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United in Diversity – Regional Unification of the Conflict-of-law Rules in Matters of Matrimonial Property Regimes

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Abstract

The unification of the conflict-of-law rules in matters of matrimonial property regimes at EU level seeks to mitigate differences in substantive law in particular legal systems. The aim of this contribution is to analyse the doctrine of overriding mandatory provisions and consider the applicability of the public policy exception, which limit the application of the law otherwise applicable determined in compliance with the unified conflict-of-law rules. The question author addresses in this paper is whether these institutes of the general part of private international law provide for sufficient safeguards to protect the fundamental values and public interests of the forum law in matters of matrimonial property regimes.

Keywords

Diversity of Substantive Law; Matrimonial Property Regimes; Matrimonial Property Regulation; Overriding Mandatory Provisions; Public Policy Exception; Regional Unification of the Conflict-of-law Rules.

1 Introduction

Ongoing globalization, progress in transport, communication and information technologies are factors that contribute to internationalization of legal relationships. One of the cornerstones affecting this social and legal phenomenon is the increasing migration of people.¹ In Europe, the mobility

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¹ Similarly Diago Diago, M. d. P. The Matrimonial Property Regime in Private International Law. In: Šarčević, P., Volken, P. (eds.). *Yearbook of Private International Law 2000*. Vol. II. The Hague: Kluwer Law International, 2000, p. 180; For more details see Rozehnalová, N. Několik slov k mezinárodnímu právu soukromému a jeho vývoji. In: Rozehnalová, N., Kyselovská, T. et al. *K některým vývojovým otázkám mezinárodního práva soukromého*. Brno: Masarykova univerzita, 2013, pp. 15–18.

of people is enhanced by the creation of a regional economic integration organisation in the form of the European Union (“EU”).² As a result, a number of marriages having cross-border implication is increasing as well. These include not only marriages of persons of different nationality, or couples who live in a state other than that of their nationality, but also situations where the spouses acquire property (e.g. immovable property or bank accounts) located in more than one country.³ Consequently, the courts of EU Member States have to increasingly deal with the cases, in which it is necessary to dissolve the matrimonial property regime having cross-border implication; in particular, as a result of the divorce or the death of one of the spouses.⁴ In these situations, the determination of the law applicable to the matrimonial property regime is of utmost importance.

The problem is that there are considerable disparities between the applicable rules governing the property effects of marriage, both in substantive law and in private international law.⁵ While the continental European legal systems prefer regimes of community of property, in the common law countries marriage has no effect upon the property rights of spouses; therefore, system of separation of property applies.⁶ Besides, there is also a variety of so-called hybrid regimes⁷, such as German and Greek community of accrued gains

² Similarly Župan, M., Pujlko, V. Shaping European Private International Family Law. *Slovenian Law Review*. 2010, No. 1-2, p. 24.

³ Diago Diago, M. d. P. The Matrimonial Property Regime in Private International Law. In: Šarčević, P., Volken, P. (eds.). *Yearbook of Private International Law 2000*. Vol. II. The Hague: Kluwer Law International, 2000, p. 180; Viarengo, I. The EU Proposal on Matrimonial Property Regimes – Some General Remarks. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2011*. Vol. XIII. Munich: Sellier. European Law Publishers, 2011, p. 200.

⁴ Similarly Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *EUR-Lex*. Published on 2 March 2016 [cit. 1. 8. 2019]. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0126>

⁵ *Ibid.*

⁶ Scoles, E. F. Choice of Law in Family Property Transactions. In: *Recueil des Cours 1988 – II*. Vol. 209. Dordrecht: Martinus Nijhoff Publishers, 1989, pp. 17–18. More to the matrimonial property regimes in European legal systems see Pintens, W. Matrimonial Property Law in Europe. In: Boele-Woelki, K., Miles, J., Scherpe, J. M. (eds.). *The Future of Family Property in Europe*. Cambridge: Intersentia, 2011, pp. 19–46. Scherpe, J. M. (ed.). *Marital Agreements and Private Autonomy in Comparative Perspective*. Oxford-Portland: Hart Publishing, 2012, 518 p.

