

Newsletter No.

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**The new EU Matrimonial and Partnership Property Regulations are now effective**

The EU Matrimonial and Partnership Property Regulations, which already entered into force on 28 July 2016, start to become effective as of **29 January 2019**.

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The EU Matrimonial and Partnership Property Regulations<sup>1</sup>, adopted through enhanced cooperation, have become legally binding for 18 EU Member States directly, i.e. without national transposition legislation, to provide married couples and registered partners with legal certainty as to property law due to their marriage or partnership in cross-border cases. The different national conflict-of-law rules regarding matrimonial/property relations shall be harmonized for the participating EU Member States.

The regulations apply as of 29 January 2019 automatically to all proceedings, authentic instruments and to court settlements on property matters (art. 69 sec. 1 EUMPR/EUPPR). Art. 69 sec. 3 EUMPR/EUPPR stipulates that chapter III of the regulation (applicable law) however shall only apply to spouses/partners, who marry/register their partnerships on or after 29 January 2019 or who specify the law applicable to the matrimonial property regime/property consequences of their registered partnership on or after 29 January 2019. Hence, for many years the national conflict-of-law rules of the participating EU Member States will continue to apply to spouses/registered partners who married/registered their partnership before 29 January 2019 but didn't make after that date a choice of law for the matrimonial property regime/property consequences of the registered partnership. In this respect certain legal uncertainties will remain.

#### Participating EU Member States

18 EU Member States have ratified the EU Matrimonial and Partnership Property Regulations. The remaining 10 EU Member States, namely the United Kingdom, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Ireland, along with Switzerland and other third countries are not bound by it but are also indirectly affected.

#### Harmonization of Conflict-of-Law Rules

Due to the globalization and mobility of persons, the number of international marriages and registered partnerships is increasing. In 2017 only about 50% of the concluded marriages were between Swiss national spouses<sup>2</sup>. The EU Matrimonial and Partnership Property Regulations mainly answer two crucial conflict-of-law questions: Firstly, which court is competent to deal with the matrimonial property regime or the partner property relationship and secondly, which law governs the matrimonial property regime or the partner property relationship in the event of death of one of the spouses or partners or in case of divorce, dissolution, legal separation or annulment of the marriage or partnership. In addition, the Regulations state how the implementation will be carried out and sets out the formal requirements for choice of law and matrimonial property agreements.

The scope of the Regulations is wide. „Property law“ in the sense of the Regulations refers to the entire financial relationship between the spouses/partners („patrimoine primaire“). It is to expect that this will lead to certain conflicts with other conflict-of-law rules, such as the Swiss Private International Law („SPILA“). The term „matrimonial property/registered partnership property“ is used by the SPILA in a more restrictive sense,

<sup>1</sup> Council Regulation on Enhanced Cooperation in the Area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in matters of Matrimonial Property Regimes of 24 June 2016, No 1103/2016 („EUMPR“); Council Regulation on 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 of 24 June 2016, No 1104/2016 („EUPPR“). Together: the „Regulations“.

<sup>2</sup> Swiss Federal Statistical Office. Statistic regarding marriage and nuptiality, 2017, see <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/heiraten-eingetragene-partnerschaften-scheidungen/heiratshaeufigkeit.html>.

namely only regulates the financial assets of the spouses/partners due to marriage/registration of the partnership. However, excluded from the scope of application of the Regulations are the substantive law on national matrimonial property regimes/property consequences of registered partnerships, alimony obligations, law of succession and the fiscal aspects.

### Key Elements of the Regulations<sup>3</sup>

#### Jurisdiction

##### Jurisdiction in the Event of Death of One of the Spouses

Where a court of a Member State is seized in matters of succession of a spouse pursuant to the EU Succession Regulation No 650/2012 ("EUSR"), the courts of that Member State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case (art. 4 EUMPR). Hence, the court dealing with the succession of the spouse shall also deal with the liquidation of the matrimonial property regime.

##### Jurisdiction in Cases of Divorce, Legal Separation or Marriage Annulment

If jurisdiction already exists in matrimonial matters under the Brussels IIa Regulation, the same competent Member State court shall in general also have jurisdiction to liquidate the matrimonial property of the spouses (art. 5 EUMPR).

Since no Europe-wide regulation has been enacted for the dissolution or invalidity of a registered partnership, the international jurisdiction is governed by each Member States' procedural law.

##### Ordinary Jurisdiction

If there is no annex jurisdiction pursuant to the abovementioned rules, international jurisdiction shall lie with the courts of the Member State (i) in whose territory the spouses are habitually resident at the

time the court is seized or, (ii) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seized, or (iii) in whose territory the respondent is habitually resident at the time the court is seized, or lastly (iv) of the spouses' common nationality at the time the court is seized (art. 6 EUMPR). These venues are to be understood in the sense of a hierarchy.

If the succession or matrimonial matters are pending before the courts of a non-participating EU Member State or a third country, e. g. Switzerland, or the habitual residence of the spouses is in such a state, a Member State cannot claim jurisdiction. However, an EU Member State has jurisdiction - despite the spouses' habitual residence in a third country - if the spouses have the common nationality of such EU Member State. Hence, forum running might occur where the spouses reside in a third country but have a common EU nationality.

The ordinary jurisdiction rules are not exclusive as the spouses have the possibility to enter into a jurisdiction agreement (art. 7 sec. 1 EUMPR). The options to choose a jurisdiction are (contrary to Swiss international private law, art. 5 SPILA) however limited: Either the courts (i) in the Member State of the agreed governing law, (ii) the courts of the country in which the spouses have their first residence, (iii) the courts of their joint citizenship or (iv) the courts of the Member State, in which the marriage was concluded, can be chosen by the spouses (art. 7 EUMPR). From the Regulations point of view, a jurisdiction agreement in favour of a third country court is not respected.

