

Theoretical and practical aspects regarding the matrimonial convention between spouses

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Abstract

By way of the present study, the authors have proposed to analyze the matrimonial convention between spouses, both from the perspective of theoretical considerations, as well as from the point of view of the notary practice. The writing pursues to display the organizational possibilities of the pecuniary aspects of marriage in the current economic context, grafted by the variety of marital situations. The study identifies the elements which can influence spouses' preference towards a certain matrimonial regime, and highlights the role of the public notary in the arrangement of the chosen matrimonial regime. The piece of work emphasizes the particularities of national law in the matter of matrimonial convention, in the light of the pithy French influence, and presents the advanced solutions in the French doctrine that can superpose the theoretical disputes born in the Romanian doctrine. The authors have recourse to use the systemic method through which it was intended to analyze the institution of the matrimonial convention by reference to practical solutions (empirical observations) adopted by the public notary at the instrumentation of a matrimonial convention. Our concise presentation may constitute a starting point for the future spouses/spouses looking forward to adopt a matrimonial technique, transposed into the pattern of matrimonial convention, to reflect as faithfully as possible the patrimonial relations between spouses, and also between them and third parties.

Keywords: spouses, the choice of matrimonial regime, the authentication of the matrimonial convention, the precipice clause.

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1. Introductory considerations

The Romanian Civil Code which came into force on the first of October 2011 has generated a revival of the notarial activity. Thereby, amongst the new powers given to the notary by the new Civil Code's legislator, we mention the authentication of the matrimonial conventions between future spouses, either spouses³.

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³ The Romanian law has configured the matter of matrimonial regimes after a pregnant French influence.

We note that the art. 312 Civil Code⁴ consecrates the principle of freedom of choice of the matrimonial regime by the future spouses, with the specification that their freedom is relative, which means that they are able to determine whether they choose a conventional regime or not. By choosing a conventional regime, the future spouses are shown two options: the regime of the separation of goods, either the one based on conventional community. Regardless of the chosen conventional regime, the clauses which will mandatorily customize the regime have to circumscribe to the imperative rules which contour the primary regime regarding the basic pecuniary statute incident to any marriage⁵.

In other words, if the future spouses' preference aspires towards a conventional regime, they have to sign a matrimonial convention⁶ authenticated by the public notary.

We notice that the principle of freedom of matrimonial conventions reinstated by the Civil Code applies to every marriage, even to the ones concluded before the first of October 2011. Therefore, the spouses can change their existent matrimonial regime with a conventional matrimonial regime whenever they want to, but with the compliance of the legal norms that govern the matter of matrimonial conventions⁷.

We remark that the Romanian legislator has adopted the rule of the mutability of the matrimonial regime⁸ by the art. 369 par. 1 Civil Code, which stipulates: "After at least one year of marriage, the spouses, as many times as they want, are able to change the existent matrimonial regime with another matrimonial regime, or to modify it, with the compliance of the conditions provided by the law for concluding the matrimonial conventions."

Consequently, the choice of the matrimonial regime before marriage, as well as the modification or the changing of the matrimonial regime while married is concretized by the spouses' matrimonial convention authenticated by the public notary.

Starting from the opinion of the author of French law Bernard Beignier, according to which "the marriage itself is an advantage and necessarily, the idea of

⁴ "The matrimonial regimes (1) The future spouses can choose as matrimonial regime: the legal community, the separation of goods or the conventional community. (2) Regardless of the chosen matrimonial regime, one can not derogate from the stipulations of the present section unless otherwise provided by law."

⁵ For details see Emese Florian, *Matrimonial regimes*, Publishing House C.H.Beck, Bucharest, 2015, pg. 1-8.

⁶ According to art. 329 Civil Code: "The choosing of another matrimonial regime than the one of legal community is made by concluding a matrimonial convention."

⁷ In the light of the art. 37 of Law no. 71/2011 on the implementation of Law no. 287/2009 regarding the Civil Code, corroborated with art. 369 Civil Code.

