

THE EUROPEAN SPACE OF FREE MOVEMENT OF PERSONS, GOODS, CAPITALS AND SERVICES – A SPACE OF FREE MOVEMENT OF AUTHENTIC INSTRUMENTS AS WELL?*

Dan Andrei POPESCU

Dan Andrei POPESCU

Associate professor, Department of Private Law,
Faculty of Law,
Babeş-Bolyai University, Cluj-Napoca, Romania
Tel.: 0040-264-596.072
E-mail: bnpdap@yahoo.com

Abstract

This article aims to analyze the current reasoning formalism in private law. Authentic instruments occupy a special place, the essential conditions required by law in order to be dealing with an authentic act, its functions and typology and, of course, the authentication procedure is presented. The last part of the study addresses private international law aspects related to a very actual issue – the free circulation of authentic instruments within the European Union. Authentic acts having their object *ius in rem* transmissions occupy a special place.

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1. Third millennium Europe: between the pathos of legal harmonization and the trauma of identities. Private international law as a tool of legal competition

One of the incontestable realities of this new beginning of century and millennium is that the individuals' private life can no longer be contained within national state borders.

Historically, people were born and died within the "area" of the same legal system. Life itself was limited to the territory of a certain state. Under such circumstances, citizenship evoked not only our membership of a certain state entity, turning us into its "nationals", but to the same extent our membership of a certain legal system, specifically of the legal system of the state in question.

The globalisation phenomenon, the increasingly intensive movement of persons, facilitated by the development of modern and fast means of transport, the expansion of international trade, the freedom to settle abroad, the internet as a new means of communication and legal commitment – and even as an "alternative lifestyle" – have led to an internationalisation of the private circuit.

As professor Horatia Muir-Watt emphasized in her editorial "Reshaping Private International Law in a Changing World":

„To some extent, traditional rules on jurisdiction, choice of law and recognition / enforcement of judgments and arbitral awards have favored the undermining of law's (geographical) empire, which is already threatened by the increasing transparency of national barriers to cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.” (2008, www.conflictoflaws.net)

No doubt, approaching the issue of the free movement of authentic instruments – and I especially mean notarial documents – should start, in our opinion, from certain premises.

First of all, the European legal space is a federal one, based on the international distribution of jurisdiction, according to the legal matter considered, still, taking into account the up-growing mobility of the persons, the need for a greater flexibility in the cross-border relationships, as well as the need to ensure an efficient protection of the consumers. As it was already noticed:

“private international methodology may require considerable reshaping, so as to harness it to the new need for strong yet adjusted regulation of the consequences of private mobility and the inter-jurisdictional competition which it inevitably generates. Approaches developed in a world where the prescriptive authority of State was coextensive with territory are clearly no longer adapted to this function; this is particularly true of the methods inspired by the private interest paradigm on which continental Europe doctrine thrived throughout the second half of the twentieth century and is loath even today to abandon. The message of this editorial is to the effect that private international law should adjust to

the stakes involved in real world conflicts of laws, which do not, or do no longer, implicate purely private interests playing out on a closed field.” (Muir-Watt, 2008, www.conflictoflaws.net)

Secondly, as far as the conflict of law is concerned, we can notice the expansion of the principle of party autonomy which “has favored the undermining of law’s (geographical) empire”. Thus, the gate of the competition between the national legal systems of the Member States is now opened, the individual is no longer “tied” to the national system. In more and more fields, the possibility to choose the applicable law became an actual “escape clause”, allowing a rather easy “escape” (gateway) from the national legal system.

In the following we focus on one of the most important instruments of contemporary private international law, which defines the new European federalism, meant to confer more flexibility to the international private circuit – *choice of law agreements*. These are an expression of party autonomy in private international law.

The freedom to choose the applicable law has become a constant of contemporary private international law, especially in the context of globalization.

At European level it was shown that the “choice of law emerges as a flexible and creative tool of multilevel governance. As has been seen, its clearest advantage is maintaining regulatory externalities” (Cafaggi and Muir-Watt, 2008, pp. 14-15). We may distinguish the following features (functions) of party autonomy in private international law (of choice of law agreements):

1. Choice of law agreements definitely represents an instrument of globalization. They are an expression of European legal federalism.
2. Choice of law agreements represents an element meant to respond to the increasing need for predictability, meant to satisfy the reasonable expectations of the participants to the international private circuit.
3. Choice of law agreements represents an element meant to raise, since the beginning, the awareness of the parties about the cultural and legal diversity of the world, imposing them caution and attention.
4. Choice of law agreements represents an element that makes the cross-border legal circuit more flexible, always opening a new alternative to participants to international legal relationships. They will be tempted to take a peek at the normative content of other legal systems (or at some non-state codifications), to compare such systems or codifications to the one that would have the competence in the absence of the choice of law. From this point, the party autonomy in private international law opens a possibility to “escape” the national normative system whenever it is in the best interest of the participants to cross-border legal relationships. What happens in this way is a desedentarization of private law, which is no longer the only one, nor mandatory. The parties may choose freely – even though not discretionarily – the normative system they wish to be subject to. *Professio juris* thus opens a breach in national legal systems, letting the parties escape.

As we have shown earlier, private international law makes a strong comeback on the European legal stage, becoming the main instrument of European unification, of a unification in and through diversity. It focuses all national legal systems around the person (the individual), stripping him of his citizenship. Citizenship thus becomes a connecting factor, with an alternative and residual character. Belonging via citizenship to a certain Member State no longer seems to play a major role. The individual can no longer be favored, nor discriminated on grounds of citizenship.

Private international law locates the individual depending on his center of interest, that is, the place of his habitual residence. Habitual residence thus becomes the main factor of locating a person, the element that identifies and imposes a person's legal membership of a certain legal system, whereas citizenship only describes the person's "political" membership of a certain state.

Private international law is kind and tolerant, but delusive at the same time. Kind and tolerant because it allows the luxury of preserving cultural and legal diversities belonging to private national legal systems, ensuring however the predictability and fluency of the cross-border legal circuit through uniform choice of law rules. Yet everything has a price (...).

It is still "delusive" because, despite this generosity, it subtly and inconspicuously opens the door to the competition of private legal systems. What is however specific to this competition is that it is not generated by private law unification. There is no question, therefore, of choosing between private legal systems – or between material (substantial) norms assigned to the different private law institutions belonging to Member States – according to preference or "performance" criteria established by the European executive or the European Parliament. National legal norms, just like the legal systems they belong to, will continue to survive. But their vitality and efficiency is left at the discretion of their recipients. A "private law market" is thus outlined, even though in an incipient and veiled manner, and controlled from the choice of law land.

The "rebellious character" of private international law is still a noble, respectable one.

Behind this "legal rebellion" (or "legal perversity") there is a hidden need to humanize the private circuit. The individual is no longer left at the discretion of the national legislator, having the freedom to "escape" the national normative system whenever there are sufficient links to other legal systems, or whenever there are sufficient reasons to apply a different legal system, perceived as more attractive, friendlier, closer to the parties' reasonable expectations.

Without going into detail, we only wish to point to the fact that the intensity of this competition depends on whether it compares legal systems belonging to Member States or the legal system of a Member State to the legal system of a third country.

This way, private international law leads to a hierarchy of legal systems. But it is not a vertical hierarchy, but a horizontal one; legal systems are entered into a competition. The specific feature of this type of hierarchy is that it is not pre-established, the criteria are permanently thrown in the game, and every time the decision belongs to the parties involved, that is, to the recipients of the normative product.

