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The Scope of the Notions of Marriage, Property Relations and Matrimonial Agreement in Romanian Private International Law

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Abstract:

Application of private international law is impossible without deciphering the meaning of the legal rules specific to this branch or without classifying the test cases on categories. This dual mental operation that the judge has to do is called ***qualification****.*

The ***notion*** *of qualification is defined by authors differently. According to a first opinion the qualification is defined as the operation performed by an authority that is required to solve a conflict, when asked to find the conflict category of the situation, in order to decide what rule should be applied. According to another opinion, the qualification establishes the meaning of the notions of legal rules on the subject of regulation and the law applicable to the legal relationship. In a reverse operation, through qualification, they determine the legal category to which a fact situation belongs and indicate the competent law. According to a last opinion, qualification is defined in two ways: starting from the conflict of laws towards the facts (legal relationship) or vice versa. Thus:*

a. the qualification is the logical-judicial operation of determining the exact full meaning of legal terms expressing the content and relations of the conflict of laws, in order to see whether a legal relationship (a state of facts) is included (or not) among these terms;

b. the qualification is the interpretation of a legal relationship (of a specific fact situation)in order to see the to which conflict of laws, in terms of content and relationship, it belongs.

In foreign literature qualification is defined differently. Thus, according to a first view, the qualification is defined as the legal operation performed to include a specific legal situation in the contents of a conflict of laws. This operation gives rise to a conflict between the contents of the conflict of laws belonging to the same legal system, and to a qualifications conflict when another system of law, which relates to the facts, places it within the content of a conflict of laws different from that chosen by the legal

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system of the forum. According to another point of view, the qualification means defining the terms used by the rules of private international law: nationality (citizenship), domicile, residence, capacity, family rights, inheritance rights, etc.

Keywords:
qualification; marriage in Romanian private international law; property relations between spouses; matrimonial agreement

1. The scope of the notion of marriage in Romanian private international law

The rules of private international law are regulated in the new Civil Code, Book VII entitled "Provisions of Private International Law", Chapter II is called "The Family".

Regarding the **Romanian private international law**, the primary qualification is performed by *Romanian law*, *the law of the forum* for any Romanian public authority. Thus, according to art.2558 of the new Civil Code "When the determination of the applicable law depends on the qualification that has to be given to an institution of law or to a legal relationship, we should consider the legal classification established by the Romanian law (Article 1). In case of referral, the qualification is made by the foreign law that made reference to the Romanian law (Article 2). The movable or immovable nature of property is determined according to the law of the place where it is, or where appropriate, where it is located (paragraph 3). If the Romanian law does not know a foreign legal institution or knows it under a different name or with a different content, they can consider the legal qualification performed by the foreign law (paragraph 4). However, when the parties themselves determine the meaning of concepts in a legal act, the qualification of these notions will be made respecting the parties' wishes" (paragraph 5). Two observations must be made: first, that the term "institution of law" must be interpreted *lato sensu*, including legal terms as well, and the second that the exceptions in paragraphs 2,3,4,5, are strictly interpretative. So, according to art 2558 paragraph 1 of the new Civil Code, the primary qualification is always performed based on the Romanian law, namely in accordance with the terms used by the Romanian legal system. Also, the qualification of an issue as procedural or substantive is made by the Romanian law.

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The law applicable to *patrimonial relations between spouses* in private international law can be determined after the *primary qualification* of the notions of *property relations between spouses* and *marital agreement*. But, to explain these notions, we have to *primarily qualify* the notion of *marriage*.

In order to perform the primary qualification of the notion of **marriage** in Romanian private international law we have to start from the meaning that this notion plays in the Romanian law, specifically in *family law*.

According to art.259 paragraph 1 of the new Civil Code "Marriage is the union freely consented between a man and a woman, contracted under the law."

The new civil code in the seventh book entitled "Provisions of Private International Law," Title II *Conflict of Laws*, Chapter II *Family*, Section I *Marriage*, paragraph 1, *The contracting of marriage*, art.2585-2587 does not define the notion of marriage but according to art.2586 of the new Civil Code the substantive conditions of marriage are governed by the national law of each spouse in accordance with art.2587 of the new Civil Code when the formal requirements of marriage are governed by the law of the State where marriage is contracted.

In conclusion, the scope of the concept of marriage in private international law is much broader. So, the Romanian authorities are free to acknowledge as marriage or not the relationships, born abroad, which do not have the fundamental characteristics of marriage as stipulated in the Romanian family law. The same conclusion can be drawn from the affirmation that the notions used in the content of the conflict of laws become through primary qualification adaptations of concepts used in intern law.