⁸ The comparative law signals the predominance of the mutable matrimonial regimes. As an example, France allows the modification/changing of the matrimonial regime in the interests of family every two years by drawing up by the French notary of an authentic act.

a community leads to the favoring of one of the spouses”⁹, we can contour the possible situations that have arisen in practice and we can establish the “personalized” framework of the pecuniary relations between partners.

As an example we present the next cause: a man of advanced age and a special financial situation marries a youngster who has a insignificant financial state. Which is the matrimonial regime which corresponds the best with the pecuniary interests of the spouses and which are the pertinent clauses that will be inserted in the matrimonial convention authenticated by the public notary? Mostly, the spouses in such marital conjunction will opt for the regime of conventional community, and the matrimonial convention which they will conclude will contain the next clauses:

- the spouses understand to choose the extended community of goods in accordance with art. 367 lit. a) Civil Code;
- in case of husbands’ death, the surviving wife will be able to take over without payment and prior to the partition of the inheritance of the deceased husband certain common goods from their common property, respectively a vacation house, a luxury car and important sums of money in bank accounts;
- the sharing of common goods in case of community liquidation will be realized taking into account the quotas established by the spouses: the husband 1/4, the wife 3/4.

If the husband’s death is produced, we can see that by the matrimonial convention the wife has been favored by concluding the extended community of goods itself, by stipulating the precipice clause (in the absence of which the enlisted goods would enter the deceased husband’s estate) and also by the insertion of the clause of unequal partition.

In order to elaborate the matrimonial regime of the spouses from the prior presented situation, we will analyze the matrimonial convention by emphasizing the specific elements regarding its validity conditions, we will treat the object of the matrimonial convention referring to the elements that can influence the choosing of the spouses of a certain matrimonial regime and we will detail the precipice clause that can be stipulated in a matrimonial convention.

2. The definition, the subject matter establishment and the principles that govern the matrimonial convention

The matrimonial convention represents the legal act by which the future spouses, or, by case, the spouses choose and, in the limits provided by law, they arrange their own matrimonial regime.

⁹ See Cristina Nicolescu “*Correlations between specific rules of the matrimonial regimes and the ones of succession law in the system of the Romanian Civil Code*”, in Mircea Dan Bob (coordination), *The evolution of the notion of family and its influence on the legal succession order*, Publishing House Official Monitor, Bucharest, 2013, pg. 9.

The subject matter establishment is given by the stipulations of art.329-338 Civil Code which are found in the economy of the rules destined for the matrimonial regime.

As a rule, the matrimonial convention is concluded by the future spouses, respectively before marriage, but it only produces legal effects from the date of the marriage (art. 330 par. 3 Civil Code).

The Romanian legislator consecrates the principle of freedom of matrimonial convention in the light of some practical rations: in the current economic context, the variety of the conjugal situations from the perspective of the pecuniary interests that guides the future spouses/ the spouses requires consecration of their possibility to organize in the most proper way the framework of pecuniary relations.

We notice that if there is no matrimonial convention concluded (or it is null/canceled), it does not mean that the spouses are deprived of a matrimonial regime, but to them is applicable the common law regime, of community of goods¹⁰.

Another principle that governs the matrimonial convention is the one of accesoriality, according to whom the matrimonial convention produces legal effects only on the background of the parties' marriage. Therefore, if the parties disclaim the marriage the matrimonial convention becomes caducous.

The doctrine¹¹ has retained the following legal characters of the matrimonial convention:

- the personal character, which issues from the *intuitu-personae* character of the act of marriage. However, being a pecuniary legal act, in opposition with marriage, the matrimonial convention can be concluded not only personally by the future spouses, or, by the spouses, but either by mandatory who has a special, authentic, with predetermined content power of attorney (art. 330 par.1 Civil Code);

- a special causative act, the matrimonial convention being animated by *affectio conjugalis*, respectively by being in the service of marriage;

- the complex character, constituting a true body of rules afferent to the pecuniary relations between spouses, and also between them and third parties;

- the solemn character; "under the sanction of the absolute nullity, the matrimonial convention is concluded by certificate authenticated by the public notary" (art. 330 par. 1 Civil Code). The notarial authentic form is needed as an *ad validitatem* condition;

- the public character, in purpose of opposability to third parties, the matrimonial convention is a subject to the formalities of registration in the National notarial register of matrimonial regime (art. 334 par. 1 Civil Code). The non-fulfilment of these publicity formalities has as consequence the consideration of

¹⁰ According to art. 338 Civil Code: "If the matrimonial convention is null or canceled, between spouses is applied the legal community regime, without prejudice to the rights of third parties in good faith".