Competition of legal systems perfectly articulates with the principle of mutual recognition of court judgments and public acts. European law is a free competition law. European space is a space of free competition. And this competition is not limited to that of goods or services. In other words, it is not limited to the economic area, but it must exist, intensively enough, in the legal area as well. Competition of legal systems thus comes to complete the European legal landscape¹.

The encounter between Community law and Private international law may seem difficult: the object of private international law is to organize the pacific coexistence of different legal systems; conversely, Community law is oriented toward the integration of markets and the construction of an area without interior borders. Yet, both at European level and the specialists of the two disciplines have understood that their simultaneous existence is not only possible, but also necessary. An extra amount of Community private international law may mean a minimum effort in the sense of (a much more difficult) uniformisation/harmonization of material rules of the Member States, and the preservation of national particularities.

The direct communitarisation of private international law, achieved by the use of classical choice of law rules, will take a significant place in our approach. In addition to the multitude of rules of conflict included in the sectorial harmonization directives

1 The relationship between private law and Community law has different natures and implications, according to the matter in question. In the area of economic relationships, the diversity of national private legislations undoubtedly represents a barrier to the achievement of the single market. Under Community influence, there is an approximation tendency in the professional status of economic operators from one state to another, and this logic has developed the principle of the *country of origin*, and the Community harmonisation of corporate law is rather advanced. However, the approximation of national private laws concerns not only the economic operators, but also the relationships between them, and the Community law has stepped in by changing significant aspects of the law of obligations, of contracts or of case law. In the law of persons and in family law, the Community legislation had at first only an indirect and subsidiary role, its influence being perceived as an effect of the play of fundamental freedoms asserted by the Treaties; as the unification of the legislations of Member States in areas that reflect national particularities is neither convenient nor particularly necessary, the Community law currently steps in by ensuring their coordination, through certain uniform choice of law rules. By extending the Community law intervention areas and by an effort of reflection on the meaning of the legislative process, starting with 1985 the Community institutions performed deep changes in their legislative policies, with a much broader intervention in the area of private law. The goal pursued by this change is threefold: to diminish the barriers to intra-Community trade (as an implication of the market economy theory), to reduce the detriments to free competition among economic operators, generated by the disparity between national legislations, to circumscribe the extent of the task of approximation of national legislations required for the smooth operation of the internal market. The result of this approach materialised in the creation of a corpus of *European private law* norms common to all EU Member States, in the renewal of private law in Member States; the problem of the usefulness and legitimacy of this approach, of its achievement methods, of its future prospects must concern today any Romanian lawyer as well.

(for instance in the area of insurance), the entering into force of the Amsterdam Treaty (May 1st, 1999) turned the situation of classical private international law upside down: Articles 61(c) and 65 of the EC Treaty invested the European Union with a competence to intervene in the area of legal cooperation on civil matters. According to the Action Plan of the Council and the Commission regarding the optimal ways of applying the norms of this Treaty in the matter of progressive achievement of the freedom, security and justice area, this competence supposes some measures for an easy identification of the competent court in litigations with elements of extraneity, for a clear indication of the applicable law, the fast obtention of court orders, efficient execution procedures; it means as many issues that fall under direct and indirect international competence and conflicts of laws. The fundamentals of Community competence on the matter being ensured (yet not indisputable), the first texts of European private international law soon appeared; among the pioneers we may mention Regulations (EC) no. 44/2001, 1346/2000, 1347/2000, 2201/2003, 805/2004; 864/2007; 593/2008, 4/2009, 1259/2010 and other similar normative acts are under adoption (the Proposed Succession Regulation). Such undertakings are extremely ambitious.

On the one hand, the novelty of Community intervention imposes the consideration of the fundamentals of different rules of private international law adopted, but also the discussion of the relevance of tools used from the perspective of a successful communitarisation of private international law at this level; in this latter sense, if regulations may represent a suitable tool (by the unification they achieve), the European directive raises a lot of questions. On the other hand, even though the process of uniformisation of private international law in Member States seems to be the means favored by EU in order to achieve European legal integration, certain clumsinesses/misunderstandings may be emphasized, due either to a poor knowledge of PIL or to a wish of leaving national judges the possibility of completing the communitary creation work. Thus, the nature of certain European norms of PIL, included mostly in directives, is not easily deductible (rules of conflict or material rules having a self-determined area of application in space), although a certain qualification entails significant consequences; and if Member States have a different understanding about issues that are however essential, we are far from the sought uniformisation. Other difficulties may be emphasized in relation to the regime of communitary laws with immediate application (police laws). In the relationship between Member States, their intervention will be neutralized, as an effect of the mutual recognition principle; conversely, in the relationships with third countries, their play will not be affected; moreover, a lot of normative acts (of material law) having a Community source will be raised to a status of police laws and will disrupt the normal solution of the conflict of laws. Such a circumstance overturns the classical theory of laws with immediate applicability.

The Community PIL will also have to choose between neutral rules of conflict (traditional in PIL) or rules of conflict inspired by material objectives (non discrimination, free movement, free competition – the latter inspiring the whole of the Community law).

Another rather delicate option is offered to the Community legislator: the one between rules of conflict limited to economic areas (this perspective being in accord with the original specialization of Community law) or rules of conflict including areas of the law of persons and family law. As demonstrated by the Rome III Regulation (the law applicable to divorce and legal separation), the lines of action are already traced.

Last but not least, a prospective analysis of Community law of the conflicts of laws supposes a solution to the problem of geographic delimitation of future rules of conflict. Two difficulties will retain our attention: the alternative between universal rules of conflict or self-limited rules of conflict, and the problem of the relationships between Community law and international tools of private international law².

2. Definition of authentic acts and existence of similar instruments

In Romanian private law, there is a definition of the authentic act in the 1864 Romanian Civil Code (in force since December 1st, 1865). According to Article 1171 of Civil Code, “The authentic act is the act drawn up with the solemnities required by law, by a civil servant in right of office in the place where the act was made”.

From this legal definition, we may extract the essential conditions required by law in order to be dealing with an authentic act:

1. the act must be instrumented by a public officer;

2 The Relationships between Community law and Contract law are also very intense. Harmonisation of contract law at a European level is not a new or isolated initiative, as shown by the works of the Lando group (completed in the Principles of European Contract Law), of those of the University of Trento (completed by a study on the subject of the Common Fund of European Private Law), the series of casebooks sponsored by Professor Van Gerven or the extremely ambitious project of The Study Group on an European Civil Code hosted by Professor Von Bar. Such reflections are currently part of a context sustained by the Community authorities, which contributes to creating the political conditions for achieving effective harmonisation. For instance, starting with 1989, the European Parliament adopted several resolutions inviting to such codification of European private law. On July 11, 2001, the European Commission published a communication regarding the *European contract law*, asking lawyers, academia, the civil society, actually all interested parties, to present their opinions concerning such initiatives. Whereas the generated discussions consolidated the conclusion that the elaboration of a European Civil Code is at the moment a utopic, unrealistic idea (in the short term), other alternatives are however open to the Community authorities (favouring the development of certain principles of contract law without binding legal value or improving the existing Community regulations). On November 15, 2001, the European Parliament adopted a new resolution emphasizing the *necessity to carry on the punctual harmonisation of contract law in those cases where the mutual recognition of national arrangements cannot be applied and where divergences between them create barriers to the smooth operation of the internal market, as defined by the Court of Justice*, and the European Commission is invited to present an accurate action plan that starting 2010 may lead to the elaboration and adoption of a *corpus of rules regarding the contract law in the European Union*. Thus, the project of harmonisation of the contract law in Europe has nothing utopic: in this context, Community initiatives were focused on guaranteeing contractual balance, such as the protection of consumers, employees, insured, economic operators or other economically disadvantaged parties.

