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THE PATRIMONIAL EFFECTS OF MARRIAGE IN THE ROMANIAN INTERNATIONAL PRIVATE LAW ACCORDING TO THE PROVISIONS OF ART. 2589- ART. 2596 CIVIL CODE

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Abstract:

Given the legislative reform of family law and of private international law after adopting the Civil Code that is subject to the modern legislations tendency of unification of the rules on matrimonial property regimes we will devote the present study to law applicable the matrimonial property regime and the law applicable to matrimonial agreement.

Currently, the conflict of laws in matrimonial matters is stated in art.2589- art. 2596 of the Civil Code.

The article aims to answer the following questions:

1. What is the law applicable to the patrimonial effects of marriage states in accordance with the provisions of art. 2589 C civ.?

2. What is the law applicable to the matrimonial property regime under art. 2590 C civ?

3. What do we mean by the notion of the choice of the law applicable to the marital regime under art. 2591 C civ?

4. How to determine objectively the law applicable to the matrimonial regime under article 2592 C. civ?

What is the scope of the law applicable to the matrimonial regime under article 2593 C civ?

6. What is the law applicable to the substantive conditions of the matrimonial agreement?

7. What is the law applicable to formal conditions of marital agreement under the provisions of article 2594 C civ?

8. How are third parties protected in accordance with the provisions of Art. 2595 C civ?

9. What happens if your usual residence or citizenship changes?

Key words:

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Law applicable to the: general effects of marriage, matrimonial property regime, matrimonial agreement; third parties protected in accordance, happens if your usual residence or citizenship changes, Romanian international private law, Civil Code.

1. What is the law applicable to the patrimonial effects of marriage states in accordance with the provisions of art. 2589 C civ.? (Anitei (2012): 1-40)

Article 2589 of the new Civil Code with the marginal title of The law applicable to the general effects of marriage states that: "General effects of marriage are subject to the law of the common habitual residence of the spouses, and in the absence of such law to the law of common citizenship of spouses. In the absence of common citizenship, the law of the State where marriage was celebrated is applied. (paragraph 1)The law determined under paragraph (1) applies to both personal effects and economic effects of marriage that this law governs and from which spouses are not allowed to derogate, irrespective of the matrimonial regime of their choice. (paragraph 2) Notwithstanding the provisions of paragraph (2), the rights of spouses on family housing, and the regime of certain legal acts on the housing are subject to the law of the place where it is located" (paragraph 3).

Article 2596 of the new Civil Code with the marginal name of Change of the habitual residence or citizenship provides:

The provisions of art.2589 paragraph 1 of the new Civil Code show that in terms of the determination of the law applicable to general effects of marriage consideration of the particular situation in which the spouses find themselves in terms of habitual residence or, in the absence of citizenship is required:

Spouses have the same common habitual residence - in which case the law of their common habitual residence is applied;

Spouses have different habitual residence, but common citizenship - in which case the law of the state of common nationality of the spouses is applied;

Spouses have both different habitual residence and different nationalities - in which case the law of the State where the marriage was celebrated is applied.

This solution, called "Kegel's Row", named after the German author who proposed it, will lead to the finding that the connection points are allowed "in cascade" and not alternatively.

The provisions of art.2589 paragraph 2 of the new Civil Code show that the law applicable to the effects of marriage governs especially the following:

Personal effects between spouses (personal obligations between spouses, change of name as an effect of marriage);

Property effects between spouses, and between them and third parties regulated by the Civil code and from which spouses cannot derogate, regardless of the matrimonial regime they chose (eg the primary regime);

Marriage effects on the legal capacity of the minor spouse, etc..

As an exception to the provisions of paragraphs 1 and 2 of art.2589 of the new Civil Code under paragraph 3 of the same article some aspects are not subject to the law applicable to the general effects of marriage, but to other laws such as:

A person's capacity to marry before coming of age - is subject to national law;

The legal regime of spouses' property - for real aspects it is subject to the location law (lex rei sitae);

Spouses' rights on family housing and the regime of legal acts on this housing are subject to the law of the place where it is located .

