

APPLICABLE LAW PRINCIPLES FOR MATRIMONIAL PROPERTY REGIMES

Andreea-Lorena CODREANU

National Union of Notaries Public of Romania

Abstract

More and more often, marriages are concluded between people of different nationalities, which brings an extraneous dimension to the legal status and matrimonial property regime jurisdiction conflict. Many European states (among which Romania, through its new Civil Code) offer the advantage of clauses that could be used by any of the spouses, with regard to the applicable law. In case of divorce, consequences differ with the applicable law. Spouses who divorce and divide their assets based on the applicable law, can revoke the advantages they had initially consented to each other. Thus, the law applicable to the matrimonial property regime can be that of the state of the spouses, if they are nationals of the same state, except for the case where the future spouses choose otherwise. If they are nationals of different states, the law applicable to matrimonial property regime can be that of the state of their first habitual residence after marriage. Upon cessation of community, depending on the state where the divorce takes place, each spouse has the right to regain possession of his/her own assets, if they still exist, or of the assets replacing them. The Romanian legislation, through its new civil provisions, promotes a more modern and open approach with regard to the option at the disposal of the spouses when choosing the applicable matrimonial property regime and managing community property or asset distribution.

Keywords: applicability, marriage, matrimonial regime, convention, nationality, divorce

The rules regulating the effects of marriage underscore the specificities faced by professionals when dealing with ordinances and internal legislations of each country. More and more often, marriages are concluded between people of different nationalities, which brings an extraneous dimension to the legal status and matrimonial property regime jurisdiction conflict.

Many European states (among which Romania, through its new Civil Code) offer the advantage of clauses that could be used by any of the spouses, resulting from the "marriage contract", with regard to the applicable law. In case of divorce, consequences vary with the applicable law. The spouses who divorce and distribute their assets based on the applicable law, can revoke the advantages they had previously consented to each other. For these reasons, in certain states, the future spouses can enter a convention in order to expressly choose the applicable law. Thus, be them Roman (latin) or *common law*, the EU's legal systems are constantly preoccupied to include, implement or modify principles that adapt the needs of the members of each society to the great variety of cases and practical solutions.

In *Croatia* (one of the newest EU member states), as a rule, if both spouses have the same nationality, the matrimonial property regime is regulated by the legislation of that state. If the spouses have different nationalities, the principle of joint habitual residence applies, that is the law of the state where the spouses have this habitual residence. In case the spouses have different nationalities and no joint habitual residence, the applicable law is that of the last state where they had the same residence.

In the *Greek* legislation, the matrimonial property regime is governed by the law applicable to personal relations existing before the marriage. The first criterion is that of the law applicable to the last joint nationality of the spouses during marriage; if there is no such case, then the applicable law is that of the last joint habitual residence of the spouses during marriage; if these two elements do not exist, the applicable law is that of the state to which the spouses are most closely connected. With regard to the divorce in Greece, if the spouses choose the community property regime, the matrimonial property regime ceases and the assets are to be distributed. If the spouses have a separate property regime, any of them is entitled to part of the assets acquired by the other spouse starting with the date the marriage was concluded, if this led to an increase in the property of the other spouse, a rule that also applies if spouses are separated for more than three years. The property acquired by one of the spouses through a donation, will or inheritance shall not be taken into account when assessing the property of said spouse.

In *Italy*, if the spouses do not stipulate otherwise, their matrimonial property regime is regulated by the law applicable to personal relation between them, namely the national common law – when they have the same nationality (note that in this case, the "national law" concept refers to the nationality law); if the spouses have different nationalities or, on the contrary, they have at least one common nationality, the applicable law is that of the state where the spouses live. If they are married based on the legal community regime, in case such a community regime dissolves, the spouses divide their assets and obligations equally, after all debts are covered. If the spouses fail to reach an agreement and minor children are involved, based on each specific case, the judge may decide upon a usufruct right in favor of any of the spouses with regard to a part of the property belonging to the other spouse. Also, if the spouses do not agree otherwise, the same rules apply for the dissolution of the conventional community property regime. In what the separated property regime is concerned, normal property provisions apply.