⁷ Dvořák, J., Spáčil, J. *Společné jmění manželů v teorii a v judikatuře*. Praha: Wolters Kluwer ČR, 2011, p. 15.

or Swiss participation in acquests⁸. Existence of this mosaic of matrimonial property regimes is a consequence of historical development, which reflects national, legal, economic, and cultural traditions in particular legal systems.⁹ There are also differences in the conflict-of-law rules. The objective connecting factors that national legal systems use for the determination of the law applicable to the matrimonial property regime traditionally cover nationality of the spouses, domicile of the spouses or habitual residence of the spouses.¹⁰ The outlined diversity in matrimonial property law in Europe forms the background for the potential unification.

Although the EU legislator has succeeded in adopting unified conflict-of-law rules in matters of matrimonial property regimes, the instruments of the general part of private international law that serve to protect the public interest considerations of forum law – namely the overriding mandatory provisions and the public policy exception – are still preserved. The aim of this contribution is to analyse the doctrine of overriding mandatory provisions and consider the applicability of the public policy exception, which limit the application of the law otherwise applicable determined in compliance with the unified conflict-of-law rules. The question the author would like to address in this paper is whether these institutes provide for sufficient safeguards to protect the fundamental values and public interests of the forum law in matters of matrimonial property regimes.

In order to set the topic of this contribution into a broader context, key milestones in the legislative development at EU level will briefly be outlined and the fundamental principles and characteristics of the unified conflict-of-laws regulation in matters of matrimonial property regimes will be identified. The crucial part will be devoted to the analysis of the instruments of overriding mandatory provisions and the public policy exception. In the concluding part, the author will summarize her findings and provide an assessment.

⁸ Pintens, W. Matrimonial Property Law in Europe. In: Boele-Woelki, K., Miles, J., Scherpe, J. M. (eds.). *The Future of Family Property in Europe*. Cambridge: Intersentia, 2011, pp. 29–32.

⁹ Dvořák, J., Spáčil, J. *Společné jmění manželů v teorii a v judikatuře*. Praha: Wolters Kluwer ČR, 2011, p. 6, 12.

¹⁰ Similarly Scoles, E. F. Choice of Law in Family Property Transactions. In: *Recueil des Cours 1988 – II*. Vol. 209. Dordrecht: Martinus Nijhoff Publishers, 1989, pp. 23–26.

2 Legislative background and fundamental principles of the conflict-of-laws regulation

It has been twenty years since the EU acquired the competence to adopt secondary legislation in the field of judicial cooperation in civil (including family) matters having cross-border implications. It was introduced with the Treaty of Amsterdam¹¹, which entered into force in 1999¹². It is however important to note that the unification of the substantive family law rules remains outside the competence of the EU, and belongs to the exclusive competence of the Member States.¹³ Therefore, the legislative competence of the EU is only limited to private international family law measures.¹⁴

Even the adoption of the EU legislation on matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan¹⁵, Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (“Matrimonial Property Regulation”) was adopted in June 2016, i. e. 18 years later. Rather than providing for the unified substantive matrimonial property regime, the Matrimonial Property Regulation preserves the particularities stemming from the national legal systems and contains the unified rules on jurisdiction, applicable law and recognition and enforcement in matters of matrimonial property regimes.

The Matrimonial Property Regulation is applicable to legal proceedings instituted on or after 29 January 2019. With regard to the determination

¹¹ Art. 65 Treaty establishing the European Community.

¹² Rozehnalová, N. Evropský justiční prostor ve věcech civilních. In: Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 26.

¹³ Art. 3 Treaty on the Functioning of the European Union (“TFEU”), *a contrario*. See Fiorini, A. Which Legal Basis for Family Law? The Way Forward [online]. *European Parliament*. Published in 2012 [cit. 22. 6. 2019]. [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT\(2012\)462498_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT(2012)462498_EN.pdf); More to the competence of the EU see Martiny, D. European Family Law (PIL). In: Basedow, J., Hopt, K. J., Zimmermann, R., Stier, A. (eds.). *The Max Planck Encyclopedia of European Private Law: Vol. I*. Oxford: Oxford University Press, 2012, pp. 596–597.

