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TRADITION, REFORM AND HARMONIZATION TRENDS IN MATTERS OF MATRIMONIAL AGREEMENT IN ROMANIAN PRIVATE INTERNATIONAL LAW¹

Nadia-Cerasela ANIȚEI

Abstract

Currently there is no work dedicated to matrimonial agreements (matrimonial property regimes) in private international law that a) studies the legal mechanisms by which, in both Romania and abroad, the competent legal system governing such agreements involving a foreign element between spouses is established; and b) studies the trends resulting from European unification of national legislation in this vast field.

Three particular aspects will be focused upon in my presentation:

a. Classical issues involved in determining the law governing matrimonial agreement.

*In Romanian law, the legal literature old considered art. 2 of the Romanian Civil Code as the only source of private international law. The three paragraphs of this article related to: goods, people and form legal documents, dedicating three basic solutions: *lex rei sitae*, *lex patriae* and *rigit locus actus formam*. Subsequently, Law 105/1992 on the regulation of private international law dedicated: Article 20 personal and property relations between spouses and 21 matrimonial convention. Legislative reform in matters of matrimonial agreement in the Romanian Civil Code. In 2011 in Romania, the legislative reform of fundamental institutions of civil law was accomplished by adopting the new Civil Code which came into force on October 1, 2011. From the provisions of the articles cited it can be noted that the articles on the effects of marriage (Articles 2589-2596 Civil Code). Conflicting rules in matters of matrimonial convention are set out in Article 2593 paragraph (1) letter b) and Article 2594 Romanian Civil Code. Article 2593 with the marginal title*

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"Scope of the law applicable to matrimonial property regime" in paragraph (1) b) Civil Code states that "the law applicable to the matrimonial property regime governs: b) the admissibility and validity conditions of matrimonial convention, except capacity". Article 2594 with the marginal title "The law applicable to form conditions of the matrimonial convention" orders "Form conditions required to conclude the matrimonial convention are those provided by the law applicable to the matrimonial property regime or those provided for by the law of the place where it is concluded." From the provisions of the articles cited it can be noted that the articles on the effects of marriage (Articles 2589-2596 Civil Code), took over some of the provisions of Law no. 105/1992, conflicting rules set by the provisions of the Hague Convention of March 14, 1978 on the law applicable to matrimonial property regimes, the solutions offered in the field by a series of laws from different European countries (Switzerland, Italy, Germany, Quebec, France etc.) being most inspired, in turn, by the provisions of the Hague Convention, but they also considered the harmonization tendencies of the European Union area. The Romanian doctrine of private international law applicable law concept of marriage effects are included: personal relations between spouses, capacity of a woman who marries before the age of 18 years and property relations between spouses (including matrimonial and convention).

b. Analysis of these issues from a European and international perspective.

In 1990, as a result of political, economic and social changes at European level, the European Commission acknowledged the actuality of finding modern solutions to the conflicts of laws relating to matrimonial property regimes, so that on July 17, 2006 the Green Paper on conflicts of law on matrimonial property regimes included the question of jurisdiction and mutual recognition. In 2008-2010, the European Commission established an expert group called "PRM / III" made up of members from various professions concerned, representing various European legal cultures. Report from 2010 noted among the obstacles to the free movement, the uncertainties related to property rights of international couples. In this context, due to the particularities of registered partnership and marriage and to the different legal consequences these forms of union determine, the European Commission issued two separate proposals for regulation: one on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of property consequences of registered partnerships and another on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of matrimonial property regimes. Regarding the harmonization of proposal for a Regulation on the jurisdiction, applicable law,

recognition and enforcement of judgments in matters of matrimonial property regimes, Romania found that: the Regulation respects both the principle of subsidiarity and the principle of proportionality, however, after the assessment of the proposal the following amendments were adopted: i) in Article 1 paragraph (3) after letter a) a new letter, letter a1) is introduced, as follows: "a1) the existence, validity or recognition of a marriage"; ii) In Article 18 paragraph (1), the introductory part shall read as follows: "After at least one year of the conclusion of marriage, the spouses may subject their matrimonial regime to a law other than the one applicable until then." The study of the trends of harmonization of rules in matters of matrimonial agreement (matrimonial property regimes) is of great interest since the increased mobility of persons in an area without internal frontiers leads to a significant increase of unions between citizens of different Member States, whatever the form of these unions (marriage, actual unions, civil partnerships), and to the presence of such couples in a Member State, without having its nationality, plus often the purchase goods in the territory of several Member States, raising thus the issue of the law applicable to the matrimonial property regimes of such couples. In particular, for Romania, the harmonization of law in matters of matrimonial agreement (matrimonial property regimes) is of particular importance since our country's EU integration prompted more and more Romanian people to settle abroad, but also the foreigners to settle in Romania, which led to a significant increase in the number of disputes with foreign element in matrimonial property regimes.

