

Law applicable to matrimonial property regimes

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Introduction

- Two Regulations
- little differences between Reg
2016/1103 and
2016/1104
- Importance of family
law/property **law**



1. Meaning of matrimonial property regime

Recital (18)

autonomous interpretation is needed

«all civil-law» aspects any property relationships between the spouses and in their relations with third parties, resulting from the matrimonial relationship or the dissolution thereof

- Matrimonial property regime – matrimonial property relations
- Civil law aspects, family law aspects
- ‘Matrimonial property regime’ has a meaning in family law sense
- Applicable law will determine the matrimonial property regime
- Therefore the regime itself is of huge relevance

2. Differences among national property regimes

- huge differences among MS

civil law / common law

different techniques in their function

- deep connection with property law
 - deep connection with contract law and general law of obligations
- 3 regimes may be highlighted in Europe

- separation of property regime
- regime of participation in acquisitions
- regime of community of acquisitions

- **What are similarities and differences?**
- **Are there differences concerning any regime in European countries?**
 - **Default regime**
 - **Alternative regimes**

Hungary

Italy

Lithuania

Portugal

**DEFAULT REGIME:
community of property**

e.g. in Catalonia – separation of assets

**e.g. in Germany – participation of
acquisitions**

**e.g. in Austria – deferred community
(2013 CEFL Principles)**

Hungary

Italy

Lithuania

Portugal

ALTERNATIVE REGIMES
community of property
or/and separation of property

**e.g. in Hungary – also participation of
acquisitions (2014)**

Changes

**Consciousness, legal help (notaries, lawyers,
attorneys)**

3. Definition of matrimonial property agreement

- **Definition (CEFL 2013)**

any agreement by which spouses organise their property relations

- **differences in family law rules**

freedom to enter into an agreement

freedom to choose another regime

freedom to modify a regime

- **Default regimes**

- **Alternative regimes**

4. Main issues concerning applicable law

- Universal application

Art 20 → even if it is not a MS's law

- Unity of applicable law

Art 21 → to all assets falling under that regime, regardless of their location

- Limited freedom to choose the applicable law

5. Applicable law in absence of choice

for spouses there is an order [**Art 26(1)**]

1. first common HR after conclusion of marriage
2. common nationality at time of conclusion of marriage
3. closest connection at the time of conclusion of marriage

DIFFERENCE for registered partners –

Law of the State under which the RP was created

Art 26(3) is exceptional rule

derogating to Art 26(1) → the applicable law is the law of the last common HR

- if they lived there a significantly longer period
- such law was taken into attention when arranging property relations
- these are demonstrated by applicant

6. Matrimonial property agreement

- Applicable law of a country
 - for its default matrimonial property regime
 - for its alternative matrimonial property reg.
- Possibility of entering into a matrimonial property **agreement**

Formal validity (Art 25)

simple – written, dated, signed

communication by electronic means

- **Formal validity**

further possible formal requirements

- common HR when concluding this agreement
if different - one is enough
if only one has HR in MS
- the law which is the applicable law

- **Material validity**

- the law which is the applicable law

7. Choice of applicable law

- Autonomy (Art 22)
- Spouses/future spouses
- Limited options
 - common HR or HR of either of them at the time of conclusion of the agreement on applicable law
 - nationality of either of them at the time of conclusion of the agreement on applicable law

Prospective effect

Protection of creditors

Formal validity (Art 23)

- simple – written, dated, signed
- communication by electronic means
- further possible formal requirements
 - common HR when concluding this agreement
 - if different - one is enough
 - if only one has HR in MS
 - the law which is the applicable law

- **Existence**
- **Material validity (Art. 24)**
 - according to the law which would govern it, if the agreement or terms were valid
- **DIFFERENCE** for registered partners –
 - They can choose also the law of the State under the law of which the RP was created

8. Scope..

Non-exhaustive list (Art 27)

- ✓ classification of property
- ✓ transfer of property between categories
- ✓ rights and obligations of parties with regard to property
- ✓ dissolution of matrimonial property regime
- ✓ effects of the regime

..and adaptation of rights *in rem*

- Matrimonial property rules are embedded in national property law

Art 29

- the right in rem will be adapted to the closest equivalent right under the law of that State

9. Conclusion: considerations of public interest

Court can take into consideration public interest.

