

## **Field of exclusion of Regulation (EC) no. 593/2008 in the matter of the status and capacity of individuals, family relationships and property aspects of matrimonial regimes.**

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### **Abstracts**

*Conflicting rules regarding contractual obligations are settled by the Member States of the European Union through Regulation (EC) no. 593/2008 (Rome I). In Romanian law, the European norm is the common law in the matter, in this respect the Civil Code refers directly to the Regulation by the provisions of Art. No. 2640 par. (1) Civil Code.*

*In terms of material domain, the Regulation does not have global application. In addition to matters of public law, wholly removed from the application of the Regulation, Art. no. 1 par. (2) a) - j) and par. (3) expressly excludes certain matters of private law, restrainedly listed, among which including those relating to the status and legal capacity of natural persons, family relationships and property matters of matrimonial regimes.*

**Keywords:** *contractual obligations, conflict of laws, questions involving the status or legal capacity of natural persons, obligations arising out of family relationships, maintenance obligation, obligations arising out of matrimonial property regimes, property regimes, relationships to have comparable effects to marriage.*

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### **Introduction**

Regulation (EC) no. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) excludes from its domain of application certain matters of private law, which expressly refers to in Art. no. 1 par. (2) a) - j) and par. (3). The enumeration is restrained and impose a restrictive interpretation as an it is an exception to the application of the Regulation. In these matters, are also identified those on the status and capacity of natural persons, family relationships and aspects of matrimonial property regimes. These exclusions present a special problem for the European legislator who uses concepts that do not match perfectly, or even at all, to those apparently similar in national law and which inevitably raise questions of interpretation. This article aims to conduct a brief analysis, from both theoretical and

practical perspective, of the most relevant aspects of these three areas of exclusion of the Regulation listed in Art. no.1 par. (2) a) - c).

### **1. Status and capacity of natural persons**

The first exclusion from the domain of application of Regulation Rome I refers to matters involving the status or capacity of natural persons, without prejudice to Art. no. 13. According to Art. no.13:

"In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

Exclusion from the domain of application of the Regulation on state issues or capacity of natural persons is explained by the fact that, in most legal systems of the Member States, they are not traditionally considered as having a purely contractual nature[1]. As a result, the ability of a natural person to conclude a contract besides the domain of application of the Regulation, following to be determined in accordance with the legal system identified through private international law norms of the forum, subject to Art. no. 13 of the Regulation. Thus, for example, in our legal system, the capacity of a natural person is governed according to Art. No. 2572 Civil Code by its national law, unless special provisions provide otherwise, and special incapacities relating to a particular legal relationship, by the law governing that legal relationship.

It is noted that the Regulation does not define the phrase "aspects involving the status or legal capacity of natural persons" meaning that it would be useful to refer to the provisions of Art. 1 par. (1) pt. 2 lit. a) of the former Regulation (EC) no. 44/2001 [2] (preceded by the Brussels Convention and now replaced by Regulation (EU) no. 1215/2012, but still retains largely similar provisions), and has an exclusion in identical terms.

Art. no.13 of the Regulation brings under regulation an institution known in the specialized literature as "the theory of national interest".[3] The norm is an exception, meaning that application of the law to persons fully competent on the capacity of the natural person can be removed only if the following conditions are cumulatively met:

the contract should have been concluded between persons who are in the same country;

at least one party should be a natural person;

the person should have the legal capacity necessary to conclude the contract according to the law of the place of its conclusion (*lex loci contractus*) but have incapacity according to his country of residence law (*lex patriae*);

the contracting party should have acted in good - faith " at the time the contract was concluded" by failing to know or could not reasonably know (without negligence) the cause of the lack of validity of the contract consisting in incapacity of the foreigner, according to his country law.

The provisions of Art. no.13 of the Regulation are aimed to minimize the risk that a contract may be declared invalid by invoking the failure of capacity of one of the contracting parties, natural person. The statement of the Community legislature in matters of incapacity, reflecting its traditional concern for the safety of cross-border commercial relations, which might be compromised if a natural person, in incapacity according to his country law (national law or the law of domicile or residence, where appropriate, whatever it may be), were permitted to take advantage of his own incapacity and invalidity of the contract that would ensure from, to the detriment of his contractual partner, who did not know that he was in incapacity. In Giuliano and Lagarde Report[4], interpreting similar provisions of the Rome Convention [5], it is highlighted that the requirement to protect the party that concluded a contract in good - faith with a person in incapacity, against the risk that the respective contract may be invalidated under a law, other than that in force, in the place where it was concluded, is seen in both legal systems which subordinate the capacity of natural persons to their national law and in those subordinated to the law of domicile (such as English law). The report also points out that that provision is applicable only on a contract that may be assimilable to one of the types of contracts covered by the Convention.