I will discuss the knowledge that has already accrued in the doctrine and jurisprudence, and consider contemporary challenges, proposals and solutions for lege ferenda.

Keywords

Spouses; The law applicable to the matrimonial agreement Romanian private international law; Romanian Civil Code; Harmonization of rules in matters of matrimonial agreement the EU.

1. Considerations on private international law and the regulation of matrimonial agreement in Romanian Civil Code dating from 1864

In 1864 the Romanian Civil Code took over the provisions of Article 3 paragraph 2 of the French Civil Code in Article 2 that represented until 1992 the only source of private international law. Thus, Article 2 Romanian Civil Code provided "*Numai imobilele aflate în*

cuprinsului teritoriului României sînt supuse legiloru române, chiaru candu ele se posedu de străini. (alin.1) Legile relative la starea civile și la capacitatea personelor, urmarescu pe Români chiaru candu ei 'și au residenta în strainetate. (alin.2) Forma esteriore a actelor e supusă legiloru terei unde se face actulu. (alin.3)''.

Classical issues involved in determining the law governing matrimonial agreement. In Romanian law, the legal literature old considered art. 2 of the Romanian Civil Code as the only source of private international law. The three paragraphs of this article related to: goods, people and form legal documents, dedicating three basic solutions: *lex rei sitae, lex patriae and rigit locus actus formam*.

The conclusion in paragraph (2) and (3) of Article 2 Romanian Civil Code is that the matter of the matrimonial agreement was concluded in Romania in case of the formal conditions the Romanian law applies. As regards the legal capacity of the individual to conclude the matrimonial agreement the national law of each of the future spouses or spouses applies.

2. The regulation of the matrimonial agreement in Romanian law until the adoption of the new Romanian Civil Code (2011)

The names used in the past to designate marital agreement are varied. Thus, the term matrimonial agreement was used in art.1224 Civil Code of 1864 along with "maritagiu" agreement (art. 932 Civil Code). Over time, the doctrine (Alexandresco ; 916: 5); (Hamangiu, Rosetti – Bălănescu, & Băicoianu, 1998:4); (Cantacuzino, 1998:697); (Vasilescu, 2003: 182-183) has used names by naming the matrimonial agreement "marriage agreement", "matrimonial contract", "agreement or marriage contract," "contract" or "prenuptial agreement".

The Civil Code of 1864 regulated, as single conventional regime, the dowry regime (Civil Code Article 1233 -1293), and the dowry being according to the provisions of art.1233 'the fortune brought by men, from or on behalf of women, to help man support the tasks of marriage Spouses could adopt it with or without modification, by matrimonial agreement. The dowry was managed and used by man, who alone, exercised the actions affecting them. The woman could alienate the movable dowry, but only with the authorization of the man, the estate dowry being inalienable, intangible and imprescriptible. The married

woman retained the right of administration, use and disposal of the paraphernal property. The Civil Code also regulated, as an annex to the dowry regime, the spouses' procurement society formed of a small community of goods, which was in joint ownership of both spouses. (Bacaci, Dumitrache, & Hageanu, 2005: 44-45)

In case the matrimonial agreement was concluded in Romania we had to consider the rules on the matrimonial agreement of Article 1124 Civil Code and Article 932 of the Civil Code. Article 1224 Civil Code provided "*Verice convențiuni matrimoniale sunt libere între soți, întrucât acelea nu vatămă drepturile bărbatului de cap al familiei, sau de cap al asociațiunii conjugale, și întrucât nu deroagă la dispozițiunile prohibitive ale acestui codice*" *alături de cel de convenție de mariaj*. Article 932 of the Civil Code provided "*The donations made to spouses or to one of them by means of the marriage agreement are not subject to any formality*").