However – strict interpretation is needed

✓ Imperative rules (Art 30)

‘overriding mandatory provisions’ are to be applied (e.g. protection of family home)

✓ Public order (Art 31)

certain foreign law provisions should not be applied

✓ EU Charter of Fundamental Rights!

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Case study

FACTS

Ingrid is a Hungarian woman living in Austria. One day she meets a man, Salvatore, from Italy, who is an Erasmus doctorate student in Wien. Salvatore is Italian but he lives in Portugal with his family, as his father has a Portuguese background.

They fall in love with each other, but their personal plans for the future differ. They decide to live together, as a first step before marrying. Salvatore is deeply in love with Ingrid but is uncertain as to whether they should get properly married, or if they should not enter into a registered partnership, maybe under Italian law. Salvatore strongly promotes an agreement on the matrimonial property regime, even before they decide for their future marriage /relationship. (Salvatore seems to be very conscious about property relations as he comes from a family being moderately rich and with a lot of legal experiences.)

Ingrid is a bit embarrassed. She wants to get married. Marriage is important to her. Plus she does not like registered partnership, as in Hungary a registered partnership is maintained for same-sex couples.

She seeks for some legal advice.

They are thinking about a property agreement and not sure whether there is such an agreement for registered partners and/or spouses.

The lawyer informs them that even if they do not enter into a property agreement they can choose the applicable law which can be useful if they terminate their eventual registered partnership or divorce.

She is not sure whether an agreement on applicable law is useful at all.

Related questions

- 1) Is it possible for them to agree on any property regime before they get married but formalize their partnership/and when they marry? What are the main differences?
- 2) What are the (substantial and formal) requirements for the validity of such a property agreement?
- 3) Is it possible for them to agree on applicable law before entering a registered partnership/marriage or only as registered partners/spouses?
- 4) If yes, which law can be chosen?
- 5) What is needed for the validity of such an agreement?
- 6) Does such an agreement comprise all their assets?
- 7) What if she changes her mind? Can they change their agreement after some time?

- 8) What happens if they do not agree on applicable law concerning their matrimonial property regime but they terminate their registered partnership/divorce later?
- 9) If they enter into an agreement on applicable law, can it happen that the court will not apply it?

LEGAL INSTRUMENT(S) TO BE APPLIED
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Regulation No. 2016/1103

Regulation No. 2016/1104

Questions with guidelines

1) Is it possible for them to agree on any property regime before they get married but formalize their partnership?

Yes, if they enter into a registered partnership they can enter into a so called partnership property agreement according to Art 25 of Reg 2016/1104. If they marry they can enter into a matrimonial property agreement according to Art 25 of Reg 2016/1103.

Although they can do that the main issue is which property regime they choose.

Possible issues to be discussed:

What are the possible advantages/disadvantages of the different property regimes?

Is it a requirement that both parties should be informed by the lawyer together?

When can we be sure that a special partnership is registered partnership in the sense of the regulation?

2) What are the (substantial and formal) requirements for the validity of such a property agreement?

If they are registered partners the requirements are the following according to Art 25 of Reg 2016/1104. It has to be expressed in writing, dated and signed by both partners. If the law of the Member State in which both partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for partnership property agreements, those requirements shall apply. If the partners 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 for partnership property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. *This case Ingrid and Salvatore have their habitual residence in different MSs*

If they marry, the requirements are the following according to Art 25 of Reg 2016/1103. It shall be expressed in writing, dated and signed by both spouses. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply. If the spouses 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 for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. *This case Ingrid and Salvatore have their habitual residence in different MSs.*

3) Is it possible for them to agree on applicable law before entering a registered partnership/marriage or only as registered partners/spouses?

If they decide to enter a registered partnership they can do that as future partners [Art 22(1) of Reg 2016/1104].

If they decide to marry, they can do that as future spouses [Art 22(1) of Reg 2016/1104].

They can designate the law applicable to their property consequences of their registered partnership [Art 22(1) of Reg 2016/1104].