The provisions of art.2596 of the new Civil Code show that in case of change of habitual residence or citizenship we have the following possibilities:

• If one spouse changes his/her habitual residence or citizenship, the effects of marriage shall be governed by the law of the common habitual residence or by the law of their common citizenship. So, in this mobile conflict of laws, old law is given priority, so the law of common habitual residence or the law of common citizenship will continue to govern the joint effects of marriage;

• If both spouses change their habitual residence or their citizenship, the effects of marriage shall be governed by the law of the new common habitual residence or by the law of the new common citizenship, but only in the future if the spouses have agreed otherwise, and in no case can be prejudicial to the rights of third parties. We support the view of the research literature that states that "this provision does not mean that the old law shall be applied in case of third parties, since it is possible that the new law is without prejudice to them (but rather perhaps an advantage), a situation in which there is no reason to deprive third parties from the benefit of the new law;

• If the spouses have chosen the law applicable to the matrimonial regime, it will be the same even if spouse change their habitual residence or citizenship.

2 What is the law applicable to the matrimonial property regime under art. 2590 C civ?

From the provisions of art.2590 of the new Civil Code, we can see that the law applicable to the matrimonial property regime is, as a rule, the law chosen by the spouses (*lex voluntatis*). However spouses have the option limited to the following laws:

• the law of the State where one of them has their habitual residence at the date of choice;

• the law of the State whose citizenship each one of them has at the date of choice;

• the law of the State where they establish the first common habitual residence after marriage celebration.

3. What do we mean by the notion of the choice of the law applicable to the marital regime under art. 2591 C civ? (Anitei (2013):41-45)

The conflict of laws in the matter of agreement of *election of the law applicable to matrimonial regime* is laid down in art.2591 paragraph 1-2 and art.2593 paragraph 1 letter a of the Civil Code.

From the provisions of art.2591 of the Civil Code in conjunction with art.2593 paragraph 1 letter a and b of the Civil Code we note that we have two types of agreement. Thus, the first type of agreement from art.2593 paragraph 1 letter a of the Civil Code is called the *agreement of election of the law applicable to the matrimonial regime* and refers to the conditions of validity "on the election of the law applicable to the matrimonial regime, except capacity" and the second type called *matrimonial agreement* is regulated by art.2593 paragraph 1 of the Civil Code referring to "the admissibility and validity conditions of matrimonial agreement, except capacity."

To clarify the meaning of the conflict of laws set out in art.2591 paragraph 1-2 and art. 2593 paragraph 1 letter a of the Civil Code the primary qualification of *agreement of election of the law applicable to matrimonial regime* is necessary.

The new Civil Code does not define the notion of agreement of election of the law applicable to matrimonial regime.

In these circumstances we believe that we can define the *agreement of election of the law applicable to matrimonial regime* as the special contract by which

future spouses or spouses choose or change *the law applicable to matrimonial regime* during marriage.

The provisions of art.2.591 paragraph 1 of the Civil Code show that the choice of law applicable to the matrimonial regime is made by concluding an agreement of election of the law applicable to the matrimonial regime which may occur either before the celebration of marriage or at the time of marriage or during marriage.

According to paragraph 2 thesis I of art. 2591 of the Civil Code on the formal conditions of the agreement of election of the law applicable to matrimonial regime there are two choices:

• the law chosen to govern the matrimonial regime;

•the law of the place of conclusion of the election agreement (*locus regit actum*).

According to paragraph 2 thesis II of article 2591 of the Civil Code regardless what law will be chosen by future spouses or spouses to govern their matrimonial regime, the agreement shall specify expressly the election of the applicable law by a document signed and dated by spouses. As an exception, if there is no such agreement the law to be chosen by future spouses or spouses to govern the matrimonial regime should undoubtedly result from the terms of a matrimonial agreement.

Of paragraph 2 thesis III of Article 2591 of the Civil Code we note that if future spouses or spouses choose as the law applicable to the matrimonial regime the Romanian law, then they must meet the requirements of the agreement as established by the Romanian law for such an agreement to be valid.

Article 2591 paragraph 3 thesis I of the Civil Code states that spouses may always choose another law applicable to the matrimonial regime, in compliance with the formal conditions of the election agreement of the applicable law.

According to art. 2591 pargraph 3 thesis II of the Civil Code the new law chosen by the spouses to govern their matrimonial regime by agreeement takes effect only for the future, if the spouses have decided otherwise (namely to produce effects for the past), the condition being that of not trespassing in any way the rights of others.

In the current stage of the Romanian regulation the *agreement of election of the law applicable to matrimonial regime* will have a scope which will include both the Romanian types of agreement as well as the types of *agreement of election of the law applicable to matrimonial regime* recognized by foreign law.

Once the operation of primary qualification is completed, by framing the legal relationship of private international law among the conflict of laws mentioned above and the applicable law determined, the *agreement of election of the law applicable to matrimonial regime* shall acquire new content and a new scope, due to the operation of secondary qualification, which is achieved by *lex causae (*Ungureanu. Jugastru. Circa (2008):180-182); (Lupascu. Ungureanu (2012):218-228), namely by the substantive law applicable to the legal relationship in question.

