

EU Regulation on Matrimonial Property Law - Applicable law in the absence of choice of law

Introduction

In this presentation I will talk about art. 26 of the Matrimonial Property Regulation, which gives the rules on how to establish the applicable law for the matrimonial property regime of the spouses when they have not made a choice of law. As I come from one of the three member states to the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes¹ I will make some comparisons between the two instruments and I will sometimes give some personal comments on the new provisions.

The applicable law according to the regulation in the absence of choice by the parties

Article 26² has a list of criteria to determine the applicable law. If one does not apply, then one may go to the next.

It starts with

(a) the spouses' first common habitual residence after the conclusion of the marriage

This is not a surprising start of the list. Already in the Hague Convention the main connecting factor was the first habitual residence of the spouses, art. 4 of the Hague Convention, but in connection with art. 5, there was quite a complicated combination in place because that convention also wanted to honour the nationality as main connecting factor for those countries that found nationality more important than the first habitual residence.

¹ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=87> .

² Article 26 reads as follows:

1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:
 - (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
 - (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
 - (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.
2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.
3. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:
 - (a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and
 - (b) both spouses had relied on the law of that other State in arranging or planning their property relations.The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State. The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1. This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

The first habitual residence is a connecting factor that is common to both spouses and therefore non-discriminatory. In many cases this will be sufficient to determine the applicable law as many couples have a common habitual residence after the conclusion of the marriage.

Habitual residence must – as all terms in the regulation – be interpreted autonomously, which means that one may not use the national definition of this term. It is a term that is used in other European instruments as well. This may help when it is difficult to decide in a certain case whether there was a first common habitual residence after the conclusion of the marriage at all. Problems may for example arise when one spouse cannot move to the state where the other is living already because of various reasons, e.g. pregnancy/childbirth with complications which prevent travelling, or the long time that it takes to get a visa or residency permit. How long may the timespan be, that lies between the marriage and the moment that the second spouse can finally join the first spouse? Recital 49 only says that the spouses must live in the same state or move to that state “shortly after marriage”.

For the Hague Convention the Netherlands stated that a period of 6 month was acceptable,³ but that is not directly applicable for this Regulation. In other cases where no Hague Conventions were applicable,⁴ the judges took into account whether the spouses had planned to move together much sooner but adverse circumstances beyond their control had prevented that. In those cases the timeframe was considered less important than the intention of the spouses.

Lagarde finds this half year period also acceptable for the Regulation.⁵ Where the limit must be drawn, will ultimately be determined by the European Court of Justice.

(b) the spouses' common nationality at the time of the conclusion of the marriage

When the spouses do not have a first common habitual residence after the conclusion of the marriage, then their common nationality at the time of the conclusion of the marriage is taken into account. In the Hague Convention the spouses' common nationality was also the second step (when the exception of art. 5 was not applicable) but the timeframe was a little different.

In the Hague Convention the spouses' common nationality was only relevant if they had just one common nationality. If they had more than one nationality in common at that point, then this nationality was not taken into account because of art. 15 of the Hague Convention, in fine.⁶ This is also the case in the Regulation, see art. 26 sec. 2.

³ Trema 1995, no. 5. This period is followed by *Gerechtshof 's-Hertogenbosch* 9 December 2004, ECLI:NL:GHSHE:2004:AR8199; *Rechtbank Maastricht* 6 April 2005, ECLI:NL:RBMAA:2005:AT3587, JPF 2005/129 with comment by Reinhartz; and *Gerechtshof 's-Hertogenbosch* 3 December 2009, ECLI:NL:GHSHE:2009:BK5376. *Rapport Von Overbeck* nr. 149, does not mention a fixed period of time for the Hague Convention 1978, either.

⁴ The Netherlands also were a member state to the old Hague Convention of 1905, which partially still applies to international couples which were married under the force of that convention. The text is published here: <https://www.hcch.net/en/instruments/the-old-conventions/1905-effects-of-marriage-convention>

⁵ He states this in a commentary on the Regulation in comment nr. 6 to art. 26 (Commentary on the Regulation, written by Lagarde, Bergquist, Frimston, Damascelli and myself, which will be published in a short time. It will be published in English by Oxford University Press and by Dalloz in French).

⁶ For the purposes of the Convention, a nationality shall be considered the common nationality of the spouses only in the following circumstances -

1. where both spouses had that nationality before marriage;

The problems addressed by art. 15 Hague Convention concerning the involuntary acquisition of a nationality, especially by women, are not relevant anymore, I hope. This issue is not addressed by the Regulation.

Also the issue of a person having more than one nationality in general, is left undecided. Recital 50 says on this matter:

“Where this Regulation refers to nationality as a connecting factor, the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, international Conventions, in full observance of the general principles of the Union. (...)”

It seems therefore that all nationalities a spouse has, are taken into account.