Research literature states (Vasilescu,2012): that: "*From a practical standpoint, the marriage portion was the most prevalent matrimonial agreement in that period, continuing thus not only legislatively, but also practically, a legal tradition that is lost in centuries. But what is meant by the marriage portion? The word was used by the legislature, doctrine and judicial practice in different ways. Thus, a "marriage portion" designates distinct realities but closely linked. The marriage portion designated the matrimonial property regime as a whole, as a normative system applicable to property relations between spouses. By "marriage portion" we also understood - then, the matrimonial agreement establishing the regime concretely applicable between the married man and woman. The same word signifies the good or goods that constitute the patrimonial support of the namesake matrimonial regime.*"

The *Constitution of 1948*, although it failed to remove the family legal relations legal from under the regulation of the Civil Code and to expressly repeal certain texts of this code, basically, by the consecration of new principles (eg gender equality) made important changes in family relationships. Thus, the dowry regime was considered tacitly repealed.

In the last 50 years Romanian experts have equated the term of *patrimonial relations between spouses* with the concept of *matrimonial regime*. The contemporary Romanian doctrine on the notions of *matrimonial regime* and *patrimonial relations between spouses* is much more nuanced than in the past, arguing that between the two notions are quite close links, but not identity links. Thus, the matrimonial regime should designate a system of legal rules that govern the patrimonial effects of marriage, but not any effects (there are some pecuniary relations that are of no interest

for matrimonial regimes such as maintenance of spouses, as well as those they have with other people: children, relatives, etc.).

The Family Code (adopted on December 29, 1953 and entered into force on February 1, 1954) regulates patrimonial relations between spouses in art. 29-36 as "patrimonial rights and obligations of spouses *as matrimonial law regime, characterized by the doctrine as not only legal, unique and mandatory, but, above all, rigid and restrictive.*

The Family Code of 1948 by art.20 paragraph 2 prohibited any agreement that would provide a different legal status than that of common property for anything acquired during marriage and which could not be included in the provisions of the art.31 of the Family Code (which listed the goods that remained in the property of each spouse). Also art.30 paragraph 2 of the Family Code prohibited the marriage agreement under penalty of absolute nullity, prohibiting, thus, any agreement derogating from the provisions of the Family Code provisions.

3. Article 21 of Law no. 105/1992 on the regulation of private international law relations.

Since 1990, the Romanian society has undergone an big process of layering. Amid the economic hardships that affected our country, the traditional family model (housewife, the sole breadwinner husband) revived, unemployment affecting, first and utmost, the female population. The vicissitudes of transition to a market economy have led many Romanian to settle abroad or to marry foreigners.

Against this background Romanian legislature adopted in 1992 Law no. 105 *on the regulation of private international law relations* which in Chapter II entitled *Individuals* (Article 11 - Article 39) discussed in Section II *Marriage and divorce* (Article 18 and Article 24). This last section included Article 21 dedicated to the issues relating to matrimonial agreement ruling "*The substantive requirements for the conclusion of the marriage agreement are those provided by the national law of each of the future spouses. (Paragraph 1) The regime and effects of matrimonial convention are governed by the law chosen by agreement by future spouses, and failing that, and its absence by the law provided by Article 20. (paragraph 2) The same law shall determine whether it is possible to amend or replace the matrimonial agreement during marriage.*

Although prohibited by the provisions of Article 30 paragraph 2 of family Code in terms of the provisions of Article 21 of Law no.

105/1992 the concept of matrimonial agreement had a scope that encompassed all types of agreements qualified by foreign law (but unrecognized by Romanian law).

Subsequently, Law 105/1992 on the regulation of private international law dedicated: Article 20 personal and property relations between spouses and 21 matrimonial conventions. Legislative reform in matters of matrimonial agreement in the Romanian Civil Code.

Studying the provisions of Article 21 of Law no. 105/1992 in various papers (Dariescu 2007: 3-20) the conclusion is the following:

- paragraph 1 of Article 21 of Law 105/1992 could be understood as follows: *the ability to conclude the matrimonial agreement, the consent to its conclusion, the object and the cause of the agreement are governed by the national law of each of the spouses.* Please note the distributive application of the national law of each spouse. This means that all substantive conditions listed above will be subject for each spouse, separately, to his/her national law;

- In terms of the form of the marriage agreement, Article 21 of Law no.105 / 1992 did not contain an express provision. Under these conditions lacking a special conflict rule, the solution to the problem of the law applicable to the formal conditions of the matrimonial agreement was uncertain. Should we have applied the law designated by the rule on the form of contracts provided by Article 86 of Law no. 105/1992? Should we apply the law designated by Article 71 of Law no. 105/1992, article on the form of legal acts in general? Or, is there in Article 21 of Law no. 105/1992 hints regarding the law applicable to the form of the matrimonial agreement? After the studies performed we concluded that we will qualify as primary the matrimonial agreement as a bilateral legal document and we will apply the conflict rules contained in the two paragraphs of Article 71 of Law no. 105/1992. Thus, we conclude that all the formal requirements of the matrimonial agreement are subject: *either to the law which governs the substance; or to the law of the place where the matrimonial agreement was concluded, or to the law applicable under the private international law of the authority examining the validity of the matrimonial agreement;*

