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WHAT IS THE PROCEDURE FOR REGISTRATION OF MATRIMONIAL AGREEMENT CONCLUDED BETWEEN SPOUSES OF DIFFERENT NATIONALITIES IN ROMANIAN IN THE NATIONAL NOTARY REGISTER OF MATRIMONIAL REGIMES (R.N.N.R.M)?

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Abstract

This article aims to study and present the procedure for registration of a matrionial agreement in RNNRM in case of two future spouses with different nationalities where they chose as the law terminating the matrionial agreement the Romanian law. For establishment we will start from the legal origin of the legal norms of Article 2593 paragraph (1) (b) Civil Code and of Article 2594 Civil Code concerning matrimonial agreement in Romanian private international law and Article 2 of Order no.1786 / C / 2011 - Notary register of matrimonial regimes and will continue to answer the questions: What law can the future spouses or the spouses of diferent citizenships choose for conclusion of the matrimonial convention? What law applies to validity conditions for conclusion of the matrimonial agreement where future spouses or the two spouses with different nationalities have their common residence in Romanian? What is the procedure for registration of matrimonial agreement concluded between two spouses of different nationalities in Romanian in R.N.N.R.M?

Keywords:

matrimonial regime, matrimonial agreement, the law of the place where the matrimonial convention is concluded , future spouses or spouses with different citizenship, Romanian Civil Code, Notary Register of matrimonial regimes.

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1. Legal instrument of matter

The conflict of laws in the field of matrimonial agreement is set out in art. 2593 paragraph 1 letter b and art. 2594 of the Civil Code

Article 2593 with the marginal title of The field of the law applicable to the matrimonial regime in paragraph 1 letter. b of the new Civil Code provides that "the law applicable to the matrimonial regime regulates:

a) .....;

b) the admissibility and validity conditions of matrimonial agreement, except capacity.

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."

Article2 of the Order no.1786 / C / 2011 - *Notary register of matrimonial regimes provides for "Matrimonial agreement and any act by means of which it is amended, revoked or cancelled are included in RNNRM for the enforceability against third parties. (paragraph1) Matrimonial agreement is registered n RNNRM only after the conclusion of marriage."*(Paragraph 2)

2. What law can future spouses or spouses with different nationalities choose for the conclusion of the matrimonial agreement?

In the current Romanian law the substantive conditions for the validity of the contract are:

- the capacity to contract;
- the consent of the parties;
- a specific and lawful object;
- a lawful and moral cause of obligations.

In terms of the formal requirements we specify that a certain form is required for the respective contract, that form must be respected, under the penalty provided by the laws in force. The contract must be concluded in authentic form and the publicity formalities must be performed.

So, since we are dealing with the conditions of validity of the *matrimonial agreement* both the substantive conditions and the formal conditions specifically provided for this type of contract must be respected.

Article 2593, paragraph 1 letter b of the Civil Code provides that "the law applicable to matrimonial regime" governs: ..... the conditions of validity of the marriage agreement, except capacity."

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Article 2594 of the Civil Code with the marginal name *The law applicable to formal conditions of the matrimonial agreement* rules: "The formal conditions as required by law for the conclusion of the matrimonial agreement are those required by the law applicable to matrimonial regime or the ones stipulated by the law of the place where it is concluded."

Analysing the provisions of Article 2593, paragraph 1 letter b of the Civil Code and art.2594 of the Civil Code we note that art.2593 paragraph 1 letter b of the Civil Code refers to substantive conditions (because as we know the substantive conditions are: the capacity to contract, the consent of the parties, a specific and lawful object and a lawful and moral cause of obligations) and not to the conditions of validity as the latter include both the substantive conditions and the formal conditions (the Romanian legislator through art.2594 of the Civil Code devoted a special article to the formal conditions). (NC Anitei (2012) : 20-45)

We suggest as *lex ferenda* the amendment of art.2593 paragraph 1 letter b of the Civil Code in the sense of "the law applicable to the matrimonial regime governs: ".....the substantive conditions of the matrimonial agreement, except capacity."

Corroborating the provisions of Article 2593 paragraph (1) letter b) with the provisions of Article 2594 and Article 2590 Civil Code., where future spouses or spouses (with the same nationality or different nationalities) chose as the law applicable for the conclusion of the matrimonial agreement the Romanian law , we note that:

- the national law of each spouse will be applicable to the capacity;
- the Romanian law will be applicable to the other three fundamental conditions (consent, object and cause)
- Romanian law will be applicable to formal conditions. (NC Anitei (2013) : 55-72)

3. What law applies to the formal conditions required for the conclusion of the matrimonial agreement where future spouses or the two spouses with different nationalities have their common residence on the Romanian territory?

