

THEORETICAL AND PRACTICAL ISSUES IN REGARD TO THE LIQUIDATION OF THE MATRIMONIAL REGIME OF COMMUNITY OF GOODS

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Abstract

Liquidation is that certain legal operation which ends the community of goods that arises by marriage through the separation of the spouses' goods. During this operation, the parties agree upon the mass of common goods, determine the common debt and establish each parties' contribution to the purchase of common goods and contracting common debt. This operation is mandatory and can be achieved through the courts of law or by the public notary. The advantages of liquidation by mutual agreement are obvious and pertain to saving time, money and effort. This material represents an extensive study on the character, means of operation of liquidation, by discussing both theoretical aspects, as well as practical aspects which pertain to the act of liquidation.

Keywords: matrimonial regime, liquidation, character, stages, notary.

JEL Classification: K33, K34

1. General issues

Family is and always has been a reality with elements of philosophy, religion and law. Family is both a fact and a legal situation when it pertains to the relation of marriage, as marriage is the act which creates family². The exercise of the right to enter marriage is protected under article 12 of the Convention for the protection of human rights and fundamental freedoms, signed in Rome, November 4th, 1950.

The first definition of marriage was phrased by legal advised Modestin around the year 240 and stated that: "*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communication*", namely "marriage is a union between a man and a woman, a union for life, a communication in human and divine law"³.

Marriage is, according to article 259 first alignment of the Civil Code, "the freely consented union between a man and a woman, concluded under the conditions of law" it entails the common will to live together but also a community of affective and patrimonial interests⁴. Given these mutual interests, marriage creates a series of legal effects which pertain to the patrimonial or non patrimonial relations between spouses.

In regard to the personal non patrimonial relations between spouses, marriage is based on affective relations and connections which pertain to the most strict area of private life⁵ and entails a series of mutual relations of the spouses, which limit the individual freedom of each spouse. These obligations are: mutual respect, fidelity, moral support, cohabitation, bearing a common name and exercising conjugal duties.

Marriage produces a series of effects in regard to the patrimonial relations between spouses. The patrimonial relations pertain to the matrimonial regimes.

Traditionally, a "matrimonial regime" is the totality of legal provisions which regulate the relation between spouses, as well as the relations between spouses and third parties in regard to the

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² Ph. Malaurie, H. Fulchiron, *La famille*, 4^e ed., Defrenois Publishing House, Paris, 2011, p. 5-12.

³ B. Laplante, *L'union libre, le Mariage romain et le Mariage chrétien*, în *Enfances, Familles, Generations*, no 15/2011, available at <https://www.erudit.org/fr/revues/efg/2011-n15-efg030/1008148ar/>, accessed on 21.04.2021 .

⁴ Y. Favier, *Couples in French Law: Concubinage vs. Civil partnership (pacs) and marriage*, *Actualidad Jurídica Iberoamericana* N° 11, agosto 2019, p. 68.

⁵ C. Barrón López, *La sociedad legal de gananciales en la empresa familiar*, în *Actualidad Jurídica Iberoamericana* N° 10 bis, junio 2019, pp. 176, available at <http://www.revista-aji.com/wp-content/uploads/2019/06/174-193.pdf>, accessed on 21.04.2021.

goods and debts of the spouses⁶.

The parties' freedom in choosing their matrimonial regime represents a consequence of the principle of contractual freedom (which, in turn, is a consequence of individual freedom) and ensures the spouses have the possibility to adapt the legal provisions to their particular patrimonial interests⁷. Contractual freedom „is a certain freedom aimed towards the regimes in which the spouses are free to choose, without mixing the regulated matrimonial regimes or creating, by their will, a new matrimonial regime (other than those which are legally regulated)”⁸. The right to enter into an agreement is a natural right of the citizen guaranteed by the virtue of its membership into the society.⁹

Considering the fact that any marriage entails common life in regard to all aspects, including the material one, it can't be denied that common life entails common expenses, as the normal course of life entails the existence of some basic rules, which will govern the patrimonial relations of the couple.¹⁰ This is the imperative primary regime. French doctrine stated that the imperative primary regime was developed as a result of the social and economical evolution of the 20th century which increased the significance of personal relations between spouses to such an extent that patrimonial relations between spouses and between spouses and third parties have become consequences of personal relations¹¹.