2. The concept of property relations in Romanian private international law

In order to clarify the meaning of the concept of matrimonial regime in private international law, we should perform the primary qualification of the notion of **property relations between spouses**.

Paragraph 2 of art.312 of the new Civil Code provides that regardless of the matrimonial regime chosen, one cannot derogate from the provisions of this section. Section I of Chapter VI called *Patrimonial*

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rights and obligations of the spouses is entitled *Common provisions*. Articles 312-338 of the new Civil Code are dedicated to this section. We note that this section sets to rights the **primary regime** that we define as *all legal norms governing the relations established between spouses, or between one or both spouses on the one hand, and third parties, on the other hand, relationships whose object is represented by property existing at the contracting marriage, or acquired during marriage, as well as the obligations incurred in connection with such property or in order to fulfill marriage tasks* and which apply to all marriages, regardless of the matrimonial regime to which the spouses are subjected.

From the provisions of art.312 paragraph 1 of the new Civil Code we note that future spouses can choose as their matrimonial regime: **the legal community, the separation of property or the conventional community**.

We note that the provisions of art.312 of the Civil Code establish: a legal regime that is the community property regime and two types of conventional regimes: the separation of property regime and the conventional community regime (the latter includes conventional exemptions from the community property regime).

Legal matrimonial regime includes assets acquired by each spouse during marriage, except property required by law, which represents each spouse's own assets.

Community legal regime will apply in all situations in which prospective spouses opt for **separation of property regime** or the **regime of conventional community**.

Separation of property regime is characterized by the fact that each of the spouses is the exclusive owner of their current assets and of those acquired alone after the dissolution of marriage, for the adoption of this regime the spouses being forced to draw up an inventory of movable property belonging to each one at the contracting of marriage.

Conventional community regime is applicable when by matrimonial agreement, it derogates from the provisions on legal community regime, and the matrimonial convention concluded in this case can narrow or broaden the community of goods.

In conclusion, the novelty of the new Romanian Civil Code which reformed the regulation of the Family Code of patrimonial relations between spouses in Romania, *rests in the possibility of future spouses to choose between several matrimonial regimes*, *responding thus to the continuous need*

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for adaptation of existing legislation to socio-economic needs and to the trends manifested in this field at European level.

At present, the conflict of laws in the matter of patrimonial relations between spouses is set out in Articles: 2590 - 2596 of the Civil Code.

The essential **features** that a legal relationship must meet in order to be qualified, by the Romanian authorities, in the conflict category of property relations between spouses are:

1. the legal relationship must be established between spouses or between a spouse or spouses on the one hand, and third parties on the other hand;

2. the legal relationship must find the source in the status of married person that parties possess;

3. the legal relationship has as its object the property of one or both spouses acquired after marriage or obligations contracted in order to achieve marriage tasks.

Any legal relationship that fulfills these features can be classified by the Romanian authorities within the category of economic relations between spouses, in order to determine the applicable law, according to the conflict of laws of art.2590 of the new Romanian Civil Code - which provides: "The law applicable to the matrimonial regime is the law chosen by the spouses (paragraph 1). They can choose: a) the law of the State on which one of them has its common residence at the date of election; b) the state law whose citizenship any of them has at the date of election, c) the law of the state where they establish the first common habitual residence after celebration of marriage (paragraph 2) - even if the legal relationship, as such, is unknown to the Romanian family law.

Also, according to art.2953 of the new Civil Code "the law applicable to the matrimonial regime governs: a) the conditions of validity of the Convention on the choice of the law applicable, except the capacity, b) the admissibility and validity conditions of the marriage agreement, except the capacity c) the limits of the choice of the matrimonial regime; d) the possibility of regime change and the effects of this change, e) the content of each spouse's patrimony, the rights of the spouses on property and spouses' debt regime, f) the termination and liquidation of the matrimonial regime, and the rules on the division of joint property (paragraph 1) . However, the formation of lots and their

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assignment are subject to state law where the property is located at the date of partition "(paragraph 2).

As an exception, if the law applicable to the patrimonial regime has not been determined according to art.2592 of the new Civil Code "it is subject to the law applicable to the general effects of marriage."

