comes to international trading is a neccesary one as the globalisation takes over. The interdependence beween the nations is increasing as we speak. One source of this interdependence was and still is the development of the business community, the expansion of international communication, transnational corporations, as their activities have led to the widespread of their services and technologies, so we face an entire set of interconnections that imply a common approach of general, global problems and issues, some common standards and common legal, jurisdictional procedures. Hence, the need to create flexibile mechanisms in order to support economic governance[2], in order to integrate sector, space and time public policies[3]. When in comes to law regulations, they must be based on the interdependent point of view, on the international values, such as solidarity,

[2] See Joseph E. Stiglitz, *EURO Cum amenință moneda comună viitorul Europei*, Ed. Publica, 2016, p. 226.

[3] See Irina Moroianu Zlătescu, Radu C. Demetrescu, Drept instituțional european și politici comunitare, Casa editorială „Calistrat Hogaș", București, 2001, p. 219 and following; Irina Moroianu Zlătescu, Elena Marinică, *Dreptul Uniunii Europene*, Ed. Universitară, Ed. Universul Academic, Bucuresti, 2017, p. 289 and the following.

equity, quality, and so on. The current relationships between the decision-making institutions functioning on national and international levels, that manage economic resources and are aware of their interdependence and of the real size of businesses, have led to a stronger relationship between law, including contract law, and economy, and this has profoundly changed the private interests of states and multinational entities[4].

We consider that private interest groups or lobbists which are legally protected by the public authorities, in order to enforce certain rules, have made the distinction between the private law and the public law, as main sources of economic regulations, more and more difficult to distinguish. This evolution affecting the contractual legal relationships, where the intervention of public authorities has become more and more visible as far as the regulation of private relationships goes, was considered by some academics and theoreticians of law as leading to a decline of the contract, as it affects its freedom. Other law theoreticians have argued at some point that the intervention of state authorities in regulating contracts represents a new step in the development of the contract structure, given the present economic and social reality, as a way to organize private interests, and also as a half-way instrument between authoritarian governance and lawless, anarchic freedom[5].

The form of business contracts, as we can see it put into practice by the economic regulations, highlights its mutual nature, where private interests meet the general interest of a society as a whole, in order to create a new economic order, without a significant pressure from the public authorities.

The globalisation, a true phenomenon of modern society development, comes with a de-internationalization of contractual obligations. Old legal provisions could no longer ensure a proper legal frame for today's size and dynamic of economic relationships. Obviously, a modern regulation of trading was neccesary, a flexible, up-to-date regulation in order to keep up with all types of activities, and also with the fast pace of economic and social development. The law, mainly concerning contracts, that regulates international business activities need to face the complexity and dynamics of worldwide business that involves national economic operations. This legal system of international relationships is different from the classic, international one, by being flexible and rigorous at the same time.

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[4] See V. Pătulea, Gh. Stancu, *Dreptul contractelor*, Ed. C.H. Beck, Bucureşti, 2008, p. 465; G. Stancu, *Influenţele ordinii juridice globale asupra dreptului contractelor*, Dreptul nr. 10/2008, p. 27-41; V Pătulea, *Acţiunile întreprinse şi perspectivele elaborării unui cod european al contractelor*, Dreptul nr. 10/2007, p. 9-21; V. Pătulea, *Acţiunile întreprinse şi perspectivele elaborării unui cod european al contractelor. Integrarea în procesul construcţiei europene şi bazele sale juridice*, Dreptul nr. 9/2007, p. 24-33.

[5] See F. Bloch Lainé, *A la recherched'uneéconomie concertée*, 3-e éd., Editions de l'Epargne, Paris,1964, p. 87.

Basically, international trade law not only receives the changes happening within intenational trade, but it also sets and stimulates it. The broadening and increasingly diverse trade relationships and economic international cooperation generated deep change of the international trade system, a renewing process, by adapting its old institutions to the demands of the modern economic life, but also by creating and expanding certain legal instruments, which are compatible with the interests of today's traders. One can find new types of contracts, especially in the field of international technology transfer and financing international trade: moreover, we should add the expansion and diversification of international economic cooperation contracts as far as their object goes, the contracts on diverse and complex operations, the expansion of general terms-based contracts and standard contracts, unified and codified customs, the simplification of the ways contracts are concluded by enstating certain standards or formalities. Moreover, the terms reffering to agreement balance have evolved, for instance the terms stipulated by long-term contracts concerning circumstance changes or terms regarding risk-taking in case of currency and non-currency fluctuations, the purpose being to avoid that risk. The terms in refference to determining the content of the contract have also shown a significant expansion, in order to identify the governing law as far as the respective legal relations betweend the parties are concerned, and the same is the case of the terms related to setting a dispute by international trade arbitration, terms related to trade and international economic cooperation.

Within international trade relations one can find new types of bank guarantees[6] and can also see significant differences between trade contracts and civil agreements, when it comes to the effects, the manner of completing the contract, in refference to liability of payment, termination of contract, joint liability of co-debtors, assignment of claims. In certain aspect, for instance the cooperation between creditors and debtors, the termination of the contract or execution in good faith, our current Civil Code has included some of the international regulations. The differences between the obligations within international contract and those stipulated within common law contracts are related to contract-specific risks, arbitration clause, public-policy exeption, the state ability to reach a compromise.