- *The effects of the matrimonial agreement were governed by the law chosen by the future spouses by agreement. In the absence of a law expressly chosen by the spouses, the regime and effects of the matrimonial agreement were governed by: the common national law of the spouses; the law of common residence of spouses if they have no common citizenship; the law of common residence, if the spouses have no*

common nationality or domicile; the law of the with which the spouses jointly maintain the closest connection, if the spouses do not have common citizenship or residence or domicile. The common national law, that of common domicile or common residence continues to govern the patrimonial relations between spouses even when, by the maneuvers of a spouse, they lost their community attribute.

After 1992, Romania concluded bilateral treaties of legal assistance with the Czech Republic, the Republic of Poland, Moldova and Ukraine.

By law no.44 of 27.05.1995 published in the Official Gazette, Part I no.106 of 05.31.1995 the Treaty between Romania and the Czech Republic *on judicial assistance in civil matters*, signed in Bucharest on July 11, 1994 was ratified.

The special conflicts of laws on property relations between spouses are regulated in art.27 paragraph 1 to 3 and 4 thesis II of the Treaty between Romania and the Czech Republic *on judicial assistance in civil matters*, signed in Bucharest on July 11, 1994.

*Summarizing the conflict of laws of art.27 of the treaty in question, it can be said that **the property relations between spouses** who belong by citizenship to Romania or (and) to the Czech Republic are governed by:*

- *the common national law of spouses;*
- *the law of the common home of spouses if they do not have common nationality;*
- *the law of the latest common home in the absence of common citizenship (if each spouse lives in one of the two states);*
- *the forum law, where the spouses, without common citizenship live separately, in different states and have never had a common home.*

The Treaty between Romania and the Republic of Poland on *legal assistance and legal relations in civil cases* signed in Bucharest on May 15, 1999 was ratified by Romania by Governmental Ordinance no.65 of 24.8.1999 published in Official Gazette, Part I no. 414 of 30.08.1999. This ordinance, in turn, was approved by Law no.33 of 12.04.2000 and published in the Official Gazette, Part I no. 158 of 17.04.2000.

Special conflicts of laws on property relations between spouses are regulated in art.30 paragraph 1 to 2 of the Treaty between Romania and the Republic of Poland on *legal assistance and legal relations in civil cases*.

*Summarizing the conflict of laws of art.30 of the treaty in question, it can be said that **the property relations between spouses** who belong by citizenship to Romania or (and) to the Republic of Poland are governed by:*

- *the common national law of spouses;*

- *the law of the common home of spouses if they do not have common nationality;*
- *the forum law, where the spouses, without common citizenship live separately, in different states and have never had a common home.*

The Treaty between Romania and Moldova *on Legal Assistance in Civil and Criminal Matters*, signed in Chisinau on July 6, 1996, was ratified by Romania, by Law no.177 of 11.04.1997 published in Official Gazette, Part I no. 310 of 11.13.1997.

The special conflicts of laws on property relations between spouses are regulated in art.26 paragraph 1 to 3 of the Treaty between Romania and Moldova *on legal assistance in civil and criminal matters*.

According to paragraph 1 of art.26 property relations between spouses are governed by the law of the contracting party whose citizens they are. So, *the property relations between Moldovan citizens spouses are subject to the Moldovan law, and if the two spouses are Romanian citizens, their economic relations are governed by the Romanian law.*

Summarizing the conflict of laws of art.26 of the treaty in question, it can be said that the property relations between spouses who belong by citizenship to Romania or (and) to the Republic of Moldova are governed by:

- *common national law of spouses;*
- *the law of the common home of spouses if they do not have common nationality;*
- *the law of the latest common home in the absence of common citizenship (if each spouse lives in one of the two states);*
- *the forum law, where the spouses, with different citizenship live separately, on the territory of one of the two states.*

The Treaty between Romania and Ukraine *on legal assistance and legal relations in civil cases* signed in Bucharest on January 30, 2002 was ratified by Romania by Law no. 3 of 28/02/2005 published in the Official Gazette, Part I no. 183 of 03/03/2005.

