# THE LEGAL REGIME OF THE PRECIPUT CLAUSE

**Iolanda-Elena LUNGU-CADARIU**[*]

## Abstract

*In the light of the New Civil Code, the matrimonial conventions the spouses will be able to sign before or during marriage and which grants them the liberty to decide on the juridical regime applicable to the goods earned during marriage will have considerable implications on the inheritance rights of the surviving spouse, thus eliminating the uncertainties regarding the competence of the inheritance mass of the predeceased spouse. In the event such a premarital convention is concluded, the spouses can insert the so-called preciput clause, stipulating that the surviving husband can claim possession, prior to the inheritance division, of one or several goods in joint or co-property.*

*Thus the spouses, through their convention, shall determine which of the goods of mutual possession during marriage, depending on their particular importance, shall be transferred exclusively to the surviving spouse at the moment the other one dies. The preciput clause will act like a relation-free donation, subject to reduction only to the extent it affects the rights of the heirs with specific inheritance and by the means of which the spouses can ensure the continuity of the life standard even after the death of the other.*

## Keywords:

*matrimonial regime, matrimonial convention, preciput, inheritance, heirs, inheritance division.*

[*] Lecturer, PhD. candidate, The Faculty of Law, "Petre Andrei" University from Iasi; lawyer in the Bar of Iasi.



LUNGU-CADARIU, I., (2010) THE LEGAL REGIME OF THE PRECIPUT CLAUSE in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

Although the prevailing legal dispositions regarding the inheritance rights of the surviving spouse[1] have been substantially upgraded since the moment the Civil Code (D. Alexandresco, (1912), : 188-189; C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, (1998), : 248-254; D. Macovei, I. E. Cadariu, (2004), : 84-85) came into force, they fail nevertheless to provide an equitable position for the surviving spouse in the light of the legal inheritance of the predeceased spouse. The surviving spouse is still bound to accept the participation of more distant relatives in class and "de cujus" degree, being forced to share with them some of the goods to the acquisition of which he/she contributed (materially or through labor within the household) and which present a special moral value.

Although there have been attempts of legislative modifications in this respect[2], the New Civil Code[3] maintained the dispositions of Law no. 319/1944 regarding inheritance rights of the surviving spouse. The novelty the New Civil Code introduces, however, resides in the possibility of the spouses or future spouses to insert in the matrimonial convention the so-called "preciput clause" by means of which they can grant several matrimonial advantages in the event one of the spouses dies.

Although this clause is regulated within the matrimonial convention in the book dedicated to family law, it has important consequences on inheritance law as the preciput clause becomes valid and executed at the death of the willing spouse, under the condition of its existence at that time and of a valid and standing marriage. The regulation of the preciput clause constitutes a first in our law, being borrowed, with certain differences, from the French civil legislation.

The etymology of the word "preciput" comes from Latin from the terms "prae"(prior) and "capio", "ere" (to take), namely "to take beforehand" or "to take in advance" (M. Avram, C. Nicolescu, (2010), : 313)[4]. A definition of the word "preciput" can also be found in the Romanian Dictionary, namely "the right of an individual to take possession of a certain part of a good before the division of the inheritance" (DEX, (1998), : 838)[5].

According to art. 333 line 1 of the New Civil Code, "the matrimonial convention can stipulate that the surviving spouse can take free possession,

[1] Law no. 319 from June 10, 1944 for the inheritance right of the surviving spouse published in the Official Monitor no. 133 from June 10, 1944.

[2] See the project of modification of the Civil Code from 2004 available at http://www.dsclex.ro/coduri/pr_civil.htm.

[3] Adopted by Law no. 287/2009 published in the Official Monitor no. 511 from July 24, 2009 that will become in force on October 1st, 2011.

[4] For other etymologies see *M. Avram, C. Nicolescu,* Regimuri matrimoniale, Ed. Hamangiu, Bucureşti, 2010, p. 313, note 1.