The legal regulations governing international obligations tend to simplify the operations, without affecting their stringency and, on the other hand, to create an efficient set of measures to protect the creditor, attached to a strong set of terms, principles and rules designed to mentain contract balance, good faith, also to

[6] Joseph E. Stiglitz, *Globalizarea. Speranţe şi deziluzii*, Ed. Politică, Bucureşti, 2002, p. 326; *idem*, *Marea divizare Societăţile inegale şi ce putem face în privinţa lor*, Ed. Publica, 2015, p. 245 and the following.

reinforce legal apparence, customs, formality and automatism in performing bank obligations, all the above completed by a swift procedure of foreclosure.

International trade contracts are governed not only by specific rules and regulations, but also by terms that are common to all international trade contracts, terms related to dispute settlement and determining the governing law, terms which aim to adapt contracts to the new realities (circumstances), or the competing offer clause, the most favored client clause, the first refusal clause, the force majeure clause, the revision of the contract.

International law imposes its influence on the national sources of contract law, thus making the globalisation effects visible, as the national law has less force and authority. International regulations slowly pierce through the internal provisions, as international entities are more and more concerned with the distinction between national and international contracts, especially those related to financial instruments, information, intangible goods and assets. Meanwhile, transnational public order, that aims to defend general interests of humankind, can explain the relative decline of national law[7].

## 2. International non-mandatory instruments for the alignment to national law

The impact of globalisation on merging contract law has taken the shape of some mandatory, constraining elements, but also has helped create some non-manatory, non-legislative instruments, such as international trade customs, using standard terms and contracts, which the business environment generated, based on trade activities or general contract law principles[8]. The working group established by the International Institute for the Unification of Private Law (UNIDROIT) drew up the principles to be applied to the international trade contracts.

These principles sought to elaborate a set of rules meant to be used all over the world, no matter the legal customs, the economic and political conditions of their enforcement, since they are flexible enough to take into consideration the determining factors, easily found within trade activities. While being put into practice, these principles were trying to ensure the fairness, the equity of international trade relationships, the general obligations of the parties of acting in good faith, as well as the criteria related to reasonable cooperation, and, in some cases, specific traits of reasonable behavior.

UNIDROIT principles follow the current point of view of the European Comission regarding community propositions on European contract law, since

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[7] See Philippe Malaurie, Laurent Ainés, Philippe StoffelMunck, *Les obligations*, 9-e éd, L.G.D.J.,Paris, 2017,p. 194-195.

[8] V. Pătulea, Gh. Stancu, *op. cit*., p. 473.

they are not constrining instruments, as their acceptance depends on a motivating approach[9]. European contract law should represent a supplementary system which empowers the principles and also presents the advantage of an extended application.

This solution highlights the freedom of contract, it symbolically defines the European contract law as a freely-chosen system, an extensive system, combining the force of an organized community with a certain freedom of contract, legal security, and also with a fair contract justice.

The collection, assembly of UNIDROIT principles is a reflection of notions one can find in numerous legal systems and aims to establish a well-balanced set of rules of international applicability, beyond legal customs, economic and political conditions of the countries where they are to be enforced. UNIDROIT principles are flexible enough to work properly according to the changing conditions, surpassing any practical incidents, enabling in this area the general obligation for the parties to act in good faith and to show reasonable behaviour. The issues found in the United Nations Convention can also be found among UNIDROIT principles, as they were adapted and shaped in order to reflect the nature and the scope. Since they are not mandatory, and they are applied using a motivating approach, UNIDROIT principles found no major obstacles while being enforced, nevertheless amendments or changes have not been excluded during this process of imposing them, as the incresing number of contracts are shaped by the technological progress, for instance the electronic contracts.

Special local customs (related to a certain geographical area) also have a widespread application when talking about international trade contracts, and they impact a single branch of the trade activity, or, if general, they can impact the whole of trade relations. If one takes into consideration the legal force, the customs can be either normative or conventional. As they become sources of law, customs state rights and obligations for the parties, and they have the same legal force as a supplementary norm. They have legal consequences on the contractual relation, whether openly or tacitly accepted, if the parties did nothing to eliminate them by contrary terms. Conventional trade customs have the same legal force as o contract clause (term), as it is based on mutual openly or tacitly expressed agreement of the parties[10]. These customs cannot go against mandatory regulations, public order or national principles of morality. Most often than not, the expression of agreement takes the form of INCOTERMS codes established by the International Chamber of Commerce in Paris. Obviously, these customs can also be used within internal (national) contracts, their enforcement is

[9] *Ibidem*, p. 395.

[10] Dragoş Alexandru Sitaru, *Dreptul comerţului internaţional*, vol. I, Ed. Actami, Bucureşti,1995, pp. 130-131.

based on mutual agreement of the parties, as shown within art. 9 paragraph 1 of the Vienna Convention in 1980 on international sale of goods, which clearly stipulates that parties are bonded by the customs they have accepted. Customs use regulations within the national legal systems. They apply to the international trading, in accordance to the particularities of international trade relationships, and, as such, they are professional-based and very specific. As an immediate expression of international trading activities, customs are highly adaptable to the circumstances of the international trade, and they can also surpass the shortcomings of national and international legal regulations and contract terms[11]. On the other hand, customs connect general legal regulations to the specific traits of the international trade relationships, and they also design some common solutions and provisions within national legal systems[12].

The Romanian Civil Code states that customs that comply with the public order and general morals are sources of law in cases unstipulated by the law, and, in the situations stipulated by the law, customs can come to life only as far as the legal regulations expressly allows it (art. 1, paragraph 1-4, Civil Code).

For its part, the UN Commision for Europe has established some general terms and conditions, some guidelines for contract drafts, and also some unifying documents, thus setting these customs within specific branches of trading activity[13].