Special conflict of laws on property relations between spouses are regulated by art.27 paragraph 1 to 5 of the Treaty between Romania and Ukraine *on legal assistance and legal relations in civil cases*.

*Summarizing the conflict of laws of art.26 of the treaty in question, it can be said that **the property relations between spouses** who belong by citizenship to Romania or (and) to Ukraine are governed by:*

- *common national law of spouses;*

- *the law of the common home of spouses if they do not have common nationality;*
- *the law of the latest common home in the absence of common citizenship (if each spouse lives in one of the two states);*
- *the forum law, where the spouses, without common citizenship live separately, in different states and have never had a common home.*

4. The legislative reform in matters of matrimonial agreement in Romanian private international law in accordance with the provisions of the Civil Code

By Law no. 287 of July 17, 2009 *on the Civil Code* republished through Law no. 71/2011, the new Civil Code is subject to the tendency of the modern legislations to create a triple economic balance in relations between spouses matters by means of the matrimonial regimes established:

1. between spouses: the emergence of marital agreements, which led to the adoption of more flexible legal rules, that allow spouses a certain freedom to choose the regime of patrimonial relations between them;
2. within the family: to protect the interests of the family, they resorted to mandatory rules that provided for limitations and prohibitions (Art. 321-322 on family home - new concept in the Romanian law, art. 316 regarding the acts seriously threatening family interests);
3. between family and society-third parties: through the establishment of certain substantive requirements of legal acts, including of the marital agreements concluded by affidavit, with the obligation to be made public.

From October 1, 2011 came into force the new Civil Code, the base of which is the monistic concept regulating private law relations into a single code, thus changing not only the institutions of family law, but also the other institutions that belong to private law.

The new regulation on family relations is based on *lex ferenda* solutions and proposals outlined in time by the doctrine and jurisprudence, but also by the provisions of the following acts: the French Civil Code, the Civil Code of Quebec, the Swiss Civil Code.

In the new Civil Code the rules of private international law are covered in Book VII entitled "*Provisions of private international law*".

The conflict of laws in the field of matrimonial agreement is set out in art. 2593 paragraph 1 letter b and art. 2594 of the Civil Code

Article 2593 with the marginal title of The field of the law applicable to the matrimonial regime in paragraph 1 letter. b of the new Civil Code provides that "the law applicable to the matrimonial regime regulates: b) the admissibility and validity conditions of matrimonial agreement, except capacity.

Regarding the form conditions of art.2594 the new Civil Code stipulates: "The form conditions required for concluding the matrimonial agreement are those stipulated by the law applicable to the matrimonial regime or those stipulated by the law of the place where it is concluded."

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.*

We can observe that art. 2593 paragraph 1 letter b and art. 2594 of the Civil Code does not define the notion of matrimonial agreement in the Romanian private international law.

Given these conditions we shall define the matrimonial agreement as the special contract with an an extraneous element by which prospective spouses either adopt, modify or change the matrimonial regime chosen, but which is provided by the law chosen by them (the future spouses or spouses) to govern their *matrimonial regime*.

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. (Filipescu: 1999:109); (Ungureanu, Juguastu, & Circa, 2008):86-131); (Jakotă, 1997:223); (Loussouarn, & Bourel, 1996:201-203); (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.

In concluding this paragraph we mention that the definitions regarding the *matrimonial agreement* represent a valuable auxiliary tool in the process of primary qualification of certain legal relationships between spouses or between spouses and others, born abroad, but unknown to the Romanian legal system. Through these notions, the Romanian authority will attempt a classification of such relationships within the scope of the matrimonial agreement notion in order to determine the applicable substantive law.

Analyzing the provisions of Article 2593, paragraph 1 letter b of the Civil Code and art.2594 of the Civil Code we note that art.2593 paragraph 1 letter b of the Civil Code refers to substantive conditions (because as we know the substantive conditions are: the capacity to contract, the consent of the parties, a specific and lawful object and a lawful and moral cause of obligations) and not to the conditions of validity as the latter include both the substantive conditions and the formal conditions (the Romanian legislator through art.2594 of the Civil Code devoted a special article to the formal conditions).

We suggest as *lex ferenda* the amendment of art.2593 paragraph 1 letter b of the Civil Code in the sense of "the law applicable to the matrimonial regime governs: ".....the **substantive conditions** of the matrimonial agreement, except capacity."

