

European Property Regimes Regulations – Choice of Law and the Applicable Law in the Absence of Choice by the Parties

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Abstract The European Property Regimes Regulations for spouses and partners of registered partnerships are undoubtedly a step forward toward the unification of European rules on conflict-of-laws. However, in some questions they do not provide the desired predictability and legal certainty for spouses and partners of registered partnerships regarding their property. Furthermore, it is regrettable that the Regulations only oblige the Member States which are participating in the enhanced cooperation.

Keywords: • matrimonial property regimes • property consequences of registered partnerships • choice of the applicable law • consent and material validity • formal validity • the applicable law in the absence of choice by the parties • enhanced cooperation • renvoi • ordre public •

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1 Introduction

The following article deals with the European Property Regimes Regulations: 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 (hereinafter: Regulation for spouses) 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: Regulation for registered partnerships). The regulations have been in force since 28 July 2017 and have been applicable since 29 January 2019. The European Property Regimes Regulations have been instrumental in effectuating standardization of international family law at the European level.

The article starts with the history, followed by a discussion of why the European Property Regimes Regulations are not binding for all Member States. It also analyzes the impact the Regulations have on Member States not participating in the enhanced cooperation. Further, the article examines the material scope of the European Property Regimes Regulations; the principles of the conflict rules; the choice of the applicable law; the applicable law in the absence of choice of law agreements; and, the importance of the overriding mandatory rules and the public policy (*ordre public*).

The aim of the article is to present the “strengths” and “weaknesses” of the rules, bearing in mind that the overarching goal of the regulations was to provide predictability and legal certainty for spouses and partners of registered partnerships regarding their property. The article assesses whether those goals have been met.

2 From the Green Paper to the enhanced cooperation

Almost ten years after the publication of the “Green Paper”¹ and five years after the presentation of the first proposals for the European Property Regimes Regulations,² the Council of the EU adopted on June 24 2016 the Property Regulation for spouses³ and the Property Regulation for registered partnerships.⁴ The content of the European Property Regimes Regulations is largely identical. They regulate not only the applicable law (Chapter III), but also the jurisdiction (Chapter II), the recognition, enforceability and enforcement of decisions (Chapter IV), as well as authentic instruments and court settlements (Chapter V). The beginning of the European Property Regimes Regulations set forth rules on scope and definitions (Chapter I) while the final chapter presents general and final provisions (Chapter VI).

Measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament (Article 81(3) of the Treaty on the functioning of the European Union; TFEU). At its meeting of 3 December 2015, the Council concluded that no unanimity could be reached for the adoption of the proposals for the regulations on matrimonial property regimes and the property consequences of registered partnerships and that therefore the objectives of cooperation in this area could not be attained within a reasonable period by the Union as a whole (Recital 17 Regulation for spouses and Regulation for registered partnerships). Especially those Member States who reject same-sex marriages and registered partnerships feared that they would have to concede matrimonial property effect for these legal institutions (Serdynska in Dutta and Weber, 2017: 8; Rudolf in St. Arnold and Laimer, 2019: 16). Hence some Member States⁵ addressed requests to the Commission indicating that they wish to establish enhanced cooperation

¹ Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 final.

² Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final. On 2 March 2016, the Commission presented further proposals for a regulation: COM(2016) 106 final in matters of matrimonial property regimes and COM(2016) 107 final regarding the property consequences of registered partnerships.

³ OJ EU L 183, 8. 7. 2016, p. 1.

⁴ OJ EU L 183, 8. 7. 2016, p. 30.

⁵ Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden, cf. Recital 11 Regulation for spouses and Regulation for registered partnerships.

between themselves in the area of the property regimes of international couples and asking the Commission to submit a proposal to the Council to that effect (Article 329(1) TFEU). The Commission submitted a proposal⁶ and the Council authorized⁷ such enhanced cooperation. As of November 2019, 18 Member States are participating in the enhanced cooperation, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain, and Sweden.

Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union (Article 20(4) Treaty on the European Union; EU). The other Member States, namely Denmark, Estonia, Hungary, Ireland, Latvia, Lithuania, Poland, Romania, Slovakia (and UK), are to be treated as third States from the point of view of the participating Member States regarding the European Property Regimes Regulations. The unified rules do not affect the rules of the non-participating Member States. The courts of the non-participating Member States continue to apply their existing national law to determine jurisdiction and applicable law and to recognize and enforce decisions in the field of property regimes of international couples (matrimonial property regimes and property consequences of registered partnerships).

