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- ◆ Setting parental standards through criminal prosecutions: criminality and co-sleeping in Aotearoa New Zealand *Monique Jonas and Joanna Manning*
- ◆ International Res Judicata: Should family laws provide a second bite of the cherry when the first bite abroad was unfair or inadequate? *David Hodson and Michael Allum*
- ◆ Court guardianship; medical treatment of a child *Paul von Dadelszen QSO*
- ◆ Supply, security and safeguards: how surrogacy law must improve *Sarah Williams and Emma Williams*
- ◆ International Centre For Family Law, Policy and Practice 'Gender, Inclusivity and Protecting the 21st Century Family' London 2019 *ICFLPP conference drafting committee*



International private law – matrimonial property regime and property consequences of registered partnerships: two new European regulations coming into effect

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From January 29, 2019, two new EU regulations came into effect in 18 of the 28 EU Member States.¹ The first regulation applies to matrimonial property regime (No°2016/1103) whereas the other one is about property consequences of registered partnerships (No°2016/1104). In both cases, the regulations apply to international couples: which means couples who have assets in several states or partners moving from their state of residence to another one, or spouses having distinct nationality.

Both regulations complement the European regulation of matrimonial conflicts with a foreign element, joining those already in force (ie Brussels II, Rome III, Brussels I) and unify the conflicting laws between the participating Member States with the objective of establishing a uniform legal framework to solve some of the problems caused by the diversity of national rules of private international law applicable to the property rights of international couples

Reminder of some principles of the 1978 Hague Convention in matters of the applicable law to matrimonial property regime

What remains

As with the EU regulation, the Hague Convention laid down the principle that the applicable law to matrimonial property regime, in the absence of a prior designation, is the national law of the state in which both spouses establish their first

habitual residence after marriage. As with the Hague Convention, the EU regulation gives the spouses the ability to choose the law applicable to their matrimonial property regime.

What changes

(1) It will no longer be possible to submit the matrimonial property regime to two different laws, for instance, one law for the assets in one country, another law for the rest of the assets in another country: the EU regulation does not want fragmented applicable law: from now on, the law shall apply to worldwide assets falling under that regime, regardless of where the assets are located.

Example: Mr Y, a German national and Mrs Z, a Spanish national, establish their habitual residence in Italy shortly after their marriage. They have assets in Germany, Spain and Italy and have not made an election on the choice of applicable law. In this scenario, Italian law will apply to all the couple's movable and immovable assets.

Thereupon, this is the end of the most convenient and frequent alternative until January 29, 2019, whereby, a British couple bought real estate in France, and signed a declaration by which they chose French law as to the law applicable to their real estate in France, elected the French universal community of assets with a clause of full attribution in favour of the surviving spouse, in order to allow, in compliance with French

¹ Portugal, Spain, France, Italy, Luxembourg, Belgium, Netherlands, Sweden, Finland, Germany, Czech Republic, Austria, Slovenia, Croatia, Bulgaria, Greece, Malta, Cyprus

law, the surviving spouse to become the sole owner of the real estate located in France at the death of the first spouse.

(2) The regulation cuts out the principle of automatic mutability of matrimonial regime, which used to apply when the spouses were living more than 10 years in a different country than the one where they used to have their primary residence. Nevertheless, for spouses married in France between September 1 1992 and January 29, 2019, in case they have not chosen a law applicable to their property regime, the Hague Convention still applies to them, with its provisions on automatic change on property regime, even though the spouses are not aware of this automatic change.

What is truly new

The regulation regarding registered partnership is a new international tool, applicable to non-married couple's assets and which substituted itself to the former private international law of each country. Before the EU regulations came into force, partners were governed by the law where the partnership was registered. Now, partners may choose the law, either of a Member State or third state, to govern their patrimonial relationships.

The main additional provisions of the 2019 regulations

(1) The two regulations are intended to the universality and the unity of the applicable law: the foreign law will be competent, even if it is the law of a non-participant Member State, and this foreign law will be applicable for the total of the assets, regardless their place of location.

(2) The two regulations give common and autonomous definitions of the main concept to all the Member States. For instance, they define the matrimonial property regime or the registered partnership. These definitions

unify the notions and bring security to couples with cross-border interests.