¹¹ See Emese Florin, *op. cit.*, pg. 61-62.

spouses, in relation to third parties of good faith, as being married under the legal community of goods regime.

3. The conditions of validity concerning the matrimonial convention

In this point of the study we are interested in the elements of specificity referring to the conditions of validity of the matrimonial convention without insisting on the ones from the common law regarding the conditions in general, stipulated by the art. 1179 Civil Code¹² and which are also applicable to the matrimonial convention.

We emphasize the fact that in the matter is incident the rule according to which whoever can validly conclude a marriage, is also able to validly conclude a matrimonial convention¹³.

Firstly, is of interest the capacity of concluding a matrimonial convention before marriage. By establishing the legal nature of the matrimonial convention as being a disposition act, we appreciate that the ones that can validly conclude matrimonial conventions are the following categories of persons:

- the person who is 18 years old;
- the minor who is 16 years old and has acquired anticipated exercise capacity¹⁴, including the minor who has acquired through marriage full exercise capacity¹⁵.

In accordance with the stipulations of the art. 337 par. 1 Civil Code: "The minor who has gained the matrimonial age can conclude or modify a matrimonial convention only with the approval of the legal upholder and with the authorization of the family court." We remark that the moment of acquiring the capacity in the

¹² "(1) The essential conditions for the validity of a contract are:

1. The capacity to contract
2. The consent of the parties
3. A determined and licit object
4. A moral and licit cause.

(2) As far as the law provides a certain form of the contract, it must be respected, under the sanction provided by the applicable legal stipulations."

¹³ "Habilis ad nuptias, habilis ad pacta nuptialia."

¹⁴ According to the art. 40 Civil Code: "For solid reasons, the family court can recognize to the minor who is 16 years old the full exercise capacity. By this mean, will be listened the parents or the tutor of the minor, taking, when it is needed, the notice of the family council."

¹⁵ According to the art. 39 Civil Code:

- (1) The minor requires, through marriage, the full exercise capacity.
- (2) If the marriage is canceled, the minor who has been of good faith at the closure of the marriage keeps the full exercise capacity." corroborated with the art. 272 par. 2 Civil Code: (2) For solid reasons, the minor who is 16 years old can be married on the basis of a medical notification, with the approval of parents or, as the case, of the tutor and with the authorization of the family court in whose area the minor has the domicile. If one of the parents refuses to approve the marriage, the family court decides on this divergence, considering the superior interest of the child."

matter coincides with the moment of acquiring the matrimonial capacity, thus at the age of 16.

From the redaction of the art. 337 par. 1 Civil Code we state that the legislator does not mention neither the required form, nor the moment when the parents' or others' legal upholder approval can be expressed¹⁶. We appreciate that the minor's necessary approval can be submitted in a special authentic act, expressed before the moment of concluding/modifying the matrimonial convention, ration based on the general norm of the art. 41 par. 2 2nd sentence Civil Code which states that: "The approval or the authorization can be given, at the latest, in the moment of the act's closure."

The minor who has acquired anticipated exercise capacity in the conditions of the art. 40 Civil Code is considered to have full capacity to contract and, therefore, is able to conclude the matrimonial convention by himself/herself.

The sanction that intervenes in the hypothesis that the special conditions of approval and authorization of the act of a 16 years old minor are not respected is the relative nullity, and the action for annulment may be brought within one year from the date of the marriage (art. 337 par. 3 Civile Code).

The married minor who acquires full exercise capacity through marriage, can conclude the matrimonial convention by himself/herself, without the approval of the parents and without family court's authorization.