According to Article 328(1) TFEU, the enhanced cooperation is open to the non-participating Member States at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions (Recital 13 Regulation for spouses and Regulation for registered partnerships). Given that enhanced cooperation in the participating Member States will provide a clear, comprehensive legal framework for the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, previously non-participating Member States can only apply

⁶ Proposal for a Council decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, COM(2016) 108 final.

⁷ Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships (OJ EU L 159, 16. 6. 2016, p. 16).

to both Regulations. This follows from the Council Decision⁸ authorizing enhanced cooperation, which always refers to the “property regimes of international couples (matrimonial property regimes and property consequences of registered partnerships)”.

3 Existing international conventions

The European Property Regimes Regulations do not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of the Regulations⁹ (Article 62(1)). However, in the relationship between the Member States – i.e. those participating in the enhanced cooperation – the European Property Regimes Regulations take precedence over conventions concluded between them in so far as such conventions concern matters governed by the European Property Regimes Regulations (Article 62(2)). This applies, for example, to the Hague Matrimonial Convention.¹⁰ This Convention has so far been ratified only by France, Luxembourg and the Netherlands, which are also bound by the Regulation for spouses (Rudolf, in St. Arnold and Laimer, 2019: 24).

4 Transitional provisions

Particular attention should be paid to the transitional provisions of Article 69 of the European Property Regimes Regulations. Subject to Article 69(1), the Regulations apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, on or after 29 January 2019. However, if the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given on or after that date shall be recognised and enforced in accordance with Chapter IV as long as the rules of jurisdiction applied comply with those set out in Chapter II (Article 69(2)).

⁸ Cf. Recital 7 and 16 of Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships.

⁹ For those Member States that join the enhanced cooperation later, at the time of the decision pursuant to Article 331(1) second and third subparagraph TFEU.

¹⁰ Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, cf. hchc.net.

The conflict-of-law rules apply only to spouses who marry or who specify the law applicable to the matrimonial property regime and to partners who register their partnership or who specify the law applicable to the property consequences of their registered partnership on or after 29 January 2019. For marriage and partnerships which are closed or registered before 29 January 2019, the national conflict-of-law rules will still apply from 29 January 2019, so that the practice will have to deal for a long time with the non-uniform conflict-of-law rules of the participating Member States. This applies with one exception: The conflict-of-law rules of the European Property Regimes Regulations also apply to spouses or partners with the date of marriage or registration prior to 29 January 2019, if the spouses or partners make a choice of the applicable law as of 29 January 2019. Before that, an effective choice of the applicable law according to the provisions of the European Property Regimes Regulation is not possible (Hilbig-Lugani, 2017: 752), a corresponding transitional provision¹¹ is missing (Rudolf, 2017: 173). A choice of law before 29 January 2019 shall be assessed according to the relevant conflict-of-law rules of the participating Member States (Meise, 2016: 491; Martiny, 2017: 12).

For those Member States that will join the enhanced cooperation in the future, the European Property Regimes Regulations shall apply as from the date indicated in the decision concerned (Article 70(2)).

5 Material scope of the Regulations

5.1 “Property regimes”

The Regulation for spouses is applicable to the “matrimonial property regimes”, while the Regulation for registered partnerships to the “property regimes of registered partnerships”. According to Article 3(1)(a) Regulation for spouses, the term “matrimonial property regime” refers to a set of rules concerning the property relationships between both the spouses as well as in their relations with third parties, as a result of marriage or its dissolution. And regarding the purposes of the Regulation for registered partners, the “property consequences of a registered partnership” means the set of rules concerning the property relationships of the partners, between

¹¹ Different Article 83(2) Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ EU L 201, 27. 7. 2012, p. 107; Succession Regulation) regarding the choice of law of the testator.

themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution (Article 3(1)(b)).

The term “property regime” is to be interpreted autonomously. The autonomous understanding of the term is independent of a qualification under national law (Henrich, 2016: 171). The material scope of the European Property Regimes Regulations is clarified on the one hand by the catalog of exceptions according to Article 1(2) (see below 5), and on the other hand by the provision of Article 27, which demonstratively provides examples for the scope of the “property regimes statute”.¹² The term “property regime” includes statutory property regimes as well as contractual ones and any default rules of the applicable law. It covers both the daily management of matrimonial property/partners property and the liquidation of the regime, in particular as a result of the couple’s separation or the death of one of the spouses/partners. The national legislation does not, however, have to specifically refer to a specific property regime; it also covers the general property-related matrimonial and partnership effects (Recital 18), unless they are subject to a special statute, e.g. maintenance obligations.

