

**NEW ROMANIAN CHOICE-OF-LAW RULES ON
MARRIAGE EFFECTS**

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Abstract:

The Romanian Private International Law has acquired new choice-of-law rules on the effects of marriage by Articles 2589 to 2596 of the Romanian Civil Code 2009 (enforced since October 1, 2011). These rules represent an original adaptation of Articles 48 to 54 of the Belgian Code on Private International Law 2004, of Article 3089 paragraph 2 of the Civil Code of Quebec and of Article 20 paragraph 2 of Law no. 105 of 1992 on the Settlement of the Private International Law Relations. The new Romanian choice-of-law rules were drafted following the answers given to The Green Paper on the Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Questions of Jurisdiction and Mutual Recognition. As a novelty, these choice-of-law rules introduce into Romanian Law the concepts of habitual residence (instead of domicile) and of general effects of the marriage.

Key words: *choice-of-law rules, marriage effects, Romania*

I A new source for the Romanian Private International Law

On October 1, 2011, in Romania, *Law no. 287 of July 17, 2009 on the Civil Code*, republished in *Monitorul Oficial* (Official Gazette) no. 505 of 2011 entered into force, replacing the Civil Code of 1864. Article 8 and Article 2557 of the new *Civil Code* stipulate that the determination of the civil law governing the legal relationships with a foreign element shall be

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done in accordance with the Private International Law rules of Book VII of the *Civil Code*. That means the new *Civil Code* includes new general choice-of-law rules which repealed the rules provided for in Articles 11-147 of *Law no. 105 of 1992 on the Settlement of the Private International Law Relations*¹. The rules of Book VII of the *Civil Code* are applicable unless otherwise provided by the international conventions Romania has joined, by the European Union's Law or by special laws (Paragraph 3 of Article 2557).

The new international proceedings rules (which will replace Articles 148 to 181 of *Law no. 105 of 1992*) will be found in Articles 1017 to 1084 of Book VII (*The International Civil Litigation*) of the new *Code of Civil Procedure* (Law no. 134 of 2010), which will enter in force on June 1, 2012.

This paper aims to present the new choice-of-law rules on the personal and patrimonial effects of marriage. These rules are to be found in the *Civil Code*, in Book VII (entitled *Private International Law Rules*), Title II (*Conflict of Laws*), Chapter II (*Family*), Section I (*Marriage*), Subsection 2 (*Effects of marriage*), Articles 2589 to 2596.

II New choice-of-law rules for the general effects of the marriage

Article 2589 is entitled *The Law Applicable to the General Effects of Marriage*. According to paragraph 1, the general effects of marriage are subjected to the law of the spouses' common habitual residence, or in the absence of a common habitual residence, to the common national law of the spouses. In the absence of a common citizenship, the general effects of marriage will be subjected to the law of the State on the territory of which the marriage was celebrated. Paragraph 2 defines the concept of "general effects of marriage", a concept unknown to the Romanian Family Law up to now². The above mentioned paragraph reads that the law determined in accordance with paragraph 1 governs both the personal and the statutory patrimonial effects of marriage from which spouses could not derogate

¹ These articles of law were expressly repealed by Article 230 letter q of Law no. 71 of 2011 on the Enforcement of Law no. 287 of 2009 The Civil Code (Official Gazette no. 409 of June 10, 2011)

² Chapter III of Title I (*Marriage*) of the *Family Code* 1953 (code which was enforced between 1954 and 2011), was entitled *Effects of Marriage*. Section I of this chapter was entitled *The Personal Rights and Duties of the Spouses*, while Section II bore the title *The Patrimonial Rights and Duties of the Spouses*.

irrespective of their chosen matrimonial regime. Paragraph 3 provides an exception from the rule established in paragraph 2. Thus, the spouses' rights over the family home and the regime of some juridical acts concerning the family home are subjected to the law of the place where this home is situated. The juridical acts mentioned in Article 2589 paragraph 3 of the Civil Code are the legal acts provided for in Article 322 paragraphs 1 and 2 of the same code (i.e. the deeds concerning the disposition and the use of the family home as well as the deeds of disposition on or which entail the removal of the goods which furnish or decorate the family residence).