By studying the provisions of art.2593 paragraph 1 letter b of the Civil Code we note that the law applicable to the matrimonial regime regulates: "... the conditions of validity of the matrimonial agreement, except capacity." So, the law applicable to the matrimonial regime regulates the

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following substantive conditions of the matrimonial agreement: *consent, object* and *cause*.

We suggest as *lex ferenda* the amendment of art.2593 paragraph 1 letter b of the Civil Code in the sense of "the law applicable to the matrimonial regime regulates: ".....the substantive conditions of the matrimonial agreement, except capacity."

In terms of the *capacity* we mention that by means of the interpretation of art.2572 paragraph 1 of the Civil Code it shall be governed by the national law of each spouse.

Corroborating the provisions of art.2593 paragraph 1 letter b with those of art.2590 of the new Code we note that in terms of the substantive conditions of matrimonial agreement, the following laws are applied:

• *Capacity* will be governed by *the national law of each spouse*;

• *The consent, object and cause* will be governed according to the choice of the future spouses or spouses of any of the following laws: *either the law of the State where one of them has his/her habitual residence at the date of election,* or *by the law of the state whose citizenship any of them has at the date of election,* or *by the law of the state where they establish their first common habitual residence after marriage celebration*. (NC Anitei (2013) : 55-72)

According to art. 2558 paragraph 1 of the new Civil Code primary qualification is always made according to the Romanian law, namely in accordance with the terms used by the Romanian legal system. Therefore, in order to make the primary qualification of the "formal conditions" of the matrimonial agreement we must show the formal conditions of the matrimonial agreement in the Romanian law.

The formal conditions of the matrimonial agreement legal act refer to the procedure of contracting the marriage agreement, which aims, on the one hand, to ensure the compliance with the substantive conditions prescribed by law and, on the other hand to guarantee the public acknowledgment of the matrimonial agreement.

The matrimonial agreement is a solemn legal act, for the validity of which the conclusion of the agreement in authentic form is necessary. Thus, according to art.330 paragraph 1 of the new Civil Code "..... the matrimonial agreement is concluded by registered authenticated by notary public with the consent of all parties, expressed in person or through an agent by special authentic mandate having deliberate content."

The penalty for failing to observe the form *ad validitatem* of the matrimonial agreement is absolute nullity.

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Since they are dealing with new regulations, the notary public will have to advise the parties in order to become acquainted with the advantages and disadvantages of both the conventional community regime and of the separation of property regime, so that spouses or future spouses could be able to choose the matrimonial regime they believe is the most suitable to regulate property relations between spouses.

Also, the notary public will check the consent of the intending spouses, checking whether the substantive conditions for concluding the matrimonial agreements have been met.

Since the matrimonial agreement is concluded before marriage, but enters into force after the contracting of marriage, it means that it still can be changed until the marriage ceremony, with the observance of the same formal requirements.

The reasons for which the authentic form of the agreement is required are:

• The authenticity ensures that the matrimonial agreements clauses remain unchanged, because one of the original document remains in the archives of the notary, so that parties cannot change the content of the original copy they hold, and consider themselves as married without a contract, a situation which might happen if the agreement had not been subjected to the formalities of authentication;

• When the matrimonial agreement is authentic, the parties or their representatives cannot cancel its effects by challenging the signatures;

• As they most often include liberalities made between them or between third parties and future spouses, they necessarily require an authentic document.

In the event that a matrimonial agreement would be concluded as an act under private signature or it would miss some form, non-observing the *ad solemnatatem* form, that matrimonial agreement would not only be dissoluble, but it would be considered non-existent.

From the fact that marriage is illegal in terms of its forms, namely it is nonexistent, the following consequences arise:

• Spouses consider themselves to be married under the legal community matrimonial regime because, legally, they have no contract;

• All interested parties may invoke the absence of the act, whether they have economic or moral interest that can be evaluated;

• The nullity of the matrimonial agreement cannot be covered either by the celebration of marriage, or by express or tacit confirmation,

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performed either during marriage or after the dissolution of marriage, because it is impossible to confirm the non-existent documents;

• Form nullity of the matrimonial agreement cannot be covered either by the 10-year prescription, as this tacit confirmation applies only in case of relative nullity.