2. the public officer must act within the limits of his material and territorial competence to instrument that act; and
3. the act should be executed with the solemnities required by law.

Therefore, in order to be dealing with an authentic act, the three essential conditions mentioned above must be aggregately satisfied.

Firstly, the act must emanate from a person invested with the exercise of public authority, by a “public officer” (the organic criterion). However, it is worth mentioning that the concept of a public officer, used by the legislator in Article 1171 of Civil Code, must be regarded in its broader, extensive, and not in a strict, restrictive meaning. The most frequent category of authentic acts is that of notarial acts. Yet the notaries public cannot be included in the public servants’ category, regarded *stricto sensu*, as there is no report of subordination between the notaries (who are and remain freelancers) and the state authority that conferred the competence to authenticate the deeds. According to Article 1 of Act on Notaries Public and Notarial Activity no. 36 of May 12, 1995, “The notarial activity ensures to natural and legal persons the assessment of undisputed civil or commercial legal relations, as well as the exertion of the rights and the protection of the interests in compliance with the law.” Article 3 of the same law stipulates that the notary public fulfills a service of public interest and has the statute of an autonomous position. Moreover, according to Article 4, “The act drawn up by the notary public, bearing his seal and signature, is of public authority and it has the proving force stipulated by law”. Be it only for these legal provisions, one may draw the conclusion that the notary public, fulfilling a service of undisputable public interest, enjoys a *sui generis* status, being the beneficiary of an autonomous position. It is nevertheless true that the legislator does not qualify the legal nature of the notary’s position. He avoids qualifying the notary as a public authority, preferring instead to speak about the public authority of notarial acts. The phrase “autonomous position”, used by our legislator to refer to the position of notary public, is as general as it is equivocal, being far from extricating its legal nature. If we’re dealing with a public function, what is the legal status of the person exercising it?; if the acts instrumented by the notary are of public authority and have the proving force required by law (as stipulated in Article 4), then what is the relationship between the one delegating the authority and the one actually exercising it?; if the function is autonomous (as stipulated in Article 3 of the Act on Notaries Public), what is the content and what are the limits of this autonomy? These are a few questions that may become an object of discussion and reflection at European level. It is a certain thing, though, that in our view the notary public cannot be regarded as a mere commercial service provider. The notarial activity has nothing in common with commercial activity. It emerges from a delegation of authority under pre-established conditions and to pre-established persons, who belong to a professional body endowed with the ability to manage this authority, in the name of the state, for the public benefit. The delegation of authority relies on confidence in the professionalism and morality of

the notaries' professional body, on their ability to defend both the parties' interests and the public interest, ensuring, via their acts, the security of the legal circuit. The notary public is at the same time adviser to the persons who request his services, their counselor, but also the defender of the public interest, the guarantor of the civil circuit's security. Therefore, he may be regarded as a real "judge in non-contentious matters". Confidence in his integrity and impartiality, in his ability to reconcile private interests of the parties to the act with the public interest, undoubtedly represents the basis and fundament of the authority transfer.

To conclude, we consider that the notary public is the exponent of a public authority delegated and regulated by the state, but freely and autonomously exercised. The authority enjoyed by the notary public is not a common one; it has a special feature. The notary, as a person, is deprived of authority. The authority of the notary public is materialized, almost completely, in the legal force of his seal and signature. Therefore, it begins where the legal competence of instrumentation he was invested with ends, that is, upon completion and execution of the notarial act. The authority of the notary public is embodied in the public authority of his acts. He serves private and public interests simultaneously, his mission being to bring satisfaction to the former ones, but notwithstanding the latter. He is not an arbitrator between the parties' divergent interests, but a mediator between them – the impartial (equidistant) counselor to those who require his services. That is why he cannot afford the promises of a lawyer. He must ensure that all parties involved in the act are aware of the specific nature and effects of the act to be executed; he must therefore obtain an informed consent. The notary public is therefore a guarantor of the parties' legitimate rights and interest. Yet at the same time he is also called to verify the existence of all validity conditions of the act, taking responsibility as to its efficacy. However, the notary public is not a mere receiver of the parties' concordant will; he is the one who provides legal force to the act, attesting not only to the informed and unvitiated consent of the parties, but also to the compliance with all imperative norms that have incidence in the matter in question. In other words, he is, at the same time, the guarantor of the security of the legal circuit. He is the architect and the designer of the whole contractual edifice, but also the one meant to ensure compliance with the "rules of urbanism" and to defend the public interest. A definition of the notary public which is very close to our perception is the one given by *Creifelds Rechtswörterbuch*. According to this prestigious German legal dictionary, the notary public is a legal protection agent, an independent provider of a public service:

“Als Rechtspflegeorgan ist der Notar unabhängiger Träger eines öffentlichen Amtes. Seine Aufgaben liegen (im Bereich der freiwilligen Gerichtsbarkeit) auf dem Gebiet der versorgenden Rechtspflege. Er ist vor allem zuständig für Beurkundungen.” (Creifelds Rechtswörterbuch, 2002, p. 968)

This dichotomy between the form of organization of the notary public and of his activity, his definite inclusion among freelancers, on the one hand, and the public

authority of his acts, on the other hand, has made certain authors include the notarial acts in the category of “quasi-public” acts.

Secondly, the person who has the legal capacity to instrument the authentic act must act within the limits of his material and territorial competence. An act instrumented by a person having no capacity to act as a notary public or a public officer or an act executed by a notary public infringing the imperative provisions regarding his territorial competence will have no legal value – for instance, an heir certificate (Erbschein) where the last domicile of the deceased was in a place that belongs to another court jurisdiction than the one in which the notary issuing the certificate had been appointed (Act on notaries public and notarial activity, no. 36 of May 12, 1995, Art. 68).

Thirdly, the act must be drawn up in strict compliance with the formalities required by the law. It is true that such formalities are largely different from one public authority to another. In relation to notaries public, we may remind the provisions included in Chapter V (“Procedure of notarial acts”), Section II (“Authentication of acts”) of the Act on notaries public and notarial activity, no. 36 of May 12, 1995, which establishes the rules on the procedure of authentication of acts. These rules refer to establishing the identity of the parties or of the attorneys representing the parties, the taking of their consent by the notary public, verification of the documents required in order to authenticate the act, fixation of notary fees, and the mandatory elements of the conclusion certifying the authentication.

3. A possible classification of authentic instruments

To better understand the objectives and the functions of the authentic instruments we believe it would be necessary to outline its typology. The category of authentic acts is not a homogeneous one. Authentic acts are extremely different; they differ both in terms of the nature of the legal situation they assess or create and in terms of the body or authority commissioned to issue or to instrument them. Thus, in our opinion, we can break down authentic acts into the following categories:

1. Acts (deeds/documents) assessing legal acts of civil status or previously occurred civil status facts whose accuracy they confirm (certify).
2. Notarial authentic acts, that is, which are the result of the parties’ private initiative. They are expressions of will, done in front of a notary public, with the intention to produce legal effects, that is, to generate, alter, transfer, or terminate legal relations. This is the most frequent category of authentic acts, which in the context of globalization, experiences unprecedented development and dynamics.
3. Authentic acts of an administrative nature, issued by various public authorities based upon, and within the limits of, the competence bestowed upon them (i.e., certifications and land registry extracts issued by property registrars, documents issued by fiscal authorities, tutelar authority decisions related to family care and representation of minors, certificates of urbanism and construction permits issued by city halls, documents issued by the Trade Register Office etc.). and

4. Authentic acts with a jurisdictional character, that is, those issued after completion of legal proceedings. The most typical example is that of court judgments.

