Pilar Jiménez Blanco on Cross-Border Matrimonial Property Regimes

Written by Pilar Jiménez Blanco about her book:

Pilar Jiménez Blanco, *Regímenes económicos matrimoniales transfronterizos [Un estudio del Reglamento (UE) nº 2016/1103]*, Tirant lo Blanch, 2021, 407 p., ISBN 978-84-1355-876-9

The Regulation (EU) No 2016/1103 is the reference Regulation in matters of cross-border matrimonial property regimes. This book carries out an exhaustive analysis of the Regulation, overcoming its complexity and technical difficulties.

The book is divided in two parts. The first is related to the applicable law, including the legal matrimonial regime and the matrimonial property agreement and the scope of the applicable law. The second part is related to litigation, including the rules of jurisdiction and the system for the recognition of decisions. The study of the jurisdiction rules is ordered according to the type of litigation and the moment in which it arises, depending on whether the marriage is in force or has been dissolved by divorce or death. **Three guiding principles** of the Regulation are identified: 1) The need of **coordination with the EU Regulations** on family matters (divorce and maintenance) and succession. This coordination can be achieved through the choice of law by the spouses to ensure the application of the same law to divorce, to the liquidation of the matrimonial regime, to maintenance and even to agreements as to succession. In addition, a broad interpretation of "maintenance" that includes figures such as compensatory pension (known, for example, in Spanish law) allows that one of the spouses objects to the application of the law of the habitual residence of the creditor and the law of another State has a closer connection with the marriage, based on art. 5 of the 2007 Hague Protocol. In such a case, the governing law of the matrimonial property regime could be considered as the closest law.

In the field of international jurisdiction, the coordination between EU Regulations is intended to be ensured with exclusive jurisdiction by ancillary linked to succession proceedings or linked to matrimonial proceedings pending before the

courts of other Member States. Although the ancillary jurisdiction of the proceedings on the matrimonial property regime with respect to maintenance claims is not foreseen, the possibility of accumulation of these claims is possible through a choice of court to the competent court to matrimonial matters.

2) The **unitary treatment of the matrimonial property regime**. The general rule is that only one law is applicable and only one court is competent to matrimonial property regimes, regardless of the location of the assets. The exceptions derived from the registry rules of the real estate situation and the effect to third parties are analysed.

3) The **legal certainty and predictability**. The general criterion is the immutability and stability of the matrimonial property regime, so that the connections are fixed at the beginning of married life and mobile conflict does not operate, as a rule. The changes allowed will always be without opposition from any spouse and safe from the rights of third parties. The commitment to legal certainty and predictability of the matrimonial property regime governing law prevails over the proximity current relationship of the spouses with another State law.

Related to **applicable law**, the following contents can be highlighted:

-The **importance of choosing the governing law** of the matrimonial property regime. The choice of law has undoubted advantages for the spouses to coordinate the law applicable to the matrimonial property regime with the competent courts and with the governing law of related issues related to divorce, maintenance and succession law. The choice of law is especially recommended if matrimonial property agreements are granted in case of spouses' different nationalities and different habitual residence, since it avoids uncertainty in determining the law of the closest connection established in art. 26.1.c). Of particular importance is the question of form and consent in the choice of law, given the ambiguity of the Regulation on the need for this consent to be express.

-The interest in conclude **matrimonial property agreements and, specially, the prenuptial agreements**. Its initial validity requires checking the content of each agreement to verify which is the applicable law and which is included within the scope of the Regulation (EU) No 2016/1103. The enforceability of these

agreements poses problems when new unforeseeable circumstances have appeared for the spouses, which will require an assessment of the effectiveness of the agreements in a global manner – not fragmented according to each agreement – to verify the minimum necessary protection of each spouse.

-The **singularities of the scope of application of the governing matrimonial property regime law**. The issues included in the governing law require prior consultation with said law to identify any specialty in the matrimonial property regime relations between the spouses or in relation to third parties. This has consequences related to special capacity rules to conclude matrimonial property agreements, limitations to dispose of certain assets, limitations for contracts between spouses or with respect to third parties or the relationship between the matrimonial property regimes and the civil liability of the spouses. Of particular importance is the regime of the family home, which is analysed from the perspective of the limitations for its disposal and from the perspective of the rules of assignment of use to one of the spouses.

