ASSETS AND PROPERTY MANAGEMENT

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Abstract

Patrimony management is an area in witch the intern legislative elements combine more and more often with extraneity elements. In marital relations, successional procedure, property management and also in safeguards granted to persons who complete acts in order to protect patrimony, there are often aspects of Private International Law. The conflict of laws brings into disscution the issue of the applicable Law. Prohibition on alienation is also provided for better protection of the movable and immovable property in their possession (whether major or minor persons). The entry into force of the new Civil Code brought into discussion problems that need both terminological and practical clarifications. Some institutions were enacted, with the necessary tools to reconsider their way of implementation. Thus because do not have litigiousness and can be solved amicably, property management issues present a particular interest for civil persons and businesses.

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Aspects of patrimony management, whether movable or immovable assets, located in the country or abroad, are found in European Legislation in many areas, such as inheritance matters, matrimonial system, property management, acquisition and alienation of property, patrimonial relations between spouse. Increasingly often, marriages are between people with different nationalities, the legal status receiving thus a foreign element and subduing the matrimonial system to conflict of laws. If there is a matrimonial advantage which has no effect, than if the status is revoked or one of the spouse dies, such an advantage is literarly revoked through divorce' procedure. The new Romanian Civil Code institutes *the engagement* and this can be proved by any probation and doesn't require marriage. If the engagement is broken, are subjected to refund, in kind or in equivalent, the gifts the fiancés received for marriage. The death of one of the fiancés cancels the refund duty.

It should be also mentioned that in Romania are allowed three types of matrimonial regimes – without possibility of their combination: regime of *legal community* (presumed valid if spouses do not choose another regime), the regime of *conventional community* and the regime of *separation of assets*, and also the possibility of changing the regime or the partition between spouses, during the marriage. Thus we may observe how the legislative flexibility leads to increased methods of administration the belongings possessed by a person, especially that, within the same patrimony, at present may be distinguished the patrimonial masses - personal and professional.

In Switzerland, if one or both of the fiancés residing in this country, the marriage completed abroad is recognized. The French sample of the rules concerning the mandate, is an open-minded one, regarding the way we look to our life, wealth,

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business order, reasoning through which we can make more efficient even the way in which our legally or testamentary legatees manage more over the inherited assets.

The French law of 5 March 2007, in force since the first of January 2009, had as main objective respecting of the person's will in protecting private life and its patrimony. The idea of future protection mandate is an original one through the fact that person can voluntarily protect its assets but also himself as mandator. This legal form allows the possibility to predict the effect of any incapacity, known or not in advance and of a dependency management that might confront the person. The contract is a bare contract but French law 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 the completion. Remuneration may be in the form of reimbursement of expenses necessary to carry out the mandate, or an annual or monthly allowances, set freely by the mandator.

The mandate for itself is the one through which the mandator may authorize one or more agents to represent him when its mental or physical faculties are deteriorated. *The mandate in other's interest* foresees as mandators the parents that mandate a person to handle a sick or disabled child, for the period or from the moment they would not be able to do so. Because of the importance of such decisions, the agent's obligations and procedures of verification of its actions will depend on the form chosen for the completeness of the mandate.

Future protection mandate will involve three parties, two binding – mandator and mandatary and an optional part of a third party "trusted" to verify the mandatary.

In the case of classic mandate, in order the mandator to be able to dispose through this particular legal form, it must be a major person or an "emancipated" minor (who is not under ward and he is under guardianship, is mandatary assisting by the trustee). *The mandate in other's interest,* requires that parents – mandators should not be under guardianship or trusteeship. There is also a difference concerning the child: when the latter is minor, the parents must have parental authority, and in the case of senior child they must assume material and effective obligations.

Regarding the contractual obligations of the mandatary, is required to distinguish between person protection and property protection. Concerning the mandator's *person***,** the mandatary provides protection as a tutor or trustee. Under the contract, the mandator may express preferences about sustenance, social life, personal life, about physical or moral integrity or the suitable respect in case of illness.

As regard to *assets*, if the mandate wears *authentic form*, the mandatary could perform acts of conservation, management disposal (only onerous)[2]. Are imposed questions concerning other possible legal operations, such as if the agent could give up at the action in reduction on behalf of mandator, if they could change the life insurance, bank accounts or if he could dispose of his mandator residence if the later

[2] *In case of disposal acts with bare title the mandatary will be required to obtain the consent of the guardianship judge.*

couldn't move or seriously ill and the distance wouldn't allow the mandatary to ensure the conditions of care. In this type of contract we are talking about a volunteer right for future protection, the mandator may define how the way of controlling the running mandate, this taking place by empowering a third person. The act may provide *a plurality of mandataries*, indicating that there is preferable the choice of them having different skills (for avoiding conflict), and their designation by category of assets (movable, unmovable, financial transactions). The mandator may designate *successive mandataries*, if the first designated agent becomes unable, waive the mandate or dies.