In order to fully understand the novelty of the provisions of Article 2589 of the Romanian *Civil Code* 2009 it is imperative to compare Article 2589 with the old Romanian choice-of-law rules of Article 20 of *Law no. 105 of 1992 on the Settlement of the Private International Law Relations*. The first paragraph of Article 20 of *Law no. 105* of 1992 provided: "The personal and patrimonial relations between spouses are subject to the common national law and, if they have different citizenships, they are subject to the law of their common domicile³." According to paragraph 2 of Article 20 of *Law no. 105* of 1992, the common national law or the law of common domicile of the spouses continued to regulate the effects of the marriage, even if one of them changes, as the case may be, citizenship or domicile. Paragraph 3 of Article 20 provided: "In the absence of a common citizenship or a common domicile, the personal or patrimonial relations between the spouses are subject to the law of the State on the territory of which they have or had their common residence or with which they have the closest relations in common". So, until the enforcement of the new *Civil Code*, the old Romanian choice-of-law rule had subjected both the personal and patrimonial relations between spouses (with the exclusion of those relations that could be settled by an antenuptial agreement, agreement governed by the law provided for in Article 21 of *Law no. 105* of 1992) to the law designated by a series of connecting factors disposed in cascade (a legal technique called "Kegel's ladder"): common nationality, common domicile, common residence (actual or former) and the State the spouses have the closest relation in common with. The connecting factors of

³ The Parliament of Romania, *Romanian Legislation . Volume 36. Private International Law Relations and the Commercial Arbitration*, Second Edition Revised and Enlarged, București, 1998,154.

common nationality and common domicile enjoyed great stability, continuing to designate the law that governed the personal and patrimonial relations between spouses even in the event when one spouse had changed his (her) nationality or domicile. Comparing Article 2589 of the Romanian *Civil Code* 2009 with Article 20 of *Law no. 105* of 1992 it is obvious that, in the new *Civil Code*, the Kegel's ladder is much more simplified and modernized. Thus, common nationality of the spouses has been demoted from the status of the main connecting factor to the position of a subsidiary one. The common domicile has been replaced with the internationally acclaimed concept of common *habitual residence*, which is correctly classified both by the Common Law States and by the Romano-Germanic Law countries⁴. Article 2570 of the Romanian *Civil Code* provides in paragraph 1 that, in the sense of Book VII (book which deals with the Private International Law), the habitual residence of a natural person is the State where that person has her/his main residence notwithstanding the fact that the person has or has not accomplished the legal formalities to register as such that dwelling. The habitual residence of a natural person acting in the exercise of her/his profession is the place where that person has her/his main establishment. In paragraph 2 of Article 2570 Civil Code it is provided that for the purpose of determining the main residence shall be taken into account those personal and professional circumstances which indicate durable connections with that State or the intention to establish such connections. Paragraph 5 of Article 2570 provides that the proof of habitual residence could be made by any means of evidence. According to Article 87 of the Romanian *Civil Code*, the natural person's domicile is the place where the person has his main residence. Corroborating Article 87 with Article 2570 paragraphs 1, 2 and 5, it is clear that, in the new Romanian Private International Law, *habitual residence* represents, for natural persons, the synonym for *domicile*. The common residence of the spouses and the "State with which the spouses have the closest relations in common" have been replaced with the more certain connecting factor of *lex loci celebrationis*. The connecting factors of *habitual residence* and *nationality* enjoy,

⁴ B. Audit, *Droit international privé*, Quatrième Édition, Paris, Economica, 2006, p.129, C.M.V. Clarkson and J. Hill, *The Conflict of Laws*, Third Edition, Oxford University Press, 2006, pp.43-45 and L.I. de Winter, "Nationality or Domicile? The Present State of Affairs", *Recueil des Cours de L'Academie de droit international de La Haye* Vol.128, (1969 /III), pp 425 and 428.

according to Article 2596 paragraph 1 (presented below) the same great stability as *domicile* and *nationality* in Article 20 paragraph 2 of *Law no. 105* of 1992. Also Article 2589 introduces, by means of paragraph 3, a new choice-of-law rule that subjects the spouses' rights over the family home to *lex rei sitae*.