The notion of imperative primary regime, unregulated by law, refers to “a body of legal texts which regulate the patrimonial relations between spouses, as well as the relations between spouses and third parties, regardless of the matrimonial regime which applies during marriage ... it represents the center piece of public order and it is impossible to rescind it by matrimonial convention”¹². It regards a series of imperative regulations, which apply to any marriage, regardless of the matrimonial regime which governs the marriage; it entails ordinary issues of daily life¹³.

The imperative primary regime is not to be confused with secondary matrimonial regime, which can be decided upon by the spouses before or during marriage by matrimonial convention, with the purpose of regulating the patrimonial relations between them¹⁴.

In regard to their source, the secondary matrimonial regimes are classified in legal regimes and conventional regimes.

The regime of legal community is an alternative regime to conventional matrimonial regimes. It applies by law, in lack of any conventional matrimonial regime.

Conventional matrimonial regimes apply based on a matrimonial convention and only to the extent in which the future spouses wish to derogate from the legal matrimonial regime, namely the regime of separation of goods; the regime of separation of goods with participation in acquisitions by activating the clause stated in article 360 second alignment of the Civil Code; the regime of conventional community.

⁶ I.P. Filipescu, A.I. Filipescu, *Family law treaty*, 8th revised and completed edition, Universul Juridic Publishing House, Bucharest, 2006, p. 57.

⁷ For contrary opinion, see R. Cabrillac, *Droit civil. Les régimes matrimoniaux*, 6^e éd., Montchrestien Publishing House, Paris, 2007, p. 93; F. Terré, D. Fenouillet, *Droit civil. Les personnes. La famille. Les incapacités*, 6^e éd., Dalloz Publishing House, Paris, 1996, p. 355 and p. 377.

⁸ C. Jugastru, *A few hypothesis of the autonomy of will in private international law*, in *Studia Iurisprudentia* no. 4/2016, available at <http://arhiva-studia.law.ubbcluj.ro/articol/699>, accessed on 24.04.2021.

⁹ R. West, *A tale of two Rights*, “Boston University Law Review”, vol. 94, issue 3, May 2014, p. 893-912.

¹⁰ Pineau J., Burman D., *Effets du mariage et régimes matrimoniaux*, Themis, Montreal, 1984, p. 5.

¹¹ H. Gaudemet-Tallon, *Les conflits de lois en matière de régimes matrimoniaux: tendance actuelles en droit comparé* in «Travaux du Comité Français de Droit International privé». Trentième à trente-deuxième annuls 1969-1971. Dalloz, Paris, 1972, p. 210 *apud* C. Dariescu, *Conflict of laws in the matter of primary matrimonial regime, according to the Romanian Civil Code*, available at https://www.researchgate.net/publication/251351457_Conflict_of_Laws_in_Matters_Concerning_the_Primary_Matrimonial_Regime_According_to_the_Romanian_Civil_Code, accessed on 21.04.2021.

¹² M. Avram, *Civil law, Family*, Hamangiu Publishing House, Bucharest, 2013, p. 201.

¹³ P. Voirin, G. Gaubeaux, *Droit civil. Droit prive notarial. Regimes matrimoniaux. Successions-liberalites*, tome 2, 24^{eme} ed., LGDJ Publishing House, Paris, 2006, p. 10; Fr. Terre, Ph. Simler, *Droit civil. Les régimes matrimoniaux*, 4^{eme} ed., Dalloz Publishing House, Paris, 2005, p. 41.