Corroborating the provisions of art.2593 paragraph 1 letter b with those of art.2590 of the new Code we note that in terms of the substantive conditions of matrimonial agreement, the following laws are applied:

- *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 future spouses or spouses of any of the following laws: *either the law of the State where one of them has his/her habitual residence at the date of election, or by the law of the state whose citizenship any of them has at the date of election, or by the law of the state where they establish their first common habitual residence after marriage celebration.*

Corroborating the provisions of art.2594 with those of art.2590 of the Civil Code we note that in terms of the formal conditions, future spouses or spouses may choose one the following laws:

- the law of the State where one of them has his/her habitual residence at the date of election;*
- the law of the State whose citizenship each one of them has at the date of election;*
- the law of the State where they establish their first common habitual residence after marriage celebration*
- the law of the place where the matrimonial agreement is concluded.*

5. Trends of uniformity in matters of matrimonial agreement in Romanian private international law

In 1990, as a result of political, economic and social changes at **European** level, the European Commission acknowledged the actuality of finding modern solutions to the conflicts of laws relating to matrimonial property regimes, so that on July 17, 2006 the *Green Paper on conflicts of law on matrimonial property regimes* included the question of jurisdiction and mutual recognition. The Green Paper has opened a broad consultation on all the difficulties faced by couples in the European context. Interested persons answered the questions by November 30, 2006. These responses helped the European Commission formulate the *White Paper* on this subject, namely the document which will contain the regulation draft for the harmonization of the resolution of conflicts of laws relating to matrimonial property regimes. In 2008-2010, the European Commission established an expert group called "PRM / III" made up of members from various professions concerned, representing various European legal cultures. Also, on September 28, 2009, the Commission held a public debate during which the exchange of ideas with about a hundred participants confirmed the need for an EU instrument in matters of matrimonial property regimes the object of which is, in particular jurisdiction, applicable law, recognition and

enforcement of judgments. UE Citizenship Report from 2010 noted among the obstacles to the free movement, the uncertainties related to property rights of international couples. In this context, due to the particularities of registered partnership and marriage and to the different legal consequences these forms of union determine, the European Commission issued two separate proposals for regulation: *one on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of property consequences of registered partnerships and another on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of matrimonial property regimes*.

In 2011 in **Romania**, the legislative reform of fundamental institutions of civil law was accomplished by adopting the new Civil Code which came into force on October 1, 2011. The new Civil Code was based on the monistic conception of regulation of private law relations in a single code, an aspect which aims to shape an integrating vision, that will influence the Romanian economic and social life. In the *Civil Code* private international law aspects are treated in Book VII – *Provisions of private international law*. Title III, entitled *Conflict of Laws*, Chapter III, called the *Family* (Articles 2585-2612), studies the law applicable to family relationships. From the provisions of the articles cited it can be noted that the articles on the effects of marriage (Articles 2589-2596 Civil Code), took over some of the provisions of Law no. 105/1992, conflicting rules set by the provisions of the *Hague Convention* of March 14, 1978 on *the law applicable to matrimonial property regimes*, the solutions offered in the field by a series of laws from different European countries (Switzerland, Italy, Germany, Quebec, France etc.) being most inspired, in turn, by the provisions of the Hague Convention, but they also considered the harmonization tendencies of the European Union area. While during my PhD I suggested as *lex ferenda* in the studies performed on the *property relationships between spouses in private international law*, the amendment of Article 20 (which concerned the personal and property relations between spouses) and of Article 21 (which concerned the matrimonial convention) of *Law no. 105/1992 on the regulation of private international law* (for example, by re-introducing the matrimonial convention in the Romanian legal system, etc.) and we agree with the opinion of the research literature to make a legislative reform in matters of family relationships through the establishment of flexible rules that allow future spouses to organize the economic aspects of conjugal life, we cannot fail to notice the modern dimension of the provisions on

family relationships and, consequently, on the effects of marriage in the new Civil Code. Since the provisions of private international law relating to matrimonial established legal system competent to govern such a legal relationship, are important for our study it is determined that the situation in the relevant legal system governing matrimonial with foreign element is Romanian legal system. The legislative reform offered by the new Civil Code in matters of family relationships (which devotes to them Book II entitled "*About Family*" (Articles 258-534)), Romanian legal system was based on solutions and proposals for *lex ferenda* outlined over time by the doctrine and jurisprudence, and also the provisions of other legal systems: the French Civil Code, the Civil Code of Quebec, the Swiss civil Code, etc. The legislative reform in our country in matters of matrimonial property regimes is subject to the harmonization trends in this area.