The inspiration source for the choice-of-law rules of Article 2589 could be found partially in the Switzerland's *Civil Code 1907* and in the *Civil Code of Quebec 1991* (according to point III, letter b of *The Preliminary Theses of the Draft of the Law on the Civil Code*, approved by *Government Decision no. 277 of 2009*⁵) and partially in other two secret sources of inspiration: the Swiss *Federal Code on Private International Law 1987* and the Belgian *Code on Private International Law 2004*.

III New choice-of-law rules on the matrimonial regime

Article 2590 of the Romanian *Civil Code 2009* has the title *The Law Applicable to the Matrimonial Property Regime*. It states in paragraph 1 that the law applicable to the matrimonial property regime is the law chosen by the spouses. Paragraph 2 provides that the spouses are allowed to choose:

- a) the law of the State on the territory of which either spouse has his/her habitual residence at the time of designation;
- b) the law of the State of which either spouse is a national at the time of designation;
- c) the law of the State where the spouses establish the first common habitual residence after marriage celebration.

In accordance with paragraph 1 of Article 2591 (*Stipulation on Designating the Law Applicable to Matrimonial Property Regime*), the agreement concerning the choice of the law applicable to the matrimonial property regime can be concluded before the celebration of the marriage or at the very moment of the celebration or during the marriage. Paragraph 2 provides that the formal conditions of the stipulation are those provided

⁵ *Government Decision no.277* of March 11, 2009 (Official Gazette no.213 of April 2, 2009) is available in Romanian at:

<http://lucian-http://lucian-cosmin.blogspot.com/2009/04/tezele-prealabile-ale-proiectului-de.html> (accessed on February, 14 2012).

either by the law that governs the matrimonial property regime or by the law of the place where the agreement is concluded. In any case, the choice of the applicable law has to be made expressly by a document signed and dated by the spouses or has to arise undoubtedly from the provisions of a marriage contract. When the Romanian Law is applicable, the formal requirements provided by it for the validity of the marriage contract have to be complied with. Paragraph 3 of Article 2591 provides that the spouses can choose any time another law applicable to the matrimonial property regime with the fulfilment of the conditions settled in paragraph 2. The new applicable law shall have effect only for the future, if the spouses do not provide otherwise and it shall not affect, in any circumstance, the rights of a third person.

Article 2592 settles the *objective determination of the law applicable to the matrimonial property regime*. If the spouses have not chosen the applicable law, their matrimonial property regime shall be subjected to the law applicable to the general effects of marriage (i.e. the law designated by Article 2589).

Article 2593 of the Romanian *Civil Code 2009* delimits the *domain of the law applicable to the matrimonial property regime*. Thus, according to paragraph 1 of Article 2593, the law applicable to the matrimonial property regime settles:

- a) the validity of the stipulation on the choice of the applicable law, excepting capacity;
- b) the admissibility and the validity of the marriage contract , excepting capacity;
- c) the limitations in choosing the matrimonial property regime;
- d) the possibility of changing the matrimonial property regime and the effects of this change;
- e) the content of each spouse's patrimony, the spouses' rights over goods as well as the regime of the spouses' debts;
- f) the termination and the liquidation of the matrimonial property regime as well as the rules on the partition of the common property.

Paragraph 2 of the same article provides that nevertheless, the constitution of the portions and their attribution are subjected to the law of the State where

the goods are placed at the time of partition. If the spouses have goods in another country than the State the law of which is applicable to the matrimonial property regime, this choice-of-law rule will contradict the statement of paragraph 1 letter f of Article 2593, according to which the law applicable to the matrimonial property regime governs the rules on the partition of common property. The core of the rules on partitioning common property rests in composing the portions and attributing them.

According to Article 2594 (the *Formal Conditions of the Marriage Contract*), the formal requirements for concluding a marriage contract are those provided either by the law applicable to the matrimonial property regime or by the law of the place where the contract is concluded (*lex loci contractus*).

Article 2595 of the Romanian *Civil Code* 2009 is entitled *The Protection of the Third Persons*. In accordance with paragraph 1, the publicity and opposability requirements of the matrimonial property regime are subjected to the law applicable to the matrimonial property regime. Paragraph 2 provides that nonetheless, when a spouse and a third party had their habitual residences in the same State, at the moment when the legal relation between them was born, the law of that State is applicable, unless:

- a) any requirements of publicity or registration specified by the law applicable to the matrimonial property regime has been fulfilled;
- b) the third party either knew the matrimonial property regime, at the time when the legal relation between that spouse and the third party arose, or he ignored it by his imprudence;
- c) the rules of publicity for immovables provided by the law of the state where the immovable is situated have been complied with.