[5] See also the French definition of the institution: "l'avantage accordé par la loi ou par la convention de pouvoir prélever, avant tout partage et hors part, certaines sommes d'argent, un objet, un lot ou certains biens. L'attribution préférentielle peut a voir lieu en pleine propriété, en nue-propriété ou en usufruit". – http://www.dictionnaire-juridique.com.

prior to the division of the inheritance, of one or several commonly held goods, in joint or co-property". Under these circumstances, the preciput clause can be defined as an act of will of the spouses or future spouses obligatorily expressed in the matrimonial convention on the basis of which the surviving spouse is entitled to take free possession, prior to the inheritance division, of one or more commonly held goods considered as "ut singuli" and which are detained by them either in joint property or in co-property.

From the definition of the article above there results that the preciput is a convention, an agreement of the spouses or future spouses that grants one of them a right possibly affected by a causal condition (the other one survives). The exercise of the said right is affected by a suspensive term (the moment of death of the other spouse), which means that during the lifetime of the spouses the good or goods are part of the common property and the spouse who benefits from the clause uses them as proprietor, in part based on the tacit mandate mutually presumed to have been received from the other spouse.

With regard to the juridical nature of the preciput clause, starting with the provision of art. 333 line 1 of the New Civil Code, namely that the surviving spouse takes free possession of one or more goods from the mass of common goods, corroborated with thesis II of line 2, that the preciput is subject to reduction, we conclude that this clause is a liberality in the sense given by the art. 984 line 1 of the New Civil Code. Discussions may arise related to the affiliation of this clause to one of the categories of regulated liberalities, donation or will. The dispositions of the New Civil Code are not sufficiently clear from this perspective, only stipulating that the "preciput clause is not subject to the report of donations, but only to reduction, under the conditions of the law" (art. 333 line 2).

Unlike the New Romanian Civil Code, the French Civil Code expressly states in art. 1516 that "the preciput may not be regarded as a donation, neither as far as form is concerned, nor its fund, but only as a marital convention between associates"[1]. In the French Civil Law the preciput clause is included in the category of the matrimonial advantages by means of which the rules of equal divisions are violated. The express statement of art. 1516 of the French Civil Code dissociates the preciput from all the legal regulations applicable to donations, so it is neither subject of the relation to the inheritance mass or imputable on the legal usage of the surviving spouse nor can it be revoked for ingratitude[2]. Under the situation, in the French Civil law, the preciput clause is considered as a legal act with an onerous title, a convention signed between the spouses. However, the preciput clause becomes liberality in the event when to

[1] See the French text of art. 1516 of the French Civil Code "Le préciput n'est point regardé comme une donation, soit quant au fond, soit quant à la forme, mais comme une convention de mariage et entre associés".

[2] For details, see *M. Avram, C. Nicolescu,* op. cit., p. 323-325.



LUNGU-CADARIU, I., (2010) THE LEGAL REGIME OF THE PRECIPUT CLAUSE in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

the inheritance of the predeceased spouse, beside the surviving spouse, beneficiary of the preciput, come the children from another marriage of the "de cujus".

There are no such clarifications in the New Romanian Civil Code.

We have established above that the preciput is, undoubtedly, a liberality, given the fact that the surviving spouse's patrimony is increased without giving something in return, to the detriment of the inheritance that decreases with the good or goods that constituted the object of this clause.

With regard to the classification of the preciput clause as similar in nature to that of a will, we appreciate that it is out of the question, as long as such a clause is obligatorily stipulated in a matrimonial convention that presupposes "ab initio" the agreement of both spouses. In the case of the will we cannot invoke the existence of any agreement, nor the existence of any of the parties, the will being in its essence a unilateral independent legal document that differs from any future manifestation of positive or negative wish on the part of the legatee.

In the absence of an express statement (such as art. 1516 of the French Civil Code) and taking into consideration the stipulation of art. 333 line 2 (the preciput clause is not subject to the report of donations, but only to reduction), we are inclined to consider the legal nature of the preciput as similar to a donation. We consider that such a clarification is closer to the essence of the preciput in the regulation of the New Romanian Civil Code by relation to the manner of formation and its effects, although it can still receive criticism given the object of such clause.