¹⁴ For aspects regarding the history of matrimonial regimes, see M.-I. Floare, *The historic origin of matrimonial regimes in modern and contemporary family law in Romania*, in *Studia Iurisprudentia* no 1/2015, available at <http://arhiva-studia.law.ubbcluj.ro/articol/638>, accessed on 24.04.2021.

2. The notion of liquidation and the stages of liquidation

Article 320 of the Civil Code states that, in case of rescission or change, the matrimonial regime is liquidated, in accordance with the law, by the parties' agreement or by legal means. The definitive court decision or the authentic document drafted by the public notary are both acts of liquidation. Article 355 of the Civil Code states the same previously stated notions, subsequently the lawmaker evokes the effects of community of goods and indicates the parties of the act of liquidation. Article 357 of the Civil Code shows the means in which liquidation operates. Thus, in case of liquidation of community of goods, each spouse is entitled to his own goods; subsequently common goods will be shared and all debt will be regularized. To this purpose, first of all, the amount of goods which will be acquired by each spouse is determined, based on their contribution in acquiring common goods, as well as the fulfillment of common obligations. Until proven otherwise, it is assumed that the spouses had equal contribution. We notice that the Civil Code does not provide an express definition of liquidation.

Furthermore, the Civil Code does not contain a section exclusively dedicated to liquidation, but merely a few separate articles in its entire content.

Seeing all these provisions, we can define liquidation as that legal operation which ends the community of goods that arises by marriage, by separating the patrimonies of the two spouses.

The purpose of using this term is to differentiate the time when the matrimonial regime ends, namely the date when it is no longer in effect and the time the regime is liquidated, namely the time when all operations regarding the payment of debt between spouses or former spouses is achieved, goods are divided or any other issues pertaining to the goods of the spouses are solved after the matrimonial regime ceases to apply¹⁵.

During liquidation, the parties establish the mass of common goods of the spouses, they determine the common debt and the contribution of each spouse in acquiring common goods and common debt.

Thus, the first stage of liquidation is establishing the common goods and the common debt.

A good is established to be common or exclusively owned by one of the spouses in relation to the date when the matrimonial regime ended. Thus, the goods acquired by the spouses until the date the matrimonial regime is liquidated, will be considered to be common goods; the goods acquired by the spouses after the regime is liquidated, are own goods of each spouse, as well as the goods established by the provisions of article 340 of the Civil Code. This conclusion is only valid as a principle, as we are about to motivate this statement.

If liquidation occurs after the marriage ends, in establishing the mass of common goods, only the goods and the debt acquired until the marriage ended, will be considered; the subsequent goods and debt will not be considered as common, as it occurred after the matrimonial regime was liquidated, when the marriage ended. In this case, during the period of time between the ending of the matrimonial regime and the liquidation, the common goods which existed at the time the matrimonial regime ended remain common, as a post-marriage community is presumed to exist,¹⁶ which will cease to exist when the mass of common goods disappears. During the post-marriage community, the mass of common goods continues to exist and is susceptible to transformation, as many elements can influence it, such as: real subrogation, income from exploiting common goods and so on.¹⁷

Thus, if during post-marriage community, the former spouses sell one of the common goods, the amount of money which resulted from the sale will have the same legal regime, based on real

¹⁵ O. Pisarenco, *Conceptual aspects regarding the time of establishing, changing and terminating a contractual matrimonial regime*, in National Law Magazine no 7/2012, p. 58-59, available at https://ibn.idsi.md/sites/default/files/imag_file/52_61_Aspecte%20conceptuale%20privind%20momentul%20stabilirii%2C%20modificarii%20si%20incetarii%20regimului%20matrimonial%20contractual.pdf, accessed on 21.04.2021.

¹⁶ Ferrante, A., *La comunidad postganancial a la luz de la jurisprudencia*, in AA.VV.: *Perspectivas del Derecho de familia en el siglo XXI: XIII Congreso Internacional de Derecho de Familia* (dir. C. Lasarte Alvarez), Instituto de Desarrollo y Análisis del Derecho de Familia en España, Sevilla, 2004, p. 158 in C. Barrón López, *op cit.*, p. 179.

