The property regimes of international couples in EU law

EUROPEAN COMMISSION
DG Justice and Consumers
Unit A1 – Civil Justice

Disclaimer: These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

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Background

- Citizens are increasingly mobile. Union law had already addressed divorce, parental responsibility, maintenance and successions
- One question outstanding: the property regime of international couples
- European Council called for solutions on this matter, as reflected in 2000 Council programme on measures implementing the principle of mutual recognition
- Today, matters on property regimes concern:

  - 16 million international couples in the Union

  - over 460 million EUR when these couples separate or one of the couple's members dies

Adoption process

- 2011: initial COM proposals
- Family law measures require a special legislative procedure: Council acts by unanimity and EP is consulted
- December 2015: Council concluded that no EU-wide unanimity could be reached within a reasonable period of time
- Between December 2015 and March 2016, 18 MS requested enhanced cooperation: SE, BE, EL, HR, SI, ES, FR, PT, IT, MT, LU, DE, CZ, NL, AT, BG, FI, CY (9 MS is the minimum required by Treaties)
- March 2016: three COM proposals:
  - Council decision authorising enhanced cooperation
  - two Council regulations implementing enhanced cooperation: (i) marriages; (ii) registered partnerships

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Adoption process

- As requested by MS, proposed regulations based on compromise texts negotiated during 4 years and presented to Council in December 2015:

  => scope of enhanced cooperation: 1 single area - the property regimes of international couples, covering both marriages and registered partnerships

  => simultaneous adoption of, and joining to, the regulations

  => safeguards introduced to respect legal traditions of MS:

  - possibility to decline jurisdiction
  - no obligation to recognise marriages and registered partnerships concluded in another MS

- 24 June 2016: adoption of Regulations by 18 MS
- Regulations applicable as from 29 January 2019

Impact

- Regulations complete the area of Union family law requested by European Council
- Regulations enable the full operation of Regulations dealing with divorce and succession
- 18 MS in enhanced cooperation represent almost 70% of Union population: Regulations cover a majority of Union international couples
- Any MS can join enhanced cooperation (both Regulations) at any time

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Impact

- No negative impact for non-participating MS:
  - non-participating MS will continue to apply their national rules of private international law to the property regimes of marriages and registered partnerships
  - application of Regulations will not depend on nationality of citizens
  - agreements concluded (i) between MS and third countries and (ii) between participating and non-participating MS, not affected

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Scope

- All civil-law aspects (i.e. excluding public law) concerning the daily management and the sharing of the couple's property as a result of separation or death of one of the couple's members
- Covers property relationships (i) between the couple's members, and (ii) the couple's relations with third parties
- Certain civil-law aspects linked to a couple's property excluded, such as:
  - general capacity of spouses/partners
  - existence and recognition of a marriage/RP
  - maintenance and succession
  - pension rights
  - nature of rights *in rem* and recording in registers

Jurisdiction

- Court: judicial authority and other legal professional acting as, or on behalf of, a court
- Notaries often deal with property regime matters. If acting as, or on behalf of, a court, subject to jurisdictional rules
- Concentration of jurisdiction in two cases - the court competent to deal with property regime matters is:
  - court dealing with succession
  - court dealing with divorce/dissolution of RP:
    - divorce: in certain cases only if spouses agree (depending on ground of jurisdiction)
    - dissolution of RP: if registered partners agree

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Jurisdiction

- In cases other than succession or divorce cases, competent court is, in hierarchical order, the court of MS of:
  - current habitual residence of both spouses/partners
  - last habitual residence of both spouses/partners
  - habitual residence of respondent
  - common nationality of spouses/partners
  - in case of RP, where the RP was created
- Choice of court: other than in succession or divorce cases, spouses/partners can agree (in writing) to choose:
  - court of MS whose law is applicable, or
  - court of MS where marriage was concluded or RP created

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Jurisdiction

- Alternative jurisdiction:
  - where a competent court does not recognise the marriage or RP, it can decline jurisdiction
  - in such case, alternative competent courts are:
    - court chosen by spouses/partners
    - any other court that could be competent under the Regulations
    - the court of the MS where marriage was concluded
- However, court cannot decline jurisdiction if divorce is entitled to recognition (in particular, under Union law)
- Courts that choose to deal with a case must apply the applicable law (not their own law)
- Whether or not they decline jurisdiction, all courts must recognise and enforce judgments from other MS

Jurisdiction

- Subsidiary jurisdiction: where no MS court is competent, a MS court is nevertheless competent in respect of assets located in its territory (to ensure access to justice in a MS)
- Lis pendens:

  Aims to avoid contradictory judgments by courts in different MS. How?

  - If proceedings concerning the same dispute and between the same parties are brought before the courts of different MS, the court first seised has priority
  - Once the court first seised has considered itself competent, the court second seised must decline jurisdiction

Applicable law

- Substantive law governing the couple's property regime remains national
- Unity of applicable law: one single national law applies to all couple's assets regardless of their nature (moveable or immoveable) and location (in a MS or third country)
- Universal applicable law: the applicable law can be the law of a MS or a third country
- Choice of law: spouses/partners can agree to choose (in writing) the law of:
  - country of residence of both or either spouse/partner, or
  - country of nationality of either spouse/partner, or
  - in case of RP, country where RP was created
- Choice can be made before, on conclusion/creation of, or during marriage/RP. Normally only with prospective effects

Applicable law

- If no law is chosen, applicable law, in hierarchical order, of country of:
  - marriage: (a) first common habitual residence, (b) spouses' common nationality, (c) closest connection. If spouses have more than one common nationality, (b) does not apply
  - RP: where RP was created
- Scope of national applicable law: it will govern issues such as:
  - responsibility of one couple's member for debts of other member
  - rights and obligations of couple's members regarding property
  - distribution of property
  - property relationship between a couple's member and third parties

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Applicable law

- Effects of property regime on third parties: couple cannot invoke the law applicable to their property regime in a dispute with a third party unless third party knew or should have known the law applicable to the property regime
- It is considered that a third party knows the law applicable to the property regime in certain circumstances (e.g. if it is the law applicable to the transaction, or the law of the country where immoveable property is located)
- If third party did not know the applicable law: the law applicable to the transaction or the law of the country where immoveable property is located will apply
- MS authority handling property matters will not apply provisions of foreign law contrary to its MS public policy

Recognition and enforcement

- Recognition and enforcement of court decision on property matters does not entail recognition of underlying marriage/RP
- Recognition of court decision is automatic
- Declaration of enforceability under simplified rules:
  - obtained on completion of formalities
  - can be appealed: grounds for non-recognition (e.g. public policy, judgement irreconcilable with earlier judgment), can only be invoked on appeal
- Notarial acts (authentic instruments):
  - if notaries act as a, or on behalf of, a court: acts recognised and enforced as court decisions
  - if notaries act as a legal professional: acts will have the same evidentiary effects as in MS of origin, unless contrary to public policy. Enforceability procedure as court decisions