In the following, we shall dwell upon the former two categories of authentic acts. The third category exceeds our area of interest, and the fourth category of authentic acts has a special character and has already been the object of Community regulations. Indeed, it is common knowledge that the international competence of the courts in civil and commercial matters, as well as the issues related to the recognition and enforcement of court judgments, are regulated by Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Brussels I Regulation.

The first category of authentic acts is dedicated to civil status acts (documents), i.e., the acts that assess previous legal facts or, as the case may be, legal acts on civil status. According to Article 2 of Romanian Law no. 119/1996, “Civil status acts are authentic deeds proving the birth, marriage, or death of a person. These are drawn up in the interest of the state and of the person and in order to find out population numbers and structure, the demographic situation, as well as to defend the fundamental rights and liberties of the citizens.” Moreover, according to Article 13 of the Law on civil status acts (Law no. 119/1996), “Civil status is evidenced by acts drawn up in civil status registers, as well as by civil status certificates issued on the basis thereof”. Civil status certificates have the same probative value as civil status acts (Article 22 (2) of Decree no. 31/1954).

From a terminological point of view, in order to avoid possible confusion, we must distinguish between legal acts on civil status, that is, willed expressions producing legal effects (e.g., the act of marriage or of recognition of filiation), and civil status acts or documents, that is, deeds drawn up in order to prove civil status or civil status facts or legal acts on civil status (Reghini, 2008, p. 176)³.

The category of notarial authentic acts is the most frequent in practice and probably the most important one, considering the complexity and variety of the legal situations they generate. Thus there are notarial acts that generate, transfer, or terminate material rights on goods or real estate, notarial acts that generate effects in civil status matters, in successoral matters, authentic acts incorporating legal entities, with patrimonial or non-patrimonial intent, not to mention the law of obligations where notarial acts are extremely numerous.

3 In the Romanian legislation there are three categories of civil status acts or documents: the birth certificate, the marriage certificate, and the death certificate. The competence for drawing up these acts belongs to local community public register offices, through civil status officers (Article 3(1) of Law no. 119/1996). Consequently, civil status acts (and civil status certificates issued on the basis thereof) are authentic deeds (documents) fulfilling a probative function; they represent evidence of civil status.

Notarial acts are thus extremely numerous and diverse, a typology of them being quite difficult to establish. We shall therefore try to dwell only on the matters (legal operations) where the law requires the authentic form as a condition of validity of the legal act.

We shall start with acts related to civil status and family law. Thus, in the case of establishing filiation to the mother through recognition, Article 48 of the Family Code stipulates that the mother's recognition of the child – whose birth was not registered in the civil status register or was registered in the civil status register as being born to unknown parents – can be done either by a declaration made at the civil status register office, or by authentic act, or by will. In the same way, the establishing of the paternity of a child born outside marriage through recognition (Article 57 of Family Code) is done by the father either by a declaration made at the civil status register office, or by authentic act, or by will.

In adoption matters, Article 15 (2) of Law no. 273/2004 regarding the legal procedures for adoption stipulates that where the child is adopted by the parent's spouse, "the natural parent's consent is given in authentic form by notarial act". It must be mentioned, though, that the rule in adoption matters is to express consent to adoption in front of a court. Therefore, in any other situation, the natural parents' consent is given in front of the court when the adoption request is resolved (Article 15(1) of Law No. 273/2004). Furthermore, consent to adoption is given by children over the age of ten still in front of a court (Article 17(1) of Law no. 273/2004), and so is the consent of the adopting person or the adopting family (Article 18 of Law no. 273/2004).

As yet, the Romanian law does not recognize the spouses' right to conclude a matrimonial contract. The only recognized matrimonial arrangement is that of the community of acquisitions. According to Article 30 of Family Code, "the goods acquired during the marriage by either of the spouses are, from the date of their acquisition, common property of the spouses" (paragraph 1). "Any convention as to the contrary is void" (paragraph 2). "The joint ownership needs not be proven" (paragraph 3). Therefore, the community of acquisitions is legal, sole, and imperative. The Civil Code stipulates in its Article 242 the possibility for future spouses to choose between legal community of acquisitions, separation of property, or conventional community regime.

In succession matters, wills are particularly important. In Romanian succession law, according to Article 858 of the Romanian Civil Code, there are three types of wills: the handwritten will, the formal will by public deed, and the secret will. The formal will by public deed is the one authenticated by a notary public, in compliance with the conditions and solemnities required by the Law on notaries public no. 36/1995 (Article 65). The will may be drawn up by the notary public (as often is the case), then authenticated, or it may be drawn up and presented by the testator to the notary public, who verifies the document, including the testator's identity and consent, and attaches an authentication conclusion to the document. The text of the conclusion

must include, under the sanction of nullity, the items stipulated by Article 65 of Law no. 36/1995. According to this article, “the conclusion that assesses the authentication of a document shall also comprise under the sanction of nullity, besides the data stipulated in Article 49, the following mentions:

1. the assessment that the consent of the parties was taken;
2. the assessment that the document was signed before the notary public by all those liable to sign it. The mention of the notary public that one of the parties could not sign shall replace the signature therefore.
3. the number of the appendixes comprised in the authentic act; and
4. the decision of vesting with authentic form that is expressed in the words: “This document is declared authentic”.

Therefore, the competence to authenticate wills belongs exclusively to notaries public. There are no restrictions or limitations from a territorial point of view: wills can be authenticated at any notary’s office in the country. A will authenticated abroad has the same legal value as a will authenticated in the country, provided it complies with the law of the place where the will was drawn up⁴.

The testator must present himself in person in front of the notary public, considering that the will has an essentially personal character (*intuitu personae*); therefore, the testator cannot be represented for the authentication of the will by an attorney with authenticated special power of attorney. The will is drawn up in Romanian. Upon the testator’s request, the notary public may authenticate a will drawn up in another language either if he knows that language or if he has been informed of its content through an interpreter. See Article 47 of Law no. 36/1995:

“The acts requested by the parties and any act of notarial procedure shall be drawn up in the Romanian language.

Citizens pertaining to national minorities or persons who do not speak or do not understand the Romanian language shall be granted the opportunity to learn about the content of the act through an interpreter. The position of an interpreter may be also fulfilled, besides the notary public, by an employee within the notary office who is in command of the language of that person, as well as by authorized translators.

4 See Article 68(3) of Law no. 105/1992 regarding the regulation of private international law relationships: “Drawing up, modification or cancellation of the will shall be considered valid if the act complies with the formal conditions applicable, either at the date when it was drawn up, modified or cancelled, or at the date of the testator's death, according to any of the following laws:

- a) the national law of the testator;
- b) the law of his domicile;
- c) the law of the place where the act was drawn up, modified or cancelled;
- d) the law of the status of the building which is the object of the will;
- e) the law of the court or of the body which carries out the proceedings of transmitting the goods inherited.”

Acts drawn up by the parties and presented for the performance of notarial operations shall be in the Romanian language.