Future protection mandate is a form of mandate which may be completed if only the mandator demonstrates its unfitness to manage the assets and interests by himself through a medical certificate issued by a doctor on a special list established by the Prosecutor of the country (in France). The role of trusteeship judge becomes important when we need the completion of the mandate of future protection with another measure in the same direction. Judge's intervention covers thus any possible lack of protection, generally related to the evolution of physical estate, health, of the mandator. If decided the estate has altered, the guardianship or trusteeship would be establish. Principled, the measure taken by the judge makes the future protection mandate to end, but the two legal forms of protection can coexist.

In both legislations, French and Romanian, the minor who attained the age of fourteen signs the legal acts with the prior consent of the trustee or the custodian. The minor can not make even with consent, donations or to ensure other obligation. Rules on guardianship the minor who has not reached the age of fourteen also applies to the case one put under interdiction, to the extent that the law stipulates otherwise. Marriage between minors under the guardianship and their tutor is prohibited.

In the Romanian Civil Code into force since 1st of October 2011, are provided rules regarding the protection of private natural person, given below: article 104 – 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; article 105 – 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; art. 106 – protection measures: 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; art. 107 – guardianship and family court solves problems concerning person protection through guardianship and trusteeship; art. 108 – through trusteeship: by tutor, appointed and named, and the family council, as consultative body.

Article 114 from the new Civil Code provides that the parent may appoint a trustee by an unilateral act or mandate, in authentic form, or (testament, provided that the parent may not have been deprived of parental rights at the date of the act or

death); At the appointment or during the guardianship, the court may decide *ex officio* or at the request of the family council as the trustee to give real or personal guarantees, when the interests of the minor requires such an action. The trusted third party of French legislation can be equated (in the sense of similarity) in the Romanian one by the „family council". Guardianship is exercised in the minor interest regarding *the person and the assets.*

Trusteeship may be instituted in special cases: if due to old age, illnesses or physical infirmity, a person, although capable, can't personally manage their assets or to defend their interests, and for good reasons can't appoint a representative or an administrator.

Legal incapacities to dispose of, may be set in consideration of the person *(intuitu personae)* or instituted in consideration of the nature, destination or special legal situation of some assets *(intuitu rei)*. The two categories have the same finality, namely total or partial prohibition of alienation. Inabilities to sell are limitations of the ability of use and exercise – interdictions of receiving and disposing through legal acts, of any assets. They are also measure of protection or with penalty character, *intuitu personae*, who refer to the unable persons (total or partial) to conclude acts which dispose or acquire. Civil incapacities end by the repeal of the prohibited rule or by ending the causes which determined and their disrespect attracts the absolute or relatively nullity. The incapacity is related to an asset or right which can not be alienated through living; it also differs to the *legal unavailability*, the latter being a measure of suspension of a disposition right over some assets.

Inalienability constitutes the impossibility to conclude legal documents with goods declared legally inalienable, as object. They are *intuitu rei,* referring to the nature or to the destination of assets, or to its legal situation (the litigious one), equivalent to the removing the asset from its civil circuit, are restrictions of the civilian circuit of assets. The penalty is always absolute, it ends when the asset is returned to civil circuit, by repealing statutory interdiction or the by fulfillment of the term which has been introduced for.

An interesting and important domain in matter of attainment is constituted by the regime of the *Law No. 312/2005, regarding the attainment of private property right over lands by foreign citizens or stateless, and also by foreign judicial persons*, which, by its disposals, imposes the explanation of some terms – specified for that matter in the actual Civil Code. And so, the notion of *secondary residence* can be found in art.88 from the Code – *the residence of civil person is in the place where one has its secondary dwelling.* In addition, in the matter of private international law, it is disposed, through art.2570, the following: "(…) the habitual residence of the civil person is in the state in which the person has his dwelling or his principal settlement, though he didn't fulfill the legal formalities of registration. The residence of a civil person *acting in the exercise of his professional activity* is the place where this person has his principal establishment. In order to determine the *principal dwelling* there will be taken into consideration those personal and professional circumstances which indicate lasting bundles with the respective state or the intention of establishing such bundles (…) The proof of common (habitual)

residence may be done by any means of probation." There is to be mentioned the fact that "the proof of the residence may be done with the identity document and when those respective mentions are missing or don't correspond with reality, the factual situation of residency in another place can't be opposed to other persons; the exception is given by the circumstance in which residence was known through other ways, by the one whose is opposed to" (art.87 from the Code). Similar aspects we meet in situation of the minor person. Thus his residence is at his parents or at that parent where he constantly lives (art.92 Civil Code). The minor under guardianship has his domicile at the trustee; only with the guardianship instance authorization the minor may have a *residence*. (art.137 Civil Code). Also, the claims which the guardianship or one of the members of family council, the spouse, a straight relative or brothers or sisters of these have over the minor, may be voluntary paid only with the authorization of the guardianship instance (art.140, alin.4).