### 3. The standard legal frame of international trade established by UN and its subordinate specialized institutions

Establishing some standard regulations regarding international trade occurs not only within the direct relations between states, but also at UN level[14]. The Organization's interest in this field is perfectly correlated to its main purposes, as shown within the UN Charter, which clearly stipulates that the Organization aims, among others, to enable international cooperation in order to solve international economic problems (as shown within art. 1.3 in the Chart). The United Nations Commision on Interenational Trade Law (UNCITRAL), as a subsidiary of the UN General Assembly, intends to foster the increasingly larger attendance of states when it comes to international conventions, and also to ensure the necessary organisational framework for establishing new international regulations, based on the main legal systems. The International Conventions hold an important role regarding the UN efforts to draw up a standard legal framework as far as international trade is concerned, and we should mention the

[11] *Ibidem*, p. 133.

[12] *Ibidem*, p.134.

[13] *Ibidem*, p.135.

[14] We would like to remind you that October 24th 2020 was UN's 75th anniversary, and December 14th was the 65th anniversary of Romania becoming full-right member of the organisation.

following conventions: the New Yok Convention (1974) on the Limitation Period in the International Sale of Goods, which Romania has taken part in, the United Nations Convention on the Carriage of Goods by Sea (Hamburg 1978), United States Convention on Contracts for the International Sale of Goods (Viena 1980) United States Convention on International Bills of Exchange and International Promissory Notes (New York 1988), the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna 1991). The international trade standards were put by UNCITRAL into a set of arbitration rules, several legal lines for contract drafting within certain trading activities and some standard legal provisions. The United Nations Conference on Trade and Development (UNCTAD), as a permanent subsidiary entity of UN, designed the Draft International Code of conduct on the international tehnology transfer. On a regional level, the UN Economic Commission for Europe played an important role in unifying international trade regulations. It helped design, and, later on, revise and amend several Conventions on international trade. Some of them were also ratified by Romania. We could mention the Convention on the Contract for the International Carriage of Goods by Road (Geneva 1956), the European Convention on International Commercial Arbitration (Geneva 1961), the Convention concerning International Carriage by Rail (Berne 1980) etc. UNCTAD has issued several legal instruments in order to unify the provisions on international trade, for instance general conditions on different types of international sale of goods, standard contracts, guidelines on drafting contracts concerning international cooperation, which were regarded as optional regulations for concluding trading operations on European territory. Among the guidelines that were drawn as instruments for standard provisions on international trade law, we should mention guidebooks on knowledge international transfer for the machine building industry, a guidebook on drawing up contracts refering to large industrial buidings, the guidebook on drawing up contracts on international cooperation. Where international Conventions regard international trade in a broad sense, they are specific sources of international trade law.

As far as bank activities and finances are concerned, Romania is a member of many international institutions, such as General Agreement on Tariffs and Trade (GATT), the European Bank for Reconstruction and Development (BERD), the Multilateral Investment Guarantee Agency. Our country has also ratified several international Conventions regarding international trade arbitrage. We should name only some of them, for example the Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States, also known as the ISCID Convention (1965), the European Convention on International Commercial Arbitration (Geneva 1961), mentioned above. The Romanian Constitution stipulates the general principles of economic and international policy of the Romanian State, and it also comprises some provisions on

international trade. Hence, one could name art. 135, which stipulates that Romanian economy is free-market economy, based on free enterprise and competition, meant to ensure freedom of trading, protection of fair competition, creating favorable framework for improvement of production factors, protection of national interests concerning economic, financial activity and currency market, enforcing regional development policies according to EU objectives. This article should be read in conjuction with art. 10, which states that Romania lays the groundwork for peaceful relatioins with other states and with its neighbors based on general principles and regulations of international law. Internal sources specific to international law are, mainly, regarding legal relations in the field of international trade, for instance the laws on authorizing and functioning of subsidiaries of foreign companies and economic entities, the regime of foreign investments, the terms of drafting contracts on projects financed by external credits or financing, the regime of import-export licensing, the Regulations on the organization and functioning of the International Commerce Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the rules and procedures which apply to arbitration in settlement of international trade disputes. Most internal, national regulations referrering to international trade represent non-specific sources of international trade, and one should find them in other normative documents or legal acts, sources for other branches of law, clearly marked by the legislator, subjectively or based on an objective analysis, by naming the specific field of regulation, meaning the international trade. Within this category one can find regulations on the bill of exchange, the promissory note, the cheque, the regulations on the Registry of Commerce and The Industry and Commerce Chambers, the regulations on companies or prevention of unfair competiton. One could further on find some non-specific sources within legal acts and regulations regarding the civil law, for instance the Law on the land resources, Law no 10/2001, or laws regarding some other branches, such as labour law or financial law.

Article 11 of Romanian Constitution states within first paragraph the obligation of the Romanian state in fulfilling accordingly and in good faith the duties deriving from the treaties to which is a part, and it also stipulates one of the principles of trust between the international community countries, namely the respect in good faith of international obligations (pacta sunt servanda). Accordingly to the same article's 2nd paragraph from the fundamental law, only international treaties ratified by the Parliament become a part of the national law, and, according to third paragraph of art. 11, international treaties which Romania is about to take part in and which have certain provisions contrary to the Constitution, are to be subject to ratification only after the Constitution is revised. Obviously, the supremacy of the Constitution reflects the clear notion of national

sovereignty. The introduction to the United Nations Chart expresses the idea that the principle named pacta sunt servanda has a much broader meaning, as it relates not only to properly fulfil the terms of a contract, but also to accurately interpret the agreement, in an honest, open, thoughtful and receptive manner, in a common effort to efficiently put the terms of the contract into practice, in the spirit of the mutual agreement and according to the concrete circumstances and the possibilities each state has in order to fulfil the obligations it has undertaken.