On the justified request of the parties, the notary public may fulfil acts in regard to the documents drawn up by the parties in a language other than the Romanian language, only if the performing notary knows the language in which the acts are drawn up or after he has learnt about their content through an interpreter, in which case a copy translated into Romanian and signed by the person who performed the translation shall be enclosed to the file.

Documents destined to be translated into a foreign language shall be drawn up either on two columns comprising in the first column the text into Romanian and in the second the text in the foreign language, or successively, first the text in the Romanian language, continuing with the text in the foreign language.”

Under the sanction of nullity, the declaration of renunciation on successoral rights and the acceptance statement /declaration /subject to an inventory must be done in authentic form, according to Article 704 Romanian Civil Code, Article 76 (3) and (4) of Law no. 36/1995 and also Art. 45 and 80 of Regulation implementing the Notarial Law (no. 36/1995), approved by Order of the Minister of Justice no. 710/C/1995. Conversely, the simple acceptance of the legacy may be done through a non-authentic act (under private signature), according to Article 689 of Civil Code.

In order to ensure opposability to third parties, both the declaration of renunciation on successoral rights and the acceptance statement subject to an inventory must be registered in the Special Register of renunciations on successoral rights. This register is kept at the notary office assigned by the Managing Assembly of the Chambers of Notaries Public, for the whole territory of jurisdiction of the court where the deceased had his last domicile.

The notarial inheritance procedure is terminated by issuing the heir certificate. According to Article 83 of Law no. 36/1995:

“The heir or legatee certificate shall be drawn up on basis of the final conclusion within 20 days and it shall comprise the assessments from such conclusion in regard to the legacy, the number and capacity of the heirs and their share from the patrimony of the deceased.

A copy of the heir certificate shall be issued to each of the heirs or legatees, as the case may be, after paying the succesional taxes and fees.

If a testamentary executor was vested, an assessment certificate of such capacity shall be issued in the above terms.

After suspending the succesional procedure in the terms of Article 78 (1) b) and c), the heir certificate shall be issued on basis of a court decision that remained final and irrevocable.”

The law also requires the authentic form as a condition of the act's validity in donation matters. Indeed, according to Article 813 of the Romanian Civil Code, “all donations are made by authentic act”. As such, the consent of both parties (the donor and the donee) must be given in authentic form. Failure to comply with such formal

requirements leads to the absolute nullity of the donation contract. If the donation contract is executed by an attorney (of the donor or of the donee), the power of attorney must also be drawn up in authentic form. The authentic form is regarded here as a means of protecting the donor, considering the principle of irrevocability of donations.

Authentic acts have a unique significance and importance in real estate matters, particularly concerning the transmission of property on land /land estate of any kind. Thus, according to Article 2 (1) of Title X (“Legal circulation of land”) of Law no. 247/2005 regarding the reform in the field of property and justice, “land with or without constructions, located in developed or undeveloped areas, whatever its destination or surface area, may be transferred or acquired by legal acts between living persons, concluded in authentic form, under sanction of absolute nullity”. Furthermore, according to Article 2 (2) of the same law, legal acts that create material rights on land with or without constructions, whatever its destination or surface area, can only be executed in authentic form. Consequently, unlike in French law, which maintains the rule of consensualism even in the case of property sale, in Romanian law the disposal of land, just as another legal operation on land, is subject to notarial authentic form, required *ad validitatem*. The agreement of wills is therefore not enough to ensure the valid execution of the contract having as object the transfer of property (or the creation of material rights) on land; the will of the parties must be expressed in authentic form (Chirică, 2008, pp. 303-304; Pop and Harosa, 2006, pp. 155-164). However, the authentic form is not required in the case of bilateral promises (precontracts) to sell land estate. According to the conversion principle, the contract having as object the transfer of land, concluded without complying with the requirement of the authentic deed, will generate effects as a promise to sell (Pop and Harosa, 2006, p. 156). Also worth mentioning is Article 5 (2) of Title X of Law no. 247/2005, providing for the possibility of substituting the consent of the party of a precontract having as object a piece of land, who culpably refuses to subsequently conclude the actual contract in authentic form. In this case, “the party having complied with his obligations may address the competent court, which may pass a judgment that substitutes for a contract” (Article 5 (2)).

Moreover, the authentic form of contracts of exchange or sale-purchase of forest land is stipulated by Article 45 (2) of Forest Code, adopted by Law no. 46 of March 19, 2008 (Official Monitor no. 238 of March 27, 2008).

The authentic form is also required in relation to mortgages (Article 1772 of Civil Code), as well as in the case of a conventional subrogation accepted by debtor – Article 1107 of Civil Code.

As far as the creation of a company is concerned, the rule is that the company contract need not be drawn up in authentic form. Thus, according to Article 5 (6) of Law no. 31/1990 on companies, “the company contract is executed under private signature, is signed by all associates or, in case of public subscriptions, by the founders”. However, according to the same article, the authentic form of the company contract becomes mandatory in three situations: „The authentic form of the company contract

is mandatory when:

1. among the goods subscribed as contribution to the registered capital is a piece of land;
2. a general partnership company or a limited partnership is set up;
3. the joint-stock company is set up by public subscription.”

Note that in the first case, the reason for the authentic form is that the company contract generates property transfer effects in relation to the land subscribed as contribution to the registered capital. In the second situation, the requirement of an authentic form of the company contract is closely related to the nature of responsibility of the future associates of general partnership companies or limited partnership companies – who have unlimited and joint liability for their social obligations (Article 3 (2) of Law no. 31/1990 on companies). In the third case, the law stipulates the obligation of the founders of joint-stock companies set up by public subscription to sign the emission prospectus in authentic form (Article 18 (2) of the same law) specifically to protect third parties, that is, future subscribers (acceptors).

Notarial authentic acts are enforceable titles. According to Article 66 of Law no 36/1995, “The act authenticated by the notary public that assesses a sure and liquid debt has the power of an enforceable title (writ of execution) on the date of its enforceability. In the absence of the original document, the writ of execution may have the duplicate or the legalized copy of the counterpart from the archive of the notary public”.

4. Legal objectives and the general policy underlying the existence and use of authentic acts

Romanian civil law traditionally considers that the prevailing reason for the authentic form requirement is that of protecting the consent of the parties involved in a certain legal operation. For most Romanian authors, the only reason of the authentic form – as an exception to the principle of consensualism – is to ensure the awareness of those who wish to execute certain legal acts (donations, mortgages) for which the law requires the authentic form *ad validitatem*, as to the serious effects specific to such acts. More precisely, the reason of *ad validitatem* formalism would come down to that of obtaining an informed consent (Chirică, 2008, p. 304). It has been noted, to this effect: “The constant of *ad validitatem* formalism is yet (beyond a mixture of other possible reasons) that of targeting the protection of the parties from themselves, avoiding a rush consent to legal acts whose “image”, from the perspective of all its implications, they are not completely aware of yet”.

It must be mentioned though that currently the reasons of formalism in private law may no longer be reduced to the function of obtaining an informed consent. There is no doubt about the fact that the authentic form requirement is meant to exercise control over the act. The objectives of this control are manifold: to ensure the security of the real estate circuit and the confidence in the real estate publicity system (which must be based on acts whose legal value is guaranteed), to ensure

compliance with certain limitations or restrictions imposed by the law (preemptive rights or temporary incapacities of foreigners to acquire land in Romania – Law no. 312/2005 on acquisition of property rights over land by foreign citizens and stateless persons, as well as by foreign legal entities).