4. How to determine objectively the law applicable to the matrimonial regime under article 2592 C?

From the provisions of art. 2592 C, it follows that if the spouses did not choose the law applicable to their matrimonial regime, it is subject to the law applicable to the general effects of that marriage, the provisions of Art. 2589 C civ.

5. What is the scope of the law applicable to the matrimonial regime under article 2593 C civ?

According to art.2593 paragraph 1 of the new Civil Code the law applicable to matrimonial regime governs:

a) the limits of the choice of matrimonial regime;

b) the possibility of matrimonial regime change and the effects of this change;

c) the content of the patrimony of each spouse, the property rights of spouses and the debts of spouses;

d) the termination and liquidation of the matrimonial regime and the rule on the division of common property (except the establishment of lots and their distribution which are subject to the law of the State where the property is located at the date of partition) [2];

e) publicity measures and enforceability of matrimonial regimes in relation to third parties[3].

However, as a protective measure for third parties, when at the date of conclusion of the legal relationship between a spouse and a third party they had their common residence in the same State, the matrimonial law of this state, with the following exceptions should be applied:

[2] Art. 2593 paragraph 2 of the new Civil Code.
[3] Art. 2595 paragraph 1 of the new Civil Code.

a) the publicity or registration conditions required by the law applicable to matrimonial regime have been met;

b) the third party knew, at the date of conclusion of the legal relationship. the matrimonial regime or recklessly ignored it;

c) the estate publicity rules laid down by the law of the State where the property is situated have been complied[4].

The essential *features* that a legal relationship must meet in order to be qualified by the Romanian authorities in the conflicting category of patrimonial relations between spouses are:

- legal relationships should be established between spouses or between a spouse on the one hand and third parties on the other;
- legal relationships should result from the status of married person that the parties have;
- the purpose of the legal relationships should be the property of one or both spouses acquired after marriage or obligations contracted for accomplishing the tasks of marriage.

6. What is the law applicable to the substantive conditions of the matrimonial agreement in private international law? (Anitei (2013):134-140)

For the clarification of the meaning of the notion of matrimonial agreement in private international law we need to perform the primary classification of the concept of matrimonial agreement in Romanian law.

We can observe that art. 2593 paragraph 1 letter b and art. 2594 of the Civil Code does not define the notion of matrimonial agreement in the Romanian private international law.

Given these conditions we shall define the matrimonial agreement as the special contract (Ungureanu. Jugastru. Circa (2008):180-182); (Lupascu. Ungureanu (2012):218-228), (Anitei (2012): 1-40) with an an extraneous element by which prospective spouses either adopt, modify or change the matrimonial regime chosen, but which is provided by the law chosen by them (the future spouses or spouses) to govern their *matrimonial regime*.

To clarify the meaning of the conflict of laws set out in art. 2593 paragraph 1 letter b of the Civil Code we need to perform the primary qualification of the "substantive conditions" notion.

[4] Art. 2595 paragraph 2 of the new Civil Code.

In the Romanian law, the substantive conditions are those circumstances that must exist at the conclusion of the matrimonial agreement in order to be valid.

The substantive conditions of the matrimonial agreement are those essential elements required for its existence and validation.

Since for the conclusion of marriage, under law, the following substantive conditions are required: the ability of future spouses (matrimonial age), the consent of the intending spouses and the notification upon the health state, we consider that for a marriage agreement to be valid, it must meet these conditions, to which we add the object and cause of the matrimonial agreement.

However, in relation to these substantive conditions we must make the following distinction:

• if the matrimonial agreement is concluded *before marriage,* we must take into account the following substantive conditions: sex differentiation, the ability of future spouses (matrimonial age) the consent of the intending spouses, the object and cause of the matrimonial agreement;

• if the matrimonial agreement is concluded *during marriage* we must take into account the following substantive conditions: the ability of spouses to conclude the matrimonial agreement, the consent of the intending spouses, the object and cause of the marital agreement.

In terms of private international law, the concept of marriage agreement will have a scope that will include the Romanian types of matrimonial agreement concluded on the basis of the matrimonial regime chosen according to the provisions of the new Civil Code and the types of agreement acknowledged by the foreign law.

7. What is the law applicable to formal conditions of marital agreement under the provisions of article 2594 C civ? (Anitei (2013):90-96)

Regarding the form conditions of art.2594 the new Civil Code stipulates: "The form conditions required for concluding the matrimonial agreement are those stipulated by the law applicable to the matrimonial regime or those stipulated by the law of the place where it is concluded."

