Available online http://lumenpublishing.com/journals/index.php/jls

e-ISSN: 2067-8509; ISSN-L: 1841-6195

Jurnalul de Studii Juridice

Year XV, No. 1-2, June, 2020, pp. 5-11

APPLICABLE LAW AND SUBSTANTIVE CONDITIONS FOR CONCLUDING THE PROMISE OF MARRIAGE BETWEEN A ROMANIAN CITIZEN AND AN ITALIAN CITIZEN

Nadia Cerasela ANIȚEI

Dragoș PALADE

DOI: https://doi.org/10.18662/jls/15.1-2/57

Covered in:
CEEOL, CrossRef, CrossCheck, Index Copernicus, Ideas RePeC, EconPapers, Socionet
HeinOnline

Presented at **BIENNIAL INTERNATIONAL CONFERENCE "FAMILY INSTITUTION.TRADITION, REFORM, STANDARDIZATION AND PERSPECTIVES"**
EDIȚIA I/ FIRST EDITION
Iasi, November 8, 2019
Coordinated by: Nadia-Cerasela ANIȚEI, Mihai LUPU, Frank S. RAVITCH

©2020 The Authors & LUMEN Publishing House

How to cite: Aniței, N.C. & Palade, D. (2020). Applicable Law and Substantive Conditionsfor Concluding the promise of Marriage between a Romanian Citizen and an Italian Citizen. *Jurnalul de Studii Juridice, XV* (1-2), 5-11. https://doi.org/10.18662/jls/15.1-2/57

APPLICABLE LAW AND SUBSTANTIVE CONDITIONS FOR CONCLUDING THE PROMISE OF MARRIAGE BETWEEN A ROMANIAN CITIZEN AND AN ITALIAN CITIZEN

Nadia-Cerasela ANIȚEI[1]

Dragoș PALADE[2]

Abstract

Under the provisions of S.2585 of the Civil Code dedicated to the law applicable to the promise of marriage and of S.79 – S.81 Italian Civil Code; Chapter IV, entitled "Family relations" of Law no. 218/1995 regarding the reform of the Italian system of private international law, as well as the provisions of S.115 and S.116 C. Italian Civil Code we will show the applicable law and the substantive conditions needed for concluding the promise of marriage between a Romanian citizen and an Italian citizen.

Keywords

Promise of marriage; law applied to the promise of marriage; habitual.

1. The substantive conditions required for the conclusion of the promise of marriage in the Romanian private international law (Anitei, 2016, pp. 1-2)

Art. 2585 of the Civil Code is dedicated to the law applicable to the promise of marriage

Paragraph 1 states: "*The substantive conditions required for the conclusion of the promise of marriage are determined by the national law of each of the intending spouses on the date of the conclusion of promise.*"

[1] PhD Professor, Faculty of Law, Social and Political Sciences, "Dunărea de Jos" University, Galați, Romania, e-mail: nadia.anitei@ugal.ro; ncerasela@yahoo.com

[2] Master Criminal Law and Forensics, Faculty of Law, Social and Political Sciences, "Dunărea de Jos" University, Galați, Romania, Attorney at Law, Galati Bar, Romania

Paragraph 2 rules: "*The effects of the promise of marriage and the consequences of breaching them are governed by one of these laws, in this order:*

• *the law of common habitual residence of the intending spouses on the date of the promise of marriage;*

• *common national law of the intending spouses when they do not have the habitual residence in the same State;*

• *Romanian law, in the absence of common national law. "*

By studying the provisions of S.2585 (1) Civil Code we will try to answer the following questions:

1. What law applies in relation to the promise of marriage (Diaconu, 2019, pp. 174-175) to future Romanian citizens who have their habitual residence abroad?

In case the future fiancées are Romanian citizens with their habitual residence abroad, the substantive conditions established by the Romanian law shall apply to the promise of marriage.

2. What law applies to the promise of marriage to the future fiancé, of whom one is a Romanian citizen and the other a foreign citizen with their habitual residence in Romania?

If a future fiancé is a Romanian citizen and the other future fiancé is a foreign citizen (for example a French citizen) with a habitual residence in Romania, the following laws regarding the promise of marriage shall apply to them: for the Romanian citizen, in terms of the basic conditions of the promise the marriage law (engagement) the Romanian law shall apply and for the fiancé who is a foreign citizen, (for example a Italian citizen) in terms of the substantive conditions of the marriage promise (engagement) his/her national law (in our case the Romanian law) shall apply.

