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WHAT IS THE LAW APPLICABLE TO THE REGIME AND EFFECTS OF MATRIMONIAL AGREEMENT?

Nadia-Cerasela ANITEI[1]

Abstract

While paragraph 2 of art. 21 of Law no.105/1992 on the regulation of the relations of private international law, provided: "The regime and effects of matrimonial agreement are governed by the law chosen by the spouses by agreement, and in its absence, by the law provided for in art. 20" we can see that the new Civil Code does not include any explanation regarding the regime and the effects of matrimonial agreement. In these circumstances the question which arises is: What law shall govern the regime and the effects of the matrimonial agreement?

Keywords: *the matrimonial agreement; spouses; the law applicable to the regime and effects of matrimonial agreement; Romanian Civil Code.*

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1. The law applicable to regime and effects of matrimonial agreement

By interpreting the provisions of art.2590 and art.2593 paragraph 1 letter b of the new Civil Code we will see that the law chosen by spouses to govern the matrimonial agreement shall be applied to the regime and effects of matrimonial agreement. In these circumstances, the law applicable to the regime and effects of matrimonial agreement can be one 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.

Performing the primary qualification according to the Romanian law, the notion of "regime of matrimonial agreement" will be defined by the Romanian authorities as all matters concerning matrimonial agreement governed by legal rules. This means that the law chosen by the spouses, by agreement or, in the absence of express choice, the law of general effects of marriage (article 2596 of the new Civil Code) shall govern all matters relating to matrimonial agreement except for the matters to which other provisions of art. 2589-2596 of the new Civil Code are applied.

When the effects of matrimonial agreement are determined by the law chosen by future spouses or spouses, the following question is raised: which is the law that validates or invalidates the choice made by the spouses; this is the "basic law". To resolve this problem we will have to see what law future spouse have chosen to govern their matrimonial agreement?

To answer this question we will make some clarifications.

Primarily, the validity of the choice of the law competent to govern the effects of matrimonial agreement will be determined according to one 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.

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

Secondly, in accordance with art.2596 paragraph 1 and 2 of the Civil Code in case of changing the habitual residence or citizenship we have the following situations:

1. The law of the common habitual residence or the law of spouses' common citizenship continues to regulate the effects of marriage if one of them changes, as appropriate, the habitual residence or nationality;

2. If both spouses change their habitual residence or, where appropriate, citizenship, the common law of the new habitual residence shall apply to the matrimonial regime only for the future, if the spouses have not agreed otherwise, and in any case it cannot prejudice the rights of third parties.

3. Thirdly, by exception from the provisions of art.2596 paragraph 1 and 2 of the Civil Code, paraagraph 3 of the same article when spouses have chosen the law applicable to matrimonial regime, it remains the same even if spouses change their habitual residence or citizenship. So, from the provisions of art.2596 paragraph 3 of the Civil Code we note that if the spouses have chosen the law applicable to the matrimonial regime this implies that they chose the law applicable to matrimonial agreement.

In conclusion, the regime and effects of matrimonial agreement will be guided by the law chosen by spouses to govern their matrimonial agreement if spouses change their habitual residence or citizenship.

2. The limitations of the law applicable to the regime and effects of matrimonial agreement

The law designated by future spouses to govern the effects of matrimonial agreement will be limited in its application by the public order of Romanian private international law. This limitation is legally justified by art.2564 paragraph 1 thesis I of the Civil Code according to which the application of foreign law is removed in case "public order of Romanian private international law is infringed or the respective foreign law became competent through fraud of the Romanian law."

Therefore, if the effects produced by the matrimonial agreement, according to the law designated by future spouses, seriously contravene the fundamental principles of Romanian law (such as, for example, the

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principle of equality of sexes or of racial or religious non-discrimination), then the enforcement of the law designated by the spouses shall be removed in whole or in part. The agreement shall produce only the effects permitted by the Romanian legal system principles. When all its effects caused by the law chosen by the spouses are against the public policy in the Romanian private international law, the agreement will not produce any effect, because paragraph 1 thesis II of Article 2564 of the Civil Code recommends in case of calls for invoking the public policy exception in private international law the enforcement of Romanian law.

In conclusion, public policy in Romanian private international law shall intervene to prevent the occurrence of effects of matrimonial agreement according to the law chosen by future spouses, but contrary to the Romanian legal system.

The law chosen by the spouses to govern the effects and the regime of matrimonial agreement may undergo a series of cuts if the legal system of the forum contains rules of immediat enforcement established in the so-called primary matrimonial regime. This statement was expressed in French literature by a renowned French author which recommends that the rules that make up the "primary matrimonial regime" be imposed on foreign law governing the matrimonial regime, not as a result of the application of public order theory but following the qualification of such rules as "rules of immediat application" (Droz G., (1974) :90).

In Romanian law the rules of immediate application are regulated by art.2566 of the Civil Code. Thus, according to art.2566 paragraph 1 of the Civil Code, the provisions on determining the applicable law shall not be applied if the law which has to regulate a legal relationship with a foreign element infringes imperative provisions of the Romanian law. According to paragraph 2 of the same article, by exception, we may apply the mandatory provisions provided by the law of another state for a legal relationship with a foreign element, only if the legal relationship has close ties with the law of that state and the legitimate interests of the parties so require. But even in such situation of exception the condition is to consider the object and purpose of these provisions and the consequences of their application or non-application.