Corroborating the provisions of art.2594 with those of art.2590 of the Civil Code we note that in terms of the formal conditions, future spouses or spouses may choose one the following laws:

-the law of the State where one of them has his/her habitual residence at the date of election;

-the law of the State whose citizenship each one of them has at the date of election;

-the law of the State where they establish their first common habitual residence after marriage celebration

-the law of the place where the matrimonial agreement is concluded.

8. How are third parties protected in accordance with the provisions of Art. 2595 C civ?

From the provisions of art. 2595 It is clear that, as regards third parties, both the advertising measures and the opposability of the matrimonial regime vis-à-vis third parties are subject to the law applicable to the matrimonial scheme, with the exception of the situation where, at the date of the legal relationship between a spouse and a third party, they were habitually resident in the same territory state, the law of this state is applicable, but in this case the following cases are also exempted:

a) the advertising or registration conditions provided for by the law applicable to the matrimonial regime have been met;

b) the third person knew the matrimonial regime at the date of the legal relationship, or ignored him imprudently;

c) the rules of real estate publicity provided by the law of the state in which the real estate is situated are observed.

9. What happens if your usual residence or citizenship changes? (Anitei (2012):84-100)

Article 2596 paragraph 1 of the Civil Code provides: "The publicity measures and the opposability of the matrimonial regime against third parties are subject to the law applicable to the matrimonial regime."

From the provisions of art.2596 paragraph 1 of the Civil Code we can notice that the publicity measures and the opposability of the matrimonial regime against third parties are subject to the law applicable to the matrimonial regime. So, in accordance with art.2590 of the new Civil Code the publicity measures and the opposability of the matrimonial regime against third parties are subject to one of the following laws chosen by the future spouses or by spouses:

• the law of the State where one of them has his/her habitual residence at the date of election;

• the law of the State whose nationality any of them has at the election time;

• the law of the State where they establish their first common habitual residence after marriage celebration.

As we already know, art.2593 paragraph 1 letter. b of the Civil Code establishes that the law governing the matrimonial regime regulates among others the admissibility and validity conditions of the matrimonial agreement, except for the capacity (which will be subject to the national law of each spouse).

Can we say that the future spouses may choose as the law governing the publicity of matrimonial agreements one of the laws governing the consent, the object and cause of the matrimonial agreement namely: the *law of the State where one of them has his/her habitual residence at the date of election*, *the law of the State whose nationality any of them has at the election time* or *the law of the State where they establish their first common habitual residence after marriage celebration*?

The logic leads me to say, by interpreting the above provisions that we cannot apply a certain law to the validity conditions and another law to the publicity of the matrimonial agreement because the publicity of the matrimonial agreement would not be meaningful and would not fulfill its purpose, namely that of protecting the interests of third parties against prejudice or frauds caused by one spouse or by both spouses.

Based on these justifications we can say that the laws governing the publicity of the matrimonial agreement can be one of the following laws chosen by the spouses:

• the law of the State where one of them has his/her habitual residence at the date of election;

• the law of the State whose nationality any of them has at the election time;

• the law of the State where they establish their first common habitual residence after marriage celebration.

However, as an exception according art.2596 paragraph 2 of the Civil Code, when the legal relationship between a spouse and a third party is established, and they have their habitual residence in the same State, the law of that State is applicable, unless:

a) the publicity or registration conditions required by the law applicable to the matrimonial property regime have been met;

b) the third party knew, at the date of establishment of the legal relationship, the matrimonial property regime or recklessly ignored its part;

c) the property publicity rules provided by the law of the State where the property is situated have been complied.

Conclusion

In conclusion, we note that the definitions: *of the matrimonial regime* and of *the matrimonial agreement,* are a valuable auxiliary means in the primary classification of legal relations between spouses, or between spouses and others, born abroad, but unknown to the Romanian legal system.

Once the operation of primary classification is concluded, by including the legal relationship of private international law within the conflict of laws of art. .2589-art. 2596 of the new Romanian Civil Code and by determining the law applicable under the provisions of that article, the concept *the matrimonial regime* and of *the matrimonial agreement,* will acquire a new content and a new scope, as a result of the operation of secondary classification, which is done by *lex causae*, ie, by using the material law applicable to the legal relationship in question. The classification solution based on *lex causae* is supported by the majority of private international law doctrine. (Filipescu (1999):109), (Jakota (1997):223), (Loussouarn. Bourel. (1996):201-203), (Audit (1997), 203-204)

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