5.2 Definition of registered partnership

The Regulation for registered partnerships contains an autonomous definition of the term “registered partnership”. Within the existing private international law instruments of the European Union this term has been defined “for the first time quite concretely and narrowly” (Dutta, 2017/18: 148). Recital 17 emphasizes that this definition is only for the purposes of the Regulation for registered partnerships. The actual content of this term remains to be determined by national law. For a Member State whose law does not have the institution of registered partnership, participation in the enhanced cooperation does not imply the obligation to incorporate this legal institution into its national law.

Pursuant to Article 3(1)(a) of the Regulation for registered partnerships, the term registered partnership means “the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation”. It should

¹² Cf. Heiderhoff, 2017: 232 “typical elements of the property regime statute.”

be noted that the gender of the partners, whose number is two,¹³ is insignificant, so that same and different sex partnerships of two people are recorded. Certain criteria for the existence of a “partnership” are not established, nor are certain legal consequences presupposed. Also, partnerships with weak effects fall under the term (Kohler and Pintens, 2016: 1512). However, the Regulation for registered partnerships covers relationships only for which there is an obligation to register. A formal partnership agreement without registration in a register is therefore not enough (Dutta, 2016: 1976). The nature of the register is not relevant (Rudolf, 2017: 174; Dutta, 2017/18: 148).

For the purposes of the Regulation for registered partnerships, the qualification of a couple relationship as a registered partnership takes place in accordance with the legal definition of Article 3(1)(a). However, the existence, validity or recognition of a registered partnership is not to be assessed as a preliminary question in accordance with the Property Regimes Regulation for registered partners (Article 1(2)(b)).

Due to a lack of binding registration, couples in *de facto* cohabitation are not covered by the scope of the Regulation for registered partnerships (Recital 16) (Coester in Dutta and Weber, 2017: 112). In some Member States (e.g. Slovenia, Croatia), however, marriage-like property effects are tied to such partnerships. Disputed is whether the national conflict of laws is applicable (Baldovini, 2018: 41) or the rules of the Regulation for spouses (Dutta, 2016: 1976; Heiderhoff, 2018: 3, advocating an analog application), since national law treat them as spouses under property regimes law.

5.3 Definition of marriage

Different than for the registered partnership, the Regulation for spouses does not provide an autonomous definition for “marriage”. According to Recital 17¹⁴ the Regulation for spouses leaves the marriage concept to the “national law of the Member States” but does not say which national law determines the definition of marriage. Controversial is how to understand this reference. It could be a reference directly to the substantive law (Coester-Waltjen, 2017/18: 198) or to national law including the conflict-of-laws rules (Weber, 2016: 669) of the Member State whose

¹³ Not three or more (cf. Coester in Dutta and Weber, 2017: 111).

¹⁴ “This Regulation does not define ‘marriage’, which is defined by the national laws of the Member States.”

courts have been seized in a matrimonial property matter (*lex fori*). Both variants have a common disadvantage: same-sex marriages would be subject to either the Regulation for spouses or the Regulation for registered partnerships, depending on the forum State (Dutta, 2016: 1976; Rudolf, 2017: 174). This prevents a European decision-making and favors *forum shopping*. This is avoided by focusing on the law of the State in which the marriage was established.¹⁵ However, this can not only be the law of a participating Member State, but also that of a third State. Ultimately, the clarification of this question is probably reserved for the case law of the Court of Justice of the European Union (CJEU).

6 Exceptions

The European Property Regimes Regulations should not apply to areas of civil law other than the property consequences of registered partnerships or matters of matrimonial property regimes. For reasons of clarity, several questions which could be seen as having a link with matters of property regimes should be explicitly excluded from the scope of both regulations (Recital 19). Therefore, in accordance with the existing private international law instruments of the European Union, the European Property Regimes Regulations also exclude certain areas from their material scope (cf. Article 1(2)(a–h)).

