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PROPOSALS FOR MODIFYING THE REPUBLIC OF MOLDOVA LEGISLATION IN THE AREA OF THE CONFLICT OF LAWS RULES REGARDING THE FORMAL AND MATERIAL VALIDITY CONDITIONS OF THE JURIDICAL ACT

Raluca-Oana ANDONE[1]

Abstract:

The paper presents the results of the author's doctoral study in the area of the conflict of laws regarding the formal and material validity conditions of the juridical act from the Republic of Moldova Civil Code, compared with the new Romanian Civil Code.

The author makes proposals for modifying the Republic of Moldova legislation following the newest international private law European trends.

Keywords: *juridical act, validity conditions, applicable law, Romanian Civil Code, Republic of Moldova Civil Code*

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The important scientific problem solved in my doctoral thesis consists in the identification of the possibility of accomplishing the *splitting-up* (*depeçage)* in the Moldavian private international law, as an exception to the principle of the juridical act unitary status, from the double perspective of the formal and material validity conditions.

As a result of the scientific study in the matter of the formal and material validity conditions (Andone, R.-O., (2010), :167-183); (Cojocaru, V., Andone, R.-O., (2011) :57-67), taking into consideration the newest European legislative trends, the following conclusions and recommendations for modifying the legislation have been formulated:

1. *Lex voluntatis* is the expression of the parties' will autonomy principle, that regulates the area of the formal and material validity conditions in the majority of the national law systems, contributing to the uniformity of the conflict of laws solution regarding the juridical act. The theory of the "lawless contract" can not be accepted because any juridical effect resulted from the will of the contract parties can have juridical value only based on the law provisions. The application area of the *lex voluntatis* conflict of law disposition is limited to the law fraud, the private international law public order, the material law uniform rules, the situations when the chosen law system is absolutely improper to regulate the juridical act and the situation when the chosen law annihilates the juridical act, by declaring it non valid.

2. In order to determine the law to of the country with which the juridical act is most closely connected the nature of the juridical act, the place of the juridical act conclusion, the main place of performance, the juridical act object situation, the domicile, the residence, the nationality, the business headquarters, the form of drafting the juridical act, the payment currency, the arbitrage clause or the jurisdiction election clause and the author of the juridical act attitude will be taken into account, the importance and the ranking of these clues being left at the appreciation of the court or of the parties (author).

3. In the application area of the law regarding the material validity conditions of the juridical act there is the interpretation, the execution of the consented obligations, the consequences of the non-execution, the extinguishing of the obligations, the prescription and the obsoletion, the juridical act nullity consequences, the exterior will validity manifestation. The following aspects are not a part of the application area of the *lex actus*:
- the persons' capacity, the nullity of the juridical act for lack of capacity,

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the lesion vice consent in the situation of the minor aged 14-18 years, the juridical value of the silence, in the case when a party denies having consented to the signing of the juridical act, when the national law of the natural person applies; - the derived object of the juridical act (meaning the goods), the risk of the goods perishing, the publicity formal conditions regarding the constitution, the modification or the transmission of some rights over the goods, that are submitted to the law of the goods' situation place; - the will – submitted to *lex succesionis*.

4. We propose the introduction in article 1609 from the Republic of Moldova Civil Code regarding the applicable law of the juridical act a new line with the following content: „(4) The author of the juridical act can establish the law applicable to the whole juridical act, as well as to some parts of it."

The splitting-up (depeçage) can be applied only to laws that can be conciliated and that correspond to the objective detachment of the juridical act elements, since there is a single juridical act involved. In the following situations there is a deviation from the principle of the juridical act unitary status: - the situation when the status of the juridical act is regulated by a certain law system, but there are taken into consideration the rules of another law system that prohibit it, when the juridical act regards the juridical relationships that can not be tied to only one law system; - the situation when the status of the juridical act is ruled by a certain law system, but the Moldavian imperative rules also apply.

5. Regarding the *lex actus* regulation from article 2638 line (2) of the Romanian Civil Code of 2009, we observe the fact that the Romanian legislator used the notion of „*characteristic* performance debtor". We consider that, when the Moldavian legislator has transferred the Romanian legislation, he has forgotten to add the adjective „*characteristic*", reason for which we propose the introduction of this one in article 1611 line (1) from the Republic of Moldova Civil Code regarding the applicable law of the material contract validity conditions.

6. We remark the novelty of using of the Romanian legislator the habitual residence as a liaison point in the area of *lex contractus*. We propose the change in the Moldavian legislation of the liaison points – the domicile and the residence of the debtor (natural person)'s performance from the moment of the contract conclusion, stipulated in article 1611 line (1) of the Republic of Moldova Civil Code, with a new liaison element - the habitual residence of the natural person.