Article 1, second paragraph of the Constitution stipulates the connection, the relation between international private law and the national, internal legislation, as well as the terms of implementing international law provisions within the national legal system. Given the context, the consensual regulations which arise from the treaties ratified by the parliament were taken into consideration. The constitutional text uses the term treaty in a broad sense, in order to name different instruments used internationally, no matter their name or content (agreement, convention, protocol, pact, final act, general act etc). Since the implementation is done by law, the terms of any contract are integrated within internal regulations and so come to life, according to the force each kind of ruling posseses. The legal base of integrating international law within international legislation is the principle of interstatal cooperation, one fundamental principle of international law, which art. 10 of the constitution refers to. Principles, as permanent values within relations between states, reflect, each on its own, a number of regulations on the manner in which states behave as members of the international life. These are highly general and stable, increasingly rich and clearly determined regulations. These fundamental principles of international law are mandatory, imperative and are integrated within international law, even though regulations have a broader area than principles.

Implementing treaties regarding human rights within national legal system (art. 20 of the Constitution, in reference to international treaties, corroborated with art. 11 of the Constitution) represents a clear image of the correlation between international law and national legal system on constitutional right. The constitutional text of art. 20 explicitly states the attachment to the Universal Declaration of Human Rights, as a landmark document that marked the beginning of a new age in proclaiming and protecting human rights, and the reference to the pacts also represents a proof of the attachment to the international pacts (agreements) regarding economic, social and cultural rights, as well as political and civil rights. When it comes to interpreting and putting constitutional provisions on human rights into practice, one should correlate them with the treaties Romania took a part in, and we could mention The European Convention on Human Rights and Fundamental Freedom (ECHR), the Treaty of Accession to the European Union, the Treaty on the European Union, the Treaty on the Functioning of the European Union, and, of course, the

European Union Charter of Fundamental Rights, which has the same imperative, mandatory force as the above-mentioned treaties, and confirms and enforces the fundamental rights guaranteed by ECHR, as one can find within the "constitutional customs of the member-states"[15].

The priority given to the international regulations, no matter the form they are taking, is conditioned by their ratification by the Parliament. The fact that international law prevails in case of disparities between international regulations and national internal norms only refers to laws, it does not refer to the Constitution. As the doctrine has recently shown, international law is not placed above the Constitution, for the Constitution rules supreme, but can be received by the Constitution in all its revolutionary elements in order to renew the relationship between the state and the citizens[16]. The solution found within art. 20 of the Constitution reffrs to the correlation between the internal regulations on human rights and the international normatives, which are the result of a long-term evolution, starting with the Universal Declaration of Human Rights, which represented the beginning of a new point of view, of a new political and legal construction and reality concerning fundamental human rights and freedoms, and going further to ECHR and the Charter of Fundamental Rights of the European Union. These benchmarking tools contributed to the way human rights, as fundamental values of mankind, have transcended national borders and have become a topic for the international community. Once this natural and universal vocation was identified, the international community designed and issued several standards (pacts, treaties, declarations, protocols, conventions etc) and created an international, integrated, comprehensive, efficient system, and this system, as far as human rights are concerned, found its way into the national legal regulations, as a requirement and a challenge for any democratic country and for the political relations between states. The Constitutional Court of Romania (CCR) is in charge with checking the consistency and the harmonisation between the Romanian constitutional provisions on human rights and the provisions one can find within the international treaties. The Court has admitted, following a constitutionality control, that the European Convention on the Human Rights, including European Union Charter of Fundamental Rights, may only be enforced "to the extent that it ensures, guarantees and develops the constitutional regulations on fundamental rights"[17]. So, the applicability of regulations on human rights, including European Union Charter of Fundamental Rights, is compared to the Romanian regulations and to the Constitution, considering international legal instruments may not prevail over the will of the

[15] Irina Moroianu Zlătescu, Elena Marinică, *op. cit.*, p. 276.

[16] See A. Severin, *Raportul dintre Constituţia României şi legislaţia UE(Constituţia României în dreptul UE şi dreptul UE în Constituţia României)*, in Dreptul nr. 2/2020, p. 88.

[17] C.C.R.,decision no.871/2010, M. Of., I, no.433 din 28th June 2010.

constitutional legislator. During the constitutionality control, CCR admitted that enforcing the E.U Charter can occur only so far as it ensures, guarantees and develops the constitutional regulations on fundamental rights. The Romanian constitutional order is relevant and enforceable within the relations between Romanian citizens and the Romanian state, and not between Romanian citizens and EU. ECHR may evaluate compliance with the human rights by the states which signed the European Convention on Human Rights only on an individual recourse and only after all national legal courts exhausted their resources. ECtHR may not directly amend either the decisions of national courts, or the national regulations, just as CCR ruling is not subject to European Court of Human Rights control, since CCR may not solve legal disputes on human rights, but only decide on the constitutionality of laws[18] or it solves legal disputes between Constitution-based institutions or nonholders of individual rights entities the Constitution empowers. Whether the Romanian Constitution follows international standards has no relevance and may not concern the relations between European citizens, citizens of European Union member states, including Romanian citizens. The latter should be allowed to have recourse, directly and individually, to the European Union Court of Justice (CJEU), in order to claim the rights European Union Charter of Fundamental Rights acknowledges and guarantees, but, for the time being, this is possible only through national courts.[19] The international political and legal system of human rights has a specific legal force, moreover it blends into the internal, national regulations, as these rights are acknowledged and guaranteed not only by the Constitution, as citizens' rights and freedoms, but also by general regulations, including the Civil Code or some special laws.