They can designate the law applicable to their matrimonial property regime as spouses [Art 22(1) of Reg 2016/1103].

Possible issues to be discussed:

What does it mean 'future partners' or 'future spouses'?

When do they have to enter into a registered partnership or marry after having chosen the applicable law?

What does exactly 'electronic communication' mean?

4) If yes, which law can be chosen?

If they agree on applicable law as (future) registered partners, they can choose one of the following [Art 22(1) of Reg 2016/1104],

- a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded
- b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or
- c) the law of the State under whose law the registered partnership was created.

In case of marriage, the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded can be chosen.

Salvatore has his habitual residence in Portugal, Ingrid in Austria. Ingrid is Hungarian, Salvatore is Italian, so they can choose among several national laws. Besides, if they choose the applicable law as registered partners they can choose the law of the State under whose law the registered partnership was created, this case maybe Italian law. This possibility does not exist if they marry with each other.

Possible issues to be discussed:

The issue if nationality is not a question this case but the habitual residence of either partners is an issue to be discussed. Can the habitual residence change if the decide

to live together further on in Austria? Or if they do not decide it clearly but enter into an agreement while being in Austria?

5) What is needed for the validity of such an agreement?

Consent has to be expressed in writing, dated and signed by both registered partners/spouses.

What concerns the further requirements it depends on the law where both of them has habitual residence at the time the agreement. If it lays down additional formal requirements those have to be applied [Art 23(2) of Reg 2016/1103]. However, if the spouses 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 for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws [Art 23(3) of Reg 2016/1103].

The same rules are contained in Art 23(2)-(3) of Reg 2016/1104.

Possible issues to be discussed:

The issue of habitual residence emerges.

6) Does such an agreement comprise all their assets?

Yes, as according to Art 21 of both Regulations the law applicable to the property consequences of a registered partnership shall apply to all assets that are subject to those consequences, regardless of where the assets are located and the law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located, respectively.

Possible issues to be discussed:

We do not see now the problems but can count with them. The principle of 'unity of applicable law' can bring a lot of difficulties especially because of the so called universal application which means that the law designated as applicable by the is Regulation(s) shall be applied even if it is not the law of a MS.

Besides, the scope of applicable law is quite wide according to Art27 of both Regulations. The rule "adaptation of rights in rem" has to be applied. (Where a person invokes a right in rem to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.) (§29 of both Regulations).

7) What if either of them changes her/his mind? Can they change their agreement after some time?

Actually, yes, but it has some restrictions.

Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only [Art 22(2) of Reg 2016/1103].

Unless the partners agree otherwise, a change of the law applicable to the property consequences of their registered partnership made during the partnership shall have prospective effect only [Art 22(2) of Reg 2016/1104].

The formal requirements always depend at the time when the agreement is concluded and the fact whether where is their habitual residence at that time. However, change requires an agreement of course.

8) What happens if they do not agree on applicable law concerning their matrimonial property regime but they divorce later? What if they are registered partners and terminate their partnership?

If they divorce in a Member State where the Regulation is in force the MS will apply Art 26 concerning applicable law in the absence of choice by the parties. It will apply the law of the State the law of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that that of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

It means that if they will start their common life in Austria, the Austrian law will be applied. They presumably won't have a common nationality.

It makes a great difference as if they were not spouses but registered partners as in the absence of a choice-of-law agreement pursuant to Art 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created [Art 26 of Reg 2016/1104].

Possible issues to be discussed:

By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State should govern the matrimonial property regime if the applicant demonstrates that the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and had relied on the law of that other State in arranging or planning their property relations.

This possibility cannot be seen at the time of entering into marriage.

9) If they enter into an agreement on applicable law, can it happen that the court will not apply it?

They can refer e.g. the invalidity of the agreement according to §24 of Reg 1103/2016. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid. Nevertheless, a spouse may, in order to establish that he did not consent, 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 law specified in paragraph 1.

The court may apply § 30 and 31, which means that the application of the overriding mandatory provisions of the law of the forum are not restricted by the Regulation. Besides, the court can refer to the public policy clause as well.

Possible issues to be discussed:

The public policy clause and the so-called mandatory may cause problems, especially considering the interpretation of provisions of the law of forum.