

MATRIMONIAL CONVENTION I. Nicolae

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Abstract: *The current paper aims to contribute to enriching the knowledge of the judicial instrument by which the spouses choose one of the matrimonial regimes acknowledged by the Romanian Civil Code. In this research context, we wish to describe aspects regarding the definition of this judicial notion, the necessary formal conditions to be met in order for it to be valid and the effects it produces.*

Key words: *matrimonial convention, matrimonial regime, preciput clause*

Introduction

The principle of the free matrimonial conventions stated by the present Romanian Civil Code¹ grants each couple the possibility² to choose one of the matrimonial regimes acknowledged by law, the legal community regime, the conventional community regime or the separation of goods regime.

This regulation was highly appreciated by doctrine for being susceptible to the current needs of modern society and for realigning our law with the European systems of law³. Although the Family Code⁴ has eliminated the possibility of conventionally establishing the patrimonial relations between spouses, this sort of regulation existed in Romanian law, as the matrimonial convention was, at some point, called “a marriage convention” and was regulated in the Caragea Law, the Calimach Code and the Civil Code of 1864.⁵

Doctrine references regarding the legal appearance of the matrimonial convention.

The notion of “matrimonial convention”

The matrimonial convention is also known as a “prenuptial agreement”, “matrimonial contract”, “dowry paper”, “dowry formation”, “marriage contract”⁶.

¹ Law no 287/2009, republished in the Official Bulletin no 505/15.07.2011, with changes and subsequent additions

² Speciality literature unanimously acknowledges that this is a choice and not an obligation of spouses to conclude such a convention; in case there is no convention, the matrimonial regime will be that of joint ownership; thus we can state that the parties are obliged to conclude such a convention when they choose a different matrimonial regime (see Al. Bacaci, Viorica –Claudia Dumitrache, Cristina Codruța Hageanu, *Family law. 7th edition. The regulation of the new Civil Code.*, C.H. Beck Publishing House, Bucharest, 2012, p.77; Marieta Avram, *Civil law. Family*, Hamangiu Publishing House, 2013, p.177, Cristina Mihaela Nicolescu-*Comment of article in The new Civil Code. Articles 1-2664*, supervisors Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p.349)

³ For the importance of unifying the matrimonial regimes on an European level, see I. L. Vlad, *The publicity of the matrimonial convention in UN member states in „Romanian Judicial Opinions”* no.7/2013, p.108-148

⁴ Law no 4/1953 republished in „The Romanian Official Bulletin” no 13/18.04.1956, currently rescinded by Law no 71/2011 for the coming into force of Law no 287/2009 regarding the Civil Code

⁵ For the analysis of the origin and evolution of the matrimonial convention, see Cristina Mihaela Nicolescu, *The historical evolution of matrimonial regimes. Special overview on the origin and evolution of matrimonial conventions*, Bucharest University, Law, no 1/2009, p.37-69

⁶ D. Lupașcu, *The matrimonial convention in “Romanian Judicial Opinions”* no.7/2013, p.35

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The law maker did not provide a legal definition of this judicial notion and only indicated, in article 329 (named “Matrimonial Convention”) of the Civil Code that “choosing another matrimonial regime than that of the legal community is achieved by the conclusion of a matrimonial convention”. Thus, legal doctrine⁷ had the mission to create a legal definition of this concept. We list below some of the definitions created by specialty doctrine:

- “the judicial document through which future spouses or spouses, by using the freedoms granted to them by the law maker, establish their own matrimonial regime or modify the matrimonial regime which is to be applied to them”⁸;
- „a public, solemn judicial act of conventional nature through which the future spouses regulate, before the conclusion of marriage, the patrimonial relations which will exist between them throughout the marriage or the convention concluded during marriage through which the spouses decide to change the current matrimonial regime with another type of matrimonial regime acknowledged by law”⁹;
- “the document through which the future spouses establish the matrimonial regime which will apply throughout their marriage”¹⁰;
- „the legal document through which the future spouses establish their own matrimonial regime or modify their current matrimonial regime or the regime they had at the time of marriage”¹¹.