In *Luxembourg*, the matrimonial property regime law is that of the spouses' nationality, if they have the same nationality, except for the case where the future spouses choose otherwise. If they have different nationalities, the matrimonial property regime is regulated by the law of the state in which both spouses had their first habitual residence after marriage. Upon cessation of community, each spouse regains possession of his/her own assets, if they continue to exist, or of the assets replacing them, otherwise. On such occasion, an account is set for reimbursement of each spouse from the communal property and for what the spouses owe to the communal property, followed by asset distribution – voluntarily or legally.

In *England* and *Wales*, *lex fori* always apply in cases of divorce and its financial consequences, if the necessary jurisdiction applies. If the spouses married based on the Scottish law and have not stipulated otherwise, the law applicable to the matrimonial property regime is that of the spouses' joint residence – for movable assets. If the spouses live in different countries and the movable asset litigation is to be settled in Scotland, the legislation of this state applies. Upon divorce, the courts can decide on a large variety of compensatory measures, when rendering the court decision, such as asset redistribution or sale, placing the assets in a fiduciary fund, periodical payments, pension related issues, one of the first objectives being that of protecting the interest of any minors involved. Of course, assets acquired before or during marriage are regulated by a regime different from the community property regime, in case of divorce and asset distribution.

The *Polish* legislation stipulates that the matrimonial property regime is governed by the law of the state whose nationality is held by both spouses. In case of different nationalities, the applicable law is that of the country where the spouses jointly reside. According to the Polish Civil Code, the residence is the place where a person lives with the intention of setting their permanent residence. In case the spouses do not live in the same country, the applicable legislation is that of the country to which the spouses are most closely connected.

In *France*, the advantage of the matrimonial property regime is given by the fact that there are clauses allowing each spouse to stipulate, following a "matrimonial contract", with regard to the state rules. In case of a divorce based on the present French legislation, the principle of will applies, and the reasons for divorce do not influence the result of asset distribution. The French litigation rule (the applicable law) is the Hague Convention (signed in 1978 and entered into force in 1992 in France, the Netherlands and Luxembourg and later on also signed by Austria and Portugal). The Convention applies only to individuals married after the date of entry into force in each country, and it excludes spousal maintenance obligations and succession rights for the surviving spouse. In what territoriality is concerned, the Convention applies not only to French spouses living abroad, but also to those who have French nationality and live in France but have their effective residence in another state, or who have acquired property in another state, at a certain point

The Convention differentiates between spouses who chose the applicable law before the marriage or, on the contrary, have no such contract. Thus, the matrimonial property regime is governed by the internal law chosen by the spouses before marriage – the principle of will autonomy allowing a choice of regime depending on the financial interests. There is, nevertheless, a choice limitation, as certain rules apply: the law of the nationality of one of the spouses at the time when the choice was made, the law of the state where one of the spouses has his/her domicile, the law of the first state where one of the spouses has his/her domicile after marriage. It is not possible to choose more than one applicable law, and the chosen law shall apply to spouses' assets as well. If there is a matrimonial advantage that becomes effective only by revoking the regime or in case of death of one of the spouses, such an advantage is lawfully revoked through the divorce procedure.

In return, community distribution does not apply if, by a declaration of will (consent), endorsed by a judge during the divorce, the spouses can reverse the lawfully revocation rules that only apply in case of legal matrimonial property regime or in case of death of one of the spouses. In this respect, the French law allows for the divorce to be decided both by a court of law and through notarial or administrative procedures.

In *Malta*, the immovable property regime is *lex rei sitae* and it depends on the matrimonial property regime chosen by the spouses. If the divorce is not amiable, the court will decide on how the assets are to be distributed. If the spouses reach an agreement on asset distribution, this distribution has to be nevertheless validated by the court.

The *Romanian* Civil Code provides individuals married in Romania with a choice that is natural for a family life in the present modern society, namely the right to choose the matrimonial property regime, which, if different from the legal community –

conventional community or property separation, consists in concluding a marriage contract (Art.329 of the Civil Code); if concluded before the marriage, the contract becomes effective only once the spouses have entered the marriage. In order to cover various cases where the spouses have different nationalities or when they get married in another state, the international private law provisions are the ones that determine the applicable law principles.