Article 2596 of the Romanian *Civil Code* 2009 is entitled *The Mutation of the Habitual Residence or of the Nationality*. According to paragraph 1, the law of the common habitual residence or the law of the common nationality of the spouses continue to regulate the effects of the marriage, even if one spouse changes, as the case may be, habitual residence or nationality. Paragraph 2 provides that if both spouses change habitual residence or, as the case may be, nationality, the law of the new common habitual residence or the law of the new common national law shall govern

the matrimonial property regime only for the future, unless otherwise provided by the spouses, and under no circumstance it shall not affect the rights of a third person. In accordance with paragraph 3, nevertheless, if the spouses have chosen the law applicable to the matrimonial property regime, the law shall remain the same even if the spouses change their habitual residence or nationality.

The new Romanian choice-of-law rules on the law applicable to the patrimonial relations between spouses and especially to the matrimonial property regimes are much more detailed than the choice of law provisions of Articles 20 and 21 of *Law no. 105 of 1992*. The reader is already acquainted with the provisions of Article 20, discussed in the previous section. The patrimonial relations between spouses, as well as the personal relations, were subjected until October 1, 2011, to the law designated by: common nationality, common domicile, common residence (actual or past) and the State with which the spouses have the closest relation in common. Article 21 of *Law no.105 of 1992* provided in paragraph 1 that the fundamental conditions required for concluding the antenuptial agreement (marriage contract) were those provided by the national law of each future spouse. Paragraph 2 of Article 21 regulated that the regime and the effects of the marriage contract were ruled by the law the future spouses had chosen by agreement or, in the absence of such a law, by the law stipulated under Article 20. In accordance with paragraph 3 of Article 21, the same law [that governs the regime and the effects of the marriage contract-A.N.] established whether it is possible to change or to replace the antenuptial agreement during the marriage. The modification or the new marriage contract could not bring prejudice to third persons⁶. So, instead of six articles of law that regulate different situations arisen in the conflict of laws on the patrimonial relations between spouses, *Law no. 105 of 1992 on the Settlement of the Private International Law Relations* had only two articles of law, one (Article 20) designating the law applicable to the personal and patrimonial relations between spouses (pecuniary relations which are not regulated by a marriage contract) and the other (Article 21), solving the conflict of laws on the marriage contract (antenuptial agreement). The latter was incomplete, because there was no clear choice-of-law rule on the formal requirements of the antenuptial agreement. The Romanian scholars had two opinions on this

⁶The Parliament of Romania, *op.cit.*, p.154.

matter: the majority supported the view according to which the formal requirements of the antenuptial agreement were subjected to Article 86 on the formal requirements of the contract⁷, while some scholars supported only *lex voluntatis* or the law applicable to the personal and patrimonial relations, using the provisions of Article 21 paragraph 2⁸. Nowadays, in the new Romanian *Civil Code*, there is a special provision in Article 2594 on the matter of the formal requirements of the matrimonial convention (which subjects the formal conditions to the law applicable to the matrimonial property regime or to *lex loci contractus*). An explanation for the small number of articles *Law no. 105* of 1992 had on the patrimonial relations between spouses could be found in the fact that between 1954 and 2011, Romanian Law recognized only one matrimonial property regime (the community of property) and forbade the marriage contract⁹. Because the *Civil Code* 2009 regulates in sixty articles of law (Articles 312 to 372) the spouses' patrimonial rights and duties, recognizing three matrimonial property regimes¹⁰ as well as the marriage contract, it is natural for Book VII of the same code to provide six articles on the law applicable to the patrimonial effects of marriage.

⁷ According to Article 86 of *Law no. 105* of 1992, the formal requirements of a contract were subjected to: the law that governs the fundamental requirements of the contract (*lex voluntatis* or the law determined by objective criteria), or by the law of the State, where one party was at the date when the contract was concluded, or by the law of the State where the representative of one party was at the moment of the conclusion of the contract. See D. Lupaşcu, *Drept internațional privat* [the Private International Law], Bucureşti, Editura "Universul juridic", 2008, p.197. For a broader palette of applicable laws see O. Ungureanu, C. Jugastru, A. Circa, *Manual de drept internațional privat* [Handbook of Private International Law], Bucureşti, Editura Hamangiu, 2008, p.221.

