

Draft Matrimonial Property Regulations A Preliminary Appraisal

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Outline

- 1st question : do we need a new Regulation(s) on matrimonial property?
- 2nd question : what to make of the draft proposal?
 - 1st case : ordinary situation
 - 2nd case : 'estate planning'

I. Do we need new Regulations on Matrimonial Property?

- Need for some form of harmonization of conflict of laws rules dealing with matrimonial assets
 - _ Estate planning practice is booming – but facing uncertainty and gaps
 - _ 'Normal' couples faced with important differences in treatment of cross-border matrimonial property relationships – *e.g.* automatic change of applicable law after continued residence in new State or not?

I. Do we need new Regulations on Matrimonial Property?

- No other solution?
 - Substantial harmonization / optional regime (French-German)
 - 1978 Hague Convention ; not a success story (3 ratifications) – overly complex / dangerous (art. 7)

I. Do we need new Regulations on Matrimonial Property?

- Do we need a (separate) Regulation on registered partnerships ?
 - Yes – problems exist (*e.g.* choice of law by partners under Art. 6-1 Dutch WCP not recognized in Germany)
 - However :
 - Law is not ripe – still in its infancy
 - Problem may be overshadowed by more urgent issues - recognition...

II. Critical overview of the Draft Regulations

A. An ordinary couple

- Ordinary situation : two spouses married without any agreement as to their matrimonial property (and obviously no agreement on applicable law / jurisdiction)
- Most common situation

II. Critical overview of the Draft Regulations

A. An ordinary couple - jurisdiction

- 1st perspective: jurisdiction – which court?
 - _ In case of death : extension of jurisdiction under Succession Reg. (art. 3)
 - _ In case of divorce extension of jurisdiction under Brussels II*bis* Regulation (art. 4) - qualification : extension of Brussels II*bis* requires agreement by parties (art. 4)
- 'Piggy-backing' is a good option – simplicity and consolidation of proceedings

II. Critical overview of the Draft Regulations

A. An ordinary couple - jurisdiction

- Caveats: if you consolidate, importance of where you consolidate
 - _ Extension of jurisdiction under Succession Regulation (principle : habitual residence of deceased) : too limited? e.g. deceased living in Spain, surviving spouse comes back to Germany where children of 1st marriage reside
 - _ Extension under Brussels IIbis Regulation : is choice offered by Brussels IIbis not too large (+ strong *lis alibi pendens*)? Jurisdictional generosity works in divorce – but different for matrimonial property? See *Hadadi* case

II. Critical overview of the Draft Regulations

A. An ordinary couple - jurisdiction

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- Proposal: include a mechanism allowing court seized to 'transfer' to other court (see art. 15 Brussels II*bis*)?

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II. Critical overview of the Draft Regulations

A. An ordinary couple - jurisdiction



- In other cases and (in divorce matters) if no agreement between parties, application of reduced list of courts having jurisdiction under Brussels II*bis* (art. 5)
- To be commended because i) reduced list (no *forum actoris*) and ii) hierarchy
- Hierarchy : why not in Brussels II*bis*?

II. Critical overview of the Draft Regulations

A. An ordinary couple – which law?

- 1st principle : default rules (art. 17)
- Most important rule
- No surprise : '*Kegel'sche Leiter*'
 - 1st step : 1st common habitual residence of spouses (trapping the spouses? : no – easy way out and nationality no alternative) – parallelism with art. 8(a) Reg. Rome III
 - 2nd step : common nationality (with '*Hadadi-caveat*')
 - 3rd step : closest links – too uncertain – make it at least a rebuttable presumption! (*comp.* art. 8(d) Rome III : law of the court seized)

II. Critical overview of the Draft Regulations

A. An ordinary couple – which law?

- 2nd principle : no automatic change of the applicable law – change only *voluntary*
- Sharp contrast with Art. 7-1978 Hague Convention (or art. 55 Swiss PILA)
- Appraisal : good choice

II. Critical overview of the Draft Regulations

B. Estate planning case – which court?

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- Possibility for the spouses to make an *ex ante* choice of court (art. 5.2)
- Choice limited to courts of State whose law has been chosen

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II. Critical overview of the Draft Regulations

B. Estate planning case – which court?

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- *Prima facie* limited to art. 5 - hypothesis (other matters than divorce/death) – too limited? 'Packaged deal' with choice of law under art. 5 Reg. 1259/2010?
- Risk to be locked in a choice in long term agreement?

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II. Critical overview of the Draft Regulations

B. Estate planning case – which law?

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- 1st principle : starting point is that parties may select the applicable law (to guarantee validity of substantial regime chosen in pre-nup)
- Limited number of laws which may be selected (art. 16 : habitual common residence; habitual residence of one spouse, nationality of one spouse)
- Proposal in line with contemporary practice

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- Two comments :
 - Limitation to a number of laws has been criticized (no real protection of spouse) – however, protection of practitioners...
 - Question : why not let future spouses choose law of their *first, future common habitual residence*?

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II. Critical overview of the Draft Regulations

B. Estate planning case – which law?

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- 2nd principle : a single law for all assets of the spouses
- In principle : good policy choice
- *Query* : if spouses wish to carve out one asset and submit it to particular regime (e.g. holiday home in other MS than residence), why not allow them take the risk of additional complexity?

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