The legal nature and the judicial characteristics of the matrimonial convention

We can draw the following conclusions regarding the juridical nature and the characteristics of this convention from the definitions listed below. Thus, the matrimonial convention is a legal act with the following judicial characteristics¹²:

- *it is, by its own essence, a bilateral judicial act*, concluded between the spouses or future spouses, but it does not exclude the participation of third parties (in case of donations, for example);
- *it is a complex judicial act, which can involve multiple judicial acts* (in can include acknowledgement of a child, for example);
- *it is a solemn judicial act*, as it must have a certain form in order to be valid;
- *it is a reciprocal judicial act*;
- *it is an accessory to the institution of marriage*, thus meaning it only produces effects during marriage;
- *it is subject to all publicity formalities*;
- *it is, as a principle, incompatible with common law regime*, although it is accepted as an exception the situation in which the parties agree to change their matrimonial regime after a certain amount of time passes;
- *it is an intuitu personae judicial act*.

Also, the definitions listed above express the *object of the matrimonial convention*, that being the choice made by the spouses for one of the matrimonial regimes stated by law. We must also mention the fact that freedom of the parties is limited, as we must distinguish between the general limits (the imperative provisions of the law must be respected as well as morality) and the special limits stated in article 332 of the Civil Code:

⁷ It was suggested to remove any interpretation regarding the nature of this convention as it was legally defined - D. Lupaşcu, *Op. Cit.*, p.37

⁸ D. Lupaşcu, Cristiana Mihaela Crăciunescu, *Family Law. Second edition*, Judicial Universe Publishing House, Bucharest, 2012, p.139

⁹ Adriana-Florentina Dobre, Conventions and matrimonial regimes in the new Civil Code in Law no 3/2010, p.13-14

¹⁰ Marieta Avram, *Op. Cit.*, p.177

¹¹ Emese Florian, *Family Law. 4th edition*, ., C.H. Beck Publishing House, Bucharest, 2011, p.86

¹² As stated by author D. Lupaşcu, in mentioned paper, p.38

“(1) The matrimonial convention can not waiver from the legal provisions regarding the matrimonial regime except in certain cases stated by law, as the sanction is annulment.
(2) Also, the matrimonial convention can not impair the equality between spouses, parental authority or the legal matters of inheritance”

By interpreting the legal provisions quoted above, it is obvious that the parties can't create a *sui generis* regime by combining rules of different matrimonial regimes or by their own will¹³. Also, the parties' autonomous will in this matter is limited by the imperative regulations regarding the parental duties and obligations, as it is clearly stated that the parents must exercise parental authority together. The matrimonial convention can't place the obligation to provide for the child on one parent alone. Thus, the rules of inheritance can't be overlooked by matrimonial convention, as it is impossible to change the legal order of heirs or the quote of each heir.¹⁴

Conditions and formalities for the validity of the matrimonial convention

General conditions for validity

As shown before, the matrimonial convention is a contract, thus it must respect certain conditions. First of all, the *general conditions for validity* of each contract - certain conditions regarding the capacity to become part of a contract, the legal expressing of consent, a legal object of contract and some formal conditions. As this is a very specific matter, that which regulates the patrimonial relations between spouses, the Romanian Civil Code states a series of special conditions to be met in order to conclude this convention in a legal manner. We will describe each and every one of these conditions as follows.

The capacity to enter into a matrimonial convention: the person who has the legal capacity to enter into marriage also has the legal ability to enter a matrimonial convention. In Romanian law, matrimonial capacity is acquired at the age of 18 according to the provisions of article 272 of the Civil Code; as an exception, the minor of 16 years of age can enter into marriage by meeting all the conditions stated in article 272 second alignment of the Civil Code¹⁵. As a result, the minor of 14 or 15 years of age can't legally enter into a matrimonial convention or marriage as he or she is not of age at the moment of entering the convention¹⁶.

In regard to matrimonial conventions concluded by minors, we will study the provisions of article 337 of the Civil Code: “(1) The minor who is of matrimonial age can enter into a matrimonial convention of modify such a convention only with consent from his legal guardian or the tutelage authority.

(2) When missing the agreement stated above, the convention concluded by the minor can be annulled under the provisions of article 46 which are to be applied in this matter.

(3) The action for the annulment can only be formulated after a year has passed since the conclusion of marriage”.

Article 337 second alignment of the Civil Code expressly states the relative invalidity for the lack of consent from the legal guardian or the tutelage authority when concluding the matrimonial convention by the minor. Thus, the matrimonial convention can be annulled under the provisions of article 46 of the Civil Code which are the following:

“(1) The people with the legal ability to enter a contract can't oppose the inability to legally enter a contract to the minor.