A particularity of the parties' consent expressed at the closure of a matrimonial convention resides in the fact that it can be perfected either personal, as well as by the instrumentality of a mandatory, who presents an authentic and with predetermined content power of attorney, in contrast to the marriage which requires at its closure, in all cases, the personal consent of future spouses.

The object of the matrimonial convention is represented by the establishment of the matrimonial regime which the spouses intend to adopt in the organization of the pecuniary relations between them.

From a practical point of view, the spouses' choice of an other matrimonial regime than the one of legal community implies the realization of two legal operations: the option regarding the matrimonial regime; the organization of the chosen regime.

The spouses can concretely choose the instauration of a community regime or of a separatist regime. The ration underlying this option is based on the common interest of the spouses, but also on the interest of each of them. As example we mention some elements that can influence spouses' choice towards a certain matrimonial regime:

- spouses' age and the eventual age difference between them;
- the existence of children of one partner from a former marriage, from outside the marriage or as a result of adoption;

¹⁶ See Emese Florian, *op. cit.*, pg. 63.

- obligations from previous marriages¹⁷;
- pecuniary or/and income discrepancy(ies) between spouses;
- a profession that implies financial risks.

The second legal operation, respectively the organization of the chosen matrimonial regime, is a complex phase which requires increased attention. The elaboration of the matrimonial regime involves the support of the public notary who, with mastery, surprises as faithful as possible the pecuniary relations between spouses and will be transposing them into the clauses of the matrimonial convention.

If the spouses have opted for the conventional community regime, the derogatory clauses of the common law regime of the community circumscribe to the enumeration contained in the art. 367 Civil Code¹⁸ and they regard the following aspects:

- the extension of the community of goods by including in the community certain personal goods/debts;
- the diminution of the community by strict reference to the goods/debts determined by the spouses;
- the extension of the common administration rule of spouses concerning the mass of common goods and the regulation of the exceptional situations;
- the possibility of inserting the precipice clause;
- the conventional community's liquidation methods.

In order to present the spouses' motivation in choosing the conventional community regime, we emphasize as an example the next situation frequently met in the notarial practice: the spouses are married under the legal community of

¹⁷ We take into account the compensatory performance which is indebted to the former partner in accordance with the stipulations of the art. 390 Civil Code:

- (1) If the divorce is pronounced for the exclusive fault of the defendant partner, the complainant partner can benefit of a performance to compensate, as much as possible, a significant imbalance which the divorce would determine in the life conditions of the one who solicits it.
- (2) The compensatory performance can only be given if the marriage lasted at least 20 years.
- (3) The partner who solicits the compensatory performance can not ask from the former spouse alimony, according to the art. 389."

¹⁸ "If the conventional community is adopted, the matrimonial convention can refer to one or many of the following aspects:

- a) The inclusion in the community, totally or partially, of the acquired goods or the personal debts born before or after marriage, except the goods provided by art. 340 letter b) and c);
- b) The restraint of the community to the goods or debts certainly determined in the matrimonial convention, regardless they are provided, or, as case, born before or after marriage, except the obligations stipulated in art. 351 letter c);
- c) The spouses' agreement compulsoriness for the closure of certain administration acts; in this case, if for one of the spouses is impossible to express her/his will or is abusively opposing, the other one can conclude the act himself/herself, but only with the preliminary approval of the family court;
- d) The inclusion of the precipice clause; the execution of the precipice clause is done in nature or, if not possible, by equivalent of the net asset value of community;
- e) Methods regarding the conventional community's liquidation."

goods regime and the husband inherits an immobile on which improvement have been made during the marriage. Which is the legal formula for the immobile to be included in the community? The answer to this question indicates the crossing of the following phases:

- firstly, they proceed to the cessation of the legal community of goods based on the art. 357 Civil Code¹⁹, and in the liquidation act authenticated by the public notary, amongst husband's personal goods will be indicated even the immobile inherited by him, on which improvements have been made during the marriage, with the establishment of the wife's right of claim;
- afterwards, the notary will authenticate a matrimonial convention by which the spouses choose the conventional community regime and which will mention that the inclusion in the community of this immobile has had as purpose the wife's right of claim extinction. Furthermore, in wife's favor can be stipulated a precipice clause, by fulfilling the condition of the spouses' co-property regarding the immobile, as the art. 333 Civil Code provides. Thus, the wife is assured, if she survives, the advantage of taking over the immobile without payment and before the deceased husband's division of inheritance.