3. What law applies in relation to the promise of marriage to the future fiancé, of whom one is a Romanian citizen and the other a foreign citizen with their habitual residence abroad?

If a future fiancé is a Romanian citizen and the other future s fiancé is a foreign citizen (for example an Italian citizen) with their habitual residence abroad (for example France), the following laws shall apply in relation to the promise of marriage: for the Romanian citizen, in terms of the conditions of the promise of marriage (engagement) the Romanian law shall apply and for the fiancé who is a foreign citizen, (for example an Italian citizen) in terms of the substantive conditions of the promise of marriage (engagement), their national law (in our case the Italian law) shall apply.

4. What law applies to foreign citizens engaged with the same citizenship and habitual residence in Romania if they want to conclude the promise of marriage (engagement) in Romania?

To the engaged foreign citizens with the same citizenship (for example, Spanish citizenship) who have their habitual residence in Romania and want to conclude the promise of marriage (engagement) on the territory of Romania in terms of the substantive conditions their national law (in our case the Spanish law) will be applied.

5. What law applies to foreign citizens engaged with different citizens with their habitual residence in Romania if they want to conclude the promise of marriage (engagement) in Romania?

If both future fiancées have different foreign citizenships (one is of Spanish citizenship and the other is of French citizenship) and they reside in Romania and they want to conclude the promise of marriage (engagement) in Romania in terms of the substantive conditions their national law (in our case the law Spanish for the Spanish citizen and the French law for the French citizen) will be applied.

6. What law applies to future fiancées who do not have any citizenship but have their habitual residence in Romania and want to conclude the promise of marriage in Romania?

To this question we find the answer in paragraph (3) of S.2568 Civil Code that states: "In the case of the person who has no citizenship, the reference to the national law is meant to be the reference to the law of the state where he/she has his/her habitual residence." So, in case of the future

fiancées who do not have any citizenship but have their habitual residence in Romania and want to conclude the promise of marriage (engagement) in Romania, the Romanian law will be applied as the law of the state where they have their habitual residence.

7. What law applies to the future fiancé who does not have any citizenship but has his/her habitual residence in another state and wants to conclude the promise of marriage (engagement) in Romania?

In the case of the future fiancées who do not have any citizenship but have their habitual residence in another state (for example Italy) and want to conclude the promise of marriage (the engagement) in Romania, the foreign law (in our case the Italian law) will be applied as the law of the state where he/she has his/her habitual residence.

2. The law applicable to the substantive conditions of the promise of marriage in Italian law

The regulation of the engagement in the Italian private international law is made in S.79 – S.81 Italian Civil Code; *Law no. 218/1995 on the reform of the Italian system of private international law,* in Chapter IV, entitled "Family relations" as well as in the provisions of S.115 and S.116 Italian Civil Code classified by the Italian doctrine as "provisions of private international law" (Mosconi & Campiglio, 2016, p. 87), which refers to "the marriage of an Italian citizen abroad and of a foreign citizen in Italy."

The scope of application of the norms of Law no. 218/1995 *on the reform of the Italian system of private international law* must be limited according to the characteristics of the institution of marriage in the Italian legal system because the expressions: "marriage, fiancées and spouses," provided in S.26 – S.32 of the mentioned law represent the traditional conception of the Italian legislator in the matter of marriage and the classification will be made according to it. Therefore, the family-marriage relationships are considered to be those stable (and therefore not simulated) unions between people of opposite gender who freely express their will in the presence of a public authority invested in this respect.

S.26 of Law no. 218/1995 defines the promise of marriage and shows the effects of its breach. These are regulated by: the common national law of future spouses or, in its absence, by the Italian law.

From the provisions of S.26 of Law no. 218/1995 we observe that, whenever the national law of spouses is the same law, this will be applied in order to validate the substantive conditions of the promise of marriage concluded in Italy, regardless of the country of residence of the future spouses.

In case the common national law is absent, the fiancées have different citizenship or are stateless the promise of marriage will be subject to Italian law in this respect.

We note that, the Italian law is imperatively applied in the above situation. It is one of the few situations in which the Italian legislature departs from the principle of equality between the Italian law (*lex fori*) and the foreign law. This imbalance is justified by the need to limit the use of public order in order to avoid the interference of undesirable effects in the Italian legal order as application of foreign law. However, this need can arise only when future spouses are citizens of different states.

