The Matrimonial Property Regime Regulation: selected issues concerning applicable law

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This project was co-funded by the European Union's Justice Programme (2014-2020)

PERSONALIZED SOLUTION IN EUROPEAN FAMILY AND SUCCESSION LAW

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ISBN: 978-886768-042-9

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This book collects the Case studies and best practices analysis to enhance EU Family and Succession Law. Working Paper which is a deliverable of the project number n. 800821-JUST-AG-2017/JUST-JCOO- AG-2017

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1. *Introduction*

In January 2019, two new regulations on property of international couples entered into force: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[1] (hereinafter: Matrimonial Property Regime Regulation) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (hereinafter: Property Consequences of Registered Partnerships Regulation).[2] Given that these regulations were enacted within enhanced cooperation, only courts in Member States which decided to participate in enhanced cooperation apply them. Currently, there are 18 participating Member States: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, Czechia, the Netherlands, Austria, Bulgaria, Finland and Cyprus. Other Member States are free to join. Estonia notified its intention to

[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1-29.

[2] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30-56.

participate in enhanced cooperation concerning these regulations.[3]

Both Regulations cover all private international law issues which arise in cross-border litigation: courts of which Member State have jurisdiction, law of which state will apply and conditions under which the judgment rendered in one Member State may be recognized and enforced in another Member State. The paper will concentrate solely on the Matrimonial Property Regime Regulation, more precisely certain problems which may arise in applying rules on applicable law for matrimonial property regime.

The Matrimonial Property Regime Regulation applies to proceedings instituted on or after 29 January 2019.[4] However, for the purposes of Chapter III containing rules on applicable law, the temporal scope of application is defined differently. Chapter III applies only to matrimonial property regimes of spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019.[5] Due to the recent entry into force of the Matrimonial Property Regime Regulation and difficulty in finding case-law regarding it, the paper will use hypothetical cases. The aim of the paper is to point out possible problems which may arise in application of rules on applicable law in the Matrimonial Property Regime Regulation without providing an in-depth scientific analysis.

2. *Applicable law under the Matrimonial Property Regime Regulation*

One of the Matrimonial Property Regime Regulation cornerstones is the unity of the law regime. In other words, the law applicable to the matrimonial property regime should be applicable to all assets, even if they are located in different Member States or a third state, for the purposes of legal certainty and avoidance of fragmentation of the matrimonial property regime.[6]

Party autonomy plays an important role in the Matrimonial Property Regime Regulation. Parties are allowed to choose applicable law. However, the party autonomy in

[3] At a glance, Plenary-20 June 2016, European Parliament, https://www.europarl.europa.eu/RegData/etudes/ATAG/2016/583835/EPRS_ATA%282016%295 83835_EN.pdf (12.11.2019).
[4] Article 69(1) and (2) of the Matrimonial Property Regime Regulation.
[5] Article 69(3) of the Matrimonial Property Regime Regulation.
[6] Article 21 and Recital 43 of the Matrimonial Property Regime Regulation. See also Lagarde, Paul, Introduction, in: U. BERGQUIST ET AL., *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 10, Paragraph 30-34.

choosing applicable law is restricted to two options: habitual residence of spouses or one of the spouses at the time the agreement is concluded or the law of a State of nationality of spouses or one of the spouses at the time the agreement is concluded.[7] Choice may be made or changed at any moment, before the conclusion of marriage, at the time the marriage is concluded or during the course of the marriage. If the spouses decide to change the applicable law during the marriage, unless otherwise agreed, it will have prospective effect only. Furthermore, the retroactive change of applicable law cannot adversely affect the rights of third parties. In this manner, the Regulation envisages a safeguard against adverse effects in the event the mutability of the applicable law, for instance, affects the assets and transforms the sole ownership of one spouse into joint ownership.[8]

The material validity of the agreement on choice of law is governed by the chosen law as if the agreement was valid. In order to establish that he did not consent, a spouse may rely upon the law of the country in which he has his habitual residence at the time the court is seised, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the chosen law.[9] The agreement on choice of law will be formally valid if it is in written form, dated and signed by both spouses. Communication by electronic means is considered to be equivalent to writing if it provides a durable record of the agreement. There is a possibility that additional formal requirements of other Member States' laws will apply. Additional formal requirements prescribed in following Member States' laws may apply if they exist: Member State in which both spouses have their habitual residence at the time the agreement is concluded; Member State in which either one of the spouses is habitually resident, if they are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements; Member State in which one of the spouses is habitually resident at the time the agreement is concluded, if only one spouses is habitually resident in one of the Member State and that Member State lays down additional formal requirements.[10]