In the hypothesis of which the spouses have chosen the separation of goods regime, we notice the missing of a community mass with the consequence of an increased pecuniary independence of the spouses²⁰. The matrimonial convention's specific which reflects the separatist type of regime resides in the clauses concerning the liquidation of this regime according to the acquisitioned mass of goods by each partner during marriage (art. 360 par. 2 Civil Code).

The separation of goods regime is advisable to spouses in case of the existence of an economic equality between them, who join the marriage with relative equal fortunes and who confront with special matrimonial situations (for example: remarriage in case of children from a former marriage). The simplicity of this matrimonial regime liquidation is obvious and can prevent the succession disputes between the surviving partner and the children from the former marriage.

We remember that, no matter what the matrimonial regime the spouses have chosen, they can not establish rules which could affect their equality, the parental authority and neither the legal succession devolution rules, as provided by art. 323 par. 2 Civil Code. In addition, it is forbidden to derogate from the

¹⁹ "(1) In case of community liquidation, each of the spouses takes over his/her personal goods, afterward it will be proceeded to the division of common goods and the debts regularization.

(2) By this mean, it is firstly determined the quota of each partner, based on their contribution to the acquisition of common goods, either on fulfilling the common obligations. Until proven otherwise, it is presumed that the spouses had an equal contribution.

(3) The stipulations of the art. 364 par. (2) apply accordingly."

²⁰ According to the art. 360 par. 1 Civil Code: "Each one of the spouses is an exclusive owner regarding the acquired goods before marriage, as well as those acquired in personal name after this date."

imperative norms that contour the primary regime²¹, respectively the clauses by which it would be determined other contributing proportions of the marriage's expenditure than in relation to the means of each partner²². Thereby, according to the art. 325 par. 2 Civil Code, is considered unwritten any convention that provides that the bear of the marriage's costs exclusively devolves upon one of the spouses.

From the point of view of the form conditions, the matrimonial convention dressed the shape of an authenticated certificate by the public notary, under the sanction of absolute nullity, as provided by the art. 330 par. 1 Civil Code.

The matrimonial convention character of being a solemn legal act derives from its subordination to the marriage act, which is also solemn.

Which are the rations that determined the Civil Code's legislator to enact the authentic notarial form? It is obvious that the choosing of the matrimonial regime and its organization requires the offered assistance of spouses by a law professional in a complex problematic. Furthermore, the importance of the set of rules that arrange a pecuniary regime²³ imposes, in our opinion, the guarantee of an expression of high legal accuracy. The spouses' consent, either personal, or by special empowered mandatory at the conclusion of a matrimonial convention is attested by the public notary by the instrumentation of this authentic certificate and, consequently, the notarial act makes full proof until statement of forgery²⁴.

4. The precipice clause

4.1. Notion

The spouses can insert so called "precipice clause" at the closure of a matrimonial convention, institution of French inspiration stipulated by the art. 333 Civil Code: "(1) By matrimonial convention it can be stipulated for the surviving partner to take over without payment, before the inheritance's division, one or many of the common goods, owned in joint property or co-property."

²¹ Set of rules that apply to the pecuniary relations between spouses, and also to the relations between spouses and third parties, regardless of the certain matrimonial regime, that has as constitutive elements: the legal regime of family's residence (art. 321-324 Civil Code), the determination of each partner's contribution to the marriage costs (art. 325-328 Civil Code) the economic and social independence of spouses (art. 317, art. 327-328 Civil Code), spouses' "powers" of dosing" methods (art. 315-316 Civil Code).

²² For details see Emese Florian, *op. cit.*, pg. 66.

²³ Called "the pecuniary charter of household" by Fr. Terré, Ph. Simler, *Droit civil. Les régimes matrimoniaux*, 6e éd., Dalloz, Paris, 2011 *apud* Emese Florian, *op. cit.*, pg. 67, note 1.

