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News: marriages with an international dimension and immovable property

Are you going to get married? Or are you already married and do you wish to stipulate which law is applicable to your marriage? In that case, the new [European Regulation on Matrimonial Property regimes](#) is applicable to your marriage if you have assets in one of the adherent Member States, in alphabetical order: Austria, Belgium, Bulgaria, Germany, Croatia, the Czech Republic, Cyprus, Finland, France, Greece, Italy, Spain, Luxemburg, Malta, the Netherlands, Slovenia, Sweden, Spain and Portugal.

Said European Regulation only becomes truly relevant for you if there is an international dimension to your marriage. For instance if:

- you and your partner do not have the same nationality;
- you and/or your partner live(s) in a different country than the country of which you or your partner are nationals;
- you and/or your partner have/has assets in another country than the country in which you and or your partner live(s).

The regulation is applicable as of 29 January 2019 and is directly applicable in the adhering Member States. As of that date the new [European Regulation on property regimes of registered partnerships](#) is applicable as well. To a large extent both regulations have the same content.

Hereafter I shall address the regulation on matrimonial property regimes ('Regulation') in broad lines. This article does not deal with tax aspects.

The Regulation lays down private international law ('PIL'). In principle, each country's PIL is different.

The great advantage of the Regulation is that eighteen Member States participate to it and that, therefore, the PIL-rules (rules of conflict of law) for matrimonial regimes are the same in as many as eighteen Member States.

Perhaps the ten current other Member States – in alphabetical order Denmark, Estonia, Hungary, Ireland, Latvia, Lithuania, Poland, the Slovak Republic and the United Kingdom shall adhere to it at a later stage.

This would be a positive thing, in view of the objectives of the Regulation, i.e.:

- the free movement of persons within the European Union;
- the possibility for spouses to arrange their mutual matrimonial relations and their relations as regards third parties both during their life as a couple and at the time of the liquidation of their property;
- increased predictability and legal certainty.

If your marriage dates from before 29 January 2019 the PIL-rules which applied before that date remain important, unless you established a (new) choice of applicable law either on or after that date.

The Regulation first addresses its scope (1.). Subsequently, the Regulation deals with:

- judicial competence (2) ;
- applicable law (3);
- recognition, enforceability and enforcement of decisions (4);
- authentic instruments and court settlements (5);

pertaining to the matrimonial property regime of a marriage with an international dimension.

The general provisions and the final provisions (6) of the Regulation include transitional provisions.

This applies both to the daily management of the matrimonial property and to the liquidation of said property, notably in the event of divorce or death.

The Regulation has (as many as!) 73 considerations and 70 articles. When implementing the Regulation the considerations are important too.

We shall now focus on the following question:

What is the relevance of the Regulation if you own immovable property?

1. Limitation of applicability

First, it should be noted that the Regulation does not apply to:

- the nature of rights in rem related to property;
- the registration of property related to immovable (and moveable) property in a register, including the statutory requirements for the registration and the legal effects of the registration as well as the legal effects of a lack of registration. (Regulation, article 1 section 2 under g and h).

Therefore, the Regulation does not in any way change the nature of your property right or the nature of the derived property right on an immovable property, such as an apartment right or a right of leasehold.

The Regulation does not change the mode of registration in a property register for immovable property.

If immovable property in the Netherlands is at stake, the following elements are required for the conveyance:

- a notarial deed drawn up between the parties by a Dutch notary to that effect;
- followed by the registration in the public registers from the Land Registry [Known as 'Kadaster' in the Netherlands], (article 89 in connection with article 31 of book 3 of the Dutch Civil Code).

2. Competent court

The main connection factor for rules of conflict of law is the habitual residence of the spouses. The same applies to the rule of conflict of law as regards the competent court. The court of the state in which the immovable property is located is only competent in exceptional cases and, if so, this competence is restricted to the immovable property in question (Regulation, article 10).

In the event of the death of one of the spouses a connection is made with the court that is competent to decide on the succession (Regulation, article 4). In general this is the court of the Member State in which the testator had his/her habitual residence at the time of his/her passing.

In other cases the spouses can, if they so wish and at their discretion, establish which judge is competent to decide on matters pertaining to their matrimonial property regime (Regulation, article 7, choice of court).