¹⁷ Raymond le Guidec in *Droit patrimonial de la famille*, Quatrieme edition, Dalloz Publishing House, Paris, mars 2011, p. 259.

subrogation, “The role of real subrogation is to ensure the survival of common goods until the liquidation. In lack of such a mechanism, common goods will exit the community, as, after the divorce, the presumption of community of goods ends for the goods acquired after this date, at which time they become the exclusive property of the spouse who acquired it.”¹⁸ If the money which resulted from selling a common goods are used by the spouses to acquire a new good, we believe that, based on the same subrogation, the new good will have the same legal regime of common good.

In regard to the fruit of common goods which arise from the post-marriage time, these will also be considered common goods and will naturally enter the mass of common goods.

The common goods of the spouses, which form the common active, correspond to the the common debt of the spouses, which form the common passive. In order for the debt to be subject to liquidation, it needs to meet both following conditions:

- it must be a common debt; according to article 351 of the Civil Code, the spouses are commonly liable for: obligations arising from conservation, administration or acquiring common goods; obligation contracted in common; obligations contracted by either spouse for the usual expenses of marriage; repairing the prejudice caused by one of the spouses while acquiring a good which belonged to a third party, to the extent in which it increases the mass of common goods of the spouses.

- they must not be paid at the time community ended.

As previously shown, the mass of common goods continues to exist even after the matrimonial regime ends. The transformation which might occur on the mass of common goods can pertain not only to the common active, but also the common passive. Thus, we point out, as an example, the fact that the managing of the common goods mass can generate expenses in the form of common debt, such as expenses made for the administration and preservation of common goods, payment of financial taxes and so on.

As a consequence, the debt which exists at the time the matrimonial regime ends will be completed with the debt of the post-marriage community, generated by the managing of this community of goods.

Thus, the operation of liquidating common goods is not as simple as it seems and, when determining if a certain good is common or owned exclusively, one must not consider only the time when the matrimonial regime ended, but also a series of subsequent factors which influence the mass of common goods.

The second stage of liquidation is establishing the contribution of each spouse in acquiring common goods and contracting common debt. In doing so, we must consider the provisions of article 357 second alignment second thesis of the Civil Code, according to which, until proven otherwise, it is presumed that the spouses had equal contribution. Thus, in the vision of the Civil Code, the contribution of each spouse is believed to be equal; however, this presumption is relative and simple and, as a consequence, can be overturned by contrary evidence. The task of proving such a situation belongs to the spouse who claims unequal contribution in acquiring common goods¹⁹. In case liquidation occurs by notary procedure, namely an amicable procedure, non-contentious, the spouses establish their contribution, by mutual agreement. They can choose to declare equal contribution or a larger contribution by one spouse; in this case, as there is a mutual agreement by the spouses, proof is no longer necessary. We believe it is not possible to declare a 100% contribution for one of the spouses and 0% contribution for the other spouse, as judicial practice stated that housework or raising and educating children is considered contribution in acquiring common goods²⁰.

Following these two steps, the common property of the spouses is transformed in shared common property, as each spouse owns in accordance with its contribution in acquiring the goods.

¹⁸ M. Avram, *Civil law, Family, op cit.*, p. 313.

¹⁹ The High Court, 1st Civil Chamber, March 20th, 2019, 18-14.571, Unpublished, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000038322271>, accessed on 21.03.2021.

²⁰ Bistrita county, civil decision no 2672/2010 available at <http://portal.just.ro/190/Lists/Jurisprudenta/DispForm.aspx?ID=10>, accessed on 25.04.2021.

The part of each spouse will be identical for each good of the community mass.