Over time, the undersigned has studied property relations between spouses in private international law in monographs and scientific articles created under the rule of *Law no. 105/1992 on the regulation of private international law relationships and of Family law*, then, as a result of the legislative reform occurred in 2011, we have focused our studies on the matrimonial convention in Romanian private international law, and on the issues related to the definition of the notions of marriage, matrimonial regimes, matrimonial convention, and on the study points related: national law and residence.

Regarding the harmonization of *proposal for a Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of matrimonial property regimes*, **Romania** found that: the Regulation respects both the principle of subsidiarity and the principle of proportionality, however, after the assessment of the proposal the following amendments were adopted: i) in Article 1 paragraph (3) after letter a) a new letter, letter a1) is introduced, as follows: "a1) the existence, validity or recognition of a marriage"; ii) In Article 18 paragraph (1), the introductory part shall read as follows: "After at least one year of the conclusion of marriage, the spouses may subject their matrimonial regime to a law other than the one applicable until then."

The study of the trends of harmonization of rules in matters of matrimonial property regimes is of great interest since the increased mobility of persons in an area without internal frontiers leads to a significant increase of unions between citizens of different Member States, whatever the form of these unions (marriage, actual unions, civil

partnerships), and to the presence of such couples in a Member State, without having its nationality, plus often the purchase goods in the territory of several Member States, raising thus the issue of the law applicable to the matrimonial property regimes of such couples.

The study of the ways to resolve the conflicts of laws in matters of matrimonial property regime has special significance because the vicissitudes of transition have led spouses to settle in a country other than their country of origin and future spouses to marry people of different nationality. Thus, the increased mobility of people in an area without internal frontiers involves a significant increase of unions between nationals of different Member States, in whatever form, and the presence of these couples in a Member State, without being nationals of that State, to which we could often add the purchase of goods within the territory of several Member States of the Union. As such, the question of law applicable to such relationships is very current.

Harmonisation of rules on conflicts of laws considerably simplifies the procedures, allowing citizens to establish the applicable law based on a single set of rules, which replace national rules on conflict of laws in the participating Member States.

Conclusion

In the context given over time the doctrine (Hamangiu, Rosetti - Bălănescu, & Băicoianu, 1998:30); (Crăciunescu, 2000:11); (Vasilescu, 2009: 182-183); (Anitei, 2012: 1-154); (Anitei, 2013:1-70); (Anitei, 2012: 1-174;) has used various names naming the matrimonial agreement "marriage convention", "marital contract," "marriage agreement contract", "contract" or "prenuptial agreement." As such, in the doctrine the concept of matrimonial agreement was defined as:

- the agreement whereby future spouses regulate their matrimonial regime, the condition of their present and future property, the pecuniary relationships that spring from marriage; (Hamangiu, Rosetti -Bălănescu, & Băicoianu, 1998: 4);
- a conditional contract, solemn and irrevocable, by means of which future spouses organize their civil capacity and shall determine, in respect of property, the consequences of the conjugal association (Alexandresco, 1916:5-6) ;

- as the legal document by which the parties regulate the essential property relations, which will take place between them during marriage (Vasilescu, 2009 :184).

From our point of view, *an effective legislative technique, of introduction in the internal Romanian of new matrimonial regimes was performed by regulating the matrimonial agreement*, by means of which spouses choose the matrimonial regime that is better adapted to the needs of their family. This freedom of the spouses is limited, however, by setting up a primary matrimonial regime, which by its provisions, applicable to any family, regardless of its matrimonial regime, governing the protection of shared residence, the duty of mutual aid of spouses, their contribution to household expenditure, the free exercise of a profession, the mutual power of representation and the patrimonial autonomy of spouses in everyday life.

Because of the non-recognition of matrimonial agreement in Romanian law, Romanian citizens could have had inconveniences, in case of their marriage, celebrated in Romania with citizens belonging to countries whose legal systems recognize the matrimonial agreement. These inconveniences had their source especially in the relationship with the other future spouse. If the future spouse is not a lawyer, then it was very difficult to explain why he/she cannot conclude the common matrimonial agreement with the spouses who was a Romanian citizen. The impediment imposed by the Romanian conflict rule did not mean anything to a foreign citizen raised and educated in a country where marriage is accompanied in most cases by a matrimonial agreement. The same obstacles came up in the relations between the Romanian citizen and his/her future in-laws.