(2) The action for the annulment can be exercised by the legal representative or the minor of at least 14 years of age, as well as its legal guardian”

¹³ Al. Bacaci, Viorica –Claudia Dumitrache, Cristina Codruța Hageanu, *Op. Cit.*, p.81

¹⁴ Cristina Mihaela Nicolescu-Comment of article 329 in *Op. Cit.*, p.352

¹⁵ For more details see Titus Prescure, Roxana Matefi, Civil Law. General part. The people. Hamangiu Publishing House, Bucharest, 2012, p. 82.

¹⁶ Cristina Mihaela Nicolescu-Comment of article 337 in *Op. Cit.*, p.359

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(3) When the convention was concluded without authorization from the tutelage authority, necessary according to the law, the prosecutor will be called upon to exercise the action for annulment”.

In case one or both spouses were placed under judicial prohibition, the conclusion or modification of the matrimonial convention is made by their legal representative.¹⁷

The parties' consent: An essential condition for the valid conclusion of the matrimonial convention is the personal and simultaneous consent of the future spouses, unlike the judicial act of marriage which always implies personal consent from future spouses; the lawmaker has stated, as an exception, that this convention can be concluded through a proxy and the power of attorney given to the proxy must be “authentic, special and with a predetermined content”, according to the provisions of article 330 first alignment of the Civil Code.

Also, consent must be serious, free and expressed knowingly (article 1204 of the Civil Code), not to be given while in error or given under the threat of violence (article 1206 first alignment of the Civil Code). However, there are opinions expressed by Romanian doctrine¹⁸, opinions which we agree with, according to which, as this is a patrimonial act, the vice of lesion can be applied; such a conclusion is drawn from the fact that lesion is also applied when concluding contracts between people of age.

The matrimonial convention's cause: As the foundation of matrimonial convention is marriage, the effects of such a convention are strictly connected to the institution of marriage¹⁹. At the same time, the matrimonial convention's cause can imply the will of the spouses to modify the matrimonial regime to be applied.²⁰

Judicial doctrine²¹ discussed the problem of the illegal cause of the matrimonial convention concluded during marriage in order to enter another marriage in the near future. It was appreciated that such a contract concluded between married people in order to take effect in a future marriage would be void as the cause of the convention is illegal.

Validity of the matrimonial convention: Article 330 first alignment of the Civil Code states that the conclusion of the matrimonial convention must be made through a document authenticated by the public notary. Such a provision offers “the certainty that the parties understood the meaning and the effect of the act they are concluding”²² and they know the future possibilities of patrimonial development²³.

In regard to the quoted provisions, the problem of whether people who get married aboard can authenticate their matrimonial convention at the embassy was raised. Although there are divergent opinions, following the changed made by Law no 36/1995²⁴, it was clearly stated, in article 18 second alignment, letter b), that it is the embassy's duty to authenticate these documents, except for all judicial documents concluded between living persons which buy or sell property and documents regarding the choice, change and liquidation of the matrimonial regime.

Particular aspects regarding the matrimonial convention

Special conditions which rule the regime of matrimonial convention refer to the *area of subjects of such a convention, the effects of such a convention in time* (what is the precise moment when this convention can be concluded and the specific date to which it can produce effects), *the limits of the disposition right*.

¹⁷ D. Lupaşcu, *Op. Cit.*, p.39

¹⁸ see, M. Avram, *Op. Cit.*, p.183

¹⁹ Gabriela Cristina Frenţiu, *Op. Cit.*, p.179

²⁰ D. Lupaşcu, *Op. Cit.*, p.41

²¹ For a newer perspectiv on this matter see G.C. Frenţiu, *Op. Cit.*, p.183

²² Adriana-Florentina Dobre, *Op. Cit.*, p.16

²³ I.L. Vlad, *Op. Cit.*, p.123

²⁴ Republished in the Official Bulletin no 444/18.06.2014

In regard to the *people who can enter such conventions*, this is limited to people who have a certain quality to one another, either husband and wife of two people of opposite sex who meet the legal conditions of age and the capacity to legally enter marriage and have expressed their intention to get married²⁵.

In regard to the *time of conclusion and the time the convention produces effects* we will take into consideration the provisions of article 330 second and third alignment of the Civil Code:

“(2) The matrimonial convention concluded before marriage produces effects only from the date of the marriage.