Liquidation can be followed by settlement or not; choosing whether to complete the settlement or not is exclusively the option of the parties. This is why, we believe that the phrasing the lawmaker used in article 357 first alignment of the Civil Code is improper. Settlement is essentially different from liquidation by the fact that it occurs after liquidation and it depends on the operation of liquidation. As an exception, in case settlement occurs during marriage, the liquidation of the matrimonial regime is not necessary as it does not end once the settlement is complete. Also, the settlement results in termination of the co ownership and is not mandatory, whereas liquidation transforms the mutual property of the spouses in shared ownership and is of mandatory character, as we are about to show in the following section.

The regime of legal community is regulated as a legal matrimonial regime in states such as Italy, Hungary, Belgium, Croatia, thus, in these states, liquidation operates in the same manner. The French Civil Code regulates some extremely detailed and precise rules for liquidation, in articles 1467 – 1480²¹. French law acknowledges the regime of community in regard to acquisitions as a legal regime and that is why liquidation entails another mandatory step, namely adding the rewards which community owes to either spouse or the rewards the spouses owe to the community. In case one of the spouses owes, his due part will be reduced accordingly and the other spouse's contribution will be increased. In case the community owes one of the spouses, he will be able to choose whether to take over common goods to the extent of the amount due or to require a money payment.

3. The liquidation of the matrimonial regime is a mandatory operation

Article 320 of the Civil Code states that, in case of end or change, the matrimonial regime is liquidated, according to the law, by mutual agreement, or in lack of an agreement, by judicial means.

Marriage represents the basis of the matrimonial regime, as there is no marriage without a matrimonial regime²². As a consequence, the matrimonial regime lasts from the time the marriage is concluded until it ends or until the matrimonial regime is changed, in accordance with the law.

The termination of a marriage can occur by: the death of one or both spouses; divorce; voiding the marriage; annulling the marriage.

In case marriage ends by the death of one of the spouses, the liquidation of the matrimonial regime will occur within the notary successor procedure. The act of liquidation will be concluded between the surviving spouse and the heirs of the deceased spouse which can and want to inherit.

In this case, the act of liquidation will be concluded in the form of a convention, mandatory to be concluded in authentic form. If the surviving spouse is the only heir, he will be the one who establishes the mass of common goods and own goods. In this case, the act of liquidation will have the form of a unilateral act. In case of death of both spouses, liquidation will be performed by their heirs, based on unanimous agreement. The liquidation of the matrimonial regime is necessary in order to establish the successor mass of the deceased. As no one is forced to accept the inheritance he is entitled to, we can conclude that liquidation will be mandatory only if the heirs choose to inherit. If they refuse to inherit, the liquidation of the matrimonial regime can't occur. As a consequence, the matrimonial regime will continue to exist.

In case the dissolution of marriage occurs by divorce, the spouses can choose to liquidate the matrimonial regime or not.

In case the spouses divorce by legal procedure before the court of law and choose to liquidate the matrimonial regime, we believe that the act of liquidation can be concluded at the time the divorce is final. We believe this is the case as, according to the provisions of article 385 of the Civil Code which states that, in case of divorce, the matrimonial regime ends at the time the request for divorce is filed, this is the only valid interpretation, as a final divorce decision leads to the termination of the

²¹ Available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF accessed on 24.04.2021.

²² M. Avram, *General issues regarding the matrimonial regimes*, „Curierul Judiciar” no. 11/2005, p. 83.

matrimonial regime, with retroactive effect from the time the request for divorce was filed.

By exception, if the spouses decide that, during the time divorce was filed and the time when it is finalized, they will liquidate the community of goods, we believe, along with other authors²³, that it will be affected by the rejection of the divorce request. We must also state that, in our opinion, there is no risk of the spouses being with no martial regime between the time divorce is filed and the time it is finalized. As a consequence, in case during the legal procedure, the spouses reconcile, they would continue to hold the same matrimonial regime which governed the effects of their marriage at the time the request for divorce was filed and which, in our opinion, never ended²⁴.