Unlike the formalities required for the contracting of marriage, when signing the matrimonial agreement, the parties, namely the spouses or prospective spouses, may be represented by mandatory with special authentic mandate, while at the contracting of marriage spouses must be present in person to give their consent and to complete the act of marriage.

Under the penalty of nullity, any change of the marital agreement before marriage should be in the same form and with the presence of the same people who participated in the conclusion of the original document.

Concluding the matrimonial agreement by notary authentic document, the notary could exercise such control over its content, being able to refuse the authentication of an illicit matrimonial agreement which is contrary to the interests of the family, by inserting any provision aimed perhaps at favouring any of the spouses at the expense of the other or achievig parental responsibility or transfer on succession law, contrary to the principle written by Article 332 paragraph (2) Civil Code which states: "matrimonial agreement cannot affect equality between spouses, parental authority or legal transfer on succession". Also, the conclusion of the matrimonial agreement by notarial document allows the society to watch over the exercise of freedom in conventions, in order not to undermine the moral values of the family and society, damaging (eg by any material compensation) the parental authority of any of th spouses or the succession rights of the other family members. (N. C. Anitei (2013) : 55-72)

As these are new regulations, the public notary will also have to advise the parties in order to know the advantages and disadvantages of both conventional community regime and of the regime of separation of goods, so that spouses or prospective spouses can choose, as a way, the matrimonial regime that they find most appropriate to regulate property relationships between them. Also, the notary public will take the consent of the future spouses or spouses, checking whether the conditions for the conclusion of the marriage agreement are met.

Unlike the formalities required for the conclusion of marriage, upon signing the matrimonial agreement, the parties namely the spouses or future spouses may be represented by proxy by special and authentic power of

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attorney, while at the conclusion of marriage the spouses must be present in person to give consent and be able to conclude the marriage act.

Per a contrario, if the formal requirements necessary for the validity of the matrimonial agreement established by Romanian law are not met, it is void (absolute nullity, resulting from the solemn form characteristic of being constituent of the legal document, so of the matrimonial agreement)

4. Organization and functioning of the National Notary Register of Matrimonial Regimes (RNNRM) and the registration and consultation procedure (NC Anitei (2012) :35-40)

According to art.1 paragraph 1 of the *Methodological Norms on the National Notary Register of Matrimonial Regimes and the registration and consultation procedure* hereinafter RNNRM organized within the National Union of Notaries Public from Romania, are registered, for opposability against third parties, the matrimonial regime chosen by spouses – the legal community, separation of goods or conventional community – as well as any other subsequent change of the matrimonial regime chosen.

By matrimonial convention spouses will choose the separation of property or the conventional community regime and it will be registered on the basis of the marriage convention in RNNRM.

As for the matrimonial regime of legal community of property this will be registered in RNNRM on the basis of the act of marriage according to art.91 of the new Civil Code, if spouses choose the matrimonial regime at the contracting of marriage.

They will register in RNNRM for opposability against third parties the matrimonial convention and any act that modifies, revokes or cancels this.

The matrimonial convention will be registered in RNNRM only after the contracting of marriage.

The record of all documents relating to the matrimonial regime chosen by spouses will be held centrally at the National Union of Notaries Public from Romania, on electronic and material support, both forms being identical and mandatory.

According to art.3 of the *Methodological Norms on the National Notary Register of Matrimonial Regimes and the registration and consultation procedure* the following mentioned should be recorded:

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- number and data of application form of the legal act, or, if necessary, of interrogation of RNNRM allocated automatically by computer software;

- name and surname of the parties, before and after marriage, from the identity documents of the parties, respectively, from the act of marriage communicated to RNNRM, in copy, by the authority of marriage;

- personal identification number of the parties;

- matrimonial regime chosen: legal community, separation of property or conventional community;

- data on the act of marriage based on which the legal community property regime is registered;

- data on the act by which the matrimonial convention is changed, revoked or cancelled.

In case of the matrimonial convention concluded, modified or revoked during marriage, the notary public that authenticates the notary act, subject to registration shall immediately send electronically, when the authentication procedure of the matrimonial agreement, the act of modification or, where appropriate, the revocation takes place, the copy of legal act and the registration form.

Either spouse may request under paragraph 2 of art.4 of this law, the accomplishment of publicity formalities. The registration application may be addressed to the public notary, to notaries public room or directly to the register.

RNNRM issues statements on data recorded therein, which will be certified by the issuer at the request of a notary public or of any natural or legal person, even if it does not justify an interest.