(3) The two regulations lead to a conflicts concentration: either the judicial authority of a Member State in charge of the conflicts regarding inheritance will be in charge of the matrimonial regime liquidation; or, the court in charge of the divorce will be in charge of the matrimonial regime liquidation. Obviously, there are exceptions, but the European legislator's wish is to join the actions in front of a same court.

The scope of application in time

The regulations apply for all the married couple and registered partnerships after January 29, 2019.

It applies to spouses married before January 29, 2019, who have not designated their applicable law and who wish to do so. It also applies to couples who want to change their matrimonial regime. The same applies for the regulation regarding the registered partnerships, when the partners designate the applicable law after the said date.

Example: a Franco-British couple gets married without making any matrimonial contract on September 28, 2015 and moves to the United Kingdom after they marry. This couple, married between September 1 1992 and January 29 2019 is, as a matter of French Law, subject to the 1978 Hague Convention. Thereupon, the applicable law to their matrimonial regime is the one of their habitual residence when they got married – the British law. If the couple moves back to France in 2019 and stays there, they will, after 10 years of life in France and because of the automatic mutability, be subject to French law. Two regimes will succeed one another in time: the English 'legal regime'², then, after 10 years in France, the French legal regime. In order to avoid the application of two different laws, in accordance with the regulation No°2016/1103: this couple can

² The notion of matrimonial regime does not exist in Common Law system. That absence is interpreted on a traditional manner, as being the French basic separation of assets regime. Nevertheless, the spouses can choose the British law, to sign a postnuptial agreement, which let them more freedom to organize the dissolution of their matrimonial regime by divorce.

choose a law – French or English – to manage their matrimonial regime, including retroactively from the date of the marriage, as long as it does not infringe the rights of third parties.

The scope of application in space

Eighteen states of 28 are participating states: in particular, it means that the authentic instruments (notarial deed), will have the same evidentiary effects within these 18 states without heavy formalities, and that the court's decision of these 18 states will be directly enforceable.

The two regulations will apply where at least one of the nationals resides or has the nationality of a Member State signatory of the regulation. The EU regulations will also apply where: (i) the authority seized is that of a Member State; and (ii) the situation is international.

Example: two British citizens have met in France, signed in 2018 a 'Civil Solidarity Pact', or registered partnership, live in France, do not make any deed to choose the law applicable to their assets acquired during their partnership. Even if the United Kingdom, either a Member State which has not ratified the Regulation regarding the registered partnership, or a third state, the French judge, seized to rule on the dissolution, will apply the EU Regulation, that is French law, the law of the state under which the registered partnership has been created.

Another example: two French citizens get married in France in 2020, live in France for 5 years after their marriage. The situation, purely internal, does not seem to call upon the EU Regulation. Afterwards, they move

to the United Kingdom, without any thought of turning back. If a French jurisdiction is seized in 2040, in case of their divorce or the death of one of them, the French jurisdiction will apply the EU regulation on matrimonial property regime. Both regarding Arts 6 or 10 of the regulation No°2016/1103, the court will be competent (common nationality and/or real estate located in France). The court will consider that their matrimonial regime is the French legal regime of joint ownership since it is the law of their first residence location after their marriage (unless exceptional application of the Art 26–3 of the regulation)³.

Example: Mr A and Mrs B, Spanish nationals, get married in Barcelona in February 2019 and they move to France straight after the marriage. According to Art 26, if Mr A and Mrs B get married after 29 January 2019 and establish their first habitual residence in France, the matrimonial property regime applicable to their marriage by default (ie if there has not been an election) will be the French legal regime.

Question: Mr A and Mrs B, both Spanish nationals, are habitual residents in Germany, where they plan to get married after 29 January 2019 and stay after the marriage. They ask whether they can elect for Spanish law to apply and whether they have to do it before the marriage or at any time after.

Answer: Article 22 allows the spouses or future spouses agree to elect the law applicable to their matrimonial property regime, as long as it is the law of their or either of them habitual residence, or, the law of the nationality of either of them.

³ By the application of this Article, the judge can consider, in 'exceptional' ways as said by the text, that the British Law can be applied if two conditions are there: (a) their last residence in the United Kingdom was significantly more longer than the one in the State of their first residence; (b) both spouses have relied on the Common Law to organize or plan their property relationships.