With regard to the manner of formation, both donation as such and the preciput clause contained in a matrimonial convention require the existence of two concordant wishes, with the difference that in the case of the donation the parties can be any individuals, including two spouses, while in the second instance only two present or future spouses can be parties.

As far as the form of the manifestation of the will of the parties, the donation and the preciput clause contained in the matrimonial convention are similar, as both must observe the condition of authenticity in order to be legally binding, under the penalty of the absolute nullity.

The effects of the preciput clause are the same as in the case of a regular donation, both resulting in the increase of a patrimony to the detriment of another one, without counterclaims, except that in the case of patrimonial preciput the patrimony that decreases is not that of the willing spouse (it couldn't be otherwise since the validity of the preciput clause is conditioned by his/her pre-death) but the inheritance patrimony and those directly affected are the heirs of the predeceased spouse. We consider that the specific condition of liberalities is also fulfilled, namely the existence of an "animus domandi", "causa proxima" being the spouses' preoccupation to ensure the surviving spouse the



LUNGU-CADARIU, I., (2010) THE LEGAL REGIME OF THE PRECIPUT CLAUSE in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

same living conditions and the same life standard as the one during the marital life itself.

The object of the preciput clause is a specific one, and namely one or several goods commonly held by the spouses, in joint or co-property. Therefore, own goods can not make the object of a preciput clause, but only of an actual donation. It is but natural, since the preciput can only be inserted in a matrimonial convention and its main goal is the predetermination of the rules of liquidation of the matrimonial community and aims, generally, at eliminating the equality of the shares. In this light, art. 367 of the New Civil Code lists the preciput clause under the object of the matrimonial convention, even as sole object of such a convention.

In conclusion, we consider that the juridical nature of the preciput clause is closer to that of a donation, with a special juridical regime[1]. Thus, we believe that the preciput clause is a convention of anticipated division of the inheritance which takes the form of an indirect donation, report-free and subject only to reduction, to the extent it breaches the inheritance reserve and applicable only at the moment of death of one of the spouses, on condition that the spouse who benefits from it should survive the other. It is therefore an act of "mortis causa" disposition.

The preciput clause is an accessory convention, its juridical status depending on the juridical status of the legal document where it is stipulated (the matrimonial convention).

We consider that, although the law fails to state expressly, the preciput operates mutually, each of the spouses bearing at the same time a double quality, that of disposing and beneficiary of the clause, except otherwise expressly stated by the parties. The possibility of the spouses to stipulate that this preciput clause should operate unilaterally is not expressly stated, but it results from the character of the norms that regulate the matrimonial convention. Such a possibility is stipulated in the French civil law[2].

---

[1] For a contrary opinion see C. M. Crăciunescu, D. Lupascu, *Clauza de preciput in Noul Cod Civil roman*, http://www.euroavocatura.ro/articole/615/Clauza_de_preciput_in_noul_Cod_Civil_roman. The authors consider that the preciput cannot be considered neither as a will nor as a donation or unequal division clause of the common goods of the spouses, being "a distinct matrimonial advantage and included in the matrimonial convention". One of the reasons why the quoted authors appreciate that the juridical nature of the preciput clause cannot be similar to that of a donation is that the beneficiary spouse is not known at the moment of conclusion of the matrimonial convention. The observation is not solid, since the beneficiary of a liberality doesn't need to be necessarily determined, but can also be determinable, when the criteria on the basis of which the beneficiary can be determined later on the date the liberality becomes binding (art. 989 line 1 thesis II of the New Civil Code). Or, as can be seen, in the present situation the person of the beneficiary spouse is determinable, able to be precisely identified at the moment of execution of the preciput clause.

[2] Art. 1515 of the French Civil Code.