They can choose:

- the court of the Member State the law of which applies according to article 22 of the Regulation, i.e. the court:
 - of the Member State where the habitual residence of one or both of the spouses is located; or
 - of the Member State of which one of the spouses is a national; or

- the court of the Member State the law of which applies pursuant to section 2 a or b of article 26 of the Regulation, i.e. the court of:
 - the Member State in which the spouses have their first common habitual residence at the time of the celebration of the marriage; or of the
 - Member State of which both spouses are nationals at the time of the celebration of the marriage; or

- the court of the Member State where the marriage was celebrated.

However, choosing the court of the Member State in which the immovable property is located is not an option.

3. Applicable law

The law that is designated as applicable on the basis of the Regulation is not necessarily the law of one of the Member States. The law of Brazil, for instance, may be applicable (Regulation, article 20, universal application). If the law of the state of Brazil is applicable this applies to all the property stemming from the matrimonial property regime and thus also for the immovable property (Regulation, article 21, Unity of the applicable law). For immovable property, therefore, the matrimonial property regime of the place where the immovable property is located is not applicable.

Choice of the applicable law

The spouses can lay down which law applies to their matrimonial property regime (Regulation, article 22, choice of applicable law).

This can be the law of the:

- state in which the habitual residence of one of the spouses or both spouses is located; or of the
- state of which one of the spouses is a national.

The spouses can choose whether a change of the applicable law shall only concern the future or if this change will start to be effective as of the date of commencement of the marriage. In the latter case, the rights of third parties are upheld. The notary can provide advice on what is the best option in your case.

In most cases this choice of law must be laid down in a notarial deed to ensure this choice is formally valid. Moreover, the notary has an advisory role.

On the basis of the Regulation it is not possible to choose the applicability of the law of the location where the immoveable property which is part of the matrimonial property is located.

The choice of the applicable law applies to the matrimonial property as a whole. Making a partial choice on the basis of the Regulation is not possible.

Law that applies when no choice of applicable law has been made

If the spouses have not made a choice of applicable law, the following law applies (in brief):

- the law of the state where the spouses have their habitual residence after the celebration of their marriage or, if this is lacking,
- the law of the state of which the two spouses are nationals at the time of celebrating their marriage or, if this is lacking,
- the law of the state with which the spouses have the closest link at the time of celebrating their marriage, taking all the circumstances into account.

Mentioning the exceptions to the above is beyond the scope of this article.

Effects in respect of third parties

Article 28 of the Regulation includes extensive measures concerning legal effects in respect of third parties.

If, in one way or another, the applicable law cannot be invoked in respect of third parties the legal effects of the matrimonial property regime as regards the third party in the case of immoveable property are governed by the law of the state where the immoveable property is located.

This can be avoided (if the legal effects are governed by the law of a different state) by rendering the matrimonial property regime public or by registering it. If a property transaction is at stake it must occur according to the law of the state where the immoveable property is located.

In the Netherlands notification takes place in the register of matrimonial agreements. The Dutch notary has a role to play in this matter.

Protection of the matrimonial home

Pursuant to article 30 of the Regulation a Member State can designate a provision of overriding mandatory law which takes precedence over the provisions in the Regulation. An example is mentioned in the considerations, i.e. the requirements for protecting the matrimonial home.

The Dutch legislator used this option by adding a new section 7 to article 88 of book 1 of the Dutch Civil Code:

“This article is applicable, regardless of the law that applies to the matrimonial property regime of the spouses if the other spouse has his/her habitual residence in the Netherlands at the time the legal act referred to in the first section occurs.”

Admittedly this is a priority rule and takes precedence over the provisions of the Regulation, but it is worth noting that Dutch transitional law also applies. On the basis of said transitional law the former Dutch IPL remains valid for marriages entered into between the first of September 1992 and 29 January 2019 unless the spouses make a choice of law as regards the applicable matrimonial property regime.

The rule of Dutch IPL that used to be applicable in the past (article 40 of book 10 of the Dutch Civil Code, obsolete by now) stipulated:

‘The question whether a spouse needs the permission of the other spouse for a legal act and if so, what form this permission should have, the question whether this permission can be replaced by the decision of a court or another authority, and the question of what the consequences are if this permission is lacking are all governed by the law of the state in which the other spouse has his/her habitual residence at the moment the legal act takes place.’

This rule is applicable irrespective of the law that governs the matrimonial property regime of the spouses and irrespective of the law that applies to the personal legal relations.

