

„COMPARATIVE ELEMENTS OF EUROPEAN LAW ON DIVORCE AND PROPERTY MANAGEMENT”

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Chapter I - Matrimonial aspects in French Legislation

In French legislation, matrimonial advantage consists in the existence of clauses of which either of spouses dispose, as a result of „marriage contract”, in relation to the statutory scheme. In case of divorce, the consequences vary depending on the legal system established. Spouses who divorce and partition according to the legal system, have the right to revoke the reciprocal advantages they had previously agreed upon.

In case of divorce pronounced under the influence of French law of 26 May 2004, the *principle of will* is applied, and the divorce causes should not affect the rules of "liquidation" . The issue of determining matrimonial regime concerning the divorce brings however into discussion, peculiarities faced by practitioners because of the existence of domestic laws and ordinances. Increasingly often, marriages are concluded between people with different nationalities, the legal situation receiving thus an international element and subjecting the matrimonial system to the conflict of laws.

French conflict rule (applicable law) is the *Hague Convention* (signed in 1978 and entered into force in 1992 in France, Netherlands and Luxembourg, and later signed for Austria and Portugal). The Convention is applicable only to persons married after the date of entry into force from each country. Convention excludes maintenance obligations between spouses and surviving spouse's inheritance. With regard to *territoriality*, the Convention applies not only to French spouses settled abroad, but also those of French nationality living in France but who actually reside in another state, or who acquire at some point, goods abroad. This regulation is important in terms of "liquidation" of the matrimonial regime, to determine in advance the situation of nationality and determine if the rules of private international law are applicable.

The Convention distinguishes between spouses who have set before marriage the applicable law to their matrimonial regime or, contrary, have not identified any contract, in which case are applied the provisions of Article 4 and 5 of the Convention. Article 3 provides that the matrimonial regime is under internal law designated by the spouses before marriage, the principle of autonomy of will, which allows selection of the system based on pecuniary interests. However, Convention restricts the freedom of choice, by applying some rules: the law of nationality of one of the spouse existing at the time of designation, the law of the state in which one spouse is resident of abode, the law of the first state in which one spouse has established his new abode after marriage. It is prohibited the choice of more than one applicable law, and this remains valid also for husbands goods.

If the spouses did not have the same address when they got married, it becomes applicable the law of the common domicile of the state in which they fixed it after

marriage. For example: in the absence of common domicile of the two spouses, is applied Moroccan law - the law of common nationality, and, implicitly, the Moroccan legal system of separation of properties. In 2005, the wife goes to live with her husband in France. In 2005, the wife moved to France to live with her husband. Once both spouses acquire French residence, they are subjected to the French system of special community of goods ("des acquêts" - the legal or conventional system of movable and immovable property, which, except those acquired by donation, attendant or inheritance, which remain own property, enter the spouses' property during marriage). This principle is in force, and exists also in some U.S. states (English partnership of acquets). For these reasons, it is recommended that practitioners, especially notaries, to advise their clients to establish expressly the applicable law through an agreement.

In reward, if there is a matrimonial advantage which has no effect only in system's revocation or in case of the death of one spouse, such advantage is revoked by law through divorce proceeding. Thus, if someone who holds a fortune marries a person of modest financial position under the universal community system, and later they will divorce, the person without financial position will have half of the other's goods. In compensation, the community attribution will not apply if, through a declaration of will (consent), approved by the judge when the divorce is pronounced, it is possible for spouses to remove revocation rules of law which have effect only under the legal matrimonial system or in case of death of one spouse.

Thus, divorce can be declared in French legislation, by the court as well as on notarial way or on administrative way. Similar provisions are found in the new Romanian Civil Code.

A principle to remember is that divorce is enforceable against third parties after publication of the decision in respect of acts of civil status, but if a third party wishes prior to contract with one of the spouses and if he has personal, knowledge on the proceeding, are opposable the rules of "dissolution" of matrimonial system of spouses (in particular the community of goods). The consequences of dissolution include "preferential prerogative", meaning the right of one spouse to benefit for certain goods or occupancy; it should be mentioned that this result is never by right/according to the law.

Chapter II. Aspects of heritage management

The post-effect mandate is a legal form that is part of the French legislative reform in the area of successions and aims to effectively manage one or more assets from the successional patrimony, even if the partition didn't occur. When the mandate begins its effects, the mandant doesn't exist anymore and the mandatory (fr. 'gestionnaire') carries out the mandate in the interest of the designated heirs. The posthumous mandate ends, in principle, on a term of two years. At notification of an heir or representative, a judge may decide to extend. In case of multiple representatives, the end of one's mandate doesn't lead to the end of the entire mandate.

The mandate of future protection is an original variety because person, voluntary basis, can protect their assets, but also can protect himself, as principal. This legal form provides the possibility to predict the effect of any possible unfitness known or not in

advance, and of management ("organization") of any dependency the person might confront with. The contract is a bare contract, but French legislation allows the establishment of remuneration, which shall be paid only with effect from the date effective exertion of the mandate and not the date of its completion. Remuneration may be in the form of expenses' reimbursement necessary to carry out the mandate, or as an annual or monthly allowances, set freely by the principal.

Besides the principal's parties and the trustee's parties, there is a third, the third trusted party, exercising, within certain limits, a control over how to carry out the mandate. The third party is freely elected by the principal (in most cases, when the mandatory is one of the principal's children, the third trustee party is one of the other children in order to involve the whole family for an optimal implementation of the mandate).

Another aspect to consider is the role of guardianship judge, which becomes important when it is necessary to complete future protection mandate with another measure in the same direction. If it is determined that this condition was altered, the guardianship or trusteeship will be establish. In principle, the action taken by the judge makes stop the mandate for future protection, but the two legal forms of protection can coexist. It provides even the possibility that the judge gives the guardianship or trusteeship to the mandatory to authorize him to complete certain acts which were not mentioned in the mandate contract.

In the Romanian Civil Code that will come into force on 1st of October 2011, are provided rules regarding the protection of private individual: when taking a measure of protection should be taking into account private individual possibility to exercise its rights and to fulfill their obligations on the person and his assets; are subject to special measures for protection, minors and those who, though able, because of old age, illnesses or other reasons stipulated by law, can't manage their assets and defend their interests in appropriate conditions; the child protection through parents, establishing guardianship, entry into foster care, social protection measures provided by law; protection of major: by placing under judicial interdiction or the establishment of trusteeship; guardianship and family court solves problems concerning person protection through guardianship and trusteeship; through trusteeship: by tutor, appointed and named, and the family council, as consultative body. Where a curator has been appointed by an unilateral act or mandate, in authentic form, it is called first. The imposition of trusteeship, are applied the rules of the mandate, thus, the guardianship court may set the mandate limits (art. 180-183, New Civil Code).

The combination between individual protection and goods protection, allow to the future protection mandate adapt to the principal's specific situations, covering, thus, various legal loopholes in safeguards. In practice, it is necessary that the contract stipulates the parties' obligations, in order not to allow them to exceed the mandate, and thus eliminate or damage to its conclusion. The mandatory and the tutor (or trustee) exercise their duties in an independent but complementary manner, with no liability to each other. This brings the novelty on this type of mandate because it allows a person when she is still capable to provide or to determine how it will be organized in the future its protection or of the protection of its patrimony.