¹⁴ Art. 4 para. 2 letter j), Art. 67 para. 4, Art. 81 TFEU.

¹⁵ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [online]. *EUR-Lex*. Published on 3 December 1998 [cit. 22. 6. 2019]. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999Y0123%2801%29>

of the law applicable to the matrimonial property regime, the unified conflict-of-law rules shall apply to spouses who marry or choose the law applicable to their matrimonial property regime on or after 29 January 2019.¹⁶ In terms of territorial scope of application, the Matrimonial Property Regulation is only applicable in 18 EU Member States (including the Czech Republic), which decided to participate in enhanced cooperation (so-called participating Member States).¹⁷ Enhanced cooperation is a result of the fact that the EU Member States were unable to reach unanimity, which was required for the adoption of the proposal for the regulation.¹⁸

The objective of the Matrimonial Property Regulation is to provide spouses “with legal certainty as to their property and offer them a degree of predictability”¹⁹ and to achieve an ultimate goal of removing the obstacles to the free movement of persons²⁰. The Matrimonial Property Regulation has universal character in the determination of the applicable law. Therefore, it enables either the law of a Member State or the law of a third state to be applicable to the matrimonial property regime.²¹ The Matrimonial Property Regulation is also based on the unity of the applicable law, i. e. the law determined in compliance with the unified conflict-of-law rules applies to both movable and

¹⁶ Art. 69 para. 2, Art. 70 Matrimonial Property Regulation. Corrigendum to Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, as of 29 April 2017.

¹⁷ Matrimonial Property Regulation is binding and directly applicable in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden. However, subject to the fulfilment of the prescribed conditions of participation, enhanced cooperation is at any time open to all EU Member States. See recitals 11, 13 Preamble to the Matrimonial Property Regulation, Art. 70 Matrimonial Property Regulation.

¹⁸ Recital 10 Preamble to the Matrimonial Property Regulation. See Art. 81 para. 3 TFEU, according to which measures concerning family law having cross-border implications shall be adopted in accordance with a special legislative procedure, i. e. unanimously by the Council after consulting the European Parliament. More to the legislative process see Marino, S. The Role of Party Autonomy in Matrimonial Property Regime and Partnership Property Regime Regulations. In: Hrnčířková, M. *Řešení přeshraničních sporů – pravomoc a autonomie vůle*. Praha: Leges, 2017, pp. 111–114.

¹⁹ Recital 15 Preamble to the Matrimonial Property Regulation.

²⁰ *Ibid.*, Recital 1.

²¹ Recital 44 Preamble to the Matrimonial Property Regulation, Art. 20 Matrimonial Property Regulation. It should be noted that the term “the law of a Member State” only refers to the legal systems of participating Member States. The law of an EU Member State, which is not participating in enhanced cooperation on the regulation, is considered as the law of a third state.

immovable property of the spouses and regardless of whether the assets are located in another Member State or in a third state.²²

Last but not least, the determination of the law applicable to the matrimonial property regime is based on the principle of proximity (i.e. closest connection).²³ As a starting point, the spouses (or future spouses) are allowed to agree on the law applicable to their matrimonial property regime. They may choose among the laws with which they have close links. It can be either the law of the state of the habitual residence of at least one of the (future) spouses, or the law of a state of nationality of at least one of the (future) spouses. For this purpose, the criteria of habitual residence and nationality are to be assessed at the time the agreement on a choice of applicable law is concluded.²⁴ In the absence of choice, the law applicable to the matrimonial property regime shall be determined based on a cascade (or scale) of three objective connecting factors, namely the spouses' first common habitual residence after the conclusion of the marriage, the spouses' common nationality at the time of their marriage, or the criteria of the closest connection at the time of the conclusion of the marriage.²⁵ Upon the fulfilment of the prescribed conditions, escape clause in favour

²² Recital 43 Preamble to the Matrimonial Property Regulation, Art. 21 Matrimonial Property Regulation. See Hein, J. von. Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques. *European Property Law Journal*. 2017, No. 2, pp. 146–147.