Another operating rule intended to regulate the capacity of future spouses is the one provided by the mechanism of remittance, as there are numerous systems of private international law, and not only between the states of *common law* which provide the application of the law of domicile or residence. Therefore, when considering the marriage of a person residing in Italy, whose national law determines the matrimonial capacity and the other conditions of the law of the state of residence, in accordance with S.13 (1) (b) of Law 218/1995, the Italian law will be applied. When considering instead a person residing in a third state the conflict of laws on the conditions of marriage of which uses the connection point of the residence, accepting in this way the resubmission, based on S.13 (1) (a) of Law 218/1995, the law of the third state shall apply. In both cases, S.116 Italian Civil Code which requires the foreign fiancé to submit a certificate of the possibility of concluding the marriage in the country the citizen of which he/she is will apply.

From the provisions of S.27 of Law 218/1995 *on the reform of the Italian system of private international law*, it follows that, in principle, the marital capacity and the existence of possible impediments must be evaluated for each spouse based on the national law, at the time of the conclusion of the engagement. The article presented can also be interpreted within the meaning that in the perspective of a marriage still not concluded if there is an impediment provided by one of the laws, that impediment should be studied according to the national law and that impediment could result in the

failure to conclude the engagement. When checking the validity of a marriage (even after an engagement) the competent authorities must refer to this article.

1. Applicable law and substantive conditions for concluding the promise of marriage between a Romanian citizen and an Italian citizen

In the case where a Romanian citizen engages with an Italian citizen, we have two situations:

1. If the engagement is concluded on the Romanian territory the substantive conditions for the Romanian citizen are regulated by the Romanian law, and for the Italian citizen by the Italian law;

2. If the engagement is concluded on the territory of Italy, as we deal with different citizenships, the substantive conditions of both fiancées will be regulated by the Italian law.

In both cases, when the law applicable to the substantive conditions is the Romanian one, (Anitei, 2011, pp. 109-119) respectively, the Italian one, a careful analysis of the notion of "substantive conditions" and therefore of the primary classification of the concepts used is required.

As in Romanian law (Diaconu, 2013, pp. 174-175), the Italian regulations do not oblige one to perform the conclusion of the marriage as a consequence of the conclusion of the promise of marriage. Moreover, the mentioned laws specify, by means of S.266 Romanian Civil Code and S.79 Italian Civil Code, that if the law of one of the parties obliges to the conclusion of the marriage as a corollary of the conclusion of the promise of marriage, the judge called to settle such a relation should evaluate the limitation of the internal public order in relation to the foreign law. In this case, the norms mentioned in the civil codes could be interpreted as necessary and immediate rules of application and the internal provisions of Romanian and Italian private international law would regulate only the residual aspects of the respective relations" (Mosconi, & Campiglio, 2016, p. 85).

It should be emphasized that, similarly to Romanian domestic law, in S.81 the Italian Civil Code mentions the essential condition of the mutual and free promise of the engagement, while the rest of the provisions of S.79 – S.81 have the function of determining the conditions, even the formal

ones, in order to have a valid promise and at the same time to determine the consequences of their breach.

References

Aniţei, N-C. (2016). *Legea aplicabila conditiilor de fond ale promisiunii de casatorie (The Law Applicable to the Substantive Conditions of the Promise of Marriage).* Revista Universul Juridic, no 11: 1-2. Retrieved from: http://revista.universuljuridic.ro/

Aniţei, N-C. (2011). *The Regulation of the Institution of Matrimonial Engagement in the New Romanian Civil Code,* Jurnalul de Studii Juridice, Anul VI, nr. 1-2, Iași: Editura Lumen; 109-119.

Diaconu, N. (2013). *Private International Law*. Bucharest: University Publishing House.

Diaconu, N. (2019). *Private International Law*. Bucharest: „Fundatia Romania Mare" Publishing House.

Italian Civil Code (Regio Decreto 16 marzo 1942 Royal Decree no. 262 of March 16, 1942)

Mosconi, F. & Campiglio C. (2016). *Diritto internazionale privato e processuale, Volume II, Statuto personale e diritti reali ((International private and procedural law, Volume II, Personal status and real rights)*, Quarta edizione, Vicenza: Utet Giuridica.

Romanian Civil Code

The normative code of the Catholic Church of Latin rite, promulgated by John Paul II on 25.01.1983 and entered into force on 27.11.1983.