LUNGU-CADARIU, I., (2010) THE LEGAL REGIME OF THE PRECIPUT CLAUSE in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

Also, we claim that this clause can be inserted in the matrimonial convention when the regime of the conventional community of assets is selected or when the regime of patrimony separation is chosen, as long as even under this circumstance the spouses can earn goods in co-property. (art. 362 line 1 of the New Civil Code).

Preciput rights of full property are acknowledged for the surviving spouse in the British law as well, rights based on which the surviving spouse can assume possession of the personal goods that belonged to the "de cujus" (car, silverware, paintings, etc.). In the British law, the juridical nature of these rights is that of a legal legatee who can absorb the entire inheritance mass, even in the presence of the heirs (F. Terré, Y. Lequette, Droit civil. Les successions. Les libéralités, (1997), : 149). If, following the exercise of the preciput rights granted to the surviving spouse, there remains a surplus of the inheritance mass, half of the rest shall be attributed for usage to the surviving spouse if he/she competes with the descendants and half of the complete property if he/she competes with privileged ascendants or privileged collaterals, and the whole of the rest in any other instances (F. Terré, Y. Lequette, Droit civil. Les successions. Les libéralités, (1997), : 149).

According to the dispositions of art. 333 line 4 of the New Civil Code, the preciput clause becomes obsolete in the event the goods community of the spouses ends during their lifetime (namely as a result of a court decision that states the nullity of the marriage as well as in the hypothesis of a change in the matrimonial regime through entering a new matrimonial convention). In this case, the execution of the preciput clause is affected by a double condition, on the one hand that one of the spouses survives the other and, on the other hand, that the marriage is valid and standing at the moment of the succession of the predeceased spouse[1].

The preciput clause also becomes obsolete when the spouses die at the same time without the possibility of deciding which of them survived even a little longer. The solution of the legislator is natural, because in such a situation it is impossible to determine the surviving spouse and the law assumes them dead simultaneously, with no succession capacity and unable to inherit one another. Without the right to inherit the inheritance mass, their heirs cannot make use of the benefit of the preciput clause.

Third, the preciput clause becomes obsolete in the event it remains without object, if the common goods stipulated in it were sold at the spouses' common creditors. We consider that in this case, if only a part of the goods

[1] In the French civil law, the preciput clause is not obsolete in case of divorce or separation, being legally binding even in such situations. Thus, according to art. 1518 of the French Civil Code, "Lorsque la communauté se dissout du vivant des époux, il n'y a pas lieu à la délivrance du préciput ; mais l'époux au profit duquel il a été stipulé conserve ses droits pour le cas de survie, sous réserve de l'article 265. Il peut exiger une caution de son conjoint en garantie de ses droits".

forming the object of the preciput clause is sold, the clause can be still enforced, but only for the part of the goods still in common property.

With regard to the object of the preciput clause, it consists of one or several commonly held goods of the spouses, owned by them in joint property or in co-property. The goods that make the object of the preciput clause must be individualized or at least the spouses should provide sufficient criteria on the basis of which their individualization can be carried out at the time the preciput is executed. Therefore, the goods that constitute the object of the preciput clause must be each individualized (ut singuli) and not determined as a juridical universality of goods. In the French civil law, beside one or several common goods, certain amounts of money or a certain quantity of a determined category of goods can also constitute the object of the preciput clause[1]. Usually, the object of the clause consists in the commonly held building, a car, a mutually exploited commerce fund, non-corporeal assets, as well as goods of predominantly moral value instead of a commercial one (paintings, jewels, books, family memories, etc.) (J. Champion, (2007), : 175) .