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7. We propose the change of the current Moldavian legislation from article 1622 line (1) - (2) of the Republic of Moldova Civil Code regarding the law applicable to the succession, that contain as liaison points the national law from the moment of the *de cujus* death and the law of the state where his immobile goods are situated with the liaison point – the law of the state where *de cujus* had, at the time of his death, the habitual residence, that should apply without any difference between his mobile or immobile goods, and only one alternative – the election of the his citizenship law state, as law applicable to the inheritance as a whole.

The liaison points - the testator's citizenship and domicile from article 1622 line(1) - (2) of the Republic of Moldova Civil Code, that refers to the applicable law of the material validity conditions and to the formal validity conditions of the will do not correspond to the current European level regulations.

8. We propose the reintroduction of the old dispositions of article 70 from the Romanian Law nr. 105/1992 into the Romanian Civil Code of 2009, between article 2638 and article 2639, under the shape of forma article 2638^{1}, considering the fact that the Romanian legislator has non intentionally omitted to regulate the law applicable to the accessory juridical acts.

9. The rule *locus regit actum* applies in all the law systems, even if it has an alternative or subsidiary character. The situations when the law of the place where the juridical act was concluded do not apply regard the public order, the law fraud in international private law and the retrogression.

10. As for the character of the conflict of law rules regarding the form of the juridical act, if these are examined in reference to each other, they have an optional (alternative) character, but, if they are examined outside the area of their enumeration, they have en imperative character. Exceptions from the imperative character of the conflict of law rule regarding the form of the juridical act, if these are examined in reference to each other: - regarding the proof of the juridical act and the proof power of the document, the rule *locus regit actum* is optional to *lex voluntatis*; - the rule *locus regit actum* has an imperative character in the area of the proof of the civil state acts and their proof power.

11. The application area of the laws regarding the form of the juridical act regards: - the exterior form of the juridical act, as *negotium* (the verbal or written form), the *ad validitatem* form or the *ad probationem* form

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or the third parties opposability form, if the manual transfer of the goods is necessary, in the case of the real juridical acts; - the writing form of the juridical act, as *instrumentum* (the competent persons to conclude the document, it's mentions – such as the "good and approved" mention from the Romanian legislation for the private signature document that contains the obligation of one party to give a certain amount of money or goods, the writing conditions – such as the multiple exemplary formality from the Romanian legislation for the private signature document); - the duration of it's validity, if it has been drawn up for a limited amount of time; - the proof methods regarding the juridical act and their proof power, if the testimonial proof is admitted and up to what value of the juridical act or if is necessary the conclusion of a document, if the document has the value of a start document proof, allowing it's completion with the witnesses proof; - the sanctions applicable to the juridical act, if the legal dispositions regarding the form are not obeyed (e.g.: the nullity, the types of nullity, the legal regime of nullity); - the formal conditions of the proof convention; - the form of the proxy; - the form of the debt cession.

12. The publicity forms regarding the goods are governed by the law applicable at the time and the place where they are accomplished, the procedure form regards the civil law suit development and is being governed by the law of the forum, and the ability form is the one stipulated by the Moldavian law for the validity of a juridical act signed on behalf of a person with no performance capacity of with restraint performance capacity – the national law of the person that is under the tutorship or curatorship.

13. Regarding the regulation of the applicable law of the juridical act formal conditions from article 1609 line (1) second thesis letter c) of the Republic of Moldova Civil Code, we propose the replacement of the liaison point – the domicile of the person that has drafted the juridical act with the liaison element – the habitual residence of the person that has signed the juridical act.

14. Regarding the regulation of the law applicable to the will formal conditions from article 1623 line 2 letter b) of the Republic of Moldova Civil Code, we propose the replacement of the liaison point – the domicile of the person that has drafted the juridical act with the liaison element – the habitual residence of the person that has signed the juridical act.

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15. We propose the replacement in article 1592 line (1) of the Republic of Moldova Civil Code of the liaison point – the national law of the person under tutorship or curatorship with the element – the law of the habitual residence of the protected person, which is a lot more practical.

16. We recommend the reintroduction in the Republic of Moldova Civil Code of article 1586[1], that should define the habitual residence notion as the one from the state where the natural person has its main dwelling house, even if the legal registration formality have not been fulfilled.

Through these scientific conclusions and recommendations, the doctoral thesis develops the problems of the law applicable to the material and formal conditions of the juridical act and opens to the Moldavian doctrine the road to new scientific research directions in this area, that should have as purpose the alignment of the Moldavian legislation to the European one.

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