The European Property Regimes Regulations do not apply to the legal capacity of the spouses or partners of a registered partnership. This exclusion does not cover the specific powers and rights of either or both partners and spouses with regard to property, either as between themselves or as regards third parties (cf. Article 27(d), Recital 20). The European Property Regimes Regulations do not apply to other preliminary questions such as the existence, validity or recognition of a marriage or registered partnership, which continue to be covered by the national law of the Member States, including their rules of private international law (Recital 21). Another exclusion concerns the maintenance obligations (Article 1(2)(c)). The maintenance obligations between spouses and partners of a registered partnership are governed by the Regulation relating to maintenance obligations¹⁶ and the Hague

¹⁵ In detail Dutta, 2017/18: 148–153; following this argumentation Rudolf, 2017: 174.

¹⁶ Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ EU L 7, 10. 1. 2009, p. 1).

Protocol on the law applicable to maintenance obligations.¹⁷ The CJEU case law must be observed for the distinction between maintenance law and the property consequences of registered partnerships or matters of matrimonial property regimes. In that situation, an autonomous qualification is required. A distinction must be made according to functional aspects of the claim in question. If a claim serves to secure the life needs of the claimant, and not merely the distribution of the goods, then the Regulation relating to maintenance obligations will be decisive (Mankowski, 2016: 480; Baldovini, 2018: 42).

The legal succession following the death of a spouse or partner of a registered partnership is covered by the Succession Regulation. Article 1(2)(d) of the Succession Regulation is excluding questions relating to matrimonial property regimes and property regimes of relationships. Article 1(2)(d) European Property Regimes Regulations is excluding the succession to the estate of a deceased spouse or partner. Again, an autonomous qualification is required. A distinction between the succession and the property consequences of registered partnerships or matters of matrimonial property regimes has to be made according to functional aspects of the claim in question (Mankowski, 2016: 482; Baldovini, 2018: 41).

The social security (Article 1(2)(e)), and “pension provisions” (cf. Article 1(2)(f))¹⁸ are also excluded from the scope of the European Property Regimes Regulations.

The nature and registration of rights *in rem* (Article 1(2)(g) and (h)) are also excluded from the scope of the European Property Regimes Regulations. These exceptions raise questions of delimitation on the property statute (Rupp, 2016: 295; Weber, 2017: 365), which are already being controversially answered in the light of the corresponding exceptions to the Succession Regulation. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its national law (Recital 24). “Where a person invokes a right *in rem* to which he is entitled under the law applicable to the matrimonial property regime or the property consequences of a registered partnership 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

¹⁷ Concluded on 23 November 2007, cf. hcch.net.

¹⁸ The entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage.

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” (Article 29, Recital 25). This should enable a cross-border enforcement of a right in immovable or movable property as provided for in the law applicable to the property consequences of registered partnerships or to the matrimonial property regime.

7 Applicable law – Introduction

The conflict-of-law rules can be found in Chapter III of the European Property Regimes Regulations. Of central importance are the rules on the choice of the applicable law and the objective criteria for the determination of the applicable law. The conflict-of-law rules apply universally in the participating Member States (Article 20). Thus, it makes no difference whether the conflict-of-law rules refer to the law of a third State (including Member States not participating in the enhanced cooperation) or the law of a Member State. In both cases, the right as applicable by the European Property Regimes Regulations shall be applied. This concerns only the point of view of a court in a Member State and does not bind a court in a third State.

According to the concept of the European Property Regimes Regulations, the entire property of the spouses or registered partners, irrespective of their location in a Member State or a third State, is subject to the law applicable by virtue of subjective (choice of the applicable law) or objective connection. The European Property Regimes Regulations thus follows the principle of unity of applicable law (monistic approach, Article 21). Therefore, e.g., a separate choice of applicable law for immovable property is not available (Weber, 2016: 676). There are, however, some exceptions, where formal requirements for property agreements (Article 25), the protection of third parties (Article 28), overriding mandatory provisions (Article 30) or public policy (Article 31) are at stake (Coester-Waltjen, 2017/18: 200).

References in accordance with the European Property Regimes Regulations are all references to the substantive law of the respective legal system not including the private international rules of that law (Art. 32). A *renvoi* is excluded (Article 32).¹⁹ Whether the third State also accepts the referral is irrelevant from the point of view

¹⁹ Critical Heiderhoff, 2018: 4.

of the participating Member State (Weber, 2016: 484). In the future, it will no longer be necessary to comply with foreign conflict of law rules (Rudolf, 2017: 176).

8 Choice of the applicable law

8.1 Spouses – partners

The European Property Regimes Regulations follow the principle of party autonomy. This is intended to make it easier for the spouses or partners to manage their assets. The confirmation of party autonomy only binds the Member States which are participating in the enhanced cooperation. From the point of view of these States, the chosen law is applicable to all assets, irrespective of their location (Article 21). With an effective choice of the applicable law, the parties “breach” the principle of immutability of the law applicable to the property regime in accordance with Article 26(1) and can adapt the law applicable to changed living conditions.