⁸ N.C. Dariescu, *Relațiile patrimoniale dintre soți în dreptul internațional privat* [Patrimonial Relationships Between Spouses in Private International Law], Bucureşti, Editura C.H. Beck, 2008, pp.103-110.

⁹ About the difficulties arisen in Private International Law litigation see for example N. C. Dariescu and C. Dariescu, "The Difficulties in Solving Litigation Concerning the patrimonial Effects of a Marriage Between an Italian Citizen and a Romanian Citizen", *Journal of Private International Law* Volume 4, Number 1, April 2008, pp. 107-120.

¹⁰ The three matrimonial property regimes are: the statutory community of property, the separation as to property and the conventional community of property (i.e a legal partnership of acquests modified by contract).

According to Point III letters d and e of *The Preliminary Theses of the Law Draft-Civil Code*¹¹, the inspiration source used by Romanian legislators for drafting articles 2590 to 2596 of the *Romanian Civil Code* 2009 are: *The Green Paper on the Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Questions of Jurisdiction and Mutual Recognition*¹² with its summary of replies and the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* (though it is not ratified by Romania). A comprehensive comparative study of the new Romanian choice-of-law rules on the matrimonial property regimes and of the rules of the *Hague Convention of 1978* demonstrates that the Romanian drafting committee did not use the authentic text of the convention but the Belgian interpretation of this convention, embodied in Articles 49 to 54 of the *Belgian Code on Private International Law* 2004 (code that is not mentioned in *The Preliminary Theses...among the inspiration sources*)¹³. The Romanian legislators adapted the provisions of both the *Belgian Code on Private International Law* 2004 and of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* taking into account the answers to the *Green Paper on the Conflict of Laws in Matters Concerning Matrimonial Property Regimes*.

According to Article 2559 paragraphs 1 and 2 of the new *Civil Code*, the Romanian Private International Law admits only the renvoi of the first degree. In accordance with the third paragraph of Article 2559, the renvoi is excluded when the parties have chosen the applicable law or in the case of the law applicable to the formal conditions of a juridical act or to extra-contractual obligations as well as in other cases expressly provided by the international conventions Romania has joined to, by the law of the European Union or by the domestic law. That means that in the field of the

¹¹ Approved by *Government Decision no.277* of March 11, 2009 and available in Romanian at: <http://lucian-cosmin.blogspot.com/2009/04/tezele-prealabile-ale-proiectului-de.html> (accessed on March 1, 2012)

¹² *COM (2006) 400, SEC(2006) 952 final*.

¹³ The text of the *Green paper* is available at: http://eur-ec.europa.eu/civiljustice/divorce/docs/com_2006_400_en.pdf (accessed on March 1, 2012). The summary of replies to this green paper is available at: http://ec.europa.eu/civiljustice/news/docs/summary_answers_com_2006_400_en.pdf (accessed on March 1, 2012).

matrimonial property regimes, the renvoi of first degree will seldom occur (only when the spouses have not chosen the applicable law) and will be excluded in the case of the law applicable to the formal conditions of the marriage contract or of the spouses' stipulation on the applicable law.

In accordance with Article 2564 paragraph 1 of the Romanian *Civil Code* 2009, the application of the foreign law is removed if it transgresses the public order (public policy) of the Romanian Private International Law or if it has become competent by fraud. When the foreign law is removed, the Romanian law shall be applied. This paragraph is inspired by Article 8 of *Law no. 105* of 1992. The second paragraph of Article 2564 explains the concept of *transgression of the public order of the Romanian Private International Law*. This infringement appears when the applicability of the foreign law would produce results which are incompatible with the basic principles of the Romanian Law or European Union's Law and with the fundamental human rights.

Article 2566 of the new *Civil Code* provides for mandatory rules. Paragraph 2 of this article provides for the facultative applicability of foreign mandatory rules, if the legal relation with an element of extraneity has close connections with the law of that State and the legitimate interests of the parties require for it. These foreign mandatory rules will be assessed in accordance with their object and purpose and by the consequences of their applicability or non-applicability.