With regard to the moment the preciput clause can be executed, the French Civil code is much clearer as compared to the regulation of the New Romanian Civil Code. Thus, according to art. 1515 of the French civil code, the surviving spouse who benefits from the preciput clause takes possession of the goods that formed the object of the preciput prior to "any division", therefore before the division of the inheritance or the division of the common goods. The new Romanian civil code fails to make such a clarification, only stipulating that the goods shall be taken into possession before the division of the inheritance. Taking into consideration the fact that the object of the preciput clause can consist only of common goods, we consider, alongside other authors (C. M. Craciunescu, D. Lupascu, (2010)), that the execution of the preciput clause is carried out prior to the liquidation through division of the community of goods. Another interpretation of the text of art. 333 line 1 of the New Civil Code is that the execution of the preciput after the division and liquidation of the joint or co-property would render the realization of the object of the preciput clause impossible, since we can no longer speak of common goods of the spouses, but only of own goods.

According to art. 333 line 5 corroborated with art. 367 let. d of the New Civil Code, the execution of the preciput clause is done in nature and, only in exceptional situations when the execution in nature is no longer possible, the execution is done through an equivalent. In all cases, the execution of the preciput clause will be carried out of the value of the net assets of the community, which means that first the debts shall be paid off, namely the debts of the creditors of the community. In fact, the common creditors of the spouses

[1] See art. 1515 French Civil Code.



LUNGU-CADARIU, I., (2010) THE LEGAL REGIME OF THE PRECIPUT CLAUSE in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

are entitled to liquidate the goods that make the object of the preciput clause even before the end of the community (art. 333 line 3 of the New Civil Code).

The anticipated effect of the preciput clause is to create an inequality in the division of the common goods of the spouses, to create an advantage for the surviving spouse to the detriment of the other heirs. However, the civil law defends the interests of the heirs with special rights of the predeceased spouse expressly stipulating that such clause is reducible to the extent it breaches the inheritance reserve.

We conclude that the regulation of the preciput clause is welcome and able to correct certain inequities created to the surviving spouse by the current law that forces him/her to share goods with a special value and to the acquisition of which he/she contributed with relatives of the "de cujus" with whom there may have been no relationships during his/her lifetime, very distant by class or degree. The protection of the rights of the surviving spouse through the preciput clause is only partial as it operates only in the event the spouses concluded a matrimonial convention, while in its absence the regime of the legal community of goods is applicable.



LUNGU-CADARIU, I., (2010) THE LEGAL REGIME OF THE PRECIPUT CLAUSE in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

## References:

### Treaties, courses and monographies

Alexandresco D., (1912). *Explicatiunea teoretica si practica a Dreptului Civil Roman*, tom. III, partea a II-a, *Mostenirile ab intestat*, Atelierele Grafice "Socec&Co.", Bucuresti.

Avram M., Nicolescu C., (2010). *Regimuri matrimoniale*, Ed. Hamangiu, Bucuresti.

Champion J., (2007). *Contract de marriage et regime matrimoniaux. Strategies patrimoniales et familiales*, 12e edition, Dalloz, Paris.

Hamangiu C., Rosetti-Balanescu I., Baicoianu Al., (1998). *Tratat de Drept Civil Roman*, vol. III, All Beck, Bucuresti.

Macovei D., Cadariu I. E., (2005). *Drept civil. Succesiuni*, Junimea, Iasi.

Terre F., Lequette Y., (1997). *Droit civil. Les successions. Les libéralités*, 3e edition, Ed. Dalloz, Paris.

Vasilescu P., (2009). *Regimuri matrimoniale*, ed. a II-a, revizuita, Universul Juridic, Bucuresti.

Terre F., Simler Ph., (2005). *Droit civil. Les regimes matrimoniaux*, 4e edition, Ed. Dalloz, Paris.

### Webography:

Craciunescu C. M., Lupascu D., (2010). *Clauza de preciput in Noul Cod Civil roman*, http://www.euroavocatura.ro/articole/615/Clauza_de_preciput_in_noul_Cod_Civil_roman

http://www.dsclex.ro/coduri/pr_civil.htm.

http://www.dictionnaire-juridique.com.

http://www.euroavocatura.ro/articole/615/Clauza_de_preciput_in_noul_Cod_Civil_roman

http://www.legifrance.gouv.fr.