However, the choice of the applicable law by partners is subject to the condition that the chosen law “attaches property consequences to the institution of the registered partnership” (cf. Article 22(1) of the Regulation for registered partnerships). According to Recital 44 of this regulation, the aim of this condition is to avoid depriving the choice of law of any effect and thereby leaving the partners in a legal vacuum. Such choice of law should be limited to a law that attaches property consequences to registered partnerships. According to one opinion (Weber, 2016: 694; Coester in Dutta and Weber, 2017: 117), this presupposes that the chosen right at the substantive level provides property consequences to the institution of the registered partnership. According to another opinion (Dutta, 2016: 1981; approvingly Martiny, 2017: 31; Rudolf, 2017: 176), this criterion is already fulfilled if the chosen law recognizes the institute of the registered partnership as such, since the denial of a participation in assets of the partners is a property consequence of the partnership.

In this context, the broad understanding of the concept of property consequences of a registered partnership, which is the basis of the Regulation for registered partnerships, must be observed.²⁰ If the chosen law provides for a claim for adequate compensation when participating in the acquisition of the other partner of the registered partnership,²¹ it attaches property consequences of a registered partnership within the meaning of Article 22(1) of the Regulation for registered partnerships to the institute of the partnership. Should the parties choose a right that recognizes the registered partnership, but in fact does not provide for property consequences of a registered partnership, the will of the parties should take precedence and the choice of the applicable law should be effective, especially since in this instance the decision of the parties was not made in a “legal vacuum” (Recital 44). Moreover, the applicable law in the absence of choice by the parties according Article 26(1) of the Regulation for registered partnerships can also lead to this result if the law of the State under whose law the registered partnership was created (the registration State) does not have any property consequences of a registered partnership.

8.2 Limited choice of law

The European Property Regimes Regulations limit the choice of the applicable law to certain legal systems, to which the parties have a close connection (Article 22), so that the spouses or partners are not at liberty to just choose the law of any State. The decisive factor is always the time of the conclusion of the agreement on a choice of applicable law and not, for example, the time when the marriage or registration of the partnership was concluded.

The (future) spouses/partners may choose the law of the State where one of them is habitually resident at the time the agreement is concluded (cf. Article 22(1)(a)). The concept of habitual residence is not defined by the European Property Regimes Regulations. The term should be interpreted autonomously and it seems to be agreed that the factual centre of the spouses/partners life, the place where both of them are socially integrated, should be regarded as their common habitual residence (Coester-Waltjen, 2017/18: 202). The decisive factor will be the actual center of life. Determining the actual center of life in any given case will involve an

²⁰ Article 3(1)(b): Property consequences of a registered partnership means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution.

²¹ Cf. § 11 Austrian Bundesgesetz über die eingetragene Partnerschaft (Mitwirkung im Erwerb).

examination of all factors, but in particular the duration and circumstances of the stay are of paramount importance (Weber, 2016: 670; Rudolf, 2017: 176).

The parties may also select the law of a State whose nationality belongs to one of the (future) spouses/partners at the time of the agreement is concluded (cf. Article 22(1)(b)). This may be the nationality of a participating Member State or a third State (including those Member States not participating in the enhanced cooperation). If a spouse/partner has two or more nationalities, she or he is not limited to the effective nationality, but the law of any nationality is eligible (Waulet, 2017/18: 215). Why this was not included in the text of the European Property Regimes Regulations, unlike in Article 22(1) of the Succession Regulation, remains unclear.

The Regulation for registered partnerships adds an additional possibility for partners; they may also elect the law of the State under whose law the registered partnership was created (cf. Article 22(1)(c)). This law corresponds to the law of the State, which is applicable in the absence of a choice of law by the parties. Nevertheless, this choice of law has a meaning: If the parties choose the law of the State of the registration, they derogate the applicability of the escape clause under Article 26(2) of the Regulation for registered partnerships.

