Jurnalul de studii juridice

Journal of Legal Studies

ISSN: 1841-6195 (print); e-ISSN: 2067-8509 (electronic)

Covered in: Index Copernicus, Ideas RePeC,

EconPapers, Socionet, CEEOL

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Jurnalul de studii juridice, Year VIII, No. 3-4, December, pp: 13-19

Published by:

Lumen Publishing House

THE LAW APPLICABLE TO THE CONCLUSION OF THE MATRIMONIAL AGREEMENT

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Abstract

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.

To clarify the meaning of the conflict of laws of Article 2590 of the new Romanian Civil Code in conjunction with 2593 of the new Romanian Civil Code we need to perform the primary classification of the concept of ***matrimonial agreement****. According to art.2558 of the new Civil Code, the primary classification is always performed according to the Romanian law, namely in accordance with the Romanian legal system.*

In the doctrine*,* ***the matrimonial agreement*** *designates the conventional act by which future spouses, making use of the freedom conferred by the legislature, establish their own matrimonial regime or change their matrimonial regime under which they were married during marriage.*

According to art.2591 of the new Civil Code "The convention of choice of the law applicable to the matrimonial regime may be concluded either before the celebration of marriage, or at the time of marriage, or during marriage (paragraph 1). The form conditions of the agreement of choice of the law applicable are those provided either by the law chosen to govern the matrimonial regime or by the law of the place where choice agreement is concluded. In all cases, the choice of the applicable law must be express and established by a document signed and dated by spouses or stipulated beyond reasonable doubt in the clauses of a matrimonial agreement. When the Romanian law is applicable, they must satisfy the requirements of form set by it for the validity of the matrimonial agreement (paragraph 2) Spouses may always choose another law applicable to the matrimonial regime, under the conditions specified in paragraph (2). The new law takes effect only for the future, if spouses have not decided otherwise, and cannot harm, in any case, the rights of third parties. (Paragraph 3).

Regarding the form conditions of art.2594 the new Civil Code stipulates: "The form conditions required for concluding the matrimonial agreement are those

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stipulated by the law applicable to the matrimonial regime or those stipulated by the law of the place where it is concluded."

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.

Once the operation of primary classification is concluded, by including the legal relationship of private international law within the conflict of laws of art.2590 of the new Romanian Civil Code and by determining the law applicable under the provisions of that article, the concept of 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 (I., P., Filipescu, (1999) :109; O., Ungureanu, C. Jugastru, A. Circa, (2008) :86-131; M., V., Jakota, (1997) :223; Y., Loussouarn, P., Bourel, (1996) :201-203; B., Audit, (1997) :203-204)

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. Through these concepts, the Romanian authorities will try to place these relations within the scope of the notions of patrimonial relations between spouses and matrimonial agreement, and then to determine, pursuant to art.2590 of the new Romanian Civil Code the material applicable law.

Keywords:

law applicable for the conclusion of the matrimonial agreement; property relations between spouses, matrimonial property regime, legal matrimonial regime; separation of property regime, conventional community regime.

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What law can future spouses or spouseschoose for the conclusion of matrimonial agreement?

Corroborating the provisions of art. 2593 paragraph 1 letter b with those of art. 2594 and of art. 2590 we note that future spouses or spouses (with the same citizenship or with different citizenships) have the possibility to choose as the law applicable for the conclusion of the matrimonial agreement one of the following laws:

- The 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 intending spouses or spouses of any of the following laws:

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

2. the law of the state whose citizenship any of them has at the date of election;

3. the law of the state where they establish their first commonhabitual residence after marriage celebration.

- Formal conditions shall be governed according to the election of the intending spouses or spouses of any of the following laws:

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

2. the law of the state whose citizenship any of them has at the date of election;

3. the law of the state where they establish their first common habitual residence after marriage celebration;

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

Summarizing the possibilities for future spouses or spouses to choose the law applicable for the conclusion of the marriage agreement, they may choose one of the following laws:

- The capacity will be governed by the national law of each spouse;
- The other three substantive conditions (consent, object and cause) and the formal conditions will be governed according to the choice of the intending spouses or spouses of any of the following laws:

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

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2. the law of the state whose citizenship any of them has at the date of election;

3. the law of the state where they establish their first common habitual residence after marriage celebration.;

- Based on the election of the intending spouses or spouses formal conditions may be governed by the law of the place where the matrimonial agreement is concluded.