It suffices to mention chapter II of the Civil Code, entitled "the respect owed to the human being and one's inherent rights, which refers personal rights" (the right to life, health, physical and mental integrity, dignity, the right to one's own image, the right to privacy, as well as any rights the law acknowledges), the right to decide on one`s life within the limits one owes to someone else's rights and freedoms, to the public order, morals, as well as the right to own unique personal identification elements. Moreover, the topic of child and family rights, the protection they should receive, are largely regulated within the Civil Code, but also within the special legislation, by paying special attention to the jurisdictional system and to the institutional system of child protection and welfare, thoroughly regulated by special provisions. The topic of establishing parentage can be found within Civil Code regulations in connection to medical engineering progress and the protective regime of assisted human reproduction, by a third-party donor. One should add to these regulations those regarding the essential

[18] See A. Severin, *loc. cit*., p. 89.

[19] *Ibidem*, p. 89.

and formal conditions (terms) of adoption and its ceasing, the regulation on enforcing parental authority and forfeiture of these rights, the regulations on child maintenance, matrimonial property regime involving property separation or conventional community, which is to be added to legal matrimonial property sharing. One can also find interesting the regulations on the dual system of sanctions and penalties, non-economic or indemnity ruling, regulations on personal rights violations and the procedures that are necessary in order to stop these violations of human rights (art. 252-257 of the Civil Code).

Equality in front of the law and public authorities, as well as the supremacy of the law is clear and visible within all regulations dealing with private relations. The Labour Code and also special legislation on the respective field enables, when it comes to the constitutional right to work, labour social protection and the interdiction on forced labour, as the Constitution stipulates within art. 41 and 42. At the same time, the Civil Code and the whole set of national normatives of repairative (mending) essence (Law no 18/ 1991, Law no.10/2001) acknowledge, guarantee and protect in a fair manner, no matter the owner, the right to private property, without anyone being expropriated for other reason except public utility, established by law, and only after receiving prior and just compensation. The right of free access to justice is thoroughly stipulated within procedural regulations and it concerns not only statal jurisdiction, but also the private system of the alternative solving disputes solutions, met a broadening substantive competence, closely linked to the increase of procedural guarantees, stipulated within the provisions on specific procedure but also within general procedure normatives found in the Civil Procedure Code, aditional to the special procedure and to the extent it is compatible to it.

### 4. The relation and the implementation of European law within national legal system

When talking about law uniformisation, one must consider important the conventions on the European Communities, the Maastricht Treaty (1992), and its consolidated version, the Lisbon Treaty (2007) on the European Union, based on the European communities. The treaty promotes economic and social progress, by creating an economic and currency union, based on a single currency, as well as common external and security policies. Within the Rome Treaty (1957), the European communities stipulated that, by the end of the transition period, given the context of free movement of goods, services, capital and workforce, the member states should implement community law, namely the European Union law. The partnership between Romania, on the one hand, and the European community and its members on the other hand, implies the current and future Romanian legislation should adapt to the EU law, as the Romanian legislation is to gradually become compatible to the community regulation, currently EU law.

One important aspect about UE law is the impact it had and continues to have on the legal order of member states, since the European Union, as an international entity and a newborn sui generis federal state, has an independent legal system.

Unlike international treaties, the European Economic Community Treaty set up its own legal system, which, from the moment the treaty came into force, became an essential part of the legal systems of member states, as legal courts are obliged to follow and put into practice. The implementation of community regulations within the legislation of each member state, the terms and spirit of the treaty, generally speaking, make it impossible for those member states that transferred some of their attributes to the community, while diminishing some of their rights, even just in a few areas, to give one-sided priority to regulations that are different from those stipulated by the European Union legislation they have accepted. The legal system the treaties have established, as independent sources of law, may not be overtaken because of its special nature by the internal, national provisions, no matter their legal force, without the legal base of the community being questioned. The transfer member states achieved from the national legal system toward the European Union legal system, as far as the rights and obligations stipulated by the treaties are concerned, implies a permanent limitation of sovereign rights, and this limitation could not prevail over a subsequent contrary to the community notion. Moreover, the standards and the efficiency of the EU legislation on a member state territory may not be affected by the statement that it may contradict constitutional provisions or national constitutional principles.

In other words, national legal regulations, including the constitutional provisions, must respect and follow European Union regulations[20]. Considering that European legislation must comply with the fundamental treaties of the European Union, and, furthermore, these treaties must be compatible with the national Constitutions of those states, in order to come into force, one can conclude that European regulations must comply with the Constitution of those states, just as the national legislation of these countries, while following the Constitution, must be consistent with the European legalislation[21]. Working within the limits assigned to the European Union by the member states, the regulations established by the European Union are imposed to them, to the extent where they are compatible to the values, principles, rules, regulations and institutions that built them, as independent, sovereign entities, as stipulated by the constitution. The precedence of the European legislation is seen in connection to the national legislation of European Union member states, but this does not

[20] CJCE,11/70, Internationale Handelsgesellschaft Gmbh/Einfuhr- und vorratstelle für Getreide und Futtermittel, hot. din 17 dec. 1970, Rec. 1970, p. 1125. Also see Brândușa Ștefănescu, *Curtea de Justiție a Comunităților Europene*, Ed. Științifică și Enciclopedică, București,1979, p. 3 și urm.