8.3 Explicit or implied choice of the applicable law

Article 22 leaves open whether a choice of the applicable law can only be express or also implied. Recital 46/Recital 45 could be brought forward against the admissibility of such,²² but the binding Article 22 again contains no restriction. Overall, however, there is no reason to exclude an implied choice of the applicable law agreement (Weber, 2016: 680; Dutta, 2016: 1981; Kroll-Ludwigs, 2016: 236; Martiny, 2017: 19; Rudolf, 2017: 177; Hausmann, 2018b: 326).²³ Indirectly, the admissibility of an implied choice of law follows from Article 24(2) (Weber, 2016: 680; Dutta, 2016: 1981; Hausmann, 2018b: 326). In practice, it is problematic that no criteria for an implied choice of the applicable law are established. Further clarification must come from the CJEU (Waulet, 2017/18: 222).

²² Cf. COM(2016) 106 final, p. 10, but this wording has disappeared; cf. Waulet, 2017/18: 221 and 220: “No allusion to this possibility is made in the Recitals.”

²³ But see, Kohler and Pintens, 2016: 1512.

8.4 Time of the agreement on a choice of applicable law

The choice of applicable law may be made at any moment: before the formation of the marriage/partnership; at the time of conclusion of the marriage/registration of the partnership; or, during the course of the marriage/partnership. If, at the time of the marriage or registration of the partnership, the parties maintain an objective connection, they may nevertheless, during the marriage or partnership, agree on a choice of the applicable law, thereby changing the applicable law and effecting a change of the statute. Likewise, the parties may change a choice of the applicable law already reached by unanimously choosing another legal system or by amicable termination of the choice of law agreement. Such a change by the parties should not have retrospective effect unless they expressly so stipulate (Article 22(2)). Whatever the case, the choice of law may not infringe the rights of third parties, e.g. creditors (Recital 45/Recital 44).

8.5 Consent, material and formal validity

The consent and the material validity of the agreement on a choice of applicable law are governed by the law which would be applicable pursuant to Article 22 if the agreement were valid (cf. Article 24(1)), the so-called “bootstrap rule”. According to Article 24(2) a spouse or partner may, in order to establish that he or she did not consent, rely upon the law of the country in which he or she had 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 or her conduct in accordance with the law specified in Article 22(1). This assumes that the laws of the two States at issue are not the same. Article 24(2) covers the plea of lack of awareness of expressing legally relevant declaration of will, but also cases of implied agreement on a choice of applicable law (Weber, 2016: 680; Dutta, 2016: 1981).

The formal requirements are intended to ensure the spouses or partners awareness of the implication of their choice of law (cf. Recital 47/Recital 46), and protect the weaker partner. The agreement on the choice of applicable law be expressed in writing, dated and signed by both parties (cf. Article 23(1) sentence 1 (substantive norm)). The written form is equivalent to any communication by electronic means which provides a durable record of the agreement.

However, if the law of the Member State in which the spouses/partners have their habitual residence at the time the agreement is concluded lays down additional formal rules for matrimonial or partnership property agreements, those requirements should be complied with. If, at the time the agreement is concluded, the spouses/partners are habitually resident in different Member States, which States lay down divergent formal rules for matrimonial/partnership property agreements, compliance with the formal rules of at least one of these States would suffice. If, at the time the agreement is concluded, only one of the spouses/partners is habitually resident in a Member State which lays down additional formal rules for matrimonial/partnership property agreements, those rules should be complied with (cf. Article 23(2), (3) and (4)).

9 Applicable law in the absence of choice by the parties

9.1 Spouses

The law applicable to the matrimonial property regime is determined on the basis of a scale of connecting factors (Article 26). Level one consists of the first common habitual residence of the spouses after the marriage. Level two consists of their common nationality at the time of the conclusion of the marriage. Finally, level three looks to the law of the State with which the spouses jointly have the closest connection at the time of the conclusion of the marriage. This scale of connecting factors should combine the legal certainty and predictability of the applicable law with the actual living conditions of the couple (Recital 49). A change of the first common habitual residence – exception: Article 26(3) – or a change of nationality after the relevant time does not cause a change of the applicable law. However, a change in law applicable to the matrimonial property regime can be achieved through an effective choice of law.

9.1.1 First common habitual residence

The first connecting factor is the spouse's first common habitual residence after the conclusion of the marriage (cf. Article 26(1)(a)). The Regulation does not define the term "habitual residence" and there are no criteria for determining it in the Recitals. The term is to be interpreted autonomously. Decisive will be the actual center of life, for the determination of which all factors are to be used, in particular the duration and circumstances of the residence. A "common habitual residence" exists even if the

spouses live in the same State, but in different places, since it is not the actual living together that determines the applicable law and, above all, the wording only refers to the same “State”.