If the spouses change their habitual residence or their citizenship, art.2596 of the new Civil Code provides: "The law of common habitual residence or the common citizenship law continues to govern the effects of marriage provided that one of them changes, as appropriate, their habitual residence or nationality (paragraph 1). If both spouses change their habitual residence or, where appropriate, their citizenship, the common law of the new habitual residence shall apply to the matrimonial regime only in terms of the future, if spouses have not agreed otherwise, and in any case it cannot prejudice the rights of third parties (paragraph 2). However, if spouses have chosen the law applicable to the matrimonial property regime, it remains the same, even if spouses change their habitual residence or nationality (paragraph 3).

For what concerns third parties, art.2595 provides: "Measures for publicity and enforceability of the matrimonial regime against third parties are subject to the law applicable to the matrimonial regime (paragraph 1). However, if, when a legal relationship is set up between a spouse and a third party, they had their habitual residence in the same state, that law of that state applies, except in the following cases: a) the conditions for publicity or registration provided by the law applicable to the matrimonial regime, b) the third party knew, when the legal relationship was contracted, the matrimonial regime or recklessly ignored it, c) immovable publicity rules laid down by the law of the state in which property is located have been complied.

Once the operation of the primary qualification is performed, by including the legal relationship of private international law within the conflict of laws of art.2590 of the new Romanian Civil Code and by determining the law applicable under the provisions of that article, the concept of property relations between spouses will acquire new content and a new scope, as a result of the operation of secondary qualification, which is done by *lex causae*, namely by the material law applicable to the legal relationship in question. The qualification based on *lex causae* is supported by the majority of the private international law doctrine.

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3. The scope of the concept of matrimonial agreement in the Romanian private international law

For the clarification of the meaning of the notion of matrimonial agreement in private international law we need to perform the primary qualification of the concept of matrimonial agreement in Romanian law.

To clarify the meaning of the conflict of laws of Article 2590 of the new Romanian Civil Code in conjunction with 2593 of the new Romanian Civil Code we need to perform the primary qualification of the concept of **matrimonial agreement**. According to art.2558 of the new Civil Code, the primary qualification is always performed according to the Romanian law, namely in accordance with the Romanian legal system.

In the doctrine, **the matrimonial agreement** designates the conventional act by which future spouses, making use of the freedom conferred by the legislature, establish their own matrimonial regime or change their matrimonial regime under which they were married during marriage.

According to art.2591 of the new Civil Code "The convention of choice of the law applicable to the matrimonial regime may be concluded either before the celebration of marriage, or at the time of marriage, or during marriage (paragraph 1). The form conditions of the agreement of choice of the law applicable are those provided either by the law chosen to govern the matrimonial regime or by the law of the place where choice agreement is concluded. In all cases, the choice of the applicable law must be express and established by a document signed and dated by spouses or stipulated beyond reasonable doubt in the clauses of a matrimonial agreement. When the Romanian law is applicable, they must satisfy the requirements of form set by it for the validity of the matrimonial agreement (paragraph 2) Spouses may always choose another law applicable to the matrimonial regime, under the conditions specified in paragraph (2). The new law takes effect only for the future, if spouses have not decided otherwise, and cannot harm, in any case, the rights of third parties. (Paragraph 3).

Regarding the form conditions of art.2594 the new Civil Code stipulates: "The form conditions required for concluding the matrimonial

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agreement are those stipulated by the law applicable to the matrimonial regime or those stipulated by the law of the place where it is concluded."

In terms of private international law, the concept of marriage agreement will have a scope that will include the Romanian types of matrimonial agreement concluded on the basis of the matrimonial regime chosen according to the provisions of the new Civil Code and the types of agreement acknowledged by the foreign law.

Once the operation of primary qualification is concluded, by including the legal relationship of private international law within the conflict of laws of art.2590 of the new Romanian Civil Code and by determining the law applicable under the provisions of that article, the concept of matrimonial agreement will acquire a new content and a new scope, as a result of the operation of secondary qualification, which is done by *lex causae*, ie, by using the material law applicable to the legal relationship in question. The qualification solution based on *lex causae* is supported by the majority of private international law doctrine.

In conclusion, we note that the definitions: *of the matrimonial regime* and of *the matrimonial agreement,* are a valuable auxiliary means in the primary qualification of legal relations between spouses, or between spouses and others, born abroad, but unknown to the Romanian legal system. Through these concepts, the Romanian authorities will try to place these relations within the scope of the notions of *patrimonial relations between spouses and matrimonial agreement*, and then to determine, pursuant to art.2590 of the new Romanian Civil Code the material applicable law.