(3) The convention concluded during marriage produces effects from the date stated by the parties or from the date it was concluded”. Thus, we understand that a matrimonial convention can be concluded even before the marriage occurs as it is clear that, being an accessory to marriage, the convention can only produce effects since the time of marriage. Certainly, for some of its provisions (like that of acknowledgement of a child), these can produce effects from a moment previous to marriage, that being the date of conclusion of the matrimonial convention²⁶.

In regard to the *specific object of these conventions*, these regulate the patrimonial relations between spouses, those certain rights and obligations which can be evaluated in money as the spouses will decide the regime of any goods they purchase during marriage (exclusive property, joint property or common property)²⁷, while respecting the *limits of the disposition rights* mentioned above.

Specific clauses of the matrimonial convention. Special overview of the preciput clause

According to the provisions of article 333 first alignment of the Civil Code “by matrimonial convention it can be stipulated that the surviving husband can take over, without payment, before the legal inheritance procedures, one or more of the commonly owned goods. The preciput clause can be stipulated to benefit either spouses or just one of them”.

In regard to the judicial nature of this clause, we must keep in mind the fact that it is concluded *mortis causa*, as it has a liberality character²⁸, being seen as a matrimonial advantage of the surviving husband, being somewhat similar to the partition of goods. As it is part of the matrimonial convention, judicial doctrine notes that the faith of the preciput clause depends on the faith of the main convention²⁹.

As the preciput clause will be further discussed, for now we will point out the judicial regime of this clause as stated by article 333 alignments 2-5 of the Civil Code:

“(2) The preciput clause is not subjected to donations report, but only to reduction under the provisions of article 1.096 alignments (1) and (2)³⁰.

(3) The preciput clause does not interfere with the right of common creditors to pursue the goods subject of this clause, even before the joint goods regime ceases.

(4) The preciput clause becomes void when community ceases during the lifetime of spouses, when the beneficiary husband dies before the other spouse or when they both die at the same time or when the goods are sold to common creditors.

(5) The execution of the preciput clause is done in nature or, if this is not possible, by an equivalent”.

²⁵ Adriana-Florentina Dobre, *Op. Cit.*, p.14

²⁶ Cristina Mihaela Nicolescu-Comment of article 330 in *Op. Cit.*, p.350

²⁷ Adriana-Florentina Dobre, *Op. Cit.*, p.17

²⁸ T. Bodoaşcă, Aurelia Drăghici, *Discussion about the preciput clause in the regulation of the new Romanian Civil Code* in „The Law” no.10/2013, p.33

²⁹ D. Lupaşcu, *Op. Cit.*, p.40

³⁰ „(1) Dispositions of the will are considered before donations. (2) The dispositions of the will are to be fulfilled all at once except if the author of the will stated that some will be fulfilled with priority”.

Ensuring the opposability of the matrimonial convention

In order for it to be opposable to third parties, Romanian law (article 334 of the Civil Code) establishes some **forms meant to ensure the publicity of the matrimonial convention**³¹:

- the mention made by the registry office on the marriage license (article 334 second alignment of the Civil Code - “after the legalization of the matrimonial convention or after receiving a copy of the marriage license, the public notary sends a copy of the matrimonial convention to the registry office in order for it to be mentioned on the marriage license”);
- the inscription in the National Notary Registry of matrimonial regimes (article 334 first alignment of the Civil Code);
- the inscription in the cadastral register, the register of companies or other publicity registers stated by law (article 334 fourth alignment of the Civil Code - “keeping in mind the nature of the goods, as the matrimonial conventions will be noted in the cadastral register, the register of companies as well as other publicity registers stated by law; in all these cases, failing to comply with all the publicity formalities can not be covered by the inscription made in the register mentioned in the first alignment”).

As a result of reading article 334 of the Civil Code, specialty literature³² mentions two categories or formalities regarding the publicity of the matrimonial convention: *general formalities* (mentioning the matrimonial convention on the marriage license, inscription in the National Notary Registry of matrimonial regimes) and *special formalities* (specific to certain categories of professionals - inscription in the register of companies and, for certain goods, inscription in the cadastral register).

We must also mention that, according to article 334 fifth alignment of the Civil Code anyone who proves interest can inquire the National Notary Registry of matrimonial regimes and can ask copies of some documents as third parties are interested to know the length of powers husbands have over their goods or the length of mortgage in case we are discussing a creditor of one of the spouses or even of both of them³³.

It is also useful to keep in mind that failure of the notary to meet his obligations can attract his material responsibility to the spouses or third parties if the lack of publicity has caused any damage to them³⁴. Of the same importance is the right of each spouse to ask for the formalities to be fulfilled (article 334 third alignment of the Civil Code).