##### Subsidiary Jurisdiction

The subsidiary jurisdiction is only relevant if none of the aforementioned jurisdictions apply. If this is the case, the court of the Member State in which the immov-

able property of one or both spouses is situated shall have jurisdiction, whereby the jurisdiction extends only to such immovable property (art. 10 EUMPR).

#### Applicable Law

##### Universal Application and Unity of the Applicable Law

The law designated as applicable by the EU Matrimonial Regulation shall be applied whether or not it is the law of a Member State (art. 20 EUMPR, „erga-omes effect“). Moreover, the law applicable shall apply to all assets falling under the matrimonial property regime, regardless of where the assets are located (art. 21 EUMPR).

##### Choice of the Applicable Law

In principal, the spouses are free to choose the law applicable to their matrimonial property status. The spouses have the following options: (i) 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 (ii) the law of a State of nationality of either spouses or future spouse at the time the agreement is concluded (art. 22 sec. 1 EUMPR). Beyond that, registered partners are entitled to choose the law of the state their partnership was justified in (art. 22 sec. 1 lit. c EUPPR).

The agreement of the spouses on the choice of law must be in writing, dated and signed by both parties (art. 23 sec. 1 EUMPR). In addition, ancillary formal requirements for marital agreements need to be complied with in the Member State in which both spouses are or one of the spouses is habitually resident at the time the agreement is concluded, if such exist (art. 23 sec. 2 EUMPR).

<sup>3</sup> The following applies by analogy to registered partnerships as well, unless explicitly stated otherwise.

### Applicable Law in the Absence of Choice by the Parties

If no choice of law has been made, the applicable law shall be determined as follows and in the following order: (i) the spouses' first common habitual residence after the conclusion of the marriage or (ii) the spouses' common nationality at the time of the conclusion of the marriage or (iii) the closest connection of the spouses to a Member State at the time of the conclusion of the marriage (art. 26 EUMPR).

It is to note that pursuant to scholars the „first common habitual residence“ in the sense of art. 26 sec. 1 EUMPR refers to a habitual residency taken up one to three months after the marriage. Hence, if the spouses take up common residence only six months after their wedding, the applicable statutory law will be their common law of nationality or, if failing, the law of the Member State with the closest relationship (see art. 26 sec. 2 and sec. 3 EUMPR).

### Formal Validity of Matrimonial Property Agreement

The matrimonial property agreement not only needs to be expressed in writing, dated and signed by both spouses but also, if the law of a Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements, those requirements shall apply. In addition, the formal requirements have to be respected, which the law applicable to the matrimonial property regime imposes. Hence, the application of the formal requirements of the State where the matrimonial agreement is concluded might not be enough. Therefore, it is to pay special attention to the various applicable formal requirements for matrimonial property agreements.

### Recognition and Enforcement

The decisions taken in an EU Member State based on the Regulations will automatically, without any special procedure,

be recognized by all Member States (art. 36 EUMPR). Reserved are certain grounds for non-recognition and the fundamental rights (art. 37 and 38 EUMPR). Authentic instruments, established in a Member State, shall have the same formal conclusiveness as they have the EU Member State of origin (art. 58 sec. 1 EUMPR).

### Impacts of the Regulations between Member States and Switzerland

As said, the Regulations are not directly applied in Switzerland. However, the Regulations may have an impact on spouses or registered partners with EU cross-border relations living in Switzerland. If for example the husband of a married French couple dies in Switzerland, there is not only a venue for the liquidation of the matrimonial property regime in Switzerland (art. 51 i.c.w. art. 86 SPILA) but also in France (art. 4 EUMPR i.c.w. art. 10 EUSR, if property is located in France; art. 6 let. d EUMPR). Hence, forum-running could occur if the spouses didn't make a prorogation in favour of the French courts. The applicable law depends on which state has jurisdiction. Switzerland applies the rules pursuant to the SPILA and France pursuant to the Regulations. The applicable law could therefore deviate depending on the facts.

Furthermore, a German married couple, which right after the marriage lived in Germany and then moved to Switzerland, may also face issues regarding the applicable law. From a Swiss law perspective Swiss matrimonial law (“Errungenschaftsbeteiligung”) would be applicable and from an EU law perspective however German matrimonial law (“Zugewinnngemeinschaft”). The statutory regimes of Switzerland and Germany are similar but there are also major differences. Couples who are relocating to or out of Switzerland should therefore seek legal advice to avoid any unexpected and unintended results with regard to their financial affairs when their matrimonial property

is liquidated. Couples should also bear in mind that in general it is recommended to harmonize the matrimonial law with the succession law. The applicable law on successions in cross-border cases is determined from a Swiss law perspective by the SPILA and from an EU law perspective by the EU Succession Regulation. Again, if no measures have been taken in advance, the couples or the heirs of a predeceased spouse may end up with an accidental result. Therefore, it is necessary to also consider the impacts of the EU Succession Regulation and its interaction with the EUMPR/EUPPR (and the SPILA if there is a connection to Switzerland).

### Conclusion

By harmonizing the conflict-of-law rules, the EU Matrimonial and Partnership Property Regulations provide married couples and registered partners with more legal certainty and predictability as to their property in the context of marriages or registered partnerships having cross-border elements within the 18 EU Member States. However, in some cases and in particular with regard to non-participating EU Member States as well as third countries, such as Switzerland, the EU Matrimonial and Partnership Property Regulations may lead to conflicting situation regarding applicable law or jurisdiction. Therefore, it is recommended that married couples and registered partners who have or for example due to relocation will have cross-border affairs review their matrimonial or partnership property law situation in order to clarify any need of action.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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