[21] See Adrian Severin, *loc. cit*., p. 73.

mean it overpowers national constitutional provisions, since this would imply the dismantle of the respective state and turning the European Union into an over-powerful super-state. Looking at the development of the European Union, the fundamental, constitutive treaties that built the Eurpean Union, the accession treaties as well as the amending, supplementing documents, together with any other new regulations established by the international treaties[22] form the constitutional frame of the European Union. The direct and immediate implementation of European legislation, or its adoption by establishing national laws enables the national entities which have constitutional controlling attributes to check the compliance of the national legislation to the national Constitution, to the European Union treaties, and also to the legislation of the European Union they built. For its part, the European Union Court of Justice checks the compliance of EU regulations to the fundamental treaties and the compliance of national regulations which were adopted by the European Union legal system to the fundamental treaties and the European Union law, as a whole, where the Union was granted the power to establish laws. Hence, we are witnessing a double-check system of the national regulations, firstly regarding the national Constitution, in conjunction with EU treaties and regulations, and this is done by CCR, and, secondly, in reference to the accession treaties and the European Union legal system, and here the competent entity is CJEU[23].

The national judge, refered to according to his competence, must enforce the European Union law as a whole, except those regulations contrary to the national law, whether previous or subsequent to the European normative. This direct application of the European provisions ensures its efficiency. This obligation goes not only to the national courts, but also to administrative institutions according to their competence, as well as economic entities.

The immediate effects of treaties when implementing them within the national legal system are based on the fact that they are the primary sources of European regulations, alongside these belonging to the national legal system. This means member states do not need to absorb them through national legislation, as the provisions of the regulations may be invoked in front of national courts as any internal normative. Not all provisions of the regulations have a direct effect, but only those that meet the terms stated by the Luxembourg Court, meaning they are clear, precise, they do not depend on subsequent national implementing measures and are unconditional.

As the above mentioned terms are met, the regulations may have a direct effect, upwards, in the relations between states, and also on the same level,

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[22] See Irina Moroianu Zlătescu, Elena Marinică, *op. cit.*, p. 228.

[23] See Adrian Severin *loc. cit.*, p.75.A, also Irina Moroianu Zlătescu, Claudia Elena Marinică, *Instituțiile Uniunii Europene*, Ed. Universitară, Ed. Universul Academic, București, 2020, p. 172 and the following.

between the state and its citizens, or in the relations between natural persons and legal persons. In reference to the directive, which is mandatory and it establishes certain goals, it has no direct applicability. It is implemented within national legal system, by national laws, while the member states are free to set a way to reach these mandatory goals. The enforcement of substantive individual rights belonging to natural or legal persons is based on the national law, the fact that the regulation is not issued by the national legislator but was drawn up in order to reflect community regulations being irrelevant. In cases where the member state does not transpose the directive within national law, or the implementation is incorrect, or the deadline expired, the directive offers individuals rights which they may claim in front of national courts, if the acknowledgement of these rights is clear, precise and unconditional. Nevertheless, in cases where the state has implemented the directive justly and in good time, individuals may have recourse only to national regulations, and its interpretation does not rule out the claiming or the assesment of national regulations according to the community directive text and essence.

The decision is mandatory in all its elements for member states, public legal persons, private legal persons clearly spicified and notified, without its implementation within the national legislation being necessary. Delegated acts are normatives issued by the European Comission and which mandatory for member states. Through delegated acts the European Comission supplements, specifies or stipulates, following a procedure which implies the European Parliament and the European Union Council, the secondary aspects of EU regulations, in order to clarify the meaning and to enable the standard enforcement of EU law. The recommendations and notices (for instance those issued by the European Comission within the cooperation and verification mechanism – CVM) are not mandatory and are not part of the community aquis, they only guide the implementation of the European law within national legal systems, namely applying European and national regulations at the same, together with principles and Luxembourg case-law. Principles arised by resort to the courts become sources of community law, for communitary instiutions and entities, member states too, in cases where national regulations are placed within community law.

Principles such as proportionality, justice, non-discrimination, security of legal relations, protection of reasonable expectations, protection of fundamental human rights, the right to defense and solidarity are constantly found within national civil regulations, substantive and procedural law. More often than not, these principles are intertwined within the same institution, and sometimes lead to new principles, in full agreement with the essence of the European legislation.

It suffices to mention the principle of good faith (art. 14 of the Civil Code) closely linked to the principle of equity, proportionality, reasonable expectations,