Worthy to notice is that Art. no. 13 applies only to natural persons. The proposal for the adoption of similar provisions on the capacity of legal persons has been considered too complex an issue to be placed in the Regulation, although the activities of companies raised more issues on recognition of the capacity. Therefore, the question

whether a similar rule in Art. no. 13 may be applied on the capacity of a legal person depends on the rules of Private International Law of each Member State [6].

Returning to the analysis of the provisions of Art. no. 13 of the Regulation, it appears contractor's good - faith is assessed by "date of conclusion", being irrelevant that, after this time, he got to know the state of incapacity of his contractual partner, natural person.

One of the conditions is that the Contracting Parties should be in the same country at the time of conclusion, though not necessarily in the same place. It is noticed that the Regulation did not intend to eliminate the protection offered to the person in incapacity by his own country law when he concluded a distance contract with a person in another country, even if the law applicable to the contract - determined under criteria of Art. No. 3 and 4 of the Regulation - should consider that contract as completed in the state where the contractual partner in capacity is. In such cases, the Community legislature considered it reasonable to expect that a person who enters into a distance contract with a natural person in another state, to exercise caution and diligence in verifying the condition of the other party capacity.

The natural person who has the quality of party may invoke his incapacity resulting from the law of another country (*lex patriae* or *lex residences*), only when the norm of private international law of the State of the forum indicates as the law applicable to the person in incapacity, a law other than that of the state where the contract is concluded. Specifically, for instance, a Romanian court may apply the provision in analysis only when the contract was not concluded in the State whose nationality the contractual partner in incapacity has.

To invoke Art. no. 13 of the Regulation, the Contracting Party who invokes his own incapacity should be considered in capacity according to the law of the state where he is when the contract is concluded. In the event that the law of *lex loci contractus* considers in turn that person in incapacity, there should not be any impediments to support and demonstrate the state of incapacity, and as a result application of Art. 13 is no longer is useful.

Worthy to notice is also the fact that to admit that the person in incapacity may invoke his own incapacity towards the other contractor, there should be a further

requirement, namely, the person in incapacity should be able to demonstrate that when the contract was concluded, his contractor was aware of that incapacity or did not know as a result of his negligence.

Article no. 13 is also applicable where contractors are fellow citizens or are domiciled or resident in the same State. In these cases, failure derived from the common personal law (the State of nationality, domicile or residence law) is known and will be relatively easy for the person in incapacity to provide proof of this knowledge by his contractual partner. A similar situation is encountered with those doing businesses in the vicinity of a border area when their customers are also people (citizens, domiciled or residents) from the bordering state, under age according to the laws of the neighboring state, but already in capacity under the law of the country in which the business operates.

## **2. Family relationships**

Letter b) of Art. no.1 par. (2) of the Regulation excludes from its domain of application "obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations". (Exclusion of these matters from the domain of application of the Regulation are justified either by uniform conflict rules EU [such as for example Council Decision 2009/941 / EC of 30 November 2009, where was approved on behalf of European Union (excluding the United Kingdom, Ireland and Denmark) the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in an area of the law applicable to divorce and legal separation, the Hague Convention of 23 November 2007 on the alimony abroad for children and other members of family and Council Decision no. 2011/432/EU of 9 June 2011 concerning the approval on behalf of the EU to this Convention, Regulation no. 4/2009 of 18.12.2009 on jurisdiction, applicable law and recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation, Convention on the Rights of the Child, adopted by the UN General Assembly on 29 November 1989, entered into force on 2 September 1990, Convention on July 17, 2006 on personal relationships concerning children, Convention Hague dated 25 October 1980 on the Civil Aspects of

International Child Abduction, Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction, recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) no. 1347/2000, etc, or on the intention of EU institutions to adopt themselves appropriate measures (proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in the matter of registered partnerships).

We may find accurate information on family relationships in recital 8 of the preamble to the Regulation, which states that "family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised."

The Regulation has a rather broad approach in terms of relationships which, "in accordance with the law applicable to them," have effects "comparable to those of marriage" meant to include any legal relationships with effects similar to marriage (registered partnerships, same sex marriages, etc). It was considered that, in general, states have inhomogeneous regulations in this regard, even in the presence of the common element, to provide the couple an intermediary "status" between marriage and free consent union. In general, legal rules on personal and patrimonial effects of international couples are complex and difficult to interpret. For example, in some legal systems, legal partnerships have a much closer nature to the regime of marriage, where the partners lose their freedom to unite with a third party in a marriage or a new partnership and the specific rules of the matrimonial regime are, at least in part, applicable. Meanwhile, in other states, partnerships have either a purely contractual - autonomous forms of expression of the will of the parties - or are treated as sui generis institutions.