The request for information may be addressed to the public notary, to notaries public room or directly to the register. The notary public, or where appropriate, the Chamber of Notaries Public, is required to communicate to RNNRM, the request for information, filling to this end, electronically the RNNRM interrogation form.

RNNRM verification is based on the interrogation form of RNNRM. For settlement of the information application RNNRM issues the extract provided by art. 334 paragraph 3 of the new Civil Code. The extract certificated by the issuer shall be signed by the operator and stamped by the register administrator.

Article 6 paragraph 1 of the *Methodological Norms on the National Notary Register of Matrimonial Regimes and the registration and consultation procedure* in RNNRM provides that for RNNRM registration of the documents referred

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to in art.1 and art.2 paragraph 1 and for RNNRM interrogation a certain fee is required. The amount of the fee and method of payment is determined by the National Union of Notaries Public. The tax is levied on the legal act subject to registration.

RNNRM interrogation fee is paid by the notary public or notaries public room, and the fee will thereafter be paid to them by the person who solicited the interrogation.

As an exception shall be exempt from fee the requests addressed to RNNRM by public authorities and institutions.

If an entry is incorrect, it will either be corrected or annulled and, if necessary, a new registration will be made, which under the heading "observations" will include mention of previous registration.

After the new registration is made, a new extract will be issued which will include both the new entry and the previous one, highlighting the part of the entry corrected or cancelled.

We mention that the correction or cancellation of registration shall be made at the request of the notary public, of the notaries public room, of any interested person or *ex officio*, at the request of the Commission of Experts on notary. Until resolution by the Committee of Experts on notary of the request for correction or cancellation of registration errors, the application will issue a warning message to that effect.

The fee for correction or cancellation of an erroneous registration of guilt of the notary public shall be paid by him/her. For rectification or cancellation of an erroneous entry due to the fault of the RNNRM administrator no fee is required.

In order to provide material evidence of legal acts provided by art.1 and art.2 paragraph 1 of the *Methodological Norms on the National Notary Register of Matrimonial Regimes and the registration and consultation procedure* the following steps should be taken: in the first working day of each month the records of the previous month will be printed, together with the RNNRM opening and closing minutes, while the RNNRM administrator or the person designated by signature shall stamp and put those pages together. Electronic records will have the same structure as those on material support.

At the beginning of the first working day of each year the application will reset the numbering of documents registration and notary procedures, the first entry bearing the number "1".

Registration or verification forms sent via electronic forms will automatically receive successive numbers in ascending order and

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chronological time. Date of receipt by RNNRM of the application through software will be at least in format year / month / day.

After the registration or verification, the applicant shall receive an authorized extract.

Any query will be made only in RNNRM database, without making verification to the public notary who certified the legal document.

Legal acts referred to in art.1 and art.2 paragraph 1 of the *Methodological Norms on the National Notary Register of Matrimonial Regimes and the registration and consultation procedure* concluded by foreign notaries or other foreign authorities, will be recorded only by the RNNRM administrator, after first holding council with the Commission of experts in the notary field.

The National Union of Notaries Public Council shall establish, by decision, the way of administration and verification of RNNRM.

To apply *Methodological Norms on the National Notary Register of Matrimonial Regimes and the registration and consultation procedure* the National Union of Notaries Public Council will develop guidelines for registration, query and verification of RNNRM, which will be communicated to the notaries public, to notaries public rooms and to RNNRM's staff. By means of the instructions the RNNRM model, the data to be communicated to RNNRM, the model of application and verification forms, the model of the extract issued by RNNRM after verification and registration, the data transmission mode, the data management procedures following the registration and verification, the ways in which to manage RNNRM, and other procedures and documents required for the operation of RNNRM will be established. Instructions will be published and made publicly available on the website of the National Union of Notaries Public.

RNNRM documents are preserved and kept by the RNNRM administrator, under the law and of archival nomenclature approved by the National Archives of Romania on proposal of the National Union of Notaries Public.

National Union of Notaries Public shall take the necessary measures for the organization and functioning of RNNRM to be functional after the entry into force of the new Civil Code.

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Conclusion

Of those presented in this article we note that RNNRM does not regulate the procedure for registration of matrimonial agreement concluded between two spouses with different nationalitis in Romania.

We propose as lex ferenda RNNRM by introducing provisions in accordance with the articles of the Civil Code relating to matrimonial property regimes and matrimonial agreemet in Book VII entitled 'Provisions of private international law ".

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