[7] Article 26 of the Matrimonial Property Regime Regulation.
[8] P. LAGARDE, *Applicable Law*: Articles 20-35, in U. BERGQUIST ET AL., *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 101, Paragraph 22.11.
[9] Article 24 of the Matrimonial Property Regime Regulation.
[10] Article 23 of the Matrimonial Property Regime Regulation.

If the spouses do not choose the applicable law, the applicable law will be determined in accordance with Article 26 of the Matrimonial Property Regime Regulation. Article 26 contains a scale of connecting factors which have to be applied in the hierarchical order.[11] The first connecting factor is spouses' first common habitual residence after the conclusion of the marriage. However, law of that state may not be applied if one spouse objects to it, and if the spouses had their last common habitual residence in another state for a significantly longer period of time than in the state of the spouses' first common habitual residence after the conclusion of the marriage and both spouses relied on the law of that other state in arranging or planning their property relations. The law of that other state applies from the time the marriage is concluded, unless one spouse disagrees. In the latter case, the law of that other state has effects as from the establishment of the last common habitual residence in that other state. The application of the law of that other state cannot have adverse effect on the rights of third parties deriving from the law of the state of the spouses' first common habitual residence. The law of that other state cannot be applicable if the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other state. The second connecting factor is spouses' common nationality at the time of the conclusion of the marriage unless spouses have more than one common nationality in which case this connecting factor becomes unusable. The third connecting factor points towards state with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.[12]

The determination of law applicable under the Matrimonial Property Regime Regulation in a particular case may have jurisdictional consequences. Namely, Article 7 of the Matrimonial Property Regime allows to parties to choose the competent court. Party autonomy in choosing the competent court is limited to the following options: the courts of the Member State whose law is applicable pursuant to Article 22; the courts of the Member State whose law is applicable pursuant to Article 26(1)(a) or (b); the courts of the Member State in which the marriage is concluded.

[11] Recital 35 of the Matrimonial Property Regime Regulation.
[12] Article 26 of the Matrimonial Property Regime Regulation.

3. *Hypothetical case 1 – Applicable law in the absence of choice: first common habitual residence after the conclusion of the marriage*

Facts

Linda, an Italian national, has been living in Trieste all her life. During her studies in architecture at the University of Trieste, in 2015, she met Luka, a Croatian and Italian national who enrolled at the University of Trieste in 2012 and has been living in Trieste ever since. The couple fell in love and started a relationship. After the graduation in 2017, Luka returned to Croatia where he settled and started working in the architecture firm owned by his father. After maintaining the relationship at a distance for two years, they planned to get married during the holidays in Greece. They concluded the marriage in March 2019 in Santorini. Luka returned to Croatia, bought an apartment for two of them and Linda returned to Italy to arrange her move to Croatia where she was supposed start working together with Luka in the architecture office as of April 2019. However, their plan was interrupted by the offer Luka received to complete a year-long LLM studies in London. They decided to take an unpaid leave of absence, move to London in April 2019 and return to Croatia after Luka finishes his studies. They signed a one-year-lease for a flat in London. In a year, as planned, they moved back to Croatia where they live and work.

Applicable law

In the event the spouses do not agree on applicable law for their matrimonial regime, Article 26 of the Matrimonial Property Regime Regulation is applicable. The first connecting factor prescribed by Article 26 is spouses' first common habitual residence after the marriage is concluded. The doctrine has already recognized potential problems with regard to this connecting factor.[13] The issue which arises in applying the connecting factor of the first common habitual residence of the spouses after the marriage is concluded is the time frame in which spouses have to acquire the common habitual residence after the marriage. Even though the provision does not specify the relevant time frame, Recital 49 states that the first

[13] P. LAGARDE, *Applicable Law: Articles 20-35*, in U. BERGQUIST ET AL., *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 112, Paragraph 26.05.

criterion for determining the applicable law should be the first common habitual residence of the spouses *shortly* after marriage. It is not entirely clear what happens if the spouses do not acquire the first common habitual residence shortly after the marriage. Does this connecting factor become unusable and should court resort to the next one in scale?