Conclusion

In conclusion, the notion of **qualification** can be seen from two perspectives:

1. on one hand it explains the meaning of concepts used by the conflict of laws in terms of content and relationships;

2. on the other hand, it represents the operation of determining the conflict of laws applicable to the specific legal situation by including the situation in the content of one of the conflicting laws of the forum.

Qualification is important for private international law because on the one hand, depending on the way a relationship is qualified, a fact, a situation, a relation eventually depends on the solution of the conflict

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of laws, and on the other hand, the settlement of the conflict of qualifications is prior to resolving the conflict of laws. For example, a French couple who live in Romania and who have acquired movable and immovable property here, die without heirs. The question: to whom such property will be assigned and by which title? arises. Will their assets become the property of the State whose citizens they are or of the State in which the heritage assets are? We should qualify the state's right in relation to the vacant property. If we think that the state's right on the vacant property is a right of inheritance, then such property will be assigned to the State whose citizens the deceased people were (in this case the assets become the French state property). If the property goods become part of the state patrimony as waifs, res nullius, they must be assigned with this title to the state on whose territory they are (the assets will be assigned to the Romanian state).

In private international law qualification is of **two kinds**:

1. primary qualification, by which the law applicable to the relationship with an extraneity nature is established, is qualified according to *lex fori*. So, after the primary qualification, the general bilateral conflict of laws is turned into a unilateral particular rule, in which the relationship makes reference to the law of a particular state.

2. *secondary qualification* subsequent to primary qualification, performed after the primary qualification, is a matter of domestic law. So, it is given by *lex causae*. Performing the secondary qualification in the above case means analyzing the conditions of validity of the consent to marriage by the French Civil Code rules.

In private international a highly debated problem **is the law based on which the qualification is performed**. In principle, qualification is performed based on *lex fori*, but there are opinions that support the qualification according to *lex causae*.

Qualification under the law of the forum - *lex fori* - is supported by most authors who base their opinion on the following arguments:

1. the conflicts of laws are part of the law of the court system, namely they are national standards. The court applies its own system of conflict of laws in principle. So, the court will qualify based on *lex fori*, using the principle "the interpretation belongs to the one that elaborated the rule" (*ejus est interpretari, cujus condere*);

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2. qualification is a problem prior to solving the conflict, and the operation can be performed only after the law of the forum.

However there are some circumstances in which the qualification cannot be performed according to the law of the forum. **Exceptions** allowed refer to:

1. *the autonomy of the will* according to which parties are free to choose by agreement the law applicable to the contract and the qualifications indicated in question;

2. *secondary qualification* is performed according to the law designated to be applied to the legal relationship;

3. *immovable property*- governed by the law of the place where property is located namely by *lex rei sitae* and qualification will be given by this law;

4. *referral* - the operation by which the forum rules make reference to the foreign law, whose rules whose conflict of laws refer back to the court law or forward the law of another state. As such, the admission by *lex fori* of the referral involves considering the qualification given by the foreign law;

5. *legal institutions unknown* to the law of the forum (for example, German law allows children born out of wedlock to claim some money from the alleged father);

6. *citizenship* – individual's belonging to a certain state – a rule that will be considered only when the person has only one nationality;

7. *autonomous qualification* – the requirements specific to the relations with an extraneity nature, and in particular the promotion of international economic relations may require certain qualifications distinct from the laws that are in conflict, so as to avoid difficulties and for the harmonization of solutions, sometimes the concepts included in an international convention are described in the text of agreement.

Qualification by the cause law - *lex causae* - is supported by a number of specialists[2]. Cause law is the foreign law competent to be applied to a legal relationship or to one of its elements. The arguments used by specialists are:

1. the normal competent foreign law cannot be applied regardless of its own qualification;

[2] **Y., Loussouarn. P., Bourel.** Précis de *Droit international privé,* Editions Dalloz, Paris, 1996, p. 201-203.

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2. the protection of the rights arising under the rule of foreign law is ensured by its correct application.

Regarding the law after which secondary qualification is performed, being a matter of intern law, the majority of private international law doctrine indicates *lex causae*, namely the law that has the closest connection with the facts. Thus, the authority informed through a report on private international law regarding the patrimonial effects of marriage finds with the help of its own conflict of laws that a foreign law is applicable. The notions of: *marriage and patrimonial effects of marriage* will gain new meanings, in agreement with the foreign legal system.

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