In case they choose to not liquidate the matrimonial regime, it will continue to exist and the spouses will continue to hold shared ownership over the common goods. This is a post-marriage community which will continue to exist until the liquidation is finalized, both in regard to goods and in regard to debt²⁵.

This solution is legally regulated in the content of article 355 second alignment of the Civil Code. Thus, the heirs will have to liquidate the matrimonial regime on the occasion of the successor procedure, by observing the previously stated rules. The same rules will apply to putative marriage.

The annulment or voiding of a marriage causes retroactive effects from the time the marriage was concluded. As it is considered that the spouses were never married, the matrimonial regime, whether legal or conventional, is believed to never have existed, which entails the fact that the spouses were not able to acquire common goods. If, by the time annulment is declared, the spouses acquired certain goods, the provisions of shared ownership will apply. Until proven otherwise, it is presumed that the spouses' contribution is equal.

As a consequence, in case of annulment or voiding of marriage, there is only a matter of a *de facto* liquidation of the matrimonial regime and not a *de iure* liquidation²⁶, as there is no mass of common goods which needs to be liquidated.

By concluding on the previous statements, we conclude that the liquidation of the matrimonial regime is a mandatory operation in case the marriage ends by death or by divorce; however, the time of liquidation is up to the parties (spouses or heirs).

As previously shown, the matrimonial regime can only end once the marriage ends, but also at the time the parties decide to change it. According to article 369 of the Civil Code, after at least a year passes from the time the marriage was concluded, the spouses can, whenever they wish to do so, to change the matrimonial regime by observing the conditions stated by law for the conclusion of a matrimonial convention. We notice the lawmaker is inconsistent, as in article 320 of the Civil Code, he speaks about the change of the matrimonial regime while in article 369 of the Civil Code he mentions the modification of the matrimonial regime.

By interpreting these legal provisions, we can deduce that the parties have two legal possibilities:

- to replace a matrimonial regime
- to change the existing matrimonial regime

Replacing the matrimonial regime entails the fact that the spouses are granted the legally acknowledged possibility of abandoning the matrimonial regime which governs marriage and to choose, by matrimonial convention, one of the conventional regimes regulated by law.

The changing of the matrimonial regime entails the maintaining of the conventional regime which governs the effects of marriage, but with adopting new clauses compatible with the same regime.

Thus, arises the question of whether all matrimonial regimes can be changed without being

²³ I. Popa, *The termination of the matrimonial regime according to the Civil Code*, in Public Notaries Bulletin year XXIV no 4/20021, available at <https://buletinulnotarilor.ro/incetarea-regimului-matrimonial-potrivit-codului-civil/>, accessed on 25.04.2021.

²⁴ For contrary opinion, see E. Florian, *Family law*, C.H. Beck Publishing House, Bucharest, 2011, p. 131.

²⁵ M. Avram, *Civil law, Family, op cit.*, p. 312.

²⁶ A.A. Banciu, *Patrimonial relations between spouses according to the new Civil Code*, Hamangiu Publishing House, Bucharest, 2011, p. 118.

replaced.

According to the provisions of article 339 of the Civil Code, the goods acquired during the legal community regime by each spouse are, from the time they were acquired, common goods of the spouses. The spouses do not have the freedom to change the legal regime of the goods as they desire, as any change leads to the change of the legal matrimonial regime into a conventional one.

Within the regime of conventional community of goods, the spouses have the possibility to establish the extension or restriction of the mass of common goods. In regard to common debt, they too can be expanded or restricted in agreement with the will of the parties. As a consequence, the spouses already married under the regime of conventional community have the possibility to change certain aspects of this regime, by introducing own goods in the common goods mass, by excluding goods from the community, by adopting clauses regarding the choice of common residence, by adopting a *preciput* clause, without causing the replacement of the matrimonial regime of conventional community with another regime. The situation is similar in case of the other conventional matrimonial regimes.

As a consequence, we appreciate that the change of the matrimonial regime is only possible in case of conventional regimes and not in case of the regime of legal community.