(c) the law of the state with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances

If there is no first common habitual residence after the marriage and no common nationality at the time of the marriage, then the law of the state applies with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

This proved to be a difficult connecting factor when applying this factor within the frame of the Hague Convention⁷ and I expect it to be perhaps even more difficult when applying it within the frame of the Regulation. Recital 49 only says:

“In applying the latter criterion all the circumstances should be taken into account and it should be made clear that these links are to be considered as they were at the time the marriage was entered into.”

The decisions which were given under the Hague Convention can – in my opinion – not be used directly when establishing which law should be applicable when using the connecting factor of the closest connection of the Regulation. Under the Hague Convention we were looking for the closest connection for the matrimonial property regime (art. 4 last paragraph) while under the Regulation we are looking in a broader perspective, because of the wording of this connecting factor which is wider.

Exception clause in art. 26 sec 3 Regulation

The exception clause reads:

“3. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State

2. where one spouse voluntarily has acquired the nationality of the other at the time of marriage or later, either by a declaration to that effect or by not exercising a right known to him or her to decline the acquisition of the new nationality;

3. where both spouses voluntarily have acquired that nationality after marriage.

Except in the cases referred to in sub-paragraph 1 of the second paragraph of Article 7, the provisions referring to the common nationality of the spouses are not applicable where the spouses have more than one common nationality.

⁷ For the application of this connecting factor under the Hague Convention 1978 see Rapport Von Overbeck nr. 88.

other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

(a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and

(b) both spouses had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State. The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1.

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.”

This rather complicated exception clause is based on the ideas of Recital 51:

“(51) With regard to the determination of the law applicable to the matrimonial property regime in the absence of a choice of law and a matrimonial property agreement, the judicial authority of a Member State,⁸ at the request of either of the spouses, should, in exceptional cases — where the spouses have moved to the State of their habitual residence for a long duration — be able to arrive at the conclusion that the law of that State may apply if the spouses have relied on it. Whatever the case, it may not infringe the rights of third parties.”

What did we do in this case under the Hague Convention? For couples that lived in a certain state for more than 10 years and they had not made a choice of law or a matrimonial property agreement, then the applicable law changed automatically into that of the new habitual residence. The new law was only to be applied for the assets and debts which were acquired after the automatic change.⁹ This automatic change, which may have taken place without the spouses noticing it, was one of the problems of the Hague Convention. Perhaps it was even one of the main problems which prevented other states to join this Convention.

Is the solution of the Regulation any better?

It is not mentioned in sec. 3 itself, but we may safely assume that this exception clause is only applicable if the spouses have not made a choice of law or a matrimonial property agreement, as stated in Recital 51. Furthermore they both must have relied on the application of that law.

The exception clause may not be used by the courts on their own initiative; the applicant has to ask for it in court. Lagarde¹⁰ reminds the courts that it is not forbidden for them to bring the matter up in

⁸ Member States are: Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxemburg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden and Cyprus.

⁹ There were two more cases in which there was an automatic change in art. 7 of the Hague Convention but in those cases one of the spouses either moved or changed the nationality. The automatic change after 10 years' time happened often without the spouses noticing it.

¹⁰ Lagarde, o.c., comment 20 to art. 26.

a procedure where it would be possible to use the exception clause and then see, what the parties do with it.

All in all when the exception clause is brought up by the spouses and it is applied by the court, the effect is that another connecting factor is applied to the property regime of the spouses. This is different from art. 7 of the Hague Convention, where we have to deal with a division of the property into different compartments (before and after the automatic change). Under the Regulation another applicable law is established with the benefit of hindsight. The applicable law is established with real retroactive force, by not taking into account the original law of the first common habitual residence of the couple.

If one spouse does not agree with this retroactive force, then the new law will only apply from the moment that they established the last common habitual residence in the new state. It seems to me that the effect of this comes very close to that of the automatic change of the Hague Convention I previously mentioned, because then we again have to deal with one part of the matrimonial property that is governed by the old law and another part that is governed by the new law.

In the Netherlands we have gained some experience in dealing with this phenomenon, and it helps that in our national law we find a provision that if one spouse cannot prove that an asset belongs to his private property, that it is assumed that it is part of the common property, art. 10:50 BW. Unfortunately this escape route is closed for spouses under the Regulation.¹¹ How one has to proceed in that case, the European Court of Justice will tell us soon, I hope.

The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1, the text concerning the exception clause adds.

I think that it is right that Lagarde¹² adds that this protection only works if the third party did not know or should have known of the applicable law in the sense of art. 28 Regulation. However I see a practical problem here. Unlike cases where the spouses have registered their foreign property regime (see art. 10:45 BW if we look at Dutch law), the application of the law according to the exception clause is only established later. It is not the result of an automatic change of the regime; it has to be established by a court. So how could the third party know beforehand that this exception will work for this couple? The couple itself never knew beforehand if the exception clause would be applicable and which effect it would have (retroactive force or not).

I understand why this exception clause is added to the Regulation but the application in the practice of notaries and lawyers may prove to be quite difficult, certainly in the first years when we all have to get used to the new regulation.

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¹¹ Staatsblad 2018, 332, art. G.

¹² Lagarde, o.c., comment 30 to art. 26.