In the presented hypothetical case, the spouses have not acquired their first common habitual residence for more than a year or perhaps even a longer period after they concluded marriage. The Matrimonial Property Regime Regulation does not give any guidance on how to determine habitual residence. The habitual residence will not necessarily be understood in the same manner in all the European private international law regulations.[14] However, for the purposes of the Matrimonial Property Regime Regulation, in majority of cases, the term should be interpreted in accordance with the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[15] (Brussels II bis Regulation).[16] While interpreting the Brussels II bis Regulation, the CJEU has provided guidance on how to assess child's habitual residence,[17] whereas for adults, the explanation is borrowed from other legal areas.[18] Thus, the habitual residence should, for the purposes of the hypothetical case be understood as the place where person's center of life is located. The most important elements to be taken into consideration are the spouses' intention and duration of stay in a particular Member State. Spouses intention regarding their life in London is to stay there for one year only which is apparent from the fact that they did not terminate their employment in Croatia, leased an apartment in London for one year and the

[14] The state of implementation of the EU Succession Regulation's provisions on its scope, applicable law, freedom of choice, and parallelism between the law and the courts, Legal affairs, European Parliament, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596822/IPOL_BRI(2017)596822_ EN.pdf (26.11.2019), p. 3.

[15] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338, 23.12.2003, p. 1-29.

[16] See P. LAGARDE, *Introduction*, in: U. BERGQUIST, ET AL., *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 61, Paragraph 6.16.

[17] See A. LIMANTE AND I. KUNDA, *Jurisdiction in Parental Responsibility Matters*, in: HONORATI, COSTANZA (ed.), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction,* A *Handbook on the Application of Brussels IIa Regulation in National Courts*, G. Giappichelli Editore, Peter Lang, Torino, 2017, pp. 62-91.

[18] See C. RICCI, *Jurisdiction in Matrimonial Matters*, in: HONORATI, COSTANZA (ed.), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, A Handbook on the Application of Brussels IIa Regulation in National Courts*, G. Giappichelli Editore, Peter Lang, Torino, 2017, pp. 38-59.

fact that the purpose of their stay in London is the completion of Luka's LLM studies. Furthermore, they intend to live in Croatia where they are both employed and own an apartment. Therefore, taking into consideration these facts and duration of their stay in London, one would most likely conclude that they did not acquire habitual residence in London. Luka's habitual residence is in Croatia where he has been living and working for two years after the graduation and where he plans to come back after one year spent in London. Linda's habitual residence is in Italy. Even though her intention is to move to Croatia, she never actually lived there. In its case-law concerning habitual residence of the children, the CJEU has demonstrated reluctance towards linking the habitual residence of a child to a Member State based on expression of intention of the parents, without the child ever being physically present in that Member State.[19] This line of reasoning might be applicable for determining habitual residence of adults even more so, considering the level of autonomy of adults in deciding on their whereabouts, whereas children's, especially younger children's place of life depends on their caretaker's decision. Therefore, Linda's habitual residence would probably be located in Italy during her stay in London. Following a pass of a certain period of time after the move to Croatia, she would probably acquire habitual residence in Croatia. Hence, the parties would acquire their first common habitual residence in Croatia more than one year after the conclusion of marriage.

If a dispute between the spouses in the hypothetical case arises concerning their property relations, there are two possible outcomes. The seised court might decide to apply Article 26(1)(a) according to which Croatian law is applicable as the law of their first common habitual residence. The court might resort to Article 26(1)(a) either because it disregards the term *shortly* from Recital 49 or because it concludes that a period of time in duration of one and a half or two years in which the spouses obtain common habitual residence after the marriage fulfills the condition of being acquired shortly after the marriage, particularly having in mind that a certain amount of time in which the person is present in the territory of a Member State has to pass before the person becomes habitually resident there. From that point of view, the time frame of one and a half or two years after the marriage fulfills the condition from Recital 49. The second outcome is the situation in which the deciding court

[19] C-111/17, OL v PQ, EU:C:2017:436.

might find Article 26(1)(a) inapplicable and apply Article 26(1)(b) pursuant to which Italian law would be applicable as both spouses are Italian nationals. This hypothetical case demonstrates that for certain category of proceedings, it will be uncertain whether connecting factor from Article 26(1)(a) may be applied.