²⁴ According to the art. 270 par. 1 Civil Procedure Code: "The authentic act makes full proof, to any person, until it is declared as false, regarding the personal ascertainments made by the one who authenticated the act, in law's conditions."

The doctrine²⁵ has retained that the precipice represents the possibility given to the spouses to constitute in the benefit of the surviving partner the right to collect, without counterperformance, before the division of the inheritance, one or many goods. In the precipice clause's absence, the quota of the defunct from those goods, together with the other goods of the succession mass, would have been constituted the shareable mass between the surviving partner and the others inheritors. Consequently, the precipice clause may be considered as a legal method to guarantee the preferential, free of charge, in nature assigning of some goods, extracted thus from the insecurity of the succession's division realized in nature.

This pecuniary advantage may be instituted in each partner's favor, or only in the benefit of one of them, as provided by the art. 333 par. 1 2nd sentence Civil Code.

Although the faculty of stipulating the precipice clause is expressly regulated only in the matter of conventional community in the art. 367 par. 1 letter d) Civil Code we opine, according to the doctrine in the matter²⁶, in the sense that this clause can be inserted even in a matrimonial convention through which the spouses adopt the separation of goods regime, in the light of the following considerations:

- the separation of goods regime generates the co-property state between spouses, so as stipulated by the art. 362 Civil Code²⁷ and, thus, the existence conditions of the precipice clause are fulfilled by the separatist regime that requires the closure of a matrimonial convention and the existence of co-property;
- from the redaction of the art. 333 Civil Code we understand the alternative character of this legal norm in the sense that the precipice clause refers to one or many goods, amongst the common goods in joint property or in co-property. However, it is known that the joint property is specific to the legal or conventional community, and the co-property is specific to the separation of goods regime.

To produce legal effects, it is imposed that, at the date of marriage's termination caused by the death of one partner, the precipice clause to exist, to not be revoked or disbanded by the spouses through a future matrimonial convention.

We appreciate that the ration of the establishment of a precipice clause in the content of a matrimonial convention through which the spouses adopt a conventional community consists in the assurance of an economic advantage to the surviving partner whose patrimony registers an enriching by taking over in the exclusive property, without payment, of one or some goods.

²⁵ Emese Florian, *op. cit.*, pg. 68; Ioan Popa, *The precipice clause, in Private Law Romanian Magazine no. 4/2011*, pg. 173; Cristina Nicolescu, *op. cit.*, pg. 20.

²⁶ See I. Popa, *op. cit.*, pg. 173.

²⁷ "(1) The goods commonly acquired by the spouses belong to them in quotas property, in law's conditions.

(2) Co-property proof is done according to the art. 361 Civil Code, which applies accordingly."

The death of the partner who is the disposer of the precipice clause is the only cause that determines the activation of the precipice clause whose beneficiary is only the surviving partner.

4.2. Object

As provided by the art. 333 par. 1 1st sentence Civil Code, the object of the precipice clause may be constituted only by the common goods in joint property or co-property. Therefore, the legal hypothesis excludes the common goods category of the predeceased partner that will totally enter the succession mass.

In the states' practice whose legislations consecrate the precipice clause, are frequent the situations where the precipice clause is instituted on the common residence and on the goods that furnish it, on a trade fund exploited by both the spouses, on bank accounts, and also on some goods that present sentimental value to the spouses. Furthermore, the precipice clause's object may be constituted by the usufruct of some incorporeal goods or by a quantity of goods generically determined (for example: household items, objects of intellectual use)²⁸.

We notice that a precipice clause does not affect in any way common creditors' rights to pursue the goods of the clause's object (art. 333 par. 3 Civil Code).

4.3. Effects

Certainly, the precipice clause generates legal effects from the inheritance's open date or, if it is a mutual character clause, at the date of the death of a spouse.

From a practical point of view, it has been ascertained that the precipice stipulation's role is the one to prevent the entering of the goods in the succession mass of the deceased partner.

The stipulation of precipice clause has as effects the completeness of the property right of the surviving partner who, until the date of the inheritance open has had the quality of a joint owner, or, as the case, of quotas owner.