The exclusion of such legal relations from the domain of application of the Regulation [solution that is also found in Regulation No. 864/2007 on the law applicable to non - contractual obligations Art. no. 1.2 lit. a) and b) leads to the conclusion that they are governed by the law determined under *lex fori*, depending on the specific qualification (family law relationship, legally binding contract or contractual legal

relationship arising from the law or ex-law ). The issue of qualification is very important, whereas only legal relationships that produce "comparable effects to marriage and other family relationships" are excluded from the domain of application of the Regulation. As outlined in paragraph 8, the qualification should be done "in accordance with the law of the Member State in which the court is sited", by way of derogation from the principle that the terms used in the Regulation have uniform and autonomous character. Interpretation of the provisions of Art. No. 1 par. (2) b) of the Regulation, however, could also lead to another solution, according to which the qualification of legal relationship shall be achieved under the law of the State where the partnership was formed. It is assumed that the law of the place the partnership set is most suitable to indicate whether that produces or not effects comparable to a marriage or any other family relationship (the proper law).

The notion of obligations arising from marriage relationships or relationships having comparable effects thereof - referred to in Art. no.1 para. (2) b) - includes specific obligations without patrimonial content, such as: establishing common habitual residence, moral obligation of reciprocal support, fidelity, etc. In this category shall also be included agreements between the spouses, on the date or - when necessary - pending the marriage or separation in fact.

Article no. 1 par. (2) b) last sentence, excludes from the domain of application of the Regulation maintenance obligations. For a correct interpretation of the categories of obligations subject to such exclusion it is required to report to specific, uniform, applicable regulations in the matter of maintenance at regional level - the European Union - and international one, and not to the domestic legal provisions of the Member States.

Thus, according to the 2007 Hague Convention, maintenance obligations fall into the category of child support obligations regardless of the marital status of parents and the maintenance obligations between former spouses without excluding other forms maintenance, such as maintenance obligations arising of kinship, affinity, alliance or maintenance obligations for vulnerable persons, as defined by the Convention.

In turn, the Hague Protocol of 23 November 2007, states that decision on the law applicable shall be achieved for the same categories of maintenance obligations,

specifically those arising from a family relationship, parentage, marriage or affinity and obligations maintenance to children regardless of the marital status of their parents.

Regulation (EC) no. 4/2009 of 18.12.2009 applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity (Art. no. 1) in recital no. 11 states that the term "maintenance obligation" should be interpreted autonomously under Regulation. Interestingly, the Regulation does not offer a definition of maintenance obligation, which means that the responsibility on the interpretation rests in all cases to the EU Court of Justice.

A special problem is raised by "maintenance agreements" concluded between people - even family members between whom there is no legal obligation of maintenance. With respect to these conventions - in interpreting Art. no. 1 par. (2) (b) of the Rome Convention, which also excluded from its domain of application maintenance obligations - Giuliano - Lagarde report decided that they should not be excluded from the application of the Convention, as long as it is not about obligations imposed by law or by public authorities. We consider that the solution remains current interest, the Regulation shall be applied to maintenance obligations, even for a family member, whenever it does not result from the law or from an order issued by a public authority, but have a purely contractual nature. Thus, by setting an example, if based on legal provisions an agreement on how to implement a legal obligation of maintenance between a husband and child of the other spouse, is concluded, that agreement is excluded from the domain of application of the Regulation. Conversely, if the husband reaches an agreement with the obligation to continue to provide maintenance for the child of the other spouse, although such maintenance is not due under law, the agreement remains within the domain of application of the Regulation. In this case, the maintenance obligation has its source neither in parent - child relation nor in the family relationship between spouses, but is simply an option of one spouse to provide child maintenance to the other spouse's child, manifested on contractual realm.

### **3. Patrimonial issues of matrimonial regimes**

Article no. 1 par. (2) c) of the Regulation excludes "obligations arising from patrimonial aspects of matrimonial regimes" (listed under Art. no. 1 par. (2) b) and among the exclusions in the Rome Convention) and "obligations under the patrimonial



aspects of relationships regarded under the law applicable to them, as having comparable effects to marriage".