4. *Hypothetical case 2 – Party autonomy restrictions in choosing applicable law for matrimonial regime*

Facts

Robert and Ana, both Croatian nationals, decided to move to Austria in search of employment at the end of 2013. During their stay in Austria, they bought a car and a small house in an Austrian village. During 2018, they started planning their return to Croatia and their wedding in Croatia. In 2018, they concluded an agreement by which they chose Austrian law as applicable to their matrimonial regime. In February 2019, they returned to Croatia and concluded a civil marriage. Ana and Robert both found employment, bought an apartment in Zagreb and rented their house in Austria.

Applicable law

Pursuant to Article 22 of the Matrimonial Property Regime Regulation, Robert and Ana may choose either the Croatian law, the law of their nationality, or Austrian law, the law of their habitual residence, as applicable for their matrimonial property regime. In 2018, at the time agreement is concluded, they are both habitually resident in Austria and they are both Croatian nationals. Under the presumption that the agreement was concluded in accordance with Article 23 of the Matrimonial Property Regime Regulation, their choice of Austrian law as applicable for their matrimonial property regime is valid based on Article 22. If a dispute concerning their property arises after they have been living for some time in Croatia, where they acquired habitual residence, in the absence of prorogation agreement, Croatian court would have international jurisdiction based on Article 6(a) of the Matrimonial Property Regime Regulation. Pursuant to Article 42 of the Croatian Family Act (NN 103/2015) it is not permissible to choose foreign law as applicable to property relations by way of marriage contract. Such restriction to party autonomy may be found in other Member

States' laws such as § 1409 of the German *BGB* and its justification lies in the fact that the law which has the closest connection to spouses' property relations and with which the spouses are most familiar with should be applied.[20] Certain scholars interpreted this provision to be applicable whenever the spouses are Croatian nationals, whereas foreign law may be applied when there is an international element, i.e. when one of the spouses is foreign.[21] Indeed, international element in a legal relationship might exist because parties are of different nationality, they are domiciled or habitually resident in different countries. However, international element is not necessarily represented through parties. It may reflect itself in the fact that the proceedings concerns a contract concluded in one country which has to be performed in another or perhaps property is situated abroad.[22] It follows that in disputes with an international element, regardless of how this international element is represented, the applicability of party autonomy restriction from Article 42 will depend on whether Croatian law is applicable. This interpretation is supported by viewpoint of one part of Croatian doctrine which established that Article 42 of the Croatian Family Act should be applied in cross-border disputes only when the applicable law is Croatian.[23] According to this interpretation, Robert and Ana could choose Austrian law as applicable despite the fact that they are both Croatian nationals. The dispute has an international element since the property is located in Austria and the Matrimonial Property Regime Regulation allows them to choose Austrian law as applicable.

[20] L. RUGGERI and S. WINKLER, *Neka pitanja o imovinskim odnosima bračnih drugova u hrvatskom i talijanskom obiteljskom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No 1, 2019, p. 177.
[21] A. KORAĆ, *Imovinski odnosi*, in: M. ALINČIĆ ET AL., (eds.), *Obiteljsko pravo, Narodne novine*, 2006, p. 511.
[22] U. GRUŠIĆ ET AL.„ P. TORREMANS, (ed.), *Cheshire, North & Fawcett Private International Law*, 15th edn, Oxford University Press, Oxford, 2017, p. 5.
[23] P. ŠARČEVIĆ and I. KUNDA, *Part III. Property Rights in the Family Law*, in: P. ŠARČEVIĆ ET AL., *Family Law in Croatia*, Wolters Kluwer, Alphen aan den Rijn, pp. 190-191, pp. 179-196.

5. *Hypothetical case 3 – The interrelation between chapters on international jurisdiction and applicable law with regards to temporal application*

Facts

Ema, a Slovenian national and Klaus, a German national met in 2015. As of 2016, they started living together in Germany. In 2016, they concluded a marriage during their holidays in Bled. For approximately a year after the conclusion of the marriage, they lived in Germany. After that, because of Klaus's work, they lived in Belgium and Luxembourg, in each country for a year. Following a deterioration of their relationship, in March 2019, they decided to divide their assets. During a meeting in March 2019 together with their attorneys, they discussed the possibility of choosing the German court as competent for discussing the division of their property.