the principle of common and invincible error, stipulated by art. 17 of the Civil Code, the principle of legal security and equal treatment of the parties. The abuse of right (art. 15 of the Civil Code) and the penalty for misuse of rights or for distorting the legal normative translates within the legal field the principle of good faith and it embodies the principle of equal obligations for the sides, closely connected to the principle of protecting personal rights. The principle of solidarity, deriving from the principle of good faith, equality and non-discrimination, underlies the contract relationship, based on the mutual interests of the parties. Solidarity within a contract ensures the stability and the endurance of the contract, the proportionality of contract benefits in case of hardship or performance in good faith of the contract. A brief analysis of the Romanian civil material law, particularly of the present Civil Code, shows the above mentioned principles, and many other principles of the community law. One should mention the regulations on nullity of the legal act, with emphasis on saving most of the contract by diminishing the destructive effects of nullity, by stating partial nullity, or by converting the act into a valid act, or by adapting it, in cases where we meet error or unfair exploitation. One can find a change of perception, namely downsizing the number of cases of absolute nullity and the increase in number of relative nullity, where penalties are not mandatory and the parties of the contract may give up on the right to invoke the nullity. The present Civil Code achieves a real revival of hardship and intangibility of the penalty clause, by emphasising the principle of equity, balance and preservation of the contract as much as possible. Adapting the contract by a legal action occurs when the performance becomes excessively onerous, due to an exceptional change of circumstances the parties could not forsee when the contract was concluded. Amending and adapting the contract ensures a fair and just distribution of loss and benefits between the parties, in those situations where the circumstances change. The same goes for the penalty clause, which operates and works independently, in reference to the amount, from the existence or the extent of the harm or prejudice caused by a party not executing its obligations. Even though art. 1541 stipulates, at least in principle, the fact that penalties are not subject to change, as the parties have mutually agreed on the amount of these penalties in case the obligations within the contract are not performed, the amount in question may be diminished or reduced in court by a legal action, in cases where the penalty can be considered excessive compared to the prejudice the parties might have forseen when the contract was concluded. In all these situations, meeting the principle of equity and fairness should be corroborated with the court interventionism, and this undermines the principle of mandatory force of the contract. At the present, the regulations within the Civil Code emphasises a new vision on contract negociation and execution, by turning the principle of

good faith into the duty (obligation) of loyalty, consistency, cooperation, security and confidentiality. We must not disregard, in reference to this aspect, the obligation the creditor has to take part to the contract being executed, by avoiding or reducing the prejudice caused by the failure to perform the contract, and his liability, if his actions or lack of have contributed to the prejudice in question. The principle of cooperation between parties in performing the contract is best described by the ruling on contract civil liability. Moreover, in reference to the non-contract vicarious liability, the damage caused to the edifice (building), caused by animals or things, one may notice, following the national case-law receiving The Court of Justice of the European Union case-law and the economic and social factors requirements, a change of perception concerning the legal base of tort, according to reality, according to the legal sources or to the scientific and technological progress. The personal basis of liability was substituted by an impersonal, objective foundation, which is linked to the obligation to set up a guarantee, as well as the support one should get regarding surveillance (monitoring), authority or activity.

The entire set of regulations on this matter aims to protect ownership, patrimonial rights of individuals, by focusing on arising, even indirectly, the responsability of those factors causing the damage, the prejudice. This trend, this approach to an impersonal, objective liability, can be found within the provosions of art. 1368 of the Civil Code, which establishes a subsidiary liability, falling within the responsabilities of a mentally incompetent individual, although the manner in which the damage or prejudice can be repaired derives from the principles stipulated by art. 1531 of the Civil Code. All these regulations and principles, many of them newly established, implement within national regulations the treaties and the conventions Romania has signed and ratified, the European Union legislation, the principles arising from these provisions, from the The Court of Justice of the European Union in Luxembourg case-law and from the European Court of Human Rights in Strasbourg case-law. One controversial aspect, which was insufficiently regulated by our national legal system is the issue of irrevocable, final decisions of courts, in cases where the judge has clearly broken the applicable regulations. When assessing these situations, one should focus not necessarily on granting compensations for material and non-material damage caused by civil or penal decisions, since we already have clear regulations and plenty of precedents on this matter, but one should focus on the lack of regulations regarding magistrate's liability for ruling errors based on flagrant violation of the law, since the state is held responsible in these situations. The difficult aspect regards the need to compensate the damage caused to the state, called upon to answer in front of the victim of the judicial error for the wrongful conduct the judge manifested while performing the act of

justice, and also the manner of complying to the principle of judges' independence. Our opinion is that the judge's independence ends in cases where abuses occur, considering that no person, not even a magistrate, a judge, is above the law. In conclusion we can safely state that the national judge (court) in charge of enforcing the provisions of the communitary law, is responsible to ensure these regulations are efficiently put into practice, since these normatives become a part of the national law, as the European treaties stipulate. Thus, one cannot argue there is a conflict between the national regulation and its corresponding provision within the European Union law. One may simply discuss the difficulties in accurately interpreting certain European Union provisions which were transposed within the national law of the entity and which are enforceable for this reason. And this in where national courts, based on their cooperation with the CJEU (The Court of Justice of the European Union) and in order to get a standard interpretation of the European Union law, transposed within the national legal systems, may request CJEU opinion, without such an interpretation being mandatory, since court organisation system is not part of the European federal system.[24] Even CCR (The Romanian Constitutional Court) within its case-law underlines the fact that cooperation and court dialogue cannot lead to a hierarchy, a ranking when it comes to courts[25].

The Lisbon Treaty emphasises the much needed steps the states have to take in order to ensure they meet their obligations derived from the European treaties or the documents, legal acts issued by European institutions so as to achieve the goals of the treaty, namely to create a new transnational democratic and legal order by federal means, within the cummunity formed by the member states. The normatives of the European law, adopted according to the competence the member states granted to the European legislative, are enforced directly or through a bill, an implementing law, according to the regulations within the fundamental treaties or according to the actual European regulation. The implementing legislation is similar to a secondary legal normative, and is not opposed to the European provisions. Therefore, the national judge in charge, according to his competence, with enforcing community law, must do his best to ensure its full efficiency, while forsaking of its own motion, if necessary, any contrary regulations within national legislation, without having to wait their elimination through constitutional procedures. The fundamental treaties of the European Union, ratified and implemented within constitutional procedure opened the way to amending national legal provisions outside common constitutional procedures, clearly regulated.