-The **balance between the protection of spouses and the protection of third parties**. From art. 28 of the Regulation, derives the recommendation for the spouses to register their matrimonial property regime, whenever possible, in the registry of their residence and in the property registry of the real estate situation. The recommendation for third parties is to consult the matrimonial property regime in the registries of their residence and real estate. As an alternative, it is recommended to choose – as the governing law of the contract – the same law that governs the matrimonial property regime.

– **The effects on the registries law**. Although the registration of rights falls outside the scope of the Regulation, for the purposes of guaranteeing correct publicity in the registry of the matrimonial property regimes of foreign spouses, it would be advisable to eventually adapt the registry law of the Member States to the Regulation (EU) No 2016/1103. A solution consistent with the Regulation would be to allow the matrimonial property regime registry access when the first habitual residence of the couple is established in that State.

Related to **jurisdiction,** the following contents can be highlighted:

-The keys of the rules of jurisdiction. The rules of jurisdiction only regulate

international jurisdiction, respecting the organization of jurisdiction among the "courts" within each State. It will be the procedural rules of the Member States that determine the type of intervening authority (judicial or notarial), as well as the territorial and functional jurisdiction.

The rules of jurisdiction are classified into two groups: 1) litigation with a marriage in force, referred to in the general forums of arts. 6 et seq.); 2) litigation in case of dissolution of the marriage, due to death or marital crisis. These are subject to two types of rules: if the link (spatial, temporal and material) with the divorce or succession court is fulfilled, this court has exclusive jurisdiction, in accordance with arts. 4 and 5; failing that, it goes back to the general forums of the Regulation.

Jurisdiction related to succession proceedings (based on art. 4) poses a problem of lack of proximity of the court with the surviving spouse, especially when the criterion of jurisdiction for the succession established by Regulation (EU) No 650/2012 has little connection with that State. This will be the case especially when the jurisdiction for succession is based on the location of an asset in that State (art. 10.2) or on the *forum necessitatis* (art. 11).

Jurisdiction related to matrimonial proceedings (based on art. 5) poses some problems such as the one derived from a lack of temporary fixation of the incidental nature. The problem is to determine how long this court has jurisdiction.

-The interest of the choice of court. The choice of court is especially useful to reinforce the choice of law. Submission may also be convenient, especially to the State of the celebration, for marriages that are at risk of not being recognized in any Member State by virtue of art. 9 (for example, same-sex marriages).

The inclusion of a submission in a prenuptial agreement or in a matrimonial property agreement does not avoid the uncertainty of the competent court. There is a clear preference for the concentration of the jurisdiction of arts. 4 and 5 apart from the pact of submission made between the spouses. In any case, the choice of court can be operative if the proceedings on the matrimonial issue has been raised before courts with the minimum connection referred to in art. 5.2.

Problems arise due to the dependence of the jurisdiction on the applicable law established in art. 22 of the Regulation, since it requires anticipating the

determination of the law applicable to the matrimonial property regime in order to control international jurisdiction.

Related to **recognition,** the following contents can be highlighted:

-The **delimitation between court decision and authentic instrument** does not depend on the intervening authority – judicial or notarial –, but on the exercise of the jurisdictional function, which implies the exercise of a decision-making activity by the intervening authority. This allows notarial divorces to be included and notoriety acts of the matrimonial property regime to be excluded.

The recognition system follows the classic model of the European Regulations, taking as a reference the Regulation (EU) No 650/2012 on succession. Therefore, the need for exequatur to enforceability of court decisions is maintained.

The obligation to apply the grounds for refusal of recognition with **respect to the fundamental rights recognised in the EU Charter** and, in particular, in art. 21 thereof on the principle of non-discrimination. This supposes an express incorporation of the European public policy to the normative body of a Regulation. Specially, the prohibition of discrimination based on sexual orientation means the impossibility of using the public policy ground to deny recognition of a decision issued by the courts of another Member State relative to the matrimonial property regime of a marriage between spouses of the same sex.

The study merges the rigorous interpretation of EU rules with practical reality and includes case examples for each problem area. The book is completed with many references on comparative law, which show the different systems for dealing with matters of the matrimonial property regime applied in the Member States. It is, therefore, an essential reference book for judges, notaries, lawyers or any other professional who performs legal advice in matrimonial affairs.