Thus, we ask the question of whether liquidation is a mandatory operation in all cases. By seeing what the replacement of the matrimonial regime entails, on one hand, and the change of the matrimonial regime on the other hand, according to those previously stated, we believe that liquidation is only mandatory when the matrimonial regime is replaced, not when it is changed.

As a conclusion, when the parties choose to replace the matrimonial regime which applies to their marriage, they must first liquidate the previous matrimonial regime. In this case, liquidation appears as a mandatory operation for the spouses and the time when it will occur coincides with the choice of the new regime.

From the content of the same article 320 of the Civil Code, we can draw another conclusion: *liquidation is not possible without the end or the change of the matrimonial regime.* In other words, the spouses can't decide to liquidate the community of goods in other cases than those expressly regulated by law, as any act concluded without observing these rules is subject to annulment.

4. The notary liquidation of the matrimonial regime

According to the provisions of article 320 and 355 of the Civil Code, liquidation can occur by authentic notary act or by court decision.

Liquidation by authentic notary act is possible if the following conditions are all met:

- the parties agree in regard to the liquidation of the matrimonial regime. Depending on the time when the liquidation of the matrimonial regime occurs, the parties of the agreement will be either the spouses or their heirs;

- the parties agree in regard to the liquidation of the matrimonial regime by notary procedure. In order for liquidation to occur by notary procedure, all parties must agree and be present before the public notary in person or by an especially empowered person. Thus, it is recommended that the act of empowerment also contains the contribution of that certain party, as determined by the empowering party;

- the parties agree in regard to the public notary who will authenticate the act of liquidation. In regard to this issue, we must state that the public notary will not be held by the rules of material competence when he authenticates the act of liquidation, except for the case in which liquidation occurs at the same time as divorce or within a succession procedure, in which case the provisions of article 15 of Law no 36/1995 regarding public notaries and notary activity, republished²⁷ will apply;

- the parties agree in regard to the composition of the community. The parties must agree in regard to the quality of common goods and common debt, but also in regard to the goods and debts

²⁷ Published in the Official Bulletin no. 237 of March 19, 2018.

which will be subject to liquidation. Thus, in case the parties do not declare, on the occasion of liquidation, all common goods and common debts, the ones which are undeclared will remain in the post-marriage community which can be liquidated at a subsequent time, by an additional act to the initial act of liquidation;

- the parties agree in regard to each one's contribution in acquiring common goods and contracting common debt. "The community of goods, by its nature, implies co ownership by the spouses over an universality of goods, not every good in particular or every immobile and mobile good that is found in the community. Thus, the contribution of each party is established in regard to the universality of common goods and not particular for every specific good or category of goods"²⁸. As the lawmaker establishes a mere relative presumption of equal contribution, the parties are free to establish the contribution of each spouse. The notary procedure is a graceful procedure, non-contentious, as the public notary will not request the parties to prove the contribution they declare.

In regard to the contribution of each spouse, we must state the following aspects:

- the contribution of each spouse will be the same for each good and for every common debt. Thus, the parties can't declare different contribution for certain goods or debts which are subject to liquidation;

- the contribution of each spouse will be the same in regard to the acquiring of common goods and in regard to contracting common debt. Thus, the parties will not be able to declare a larger contribution by one of the spouses in acquiring common goods and a smaller contribution of the same spouse in contracting debt;

- in case the parties have, intentionally or not, left out certain common goods or common debt and they conclude an additional act to the act of liquidation, the additional act will contain mentions regarding the completion of the mass of goods, as the contribution initially declared when the act liquidation act was concluded, can't be changed.

As we have previously shown, liquidation is mandatory when the matrimonial regime is replaced. Thus, along with the conclusion of the matrimonial convention, the spouses will have to liquidate the previous regime, namely, to declare the common goods and debts, as well as each spouses' contribution in acquiring those goods. Considering the fact that the matrimonial regime continues to exist throughout the marriage and the fact that there is no marriage without a matrimonial regime, from a procedural point of view, we believe that the act of liquidation must have an authentication number subsequent to the matrimonial convention, so as the spouses are not left without a matrimonial regime at any time²⁹.