If the publicity formalities were not met, we are in the presence of the **inopposability of the matrimonial convention** in agreement with article 335 of the Civil Code:

„(1) The matrimonial convention can't be opposed to third parties in regard to the acts concluded with one of the spouses unless the publicity formalities stated in article 334 were met or in case third parties had knowledge from another source.

(2) Also, matrimonial convention can't be opposed to third parties in regard to the acts they conclude with any of the spouses before marriage”.

Effects of the matrimonial convention

We are about to distinguish, as does the doctrine, between:

- *effects produced between parties (spouses or future spouses) and*
- *effects in relation to third parties.*

The effects of matrimonial convention between parties

³¹ As centralized by speciality literature -D. Lupaşcu, *Op. Cit.*, p.42

³² M. Avram, *Op. Cit.*, p.192

³³ Al. Bacaci, Viorica-Claudia Dumitrache, Cristina Codruţa Hageanu, *Op. Cit.*, p.86

³⁴ *idem*

It is a known fact that the specific effect of the matrimonial convention is the configuration of the patrimonial relations between spouses according to the matrimonial regime they choose. Subsequently, we must consider the probation effects as this convention will be used as proof of the matrimonial regime the spouses choose. At the same time, as we have examined before, the effects of the matrimonial convention, regardless of the moment it was concluded, come into force at the date of marriage.

The matrimonial convention ceases to produce effects:

- from the date when another matrimonial convention is concluded, as it is a known fact that the matrimonial regime chosen by the spouses is not definitive, it can be changed by respecting the conditions stated by law for the conclusion of another matrimonial convention (article 336 of the Civil Code);
- as a result of becoming void;
 - when the parties concluded the convention before marriage and did not conclude the marriage;
 - when the tutelage authority decided to change the joint matrimonial regime to separately owned goods;
 - the marriage is void or was annulled (except for putative marriage).
- in case the *matrimonial convention is void or annulled*³⁵, the regime of legal community between spouses is applied, without impairing the rights acquired by third parties of goodwill (article 338 of the Civil Code)

The effects of matrimonial convention in relations with third parties

After having analyzed the *inopposability of the matrimonial convention to third parties*, we will now analyze the issue of *simulating a matrimonial convention* regulated by article 331 of the Civil Code as follows: „The secret act, by which another matrimonial regime is chosen or the current matrimonial regime is changed produces effects only between spouses and can not be opposed to goodwill third parties”.

The quoted text is completed by the general provisions of simulation, thus it is legitimate to state that third parties have the right to choose between rejecting the effects of the secret civil act when it prejudices their rights or to invoke the same act in their favor when the effects of the act benefit them. This choice can be exercised within the action for declaring the simulation³⁶. We must also mention that while simulation has three forms: fiction, disguise and the interposition of people, in case of matrimonial convention simulation has only two forms, fiction and disguise, as the matrimonial convention has an *intuitu personae* character which means that only spouses can become parties to this act³⁷.

As the doctrine pointed out³⁸, by assuming some judicial solutions, the secret act is valid even if it is not authenticated, although the law requires an *ad validitatem* form, if the public act is concluded in the necessary form.

Conclusions

At first sight, matrimonial convention or the prenuptial contract seems to be a tool for families with a certain financial position. In time, we believe that these modern provisions embraced by the Romanian law maker, will prove to be useful, as they will be capitalized by every couple according to their specific needs.

³⁵ Causes for the absolute annulment of the matrimonial convention are: lack of consent, derogatory clauses from the chosen matrimonial regime, clauses which impair the equality between spouses, parental authority or legal inheritance procedures, not respecting the necessary form stated by law, conclusion of the convention by a minor under the age of 16; relative annulment clauses: consent affected by vices or violence, concluding the convention without legal authorization.

³⁶ Gabriela Cristina Frențiu, *Op. Cit.*, p.188

³⁷ *idem*, p.185

³⁸ For details, F.A. Baias, *Doctrine study and jurisprudence*. Rosetti Publishing House, Bucharest, 2003., p.58

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From the facts stated in this study, we can safely say that by regulating this type of convention, the lawmaker was preoccupied with ensuring an equilibrium between the interests of both the parties and the third parties, as it has established certain regulations regarding the conditions to be met in order for this act to be valid, rules regarding both the publicity formalities and the opposability to third parties.

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