If *spouses* have not chosen the law applicable to the matrimonial regime but *want to conclude a matrimonial agreement,*this will be governed by the law applicable to general effects of marriage according to art. 2589 paragraph 1 of the Civil Code. So, if they have not chosen the law applicable to the matrimonial regime but *want to conclude a matrimonial agreement this shall be governed according* to the concrete situation in which the spouses find themselves in terms of their habitual
residence or, in the absence of citizenship:

1. the law of their common habitual residence (spouses have the same common habitual residence) and in its absence;

2. the law of the state of the spouses' common citizenship (spouses have different habitual residences, but common citizenship) and in its absence by;

3. the law of the State where marriage was celebrated (spouses have different habitual residences and different citizenships).

Romanian law as the lawapplicable to the conclusion of the matrimonial agreement

By corroborating the provisions of art. 2593 paragraph 1 letter. (b) with the provisions of art. 2594 and art. 2590 of the Civil Code if future spouses or spouses (with same citizenship or with different citizenships) chose as the law applicable for the conclusion of the matrimonial agreement the Romanian law we see that:

- the national law of each spouse will be applicable to capacity;
- the Romanian law will be applicable to the other three substantive conditions (consent, object and cause) and to formal conditions.

From the provisions of art. 2591 paragraph 2 thesis II of the Civil Code we note that when future spouses or spouses choose to conclude the matrimonial agreement in Romania one has to observe the formal requirements as established by the Romanian law for the validity of the matrimonial agreement.

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The formal conditions of matrimonial agreement refer to the procedure for concluding the marriage agreement which aims, on the one hand, to ensure that the substantive conditions prescribed by law are observed, and on the other hand to ensure public recognition of matrimonial agreement .

Matrimonial agreement is a solemn legal document69. Its solemnity is achieved through the authentic act with which it formally identifies; the non-observance of the formal requirements shall lead to absolute nullity of the legal transaction.

The matrimonial agreement concluded by future spouses (foreign citizens with different citizenships) take effect only from the date of the conclusion of marriage.

If the couple concluded the matrimonial agreement during marriage it shall take effect from the date specified by spouses or, failing that, from the date of its conclusion.

As the law does not set any period of time, the matrimonial agreement retains its strength and is likely to take effect, whatever the period of time between its authentication and marriage celebration. It is declared null only when it is clear that the parties have waived the projected marriage.

By concluding the matrimonial agreement by authentic notary document, the notary can exercise in this way a control over its content, being entitled to refuse authentication of illicit marital agreement that would contravene to family interests, any clause that may pursue to favor any of the spouses at the expense of the other or infringement of parental responsibility or of legal devolution of inheritance, contrary to the written principle of art. 332 paragraph 2 of the Civil Code which provides: "the matrimonial agreement cannot affect equality between spouses, parental authority or legal devolution of inheritance."

Also, the conclusion of the matrimonial agreement by notarial act allows the society to watch over the exercise of freedom in agreements, so that they will not affect the moral values of family and of society, damaging (for example, by any material compensation) the parental authority of spouses or the inheritance rights of the other family members.

Conversely if the form requirements necessary for the validity of matrimonial agreement established by Romanian law are not met, this is declared null (we are referring to absolute nullity, resulting from the

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characteristic of the solemn form of being a constituent of the legal act, and therefore of the matrimonial agreement).

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

Conclusion

The general feature of matrimonial agreement is that of being concluded between future spouses, in order to take effect on the date of the conclusion of marriage and, in principle, for the entire duration of marriage, without excluding the possibility of modifying the original matrimonial regime, whether it is a legal or a conventional regime. In conclusion, if future spouses or spouses chose the Romanian law as the law under which they want to conclude the matrimonial agreement we shall see that:

- The national law of each spouse will apply to capacity (for example, if both spouses have French nationality the common law shall apply to capacity; if the two spouses have different citizenships (one spouse is Spanish and the other spouse is Italian, the capacity of the Spanish shall be governed by Spanish law and the capacity of the Italian by the Italian law; when one of the spouses is Romanian and the other spouse is Greek, the Romanian's capacity shall be governed by the Romanian law and the Greek's capacity by the Greek law) ;
- Romanian law shall be applied to the other three substantive conditions (consent, object and cause);
- Romanian law shall be applied to formal conditions.

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