The procedure to be followed at the activation of the precipice clause requires two stages:

- the surviving partner takes over the good/the certain stated goods without payment and before the deceased partner's inheritance division;
- if the spouses' matrimonial regime has been the one of conventional community it will be perfected by the public notary, in authentic form, the conventional community liquidation act signed by the surviving partner

²⁸ See Cristina Nicolescu, *op. cit.*, pg. 22-23.

and the others inheritors of the deceased partner²⁹. Thus, from a joint owner or quotas owner, the surviving partner becomes an exclusive owner of the goods who had formed the object of the precipice clause.

If the surviving partner discards the benefit of the precipice clause or, in its absence, the deceased partner's part of the joint property or of the quotas common property regarding same goods will be included in the succession mass which will be shared between inheritors (from the circle to which belongs even the surviving partner) following the succession's devolution rules.

In practice is advisable that the exercise of the precipice clause by the surviving partner to take place at the public notary noticed with the debating of the deceased partner's succession.

By stipulating that the precipice clause is a subject to reduction, not to donations' report when the available quotas are overtaken (art. 333 par. 2 Civil Code), the legislator had followed by means of this legal norm to assure the protection of the other inheritors' interests, especially the descendants' who are not common to the spouses. The solution adopted by the legislator of the Civil Code has been roughly criticized by the doctrine which considers improper the solution of submission of the precipice clause to the reduction of the excessive liberalities³⁰ and that the reduction of the precipice clause is a big error made by the Romanian legislator and, consequently, art. 333 par. 2 Civil Code should be abandoned as soon as possible³¹. *De lege ferenda*, it is imposed to trance this problematic, in our opinion being significant the purpose of the institution so as to be a protection instrument of the surviving partner which to guarantee the life standard's maintenance during marriage.

In a community type regime, the precipice clause is exercised only after the satisfaction of the common creditors (art. 367 letter d) Civil Code).

As a rule, the exercise of the precipice clause is done in nature by taking over the good owned by spouses in joint property or in co-property; if the exercise in nature is not possible, it is done by equivalent (art. 333 par. 5 Civil Code).

We emphasize that at the end of the marriage the surviving partner, beneficiary of the precipice clause may solicit the registration in the Land Registry of his/her property right so fulfilled, based on the matrimonial convention where the precipice clause is inserted. So, the precipice clause is opposable to the others inheritors of the deceased partner as an effect of the registration of the exclusive property right of the surviving partner in the Land Registry. *De lege lata*, as we

²⁹ Based on the art. 368 Civil Code: "If by matrimonial convention is not otherwise provided, the legal regime of the conventional community is to be completed with the legal stipulations regarding the legal community regime." reported to the art. 355 par. 3 1st sentence Civil Code: "When the community ceases by one of the spouses' death, the liquidation operates between the surviving partner and the inheritors of the deceased partner."

³⁰ See Marieta Avram, *Civil Law. The Family*, Publishing house Hamangiu, Bucharest, 2013, pg. 331.

³¹ For this argued conclusion see Dan Chirica, *Treatise of civil law. The succession and the liberalities*, Publishing House C.H.Beck, Bucharest, 2014, pg. 374-375.

have seen, the inheritors have the possibility to solicit the precipice clause's reduction which infringes the inheritance reserve.

Without entering the substance of the theoretical disputes regarding the legal nature of the precipice clause, we expose the advanced solution in the French doctrine, to which the majority of the Romanian doctrinaires have rallied: the precipice clause represents a matrimonial advantage, as a result of the matrimonial regime functioning³².

5. The publicity of the matrimonial convention

Any matrimonial convention, the one concluded before marriage, either the one concluded during marriage, requires publicity formalities, provide by the art. 334 Civil Code: "(1) To be opposable to third parties, the matrimonial conventions are registered to the National notarial register of matrimonial regimes, organized according to the law.

(2) After the authentication of the matrimonial convention during marriage or after receiving the copy of the marriage act, according to the art. 291 Civil Code, the public notary sends, ex officio, an exemplary of the convention to the civil status service where the celebration of the marriage took place, to be mentioned on the marriage act, to the register mentioned at par. (1), and also to the others publicity registers, in conditions of par. (4).