[24] *Ibidem*, p. 77.

[25] C.C.R., decision no.668/2011, in „M.Of.", I, no. 487 in 8th of July 2011.

## 5. The Rome Convention and the normatives on dispute settlement related to contract obligations

The international current debate related to the contract as a legal entity still revolves around the concepts of the Club of Rome, and it starts from a global, world-wide approach of important and complex problems the current world has to face, as the nations are increasingly connected and interdependent. The Club of Rome assesses the numerous political, economical, social, cultural, technological of today's dynamic world and focuses on a long-term effort regarding these issues, and this is something governments cannot do, as they have to face immediate problems. The national regulations on contracts within each European Union member state meets serious challenges, as it opposes standardisation and uniformisation imposed by European Union market. The first step in drawing up an homogenous flexible legal frame, applicable in the European Union area, was the Rome Convention that took place on June 19th 1980. As mentioned before, it follows the conceptual lines drawn by the Club of Rome, although this convention only designed some necessary regulations for settling legal inconsistencies in terms of contract obligations. The convention provisions established the principle that allows the contract parties to choose freely the law governing the contract. The choice should be clearly stated or it should result by way of reasonable certainty from the terms of the contract or from particular circumstances (art 3.1 of the Convention): "The parties may appoint the law applicable to the contract as a whole or to a certain part of it". If parties have not appointed the applicable law, it shall be determined by using impersonal, objective criteria.

The theoretical solution is stipulated by art. 4.1 of the Convention, more specifically the contract is governed by the legislation of the state the contract is closest to. According to art.4.2 of the Convention it is presumed that the state which is closest to the contract is the country where the party indebted to execute or perform the standard, "typical" benefit resides, by standard benefit or performance one defines the performance that requires payment.

This presumption does not work in cases where the contract refers to a right in rem, acquiring or transferring the right of property concerning real estate, in this case the applicable law is called Lex rei sitae, namely the law that states that the governing law is the law where the property is situated. When it comes to contracts for the carriage of goods, the applicable law is that law of the state where the carrier (transporter) has its headquarters. As far as contracts between suppliers and consumers are concerned, art. 5 of the Convention stipulates that, no matter the law appointed by the parties may not derogate from the mandatory provisions of the state where the consumer resides. Our legal system, in reference

to the international private law, has adopted the regulations of the Rome Convention, on settling disputes regarding contract obligations. According to art. 2640 paragraph 1 of the Civil Code, the law governing contract obligations is determined according to the European Union regulations and only in the alternative, in cases the European Union regulations do not reach the Civil Code normatives are applicable, unless international conventions or special regulations stipulates otherwise. The provisions within art. 2637 and 2638 of the Civil Code on the material requirements for drawing up law-binding documents including an international element implement the convention regulations while enabling within contracts the principle of parties having freedom to appoint the applicable law, the choice should be clearly expressed or deriving beyond doubt from the content or the circumstances of the contract (first and second paragraph in the art. 2637 of the Civil Code). Just like art. 3.1 of the Convention, art. 2637 paragraph 3 of the Civil Code states that the governing law may be applied to the whole act or to a certain part of it.

Where no governing law was appointed, art. 2638 paragraph 1 of the Civil Code stipulates the enforcement of the law belonging to the closest related country, and, in case no such law can be appointed, the Civil Code enstates an impersonal criterion, namely locus regit actum, meaning the governing law is that applicable to where the act was concluded. The theoretical solution stipulated by art. 4.1 of the Convention, on the governing law and the state closest to the act, namely the contract, related to art. 2638 paragraph 1 of the Civil Code, is presented within the second paragraph, which mentions the state where the party performing the standard execution or the author of the act has its residence, goodwill or registered office. Law of contracts is strongly influenced by the secondary sources of European Union law, regulations, directives, decisions, recommendations that, directly or indirectly, through national regulations, become a part of the internal law and are highly enforceable.

## 6. Conclusions

Implementing timeframe within legal provisions guarantees the security and stability of legal relations, but also a requirement of globalisation, where the dynamic of social and international relations can no longer be confined within old, classic legal systems. The scientific and technological evolution and its impact on transforming and improving production, movement of goods, work force, services and capital, especially following the Lisbon Treaty, set up the trend in standard contract terms, as a necessary process given the globalisation phenomenon, and the increasingly interdependent nations. National economic operations engaged in international business need a global approach on the legal

system, as it must be not only flexible and rigurous, but also compatible to the needs and interests of those participating to trading today. Globalisation and the manner in which international and regional regulations conquered national legal order make the distinction between internal (national) and international contracts more and more questionable, and the national law less and less significant.

The uniformisation of law in an increasingly globalised world is achieved by international and regional regulations penetrating the national legal system. The priority these regulations are given relates to the law, and not to the Constitution, as a filter for implementing them within the national legal system. The Council of Europe and European Union jurisdiction enables the development and the suport of their regulations within given competence.

The recourse to the European Court for Human Rights ensures the interpretation and the enforcement of legal laws on human rights in reference to the European Convention on Human Rights, just as the Court of Luxembourg verifies and supervises the conformity of national regulations to the sources of European Union law. One may find, in reference to the Council of Europe regulations and to the European Union provisions, a regional jurisdiction meant to ensure, within the limits of each jurisdiction, the uniformisation of national and regional legal regulations.

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