Thus, Art.2586 of the Civil Code stipulates the law applicable to the marriage conditions, as they are determined by the national law of each of the spouses at the time of marriage; if one of the foreign laws such determined stipulates an impediment to marriage, which, according to Romanian law, is incompatible with the freedom to marry, that impediment shall be removed as inapplicable in case one of the spouses is a Romanian citizen and the marriage takes place on Romanian territory. Furthermore, the law applicable to formal conditions is stipulated in Art.2587 of the Civil Code, namely the form in which the marriage is concluded is regulated by the law of the state where the marriage is celebrated. Symmetrically, the law regulating the legal requirements for entering a marriage applies to marriage nullity and its effects (Art.2588 of the Civil Code).

The spouses can also choose the law applicable to the matrimonial property regime through a contract that can be concluded before celebrating the marriage, upon marriage celebration or during the marriage. According to Art.2591 of the Civil Code, "the formal conditions of the convention aimed at choosing the applicable law are either those stipulated in the law chosen for the matrimonial property regime, or those stipulated in the law of the place where said contract was concluded". In all cases, the choice of applicable law has to be expressly made and rendered in writing in a document signed and dated by both spouses or it should unequivocally result from the clauses of a marriage contract. When the Romanian law applies, the formal conditions set by law for the validity of the marriage contract have to be observed. At any time, the spouses can choose another law applicable to the marriage contract, but this new law shall be effective only for the future, if the spouses did not choose otherwise, and it cannot be, in any case, detrimental to the rights of third parties. Once the law applicable to the matrimonial property regime has been set, the marriage contract can be concluded. Its formal conditions, according to Art.2594 of the Civil Code, refer to the law applicable to the matrimonial property regime (Art.2590) or to those set in the law of the place where the contract is concluded.

In case the spouses wish to dissolve their marriage, according to Art.2587 of the Civil Code, they can jointly choose one of the following laws applicable to the divorce: "a) the law of the state where the spouses had their joint habitual residence at the date they entered the contract regarding the applicable law; b) the law of the state where the spouses had their last joint habitual residence, insofar as one of them still resides there at the date they entered the contract regarding the applicable law; c) the law of the state whose nationality is held by one of the spouses; d) the law of the state where the spouses lived for at least three years; e) the Romanian law". If the spouses did not choose a law applicable to their divorce, the applicable law for this institutions is: "a) the law of the state where the spouses have their joint habitual residence at the date when they filed for divorce; b) if there is no joint habitual residence, the law of the state where the spouses had their last joint habitual residence, insofar as one of the spouses still resides in that

state at the date they filed for divorce; c) if none of the spouses still resides in the state where they had their last joint habitual residence, the law of the state whose nationality was held by both spouses at the date they filed for divorce; d) in case there is no such common nationality, the law of the state whose nationality was lastly held by both spouses, insofar as at least one of them still had that nationality at the date they filed for divorce; e) the Romanian law, in all other cases (...)" – Art.2600 of the Civil Code.

In what the contract regarding the law applicable to the divorce is concerned, the Code stipulates it should be in writing, signed and dated by both spouses (Art. 2599). Regarding the convention date, Art.2598 has a special provision stipulating the fact that the contract regarding the law applicable to divorce can be closed or changed until the date the competent authority is notified with regard to the divorce, at the latest.

Bibliography:

1. Marieta Avram – “Civil Law. Family”, Hamangiu Publishing House, Bucharest, 2013.
2. Valentin-Stelian Bădescu – “Commercial Law”, Universul Juridic Publishing House, Bucharest, 2012.
3. Mariel Revillard – “Community and Private International Law”, Notarom Publishing House, Bucharest, 2009.
4. The Romanian Civil Code – updated 2014.
5. Community Legislation on Judicial Cooperation in Civil and Commercial Matters – the European Commission, 2011.