4. Recognition and enforceability of decisions

The main rule is that a decision rendered in one of the Member States is recognized in another Member State without an additional procedure being required.

There is a procedure in terms of the enforceability in another Member State. This procedure starts with the submission of an application for a statement of enforceability, issued before the competent (judicial) authority.

5. Authentic instruments

Above, under 3, we mentioned that in most cases it is necessary to set a choice of law in a notarial deed to ensure the choice is formally valid. Thus, it is useful to know that the Regulation stipulates that an authentic instrument executed in another Member State has the same evidential value as in the original Member State.

6. General provisions and final provisions

The adhering Member States are obliged to provide certain data on their legislation and procedures pertaining to matrimonial property regimes.

At this moment, useful information on couples within the EU can be found on the following websites:

[Your Europe](#)> [Citizens](#)> [Family](#)>[Couple](#) and [Couples in Europe](#).

7. Example

The following example illustrates the above:

Maria is a German national. Jean is a Belgian national. They married three years ago in Frankfurt, where they lived for a while. They are now living and working in Brussels. They live in an apartment they own. They did not make a matrimonial agreement.

Marie received an interesting offer from her employer. This offer means that Maria will work in Amsterdam the coming years. She will spend the week days in Amsterdam and the weekends in Brussels. She already bought a whole bunch of train tickets for the Thalys with a discount for booking early.

At the moment Marie is staying at a hotel in Amsterdam during the week but Marie and Jean are considering purchasing a studio in Amsterdam. In spite of the manic property market they believe this would be financially more savvy than renting a studio.

What are the consequences of the Regulation for them?

Applicable law

As the marriage between Marie and Jean stems from before the entry into force of the Regulation one must check which IPL-rules (rules of conflict of law) which applied before the entry into force of the Regulation are applicable.

[Couples in Europe](#) mentions that marriages entered into in Germany up to and including 28 January fall within the scope of German international rules. If no choice of law has been made the common national law of the spouses at the moment of the marriage is applicable. If the spouses do not have the same nationality at that time, the law of their common country of residence is applicable.

This is the case for Marie and Jean. German law is applicable to their matrimonial property regime.

As they have not made a matrimonial agreement, the German statutory matrimonial property regime applies, i.e. the community of acquisitions ('Zugewinngemeinschaft'). This implies a separation of property, but if the assets of the spouses have increased during the marriage a 50 :50 division or settlement shall occur between the spouses in the event of the dissolution of the matrimonial property regime, for instance in the event of death or divorce.

The apartment that belongs to Marie and Jean was bought by both spouses and was acquired by both spouses and has become property through this joint acquisition and not through the 'Zugewinngemeinschaft.'

If Marie and Jean decide to make a choice of law for their matrimonial property regime, they have the following options:

- Belgian law (after Marie moves to the Netherlands), Dutch law (habitual residence of one of the spouses or both) ; or
- Belgian or German law (the state of which one of the spouses is a national).

Miscellaneous

Marie and Jean must see a Dutch notary for the purchase of the studio in Amsterdam. The notary shall draw up the deed of transfer of the property and in Amsterdam it is common practice that the notary drafts the purchase agreement as well.

Further, article 40 of book 10 of the Dutch Civil Code as it applied in the past is applicable. Assuming Jean and Marie have their habitual residence in Belgium Belgian law applies to the question whether one of the spouses needs the permission of the other spouse for a legal act. In the case in hand, the spouses are acquiring the property jointly, they are encumbering said property with a mortgage jointly and they are mutually implicitly granting one another permission merely by carrying out these legal acts.

Finally, it can be useful to ask a Dutch notary to lay down in the Dutch register of matrimonial agreements that Jean and Marie's matrimonial property regime is not governed by Dutch law.

If the bill which includes the amendment of article 45 of the Dutch Civil Code is adopted it will be possible as well to register the matrimonial property regime that is applicable to the spouses in the Dutch register of matrimonial agreements. Couples who marry or set the law that is applicable to their matrimonial property regime after this law has been adopted can invoke said applicable matrimonial property regime in respect of third parties.

Please get in touch with me if you have any questions on this subject.

[Michèle van Velzen](#)



Advocaten en notariaat
in Leiden en Den Haag

Hoge Rijndijk 306, 2314 AM Leiden

WTC The Hague, Prinses Margrietplantsoen 33, 2595 AM Den Haag

www.declercq.com, info@declercq.com, 071-5815300