(3) The stipulations of par. (2) do not exclude each partner's right to solicit the fulfillment of the publicity formalities.

(4) Considering the goods' nature, the matrimonial conventions will be noted in the Land Register, will be registered in the Trade Register and also in others registers of publicity provided by law. In all these cases, the non-fulfillment of the special publicity formalities can not be covered by registration in the register mentioned at par. (1).

(5) Any person, without being held to justify any interest, can examine the register mentioned at par. (1) and can solicit, in the conditions of the law, the issue of certificated extracts"

A third party that joins a contractual relation with one of the partners is certainly interested if the concluded act rises a common debt of the spouses or a personal debt of the contractor spouse. The realization of the publicity formalities of the matrimonial convention has as finality the assurance of the security of the civil circuit.

From the redaction of the art. 334 Civil Code resides the distinction between general and special forms of publicity of the matrimonial convention.

From the general category of the publicity formalities we emphasize the following ones:

- the mention made by the civil state officer on the marriage act regarding the matrimonial regime chosen by the spouses (art. 291 Civil Code);

³² See Cristina Nicolescu, *op. cit.*, pg. 21-22 and Emese Florian, *op. cit.*, pg. 76.

- the registration of the matrimonial convention in the National notarial register of the matrimonial regimes by the public notary who authenticated it.

Even the cessation of the matrimonial regime by the effect of its dissolution (in the hypothesis of divorce, of a putative marriage or because of the death of a partner) is an aspect to bring to the public acquaintance.

The special forms of the matrimonial convention publicity regard the denotation in the Land Register, as provided by the art. 902 par. 2 Civil Code, of the common good quality of an immobile (point 3), the matrimonial convention, as its modification or, as the case, its substitution (point 4), the destination of a family immobile (point 5). These denotations in the Land Register have as purpose the information of the third parties that gained a real estate or another right in conjunction with the immobile registered in the Land Register (art. 902 par. 3 Civil Code).

Still in the special formalities category regarding the publicity we enclose the registration in the Trade Register specially instituted for professionals, based on the art. 21 letter d) from the Law no. 26/1990 concerning the Trade Register, republished³³ and modified by the Law no. 71/2011 for applying the Law no. 287/2009 regarding the Civil Code³⁴.

We note that, even if there had been strictly fulfilled all the publicity formalities, the matrimonial convention can not be opposed to third parties regarding their concluded acts with any of the partners before marriage (art. 335 par. 2 Civil Code). By this legal norm is realized the protection of the creditors who had been contracting before marriage with each of the spouses and who can forwards pursue the goods of the debtor partner, regardless the “prechanged” nature of them by the effect of the matrimonial convention.

6. Conclusions

This study is an instrument that is proposing to emphasize the pecuniary aspects of marriage by elaborating the matrimonial regime chosen by the spouses. The signing of a matrimonial convention coincides with the moment when the future husbands/wives ask themselves questions concerning the purpose of the marriage's closure, the professional perspectives of the spouses, their mutual feelings and, inevitably, the pecuniary situation of the surviving partner.

³³ In the Official Monitor no. 49/04.02.1998.

³⁴ The professional has the obligation to solicit the registration by mention, amongst others, “of the matrimonial convention, concluded before or during marriage, inclusively the modification of it, the judicial decision regarding the legal modification of the matrimonial regime, the action or the ascertainment decision or the nullity declaration of the marriage, the action or the ascertainment decision or the nullity declaration of the matrimonial convention, and also the action or the divorce decision pronounced during the exercise of the economic activity”, in maximum 15 days from the day of the acts/facts which are subject to the obligation of registration.

Without pretending to have been approached exhaustively the treated problem, the present writing may constitute a useful guide for the future husbands/wives regarding the adoption of a decision which implies the choosing of a conventional matrimonial regime. The practical landmarks that targets the matrimonial convention's conclusion, inserted in our scientific demarche, can prove their utility in spouses' decisional process.

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