Besides the issues mentioned above, we may add that the control function exercised through the *ad validitatem* requirement of form is pursuing objectives of a fiscal nature. Thus, according to Article 254 (7) of Fiscal Code, the transfer of property on a building cannot be undertaken as long as the holder of the title to that building has any outstanding local fiscal debts; acts executed in infringement of this provision are lawfully void. Furthermore, according to Article 77*1 (6) of Fiscal Code, it is the obligation of the notary public to compute, establish, collect and transfer the tax on the sale of private property, thereby ensuring the record and taxation of such legal operations. It is also worth mentioning that the notary public has the obligation to report to the National Money-Laundering Prevention and Control Office all transactions with amounts exceeding EUR 15,000 (Article 8 of Law no. 656/2002). The objective pursued through the requirement of form is therefore a control of money transfers in order to prevent money-laundering.

We believe that the prevailing reason of *ad validitatem* formalism is that of control. The sale/purchase agreement remains, as a rule, a consensual contract. Exceptionally, it becomes a solemn contract only when its object is land. We further remind that, according to Article 1 (3) of the Law on Cadastre and Real Estate Publicity no. 7/1996, real estate, for the purposes of this law, “means one or more adjoining lots of land, with or without constructions, belonging to the same owner”. A close link may be noted between the authentic form requirement in the case of acts having land as their object, and the aim of ensuring the security of the real estate circuit and the confidence in the real estate publicity system. The fact that the prevailing reason of the form requirement is not to protect the parties’ consent, but to exercise control also results from Article 9 (6) of the Rome Convention on the Law Applicable to Contractual Obligations, of June 18, 1980: “Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract”. Therefore, even if the parties have chosen the law applicable to their contract, this chosen law will only be applied in relation to substantive issues (including the consent) and issues of an obligational nature, but not to in rem issues, nor to the form of the contract “the subject matter of which is a right in immovable property or a right to use immovable property.” See also, in this sense, the recent “Rome I” Regulation – Regulation (EC) no 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I) – Art. 11 (Formal validity)⁵.

5 1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law

5. National authorities and authentication procedure

5.1. National authorities competent to issue authentic acts

As we have pointed out before, we must distinguish, in this respect, between:

1. Authentic instruments concerning declarations of *the public authority itself* – which are drawn up by most public authorities (i.e. titles on land property issued in application of land reform and land restitution laws, administrative decisions regarding the urbanism, land register decisions and other similar documents, tutelar authority decisions regarding family care and representation of minors etc.);
2. Authentic instruments on *facts* (i.e. facts relating on civil status matters – birth or death documents and certificates) drawn up by civil status officers;
3. Authentic instruments concerning *legal agreements* (Rechtsgeschäfte) or other declarations by third parties, which are the task of civil law notaries or of consular authorities. The notary public has fulfills the following acts:
 - The drawing up of documents with legal content, on the request of the parties;
 - The authentication of documents drawn up by the notary public, by the party in person or by the lawyer;
 - The notary successional procedure;
 - The certification of certain facts, in the cases stipulated by law;
 - The legalisation of signatures on documents, of signature samples, as well as of seals;
 - The rendering of a certain date to the documents produced by the parties;
 - The reception in deposit of the documents and acts produced by the parties;

which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

- a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
- b) those requirements cannot be derogated from by agreement.

- The protestation acts of bills of exchange, promissory notes and cheques;
- The legalisation of copies of documents;
- The performance and legalisation of translations;
- The issuance of duplicates of the notarial acts he drew up; and
- Any other operations stipulated by law.

Competency of notaries public and consular authorities are regulated in Art. 9-13 of Notaries Public and Notarial Activity Act, no. 36/1995: Notaries public shall render legal advice in notarial matters, others than those regarding the content of the acts, which they draw up and they shall participate as specialists appointed by the parties in the preparation, and drawing up of certain legal acts of notarial nature (Art. 9). In fulfilling the attributions incumbent on him, the notary public has the general competency with the exceptions stipulated in the following cases:

1. The notarial successional procedure falls under the competency of the notary public from the notary office located in the territorial circumscription of the court of law where the deceased had his last domicile.
2. In case of successive inheritances, the heirs may choose the competency of any of the notary offices from the territorial circumscription of the court of law where the last domicile was located that pertained to that author who last deceased.
3. The protestation acts of bills of exchange, promissory notes and cheques shall be made by the notary public from the territorial circumscription of the court of law where the payment is to be performed.
4. The issuance of duplicates and the reconstruction of notarial acts shall be made by the notary public in whose office their original is deposited (Art. 10).

Competency conflicts between offices of notaries public located within the same circumscription of a court of law shall be solved by that court when notified by the interested party. The court decision shall be final.

When the conflict occurs between notary offices located in different circumscriptions, the competency pertains to the court of law in whose circumscription the notary public office that was last notified is located (Art.11).

The secretaries of local councils of communes and towns where there are no notary public offices shall draw up the following notarial acts, on the request of the parties:

1. the legalization of signatures on the documents produced by the parties; and
2. the legalization of copies of acts, except documents under private signature.

5.2. Authentication procedure

We have to make an essential distinction between authentication procedure and the legalization of signature. According to Art. 89 (Notaries Public Act no. 36/1995), the notary public may legalize the signature of the parties only on the documents wherefore the law does not stipulate the authentic form as a validity condition of the act.

The notary public shall identify the parties, he shall convince himself that they know the content of the document and afterwards he shall request from them to sign before him all counterparts of the document.

In the conclusion it shall be indicated that the essential terms of the signature legalization were fulfilled for the purpose of Article 49 g) by the following mentions:

1. the date (year, month, day);
2. the name of the party and the fact of appearing in person; and
3. the assessment of signing before the notary public all counterparts of the document.

The notary public may legalize upon the request of the party the signature sample of the person who shall personally appear at the headquarters of the notary office and who shall sign before the notary public.

For the legalization of the seal, the party shall present it to the notary public who shall draw up the legalization conclusion after the checking (Art. 89 *fin*).

Authentication procedure has various steps. The role of the notary public is crucial in clarifying the parties' intent. The documents regarding notarial acts shall be drawn up according to the will of the parties and under the terms provided by law.

The documents shall be drawn up in a legible, careful manner and without abbreviations; the mentions in figures shall be also recorded in letters and blank spaces shall be filled in by drawing lines (Art. 43, par. (3) Notarial Law, no. 36/1995). Also, according to Article 43 par. (2) of Law no. 36/1995 (Notarial Law), the documents regarding notarial acts shall be drawn up according to the will of the parties and under the terms provided by law. The notary has the legal duty to inform the parties of the legal options available to them and to advise them on the legal issues inherent in the respective option. According to Art. 45 (1), "the notary public must determine the real relations between the parties with regard to the act they are to conclude, check whether the scope they aim at is compliant with the law and give the necessary instructions about their legal effects".

Preparation of the contract is another step in the authentication procedure. According to Art. 44 (1), "documents wherefore the law establishes an authentic form shall be drawn up only by the notaries public, the lawyer of the interested parties or the legal advisor or the legal representative of the legal person. The persons with higher law education may draw up documents wherein they, their spouses, the ascendants or descendants are parties".

The notary public determines the identity, domicile and capacity of the parties within the works of drawing up notarial acts, save the cases when a rendering of a fixed date, the drawing up of legalized (certified) copies or the granting of notary legal advice is requested (Art. 43 par. (4) Notarial Law).