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3. Romanian law as the law applicable to the regime and effects of matrimonial agreement

Where future spouses or spouses (foreigners of same nationality or of different nationalities) have chosen the Romanian law as the law applicable to matrimonial agreement law, it will govern both the regime and its effects. So, under these circumstances, future spouses or spouses (foreigners of the same nationality or different nationalities) shall apply in respect to the regime and effects of matrimonial agreement the legal provisions of the Romanian law.

3.1. The content of the matrimonial agreement effects

The matrimonial regimes cause the same effect, regardless of their actual origins. Therefore, the effects of the marital agreement will result in a patrimonial state of community or separation or mixed between spouses. There may be situations, however, when the effects of the marital agreement are different. An example would be the effects of a marital agreement by which a conventional matrimonial regime is not established, when spouses decide to apply the legal matrimonial regime, whose effects will actually occur under the law (Vasilescu, P., (2009):239-240; Mares, C., (2013) :95-100), but which includes a preciput clause, whose implementation will take place at the death of one spouse.

What we emphasize is that in addition to the specific and essential effects of the matrimonial agreement, these agreements also produce other type of consequences. Thus, first of all, the matrimonial agreement produces effects of probation, because of the publicity formalities it assumes, being used as evidence of the matrimonial regime applicable to spouses or of the other instruments that it may include. Secondly, the legal documents included in the matrimonial agreement produces only their specific effects, and certain clauses such as: donations, assignment clauses, etc. will be subject to the common law rules (Vasilescu, P., (2009):239-240; Mares, C., (2013) :95-106; Craciunescu, M., C.. Berindei M., G., (2011) :428-429; Avram, M., Nicolescu, C., (2010): 110; Banciu, Al. (2011) :98-99).

Other legal documents contained in the matrimonial agreement (donations, assignment clauses) will produce the effects specific to common law.

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3.2. The extent in time of the matrimonial agreement specific effects

The temporal effects of the matrimonial agreement coincide with the extent in time of the matrimonial regime.

According to art.330 paragraph 2 of the new Civil Code "the matrimonial agreement concluded before marriage takes effect only after the contracting of marriage" and according to paragraph 3 of the same article "the agreement concluded during marriage takes effect from the date specified by the parties or, in its absence, from the date of its conclusion". Also, according to art.313 of the new Civil Code "Between spouses, the matrimonial regime takes effect only from the day of the contracting of marriage (paragraph 1) To third parties, the matrimonial regime is opposable from the date of the fulfillment of the publicity formalities prescribed by law, unless they have known it otherwise (paragraph 2). The non-observance of the publicity formalities causes spouses to be considered in relation to third parties in good faith, as married under the matrimonial legal community regime." (paragraph 3). Likewise, according to art.319 of the new Civil Code "The matrimonial regime ceases by nullity, annulment, dissolution or termination of marriage (paragraph 1). During marriage, the matrimonial regime can be modified under the law" (paragraph 2).

From the texts mentioned it results that one needs to distinguish between the effects of matrimonial agreement (the matrimonial regime) between spouses and the effects on third parties.

The matrimonial agreement concluded before marriage will produce legal effects between spouses after the contracting of marriage and to third parties from the date the publicity formalities prescribed by law are met.

The matrimonial agreement concluded during the marriage takes legal effect from the date of the conclusion of the agreement.

The application of the matrimonial regime will stop between spouses, either at the date fixed by the parties by matrimonial agreement that complies with the publicity formalities provided by law or at the date of the application for divorce or from the date of the separation in fact of the spouses under the law or from the date of cancellation or acknowledgment of the nullity of marriage or at the date of the termination of marriage by the death of a spouse or at the date the court

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decision by which the legal change of the matrimonial regime has been ordered is declared irrevocable. This is not the moment when the effects of the marital agreement will cease, they will still remain in effect until the end of the liquidation of the applied regime applied. Also, some provisions that represent other legal acts included in it which may produce its effects independently of the marital regime applied will also remain in force.

To third parties, the period when the effects of the matrimonial agreement are produced is conditioned by the date when the forms of publicity provided by law are achieved or when third parties have met it otherwise; ideally these data should coincide, so that there would be no periods in which the matrimonial agreement apply between spouses; the result consists in applying between spouses of a conventional matrimonial regime and against third parties of the legal matrimonial regime. However, the Romanian legislator in the new Civil Code, found a solution so that the same conventional matrimonial regime stays effective at the same time, both in relation to the parties and against third parties, where third parties have known this regime otherwise Vasilescu, P., (2009):239-240; Mares, C., (2013) :95-132; Craciunescu, M., C.. Berindei M., G., (2011) :428-429; Avram, M., Nicolescu, C., (2010): 110; Banciu, Al. (2011) :98-99).

As a result of the termination of the matrimonial regime, it will logically go into liquidation. The rules to be applied are the conventional ones, established by the parties through their marital agreement, for example, through the preciput clause and if the spouses have forgotten to stipulate such clauses the common law will be applied.

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