Prorogation of jurisdiction

Based on Article 6 of the Matrimonial Property Regime Regulation which contains a scale of jurisdictional bases in case parties do not agree on the competent court, German court would not be competent. However, according to Article 7 of the Matrimonial Property Regime Regulation, parties may choose the competent court. They cannot prorogate the jurisdiction of any court. Their choice is limited to the court of the Member State whose law is applicable pursuant to Article 22 or Article 26(1)(a) or (b), or the courts of the Member State where the marriage was concluded. Since Ema and Klaus did not choose applicable law pursuant to Article 22 and they do not have common nationality, they have at their disposal courts in Member States of their first common habitual residence after the marriage was concluded mentioned in Article 26(1)(a) or the Member State where the marriage was concluded. Under the presumption that Ema and Klaus actually acquired habitual residence in Germany, they would be able to designate the German court as the competent one pursuant to Article 7 of the Matrimonial Property Regime Regulation. However, one has to keep in mind that Chapter II of the Matrimonial Property Regime Regulation which contains rules on jurisdiction and Chapter III which contains rules on applicable law have different temporal application. Rules on jurisdiction apply if the proceedings were instituted on or

after 29 January 2019,[24] whereas for the rules on applicable law to be applicable, the spouses have to conclude marriage or agree on the law applicable to the matrimonial property regime after 29 January 2019.[25] Consequently, certain category of matrimonial property disputes, namely those instituted after 29 January 2019 which concern marriages concluded before that date and property regimes for which the law was chosen before that date, will fall into the scope of Chapter II but will remain outside of Chapter III. The issue to be resolved is how will this two-fold temporal ambit affect the application of Article 7 which is jurisdictional rule but links almost all of the potential jurisdictional bases which parties may choose to applicable law. For that category of disputes, such as the present one, there are two potential solutions. The first one is allowing the parties to agree on jurisdiction of courts of any Member State whose law would be applicable, as if the Chapter III were applicable. In this particular case, Klaus and Ema would be able to choose the German court as the competent one, since Germany is the state of their first common habitual residence after the marriage. The second one is giving parties only the option of prorogating the jurisdiction of the court located in the Member State where the marriage was concluded, since this is the only jurisdictional base prescribed in Article 7 not linked to applicable law. Under this approach Ema and Klaus would be able to prorogate the jurisdiction of only one court, the Slovenian one.

6. *Conclusion*

The Matrimonial Property Regime Regulation, along with the Property Consequences of Registered Partnership Regulation, complements the list of European private international law sources in the area of family law. By covering all the private international law issues which arise in cross-border situations, it facilitates division of international spouses' assets. Due to the recent entry into force of the Matrimonial Property Regime Regulation, case law interpreting it is virtually non-existent. However, doctrine has already anticipated certain problems which may arise in application of the Regulation provisions. The recognition of other potential issues derives from Regulation particularities

[24] Article 69(1) of the Matrimonial Property Regime Regulation.
[25] Article 69(3) of the Matrimonial Property Regime Regulation.

such as different temporal application of chapters in Regulation. In terms of applicable law, the Matrimonial Property Regime Regulation enables spouses to choose applicable law, restricting the party autonomy to two possible choices: habitual residence and nationality of one or both spouses at the time the choice is being made. Certain Member States, like Croatia, prescribe further restrictions to choice of law for property relations. Therefore, the potential issue which may arise derives from the interplay of such restrictions with provisions of the Matrimonial Property Regime Regulation on choice of applicable law. In the absence of the choice of law, the Matrimonial Property Regime Regulation prescribes the scale of connecting factors. The first one is the first common habitual residence of spouses after the marriage, which might be problematic if spouses do not acquire common habitual residence shortly after the conclusion of marriage. It remains to observe the doctrinal and judicial developments concerning these issues and see how they will be resolved.

Abstract: The recent development of European private international law has been marked with the enactment of two new regulations concerning property relations of international couples. Applicable law rules in one of these regulations, namely the Matrimonial Property Regime Regulation will be analyzed. Against this background and based on three hypothetical cases, selected issues which may arise in application of these rules will be detected and anticipated.