Decisive is the law of the State in which the spouses have their first common habitual residence after the conclusion of the marriage. The wording of Article 26(1)(a) does not contain a limitation on the period of time (cf. “after”). Nor is it based on the intentions of the spouses at the time of the marriage. It follows from Recital 49 sentence 2 that the first common habitual residence of the spouses “shortly” after the marriage is the first connecting factor. Clear is the purpose, namely the “strengthening” of the connecting factor habitual residence. Regrettably, Recital 49 contains no further criteria for the concretization of the term “short”. However, if the spouses establish a common habitual residence “shortly” after the marriage, the law of this State will apply *ex tunc* (Weber, 2016: 672; Dutta, 2016: 1982; Martiny, 2017: 22; Rudolf, 2017: 178; Coester-Waltjen, 2017/18: 203; Hausmann, 2018b: 351).

9.1.2 Common nationality

The common nationality of the spouses at the time of marriage constitutes the second criterion (Article 26(1)(b) Regulation for spouses), and presupposes that the spouses have neither a common habitual residence at the time of marriage nor “shortly” after the marriage. If the spouses have more than one common nationality at the time of the conclusion of the marriage, the third criterion applies,²⁴ namely the law of the State with which the spouses have the closest link (Rudolf, 2017: 178).

The question how to resolve the choice of law issue in a case where a spouse has multiple nationalities is a preliminary question which falls outside the scope of the Regulation of the spouses and is left to national law, including, where applicable, international conventions, in full observance of the general principles of the European Union (Recital 50). In particular, the prohibition of any discrimination on grounds of nationality (Article 18 TFEU) must be taken into account.

²⁴ Cf. Coester-Waltjen, 2017/18: 205 for this exclusion.

9.1.3 Right of the closest connection

Level three of the scale of connecting factors is the law of the State with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, considering all circumstances. Neither Article 26(1)(c) nor the Recitals of the Regulations for spouses contain concrete criteria for clarifying the term “closest connection”. For the determination of the applicable law, all circumstances with deadline “conclusion of the marriage” (e.g. not beginning of the proceedings) are relevant (Weber, 2016: 673; Martiny, 2017: 23; Coester-Waltjen, 2017/18: 206). The term “closest connection” must be interpreted autonomously in order to provide the same results in all Member States participating in the enhanced cooperation (Coester-Waltjen, 2017/18: 205). Significant factors will include the nationality of the spouses, where they were born, their social relations and the intention of the spouses regarding their future life.

9.1.4 Escape clause

The escape clause is an exception to the principle of immutability of the law applicable to the property regime. The escape clause only applies if the spouses have not designated the applicable law by agreement and if the common habitual residence at the marriage date or shortly thereafter has been the connecting factor (Coester-Waltjen, 2017/18: 206). The result of employing the escape clause is the application of the law of the last common habitual residence to all assets falling under the matrimonial property regime, regardless of where the assets are located. The requirements for a deviation from the first common habitual residence after the marriage are firstly an application by at least one spouse; secondly, proof that they have had the last common habitual residence for a “significantly longer period of time than their first common habitual residence” in another State; and, thirdly, that both spouses had relied on the law of the State of their last common habitual residence.

The wording of Article 26(3)(a) of the Regulation for spouses does not presuppose that the “last” common habitual residence must be the current habitual residence at the time of application by either spouse. In order to concretize the term “significantly longer period of time”, the individual case is to be assessed. A common habitual residence in another State between the first (Article 26(1)(a)) and the last common habitual residence (Article 26(3)(a)) is not to be considered in the decision.

Both spouses must have relied on the law of the last common habitual residence (cf. Article 26(3)(b)). The proof will succeed if a matrimonial property agreement has been made on the basis of the law of the State of the last common habitual residence. The reliance on the escape clause does not apply if the spouses have reached an agreement on the matrimonial property regime prior to their last habitual residence (cf. Article 26(3)). In this case, the spouses have not relied on the law of the last common habitual residence. In addition, there is a contractual relationship that cannot be terminated by request of one of the spouses.

If the escape clause applies, the law of the State of the last common habitual residence shall apply retroactively from the date of the marriage. This requires the consent of both spouses. Otherwise, the escape clause shall apply from the establishment of the last common habitual residence in that State (cf. Article 26(3)). Rights of third parties based on the law applicable under Article 26(1)(a) of the Regulation for spouses remain unaffected by the applicability of the law of the State of the last common habitual residence (cf. Article 26(3)).