The drawbacks could not have been eliminated either by the celebration of the Romanian citizen's marriage abroad or in the State the nationality of which the other spouse has or in a third country. And this, because, as pointed out by the research literature in most systems of law which include the matrimonial agreement operates the conflict rule according to which the person's ability to conclude the matrimonial agreement is governed by his/her personal law (ie national law, for certain legal systems or the law of domicile for others) (Droz; 1974 :50). In case of the conclusion of marriage in a state which supports the national law, as personal law, the Romanian citizen was unable to conclude a matrimonial agreement. If the marriage was celebrated in a state which was a supporter of residence law as personal law, the Romanian citizen will be able or unable to conclude the matrimonial

agreement, depending on the placement of his/her residence in a country that recognizes the matrimonial agreement or in Romania. More likely to avoid misunderstandings was the Romanian citizen if he/she would marry a foreign citizen in a country that links the capacity to conclude the matrimonial agreement to the law applicable to the convention itself (such as the US or common-law provinces from Canada). And this takes place only if the law applicable to the agreement was a law other than the Romanian one. But for identifying such countries, the future spouses had to be rich enough to pay for counselling from a specialist in Private International Law.

The inconveniences arising from the Romanian conflict rule on the substance of the matrimonial agreement, were repeated even in case of the celebration in Romania, of a marriage between a stateless person or a person with multiple citizenships (with residence or, in its absence, residing in our country) and a foreigner.

It is easy to see, in these circumstances, that because of the Romanian legal system which does not recognize the matrimonial agreement and because of the chosen relationship between the conflict rule on the substance conditions of the matrimonial agreement (paragraph 1, Article 21 of Law no. 105/1992), Romanian citizens become persons with whom it was not advisable to marry, if you were a foreigner, to avoid the occurrence of many legal problems.

Just to remove this "label" places by foreigners to Romanian citizens, it was necessary for the legislature to reintroduce the matrimonial agreement in the Romanian law.

The institution of the matrimonial agreement introduced into the internal Romanian law represents a progress and also a proposal was achieved based on the following reasons (Dariescu, 2008:1-304):

a) thus, they eliminated the state of inferiority of persons who according to Article 18 of Law no. 105/1992 have the Romanian national law, an inferiority born of the impossibility of a valid conclusion of a matrimonial agreement;

b) they created the necessary conditions for the transformation of the issues related to the effects of the matrimonial agreement, from issues concerning especially the conflicts of law in time and space in situations of conflict of laws in space, which allowed the public order of Romanian private international law to act with more force and at the same time, created the prerequisites for Romanian law enforcement, in case of the removal of the law applicable to the effects of the

matrimonial agreement as a result of invoking the public policy exception in the Romanian private international law;

c) Romanian citizens were permitted to adjust their matrimonial regime depending on their social situation;

d) Romanian family law followed a natural process of liberalization through the transfer of a large part of the legislative power from the central level, at the level of every family, individually.

The matrimonial agreement proves to be a legal institution useful to the contemporary Romanian society.

The reintroduction of the matrimonial agreements in Romanian family law represents a progress, Romanian legislation becoming much more flexible and liberal, transferring the responsibility for regulating property relations within the family (the lowest form of social organization) from the central legislature, to the spouses, who know best their needs and the ways to meet them. The same liberalization of the Romanian legislation requires the mutability of matrimonial agreements, adjusting them, in this way, to the unexpected occurrences in life.

We believe that the reintroduction of this institution in Romanian positive law represents an important step towards the harmonization of our legislation with European legal systems.

From our point of view, an *effective legislative technique, of introduction of new matrimonial regimes in the Romanian law is represented by the regulation of matrimonial agreements*, by which the spouses who are discontent with the characteristics of the legal community regime, can choose the conventional community regime or the separation of property regime as their matrimonial regime, better adapted to the needs of the respective family.

The introduction of marriage agreements in the Romanian family law represents a step forward, whereas the Romanian legislation is far more flexible and more liberal, passing over the responsibility in respect to the regulation of economic relations within the family from the central legislature, to the spouses, who know best their needs and the ways to meet them. The same liberalization of the Romanian law requires the mutability of matrimonial agreements, thus adapting them to the unexpected occurrences of life.

Given the complexity of matrimonial agreement issues and the implications of these contracts, the legislature stated that these marriage agreements should be concluded before a notary public, so that the spouses can benefit from his assistance in drafting these agreements.

The need to protect third parties against fraudulent intentions of the spouses requires, in addition to the requisite, the organization of an efficient system of publicity of any matrimonial agreement and of any of its amendments

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