Documents drawn up by the parties or by their legal or conventional representatives, as the case may be, shall be checked in regard to the observance of the essence and form conditions and the notary public may bring the proper amendments and completions with the consent of the parties (Art. 43(1)).

Laying down the declarations of the parties and identity check represents another step.

When the notary public has doubts in regard to the mental sanity of any of the parties, he proceeds to the authentication only if a specialist physician attests in writing that the party may validly express their consent at the moment of concluding the act. However, if the notary is convinced of the lack of the mental sanity of any of the parties, he is obliged to refuse the authentication (Art. 51 par. (2) d) – Art. 59 (Notaries public and Notarial Activity Act no. 36/1995).

In order to take the consent of the parties, further to reading the act, the notary public shall ask them whether they have understood its content and whether the content of the act expresses their will. Due to justified grounds, the notary public may take separately, but on the same day, the consent of the parties that are stipulated in the act. In this case, the time and place of taking the consent of each party shall be mentioned in the approval conclusion of the authentication (Art. 60). The declaration of will of the deaf, dumb or deaf and dumb person who is literate shall be given in writing before the notary public by the party's registering before the signature the mention "I agree to this act which I read". If the deaf, dumb or deaf and dumb person is due to any reason incapable of writing, the declaration of will shall be taken through an interpreter. In order to take the consent of a blind person, the notary public shall ask whether he has heard well when the document was read to him and whether what he heard represents his will, registering this in the authentication conclusion. (Art. 61 Notaries public and Notarial Activity Act no. 36/1995). In case of persons who due to infirmity, disease or any other causes cannot sign, the notary public shall make the mention when fulfilling the act about such circumstance in the conclusion he draws up and the mention made in this manner shall replace the signature. For the authentication of an act, the notary public shall previously check and establish the identity of the parties. The parties may be represented on authentication by an attorney with authenticated special power of attorney (Art. 58(1)).

In case of persons who due to infirmity, disease or any other causes cannot sign, the notary public shall make the mention when fulfilling the act about such circumstance in the conclusion he draws up and the mention made in this manner shall replace the signature. For the authentication of an act, the notary public shall previously check and establish the identity of the parties. The parties may be represented on authentication by an attorney with authenticated special power of attorney (Art. 58, (1)). "The notary public determines the identity, domicile and capacity of the parties within the works of drawing up notarial acts, save the cases when a rendering of a fixed date, the drawing up of legalized copies or the granting of notary legal advice is requested" (Art. 43(5)) – Art. 62).

The parties participating in the notarial act may be identified by the notary public by mentioning in the conclusion that they are personally known by him. If the notary public does not know the parties, he must convince himself of their identity

established, as the case may be, by:

- a) identity documents or official permits bearing a signature, stamp and photo of the holder;
- b) the assessment of the lawyer that assists the party;
- c) two witnesses of identity, personally known by the notary public or identified according to letter a).

A witnesses for identification may not be a person that:

- a) is not 18 years of age;
- b) does not appear as a party or as a beneficiary in the act;
- c) due to a mental or physical deficiency is not capable of proving the identity (Art. 50).

The notary public must request from the parties, whenever the case may be, documents in proof and authorizations necessary for the concluding of the act or he may obtain himself the necessary documentation, on their request.

Of course, the authentication procedure includes the legality control, signature by the parties and by the notary public.

The legality control is very important. The civil law notaries are not simply receptors of the parties' intentions. They have to certify the legal efficacy of the notarial act. According to Art. 51, in case when the fulfilling of the notarial act is refused, the rejection conclusion shall be given only if the parties insist in their request, after having drawn their attention that the requested act is contrary to the law or morals. The conclusion shall also comprise the motivation of the rejection, the remedy at law before the law court and the time limit for exercising such remedy.

The fulfilling of the notarial act may be also rejected due to the following reasons:

1. the request of works outside the business schedule, except for the cases stipulated in Article 48 (3);
2. the failure to submit the necessary documentation or its incomplete presentation;
3. the failure to pay the established duties and fees; and
4. the impossibility to identify the parties or their lack of judgment.

All original copies of the authenticated document requested by the parties, as well as the one that is kept in the archive of the notary office, together with the appendixes that are integral part of such a document shall be signed before the notary public by the parties or their representatives and by the ones called to approve the acts, as the case may be, which the parties draw up, by assistant witnesses, when their presence is necessary and by the one who drew up the document, if the case may be, under the terms of this law. Each party may request at least one original counterpart of the authentic document (Art. 64).

Not at least, notification of tax authorities and other public authorities are part of the notarial procedure. I.e.: the acts whereof result rights that are to be subjected to private or real publicity shall be immediately notified in the place where such evidence is kept, by the notary public who shall also fulfill the necessary formalities

in the name of the titulars in order to complete all publicity works (Art. 45 (3) and Art. 54 par. (1) Law no. 7/1996 on the cadastre and on real-estate publicity).

An even higher level of control and documentation applies within the area of application of the provisions against money laundering. See Art. 8 and next of Law no. 656 of December 7, 2002 on preventing and sanctioning money laundering.

6. Legal value of authentic acts

Authentic acts are, as we have seen, instruments drawn up with the solemnities required by the law by a public officer (or equivalent person) who enjoys material and territorial competence to instrument the act (Article 1171 of Civil Code).

Unlike deeds under private signature, authentic acts enjoy the presumption of authenticity, in the sense that they really emanate from the persons mentioned as the signatories of the act. It must be emphasized that this presumption of authenticity is applied not only to the parties of an act, but to third persons as well. The authentic act is, from this perspective, opposable *erga omnes* (Article 1173 of Civil Code).

7. Probative value of authentic acts

As far as the probative value is concerned, we must distinguish between two categories of mentions of the authentic act: personal findings (*ex propriis sensibus*) of the notary public and declarations of the parties taken by the notary public. In the case of the first category of mentions, their truthfulness can only be challenged by the parties or by third persons through a false inscription procedure, stipulated in Articles 180-194 of Civil Procedure Code. The reason of this legal provision is based on the fact that the person who authenticates the act is invested with an official capacity, enjoying credibility and integrity. In other words, everything a notary public finds with his own senses (the presence and identity of the parties, their expressions of free will, the date of execution of the act etc.) is presumed to be true. The presumption can only be rebutted through a false inscription procedure, which consists of a verification by criminal investigation agencies of possible inconsistencies (false mentions) imputable to the instrumenting agent (the notary public).

As for the truthfulness of the parties' declaration content, an item that could not have been checked by the notary public, the authentic act is probative save proof to the contrary. For the parties of the act this can be done, in principle, by counter-inscription, whereas for third parties any evidence is allowed. According to Article 1174 of Civil Code, the mentions exceeding the scope of the act but somewhat related to it are also considered evidence save proof to the contrary.

The full probative force, save false inscription, of authentic acts is definitely one of the major advantages of this category of acts:

- Trustworthy proof of the execution of documents;
- Reduction of fraud, particularly in areas of real property conveyances and lenders' security documentation, e.g. personal guarantees, mortgages;
- Reduction in possibility of disputes concerning contents of contractual documents, intentions of the parties and chronology of events;

- Expectations of parties as to the legal effect of executing documents before notaries would be met;
- The development of electronic (paperless) commerce would be encouraged since this is an area in which notaries (as trusted third parties and certifying authorities) are likely to play an important role; and
- In the context of anti-money laundering regulations, notaries could expand the valuable role which they undertake in positively identifying individuals and confirming the existence and good standing of legal entities and certifying the powers of the persons entitled to represent such entities. This assists financial institutions and their customers by avoiding the need for individuals to attend in person at the institutions concerned in order to produce documentary proof of their identity and removes a considerable administrative burden from the institutions themselves.