In case the spouses change their matrimonial regime under the conditions of law several times during marriage, than they will have to conclude a liquidation act each time. As the material situation of the spouses can change in time, they will have the possibility to declare different contribution in acquiring common goods and contracting common debt on the occasion of each liquidation act; we must mention that the liquidation act will only contain the goods acquired under the regime which is liquidated. As a consequence, the situation in which both spouses declare different contribution in acquiring the same good is not possible. Disrespecting the obligation to liquidate would entail the impossibility to take over and divide the goods, as the nature and contribution of each spouse would be unknown.

The result of the spouses' agreement in regard to all these aspects is contained in the act of liquidation.

The act of liquidation must be concluded in authentic form, as the sanction is annulment. The authentic form is mandatory as stated by law because it allows for control and verification of the will of the parties and counseling from the public notary. Thus, Law no. 36/1995 of public notaries and

²⁸ TS, s. civ., dec. no 326/1984, in CD 1984, p. 142 ; in the same manner, Decision no 104/R/25.10.2017 of Targu Mureş Appeal Court, available at <http://portal.just.ro/96/Lists/Jurisprudenta/DispForm.aspx?ID=223>, accessed on 24.04.2021.

²⁹ For contrary opinion, namely that the act of liquidation is concluded first and then the matrimonial convention, see V. Stoica, G. Dumitrache, *Theoretical and practical aspects regarding the matrimonial convention between spouses*, in „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 2, December 2017, p. 184.

notary activity expressly states that the public notary must find out the specific relation between the parties in regard to the act they want to conclude, to verify if their purpose is in accordance with the law and provide necessary guidance in regard to the legal effects of the act; in order to prevent litigation, public notaries must verify that the act they conclude does not contain provision which are contrary to the law and good ethics, to demand and provide clarification to the parties in regard to the content of the act in order to form the belief that the parties understood the meaning of the act and accepted its effects.

In regard to the content of the act of liquidation, it will contain mentions regarding the parties and their quality; the object of the act, namely the parties' declaration in regard to own debt of each spouse as well as the co-owned common goods; the parties' declaration in regard the each spouses' contribution in acquiring common goods and contracting common debt; the mention regarding the transformation of co ownership in shared co ownership; mentions regarding the publicity of the act of liquidation and the number of copies drafted, as well as the signatures of all parties.

From a procedural point of view, as previously shown, the act of liquidation will receive a number from the General Notary register, subsequent to the matrimonial convention, in case liquidation occurs at the same time with the change of the matrimonial regime.

In order to become known to third parties, it will be communicated to the National Notary Register for Matrimonial Regimes. Either party will be able to perform the formalities for registration in the Immobile Publicity and Cadaster Registry for immobile goods or the Electronic Archive of Mobile Guarantees in case of mobile goods.

In case the parties can't reach an agreement in regard to all previously mentioned matters, they will have to solve the matter in a court of law.

The advantages of liquidating a matrimonial regime by notary procedure are obvious: it saves time, as the parties only have to be present before the public notary once when the act is concluded; it saves money as the act will not be charged in accordance with the value of the mass of goods, but with a fixed fee; it saves effort, as the parties are not held to prove their demands.

5. Conclusion

Based on this study, we can conclude that liquidation is a mandatory operation in all cases; the time when liquidation operates is left at the will of the parties. It ends the common co ownership over the spouses' goods, thus turning it into shared co ownership.

Liquidation is not to be confused with settlement, which is an operation subsequent to liquidation, not mandatory and which transforms shared co ownership in exclusive property of each spouse.

The liquidation of the matrimonial regime by notary procedure appears to be the most advantageous as it saves time, money and effort for the parties, which are not held to prove their contribution. However, this is possible only if the parties agree in regard to all aspects.

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