The reasons for the European legislator to conclude to the exclusions listed in Art. no.1 par. (2) c) are different. Among them should be the particularism of such patrimonial relationships that would not allow their inclusion in legislation covering contracts in civil and commercial matters in general [7], intention to avoid duplication with other internationally agreed regulations or the guiding line followed until recently by EU legislative policy, characterized by a certain reluctance to fully extend its regulatory power broadly in family law, area traditionally considered a bastion of national sovereignty. This last argument is no longer topical compared to current EU legislative framework in which we find two proposals for a regulation submitted by the Commission, that proposal [COM (2011) 126 final] for the adoption of a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes and the Proposal COM [2011] 127/2) of Council Regulation on jurisdiction, applicable law, recognition and enforcement of legal decisions in registered partnerships matter.

In terms of norm content, it should be noted that Art. no.1 par. (2) c) does not lead to a qualification under national law of the state court, but always should be referred to the interpretation given by the European legislator, or where appropriate, by the Court of Justice of the European Union. In this purpose, it appears useful the interpretation performed over time, on certain terms and similar concepts used in the Rome Convention [Art. no. 1 par. (2) b)], the Brussels Convention [Art. no. 1], Regulation (EC) No. 44/2001 [Art. no. 1], and more recently in the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of legal decisions in matrimonial regimes matter [COM (2011) 126 final]. For example, in the interpretation of the term "property rights arising from matrimonial relationship" used by Art. no.1 of the Brussels Convention, the European Court of Justice has stated that this includes not only "property arrangements envisaged specifically and exclusively by certain national legal systems in case of marriage, but also any proprietary relationships resulting directly from the matrimonial report or its dissolution "[8]. On the same line, according to the Commission's point of view expressed in 2011, "the concept of

matrimonial regime must be interpreted independently and must cover both aspects of administration of the property of spouses, as well as those related to their liquidation, as a result of the couple's separation or the death of one of its members "[9]. We speak therefore of an independent Community concept, very extensive, clarified by case law, especially in order to achieve a clear distinction from other types of obligations defined by the European legislator, such as maintenance obligations [10].

Article no.1 par. (2) c) should be interpreted as not referring only to property relations occurred between spouses during marriage exclusively. This also includes agreements concluded before perfecting marriage (so-called prenuptial agreements concerning the choice of the matrimonial regime) and those which concern the regulation of relations between spouses when in fact separation, divorce or the death of one spouse.

The concept of "patrimonial aspects of matrimonial regimes" fall into "donation agreements concluded between spouses" when they have as objects goods having a close connection with marriage and matrimonial regime. Donation contracts, regarded as unilateral commitments freely undertaken by the parties, are included in the domain of application of Regulation Rome I, framing confirmed by the Commission, when formulating the proposal for regulation on the law applicable to matrimonial property regimes where Art. no. 1 par. (2) states that "matters already covered by the regulations in force of the Union, such as [...] aspects concerning the validity and effects of liberalities (regulated by Regulation (EC) no. 593/2008 (OJ L 177 of 4.7.2008, p .6) shall not be part of the domain of application of the Regulation." In the domain of application of the regulation Rome I cannot be included donations that are a direct result of obligations imposed by marriage (for example, a contract between spouses, whereby one gives the other an exclusive property good in order to resolve certain issues connected to liquidation of matrimonial regime by divorce).

The Regulation is excluded from application when if it came into conflict with the norms of family law in the broad sense, respectively with the right to inheritance (for example the norms regarding donations report) [11].

## Conclusion

As I emphasized throughout the study, the terms and concepts used in delimitation of the matters excluded from the domain of application of Regulation (EC) no. 593/2008 should be interpreted and understood autonomously and independently of any national concept to ensure uniform application of its provisions. In order to clarify certain aspects, the present work was limited to a brief analysis of three of the matters excluded from the domain of application of Regulation (EC) no. 593/2008, however, as shown in the introduction, the exclusion domain is broader, the provisions of Art. no. 1 par. (2) a) - j) and par. (3) enumerating also other matters, including: negotiable instruments; arbitration and choice of court; company law, etc.

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- [10]. See Art. no. 1, pt. 5.1. Chapter I: domain of application and definitions in COM(2011)126.
- [11]. Court decision from 27 February 1997 given in Cause C-220/95 Antonius van den Boogaard versus Paula Laumen it was considered that the transfer of goods or a sum of money from a spouse to the other spouse, with the purpose of satisfy personal necessities, comes into the category of relations that have as object maintenance, whereas the agreement between spouses regarding only sharing matrimonial property as such, shall be framed in the category of propriety rights, which arise from matrimonial regimes. The European Court decision was given to interpret similar decisions from Brussels Convention where such distinction was necessary, taking into consideration that, unlike maintenance obligations, propriety rights were off the domain of application of the Convention. E