All these remarks were considered necessary, since the aspects above influence the judicial mode through which the foreign citizens may achieve lands in Romania according to the stipulations of the Law 312/2005. The fourth article of the Law disposes that "the citizen of a member state non – resident in Romania, stateless non – resident in Romania with domicile in a member state, as well as the judicial non – resident person, constituted according to a member state legislation, may acquire property right over lands for *secondary residence, respectively secondary headquarters,* at 5 years from the date of Romania's accession to European Union. Having into consideration that the term specified in the text above has been accomplished at the 1st of January 2012, must be retained the importance of abidance the scope for which the mentioned citizens categories may acquire lands. ("a person can't have in a specific moment only one secondary residence, even when he posses more then one dwelling" – art.86 Civil Code). Therefore, they may be acquired more lands however only one may be used at a specific moment in order to establish the secondary residence. The exception is for the agricultural and forest lands, because their regime of acquisition is submitted to some special and different conditions.

Regarding the legal person, the Civil Code stipulates that they are of Romanian nationality all the legal persons of whose headquarter, according to the constitution act or statute, is established in Romania (art.225). The legal person must have a stand – alone organization and a proper patrimony, affected to achieve a certain lawful and moral purpose, in accordance with the general interest (art.187 Civil Code). Also, it has the possibility to posses more than one secondary headquarters for branches, regional offices and workstations, together with their lands, remaining applicable the disposals of the art.97 from the Code, regarding the chosen domicile. Concerning the applicability of the private international law's rules, the Civil Code established that "the legal person has the nationality of the state where, according to the Constitution act, established his headquarter. If there are headquarters in more than one state, decisive in identifying the legal person's nationality is the real headquarter(…)". The organic statute of the legal person is governed by its national law, the organic statute of the branch set up by the legal person in another country is governed by the

national law of that country and the organic statute of the subsidiary is governed by the law of the state where he established his own headquarter, independently of the law applicable to the legal person who founded it (art.2580). In addition, art.2583 stipulates that "the foreign legal person recognized in Romania unfolds its activity on the country's territory in the conditions established by the Romanian law regarding the course of economics, social, cultural and of other nature activities."

With reference to the acquisition of land by non-resident legal person (who is not registered in Romania), formed under the law of a Member State, according to Article 4 of Law nr.312/2005, it may acquire ownership over land for secondary headquarters, at the end of a period of five years from the date of Romania's accession to the European Union, accomplished, as mentioned above, on 1 January 2012. Situation of legal person belonging to third states is provided in Article 6 of the Act, in that it may acquire ownership of land in the conditions regulated under international treaties, based on reciprocity between states. Romanian internal law provides that the common residence of judicial person is in the State where it has its principal establishment, meaning the place where it is set the central administration.

Interesting aspects brings into forefront the *Ordinance nr.44/2008 on the economic activities by authorized individuals, individual companies and family businesses*. Article 3 of the *Ordinance* provides that, under the right to free enterprise, the right to freedom of association and the right of establishment, any person, a Romanian citizen or a citizen of another member state of the European Union or the European Economic Area may carry out economic activities in Romania, as provided by law; the economic activities can be carried out in all fields, trades, occupations or professions that the law does not expressly prohibit for the free initiative. Individuals referred to in Article 3 may conduct economic activities individually and independently as: civil-authorized persons, as entrepreneurs, holder of an individual enterprise or as members of a family business (Article 4). According to Article 2 of the *Ordinance*, an entrepreneur may be the person that organize an economic enterprise, defined as an economic activity which unfolds in organized way, permanently and systematic, combining financial resources, the attracted labor force, materials, logistics resources and information, on the entrepreneur risk in cases and under the conditions provided by law. Also, the right of establishment is the prerogative of a citizen of a Member State of the European Union or the European Economic Area to conduct economic activity in another Member State through a permanent establishment under conditions of equality of treatment with citizens of the host State. The Ordinance 44/2008 requires the obligation that the authorized physical person to have professional office in Romania and that the economic activities through a permanent establishment by citizens of other Member States of the European Union or the European Economic Area is done in compliance with regulations the permanent establishment.

Returning to Law no.312/2005, agricultural land acquisition takes place thus: "the citizen of a Member State, stateless persons domiciled in a Member State or in Romania and legal entity formed under the laws of a Member State may acquire the

ownership right over agricultural lands, forests and forestry land at the accomplish of a period of 7 years from the date of Romania's accession to the European Union ". The Acquisition of such lands is therefore possible since 1 January 2014.

Final mark:

In case of disposal through mandate contract, concerning the legal effects, they may be limited by the mandator will, only to the person's protection or to the assets' protection. The mandatary and the tutor (or trustee) exercise their duties in an independent but complementary manner, with no liability to each other, except the common obligation to notify each individual decisions. 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[3]. Regarding the acquisition of immobile-land from Romanian territory, from the interpretation of constitutional norm according to which "the constituent treaties of the European Union and also the other binding community rules take precedence over the contrary stipulations of the national laws, in compliance with the act of accession "(Article 148 paragraph 2 of the Romania's Constitution) results that concrete application of the law nr.312/2005 requires reporting the term of *resident* to the meaning given by the Treaty of Romania accession to the European Union, namely that the right of residence in any of the three ways to exercise, assume the presence of the foreign citizen or stateless in Romania, in legal way. Hence the concern of the institutions and authorities responsible for applying the provisions of this Act, for their correct interpretation in the spirit of the Constitution.

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3 *In Quebec the mandate for incapacity is applied since 1990.*