8. Enforceability of authentic acts

In Romania, authentic acts are enforceable as such. There are no differences between authentic acts drawn up by the notary public and judgments. Indeed, according to Art. 66 of Notaries Public and Notarial Activity Act, no. 36/1995, “the act authenticated by the notary public that assesses a sure and liquid debt has the power of an enforceable title (writ of execution) on the date of its enforceability. In the absence of the original document, the writ of execution may have the duplicate or the legalized copy of the counterpart from the archive of the notary public”.

9. Cross-border use of authentic instruments in the field of immovable properties

Of course, there are some reasons to exclude the matter of cross-border use of authentic instruments in the field of immovable properties from a (potential) new regulation. For example:

- property purchase is fundamentally a “local” matter, due to the multitude of special rules and directives and the need to frequently involve local authorities;
- the real property registers differ from one country to another, have different functions and they need very different knowledge to be used;
- in financing the purchase, normally local financing entities are chosen, as they are in better condition to evaluate the investment;
- the principle of application of *lex rei sitae* is a general rule regarding immovable properties, confirmed – as far as Community law is concerned – by the Rome Convention and, more recently, by the new Rome I Regulation (Reg. CE 593/2008, Art. 11); and
- concerning jurisdiction, the same principle is applicable, according to Brussels I regulation (Reg. CE 44/2001, Art. 22).

Let us say that we consider the reasons indicated above to be insufficient in order to exclude the matter of cross-border use of authentic instruments in the field of immovable properties from a (potential) new regulation. We can easily imagine

that a well-equipped law firm will be in a near future in condition to manage the different local laws and habits, to create a net of associates or of contact-points in different countries, to negotiate with financing institutions, etc., and so to achieve the necessary know-how to offer its services even on a cross-border basis. On the other hand, the application of *lex rei sitae* does not mean that a professional (a lawyer, a notary, a judge) cannot manage to draft a contract (or to state a judgment) applying not the law of his own country, but the law of the country in which the property is situated: a notary, e.g., could perfectly well receive an authentic act fully respectful of the (substantive) law of a different country. Let's think to the case, that the same Rome I Regulation already allows for choice of applicable law by the concerned parties, in consequence of which we have to consider as perfectly normal such a possibility (and the obligation for the notary to deal with it). Even if we consider the application of the *lex rei sitae* only from the formal point of view, i.e. referred to the form of the authentic instrument concerned, the result is the same: the application of the form required by the law of the *situs rei* does not mean the necessity of a "local" notarial act, but simply the (generic) notarial form, which can be accomplished abroad as well, being of general application also the rule *locus regit actum*.

If we wish to remark the present status of the discipline applicable to the international circulation of notarial acts in the European Community, and imagine its possible future development, in addition of the referred points, we also need to consider:

- The danger of leaving without a specific discipline the (maybe) most relevant case of potential cross-border circulation of notarial acts, that is the constitution and transfer of *ius in rem* in immovable properties, with the possibility that either a decision of the European Court of Justice, or the simple procedure of local land registers, can easily legitimate the practice of registration of foreign documents (see, for instance, the current developments of registration of German notarial acts in Spain).
- The possibility that the same Court of Justice could develop a doctrine of circulation based on the principle of "mutual recognition", as already existing in many other fields, supported by a presumed equivalence of the notarial act in all the European countries.
- The provision of article 17, no. 12, of the Directive 2006/123/EC, on services in the internal market, which statutes that "Article 16 [on the freedom to provide services] shall not apply to [...] 12) acts requiring by law the involvement of a notary", should be better evaluated, as it seems to be the way to demonstrate that the Community law recognizes that the discipline of circulation of notarial acts cannot be based on the application of the law of the country of origin; this should mean, in my opinion, that the subject matter is still governed by the different private international law rules of the concerned countries.

10. Conclusions

A future European regulation regarding the cross-border circulation of the authentic instruments shall not exclude the field of authentic instruments relating to rights *in*

rem in movable and immovable property, considering their destination to the public registers of the different Member States. With regard to the notarial documents relating to the transfer of the rights *in rem* on immovable property, I note that:

- The principle *lex rei sitae* is a traditional principle of the private international law, acknowledged by all Member States. It applies to the legal regime of the immovable property.
- However, we should make a clear distinction between the deed (notarial instrument/contract) that transfers the property or other rights *in rem*, on one hand, and the regime of the property right (itself) in the immovable asset, on the other hand. More precisely, both the Rome Convention in 1980 and, more recently, the (CE) Regulation no. 593/2008 (“Rome I”), allow the parties to choose freely the law applicable to their agreement – article 3 of the Regulation – even if it is a contract that has as object the transfer of property of an immovable asset (land)⁶.

Thus, it is mandatory to observe the form imposed by the law of the place where the immovable property is located (the land). Under no circumstance shall have exclusive jurisdiction the Notary of a Member State on whose territory the immovable asset is located. Such an exclusive jurisdiction can only be found in litigation matters, in civil actions “which have as their object rights *in rem* in immovable property or tenancies of immovable property”. In this situation the courts of the Member State in which the property is located shall have exclusive jurisdiction, regardless of domicile (Article 22, Brussels I Regulation).

The autonomous concept of right *in rem* is characterized by the power of its holder to claim the property that is subject to this right against any person who does not hold a prevailing right *in rem* (Cf. Report Schlosser, para. 166).

As it was mentioned “the exclusive jurisdiction comprises only an action based upon a right *in rem* and not an action having as an object, a right *in personam*. Thus, it excludes an action for rescission or damages for the loss resulting from the breach of a contract for the sale of immovable property; an action to enforce the obligations

6 We can easily draw the same conclusion from the wording of Article 4 of the above mentioned European Rome I Regulation which reads in paragraph I letter (c), that: „To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows (...): (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated”. The Regulation imposes only the form of the contract. Article 11 (4) of the Regulation: „Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law: (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and (b) those requirements cannot be derogated from by agreement.”

of the seller regarding the transfer of title, in those systems in which this transfer is not an automatic effect of the contract for sale; an action for restitution of property raised by a party where the other party to the contract is not performing his obligations under the contract for sale of the property; an action for annulment of the contract for sale; an action where a creditor seeks to set aside a gift of the legal owner of an immovable property allegedly made by the debtor to defraud his creditors (action paulienne) etc.” (Gaudemet-Tallon, 2002, p. 73; Magnus and Mankowski, 2007, p. 352). Hence, as it was already rightfully established:

“the exclusive jurisdiction doesn’t extend to the whole of the actions concerning rights in immovable property, but just to those that, simultaneously, fall within the scope of application of the Regulation and tend to determine the extent, content, ownership or possession of an immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest” (Magnus and Mankowski, 2007, p. 353).

Therefore, no reasonable argument can be brought in favor of extending the effects of Article 22 (1) of Brussels I Regulation to the matter of notarial contracts. The exclusive jurisdiction refers only to the litigation matter and strictly when we deal with in rem actions. This is because the courts of a Member State where the immovable asset is located controls the qualification of rights in the immovable assets.

On the other hand, the exclusive jurisdiction of the courts of the Member State in which the public register is kept “in proceedings which have as their object the validity of entries in public registers” (Article 22 (3) Brussels I Regulation), does not imply an exclusive jurisdiction of the notary from the place where the immovable asset is located and whose document is registered in the public Land Registers.

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