9.2 Partner of registered partnership

Regarding the applicable law in the absence of a choice of law agreement, the connecting factor for 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 (Article 26 Regulation for registered partnerships). This is the only connecting factor. According to the principle of immutability, later changes of the common habitual residence do not influence the law applicable to the property consequences of registered partnership – except where the partners later agree on a choice of the applicable law.

A further exception to the principle of immutability is the escape clause. The escape clause only applies if the partners have not designated the applicable law by agreement. The result of the escape clause is the application of the law of the State of the last common habitual residence. The requirements for a deviation from the law of the State of registration are firstly, an application of least one partner; secondly, the proof that they have had the last common habitual residence for a “significantly longer period of time in that other State; and, thirdly, that both partners had relied on the law of the State of their last common habitual residence. However, the application

of the law of the State of their last common habitual residence is possible only if the law of that other State attaches property consequences to the institution of the registered partnership. It will suffice for the law applicable under the escape clause to be acquainted with the institute of registered partnership.²⁵

10 Scope of the applicable law

The law applicable to the matrimonial property regime or to the property consequences of registered partnerships pursuant to the European Property Regimes Regulations shall govern, *inter alia* (cf. Article 27):

- the classification of property of either or both spouses/partners into different categories during and after marriage or the registered partnership;
- the responsibility of one spouse/partner for liabilities and debts of the other spouse/partner;
- the powers, rights and obligations of either or both spouses/partners with regard to property;
- the partition, distribution or liquidation of the property upon dissolution of the registered partnership or marriage; and
- the effects of the matrimonial property regime or the effects of the property consequences of registered partnerships on a legal relationship between a partner and third parties.

11 Overriding mandatory rules

Article 30(1) of the European Property Regimes Regulations leaves the application of overriding mandatory provisions²⁶ of the law of the forum in exceptional cases unaffected. Non-forum overriding mandatory provisions are not reserved. As an example, Recital 52 for partners or Recital 53 for spouses cites rules for the protection of the family home. However, this exception to the application of the law applicable to the matrimonial property regime/property consequences of registered partnerships

²⁵ Cf. 8.1; Rudolf, 2017: 179; different Weber, 2016: 694.

²⁶ Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the property consequences of a registered partnership pursuant to this Regulation (Article 30(2) of the European Property Regimes Regulations.

requires a strict interpretation in order to remain compatible with the general objective of the European Property Regimes Regulations.

12 *Ordre public* (public policy)

The application of a provision under the foreign applicable law may be refused only if its application would be manifestly incompatible with the public policy of the forum (Article 31 of the European Property Regimes Regulations). However, the refusal of application must not violate the Charter of Fundamental Rights of the European Union, in particular Article 21 thereof on the principle of non-discrimination²⁷ (Recital 53/Recital 54). The wording of Article 31 calls for a strict interpretation of the *public order* exception. The difference between various systems (e.g. separation or full community) is not so fundamental that the application of a foreign system may be refused on that basis (Clavel and Jault-Seseke, 2018: 238). *Ordre public* would be, for example, rules that regulate the matrimonial property regime differently due to the gender of the spouses (Rudolf, 2017: 182).

13 Conclusion

All in all, the European Property Regime Regulations establish conflict-of-law rules which will help facilitate planning in the context of matrimonial property regimes or property consequences of registered partnerships having cross-border implications.

But despite their overall positive attributes, the lack of an autonomous definition of the term "marriage" is a weak point of the Regulation for spouses. Divergences in the participating Member States regarding how the Regulations will be applied are predictable. Wealth planning is therefore associated with an increased degree of legal uncertainty for certain couples. Although the conflict-of-law provisions of the European Property Regime Regulations are largely the same, there are differences regarding the choice of law and the scale of connecting factors in absence of choice by the parties. The clarification of the meaning of Recital 17 of the Regulation for spouses is reserved for the case law of the CJEU.

²⁷ Cf. for discriminatory law Clave and Jault-Seseke, 2018: 238.

In practice, the connecting factor “first common habitual residence of the spouses after the marriage” is undoubtedly associated with uncertainties in certain case constellations. Also, some uncertainties are inherent in the escape clause.

Nevertheless, on balance, the European Property Regime Regulations are an improvement and they provide affected parties with more certainty as to the property of spouses and partners of registered partnerships and offer them a certain degree of predictability. Since the law should always strive to promote predictability, the European property Regimes Regulations are a welcome development, despite some current shortcomings.

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