²³ Similarly Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 278, 280, 282; Marino, S. The Role of Party Autonomy in Matrimonial Property Regime and Partnership Property Regime Regulations. In: Hrnčířiková, M. *Řešení přeshraničních sporů – pravomoc a autonomie vůle*. Praha: Leges, 2017, p. 116.

²⁴ Recital 45 Preamble to the Matrimonial Property Regulation, Art. 22 Matrimonial Property Regulation. More to the choice of the applicable law see Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 277–278; Marino, S. The Role of Party Autonomy in Matrimonial Property Regime and Partnership Property Regime Regulations. In: Hrnčířiková, M. *Řešení přeshraničních sporů – pravomoc a autonomie vůle*. Praha: Leges, 2017, pp. 114–127.

²⁵ Recital 49 Preamble to the Matrimonial Property Regulation, Art. 26 para. 1 Matrimonial Property Regulation. More to the determination of the law applicable in the absence of choice of the applicable law see Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 279–281.

of the application of the law of a state, in which the spouses have their last common habitual residence, may be utilized as well.²⁶

3 United in diversity

It should be noted that the application of the unified conflict-of-law rules contained in the Matrimonial Property Regulation might not exceptionally lead to the determination of the foreign law as the law applicable to the matrimonial property regime. In which case, not only the law of a Member State but also the law of a third state may be applicable.

Term “united in diversity” used in the heading of this article refers to the official motto of the EU, which is one of its symbols. The motto “*signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent’s many different cultures, traditions and languages*”.²⁷ This is connected with the principle of subsidiarity, according to which “*the Union shall respect the equality of Member States between the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*”.²⁸ The respect for fundamental rights and the different legal systems and traditions of the Member States is also explicitly emphasised in the context of the creation of an area of freedom, security and justice.²⁹

While stressing the need to extend mutual recognition to the field of matrimonial property regimes in 2010 Stockholm Programme, the European Council emphasised that “*Member States’ legal systems, including public policy, and national traditions in this area*” should be taken into consideration.³⁰

²⁶ Recital 51 Preamble to the Matrimonial Property Regulation, Art. 26 para. 3 Matrimonial Property Regulation. More to escape clause see Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 282–283.

²⁷ European Union. *The EU motto* [online]. *Europa.eu*. Published on 13 February 2019 [cit. 23. 8. 2019]. https://europa.eu/european-union/about-eu/symbols/motto_en

²⁸ Art. 4 para. 2 Treaty on European Union. Similarly Corthaut, T. *EU Ordre Public*. Alphen an den Rijn: Kluwer Law International, 2012, pp. 285–286.

²⁹ Art. 67 para. 1 TFEU.

³⁰ Stockholm Programme: An open and secure Europe serving and protecting citizens [online]. *EUR-Lex*. Published on 4 May 2010 [cit. 22. 6. 2019]. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>; Similarly Recital 7 Preamble to the Matrimonial Property Regulation.

Consequently, the Matrimonial Property Regulation provides for two traditional exceptions (or limits) to the otherwise applicable foreign law, which stem from the public policy considerations. These are overriding mandatory provisions and the public policy exception.³¹ While overriding mandatory rules are seen as a positive construction of *ordre public*, the public policy exception is considered a negative construction of *ordre public*.³² Despite these instruments are closely interrelated, it is necessary to distinguish them.

4 Overriding mandatory provisions

Overriding mandatory provisions are rules that “*are applicable to a situation irrespective of the lex causae*”³³. The Matrimonial Property Regulation contains a provision on overriding mandatory provisions in Art. 30, which reads as follows: “*nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum*”³⁴. For the purpose of the Matrimonial Property Regulation, overriding mandatory provisions are defined as “*provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the matrimonial property regime pursuant to this Regulation*”³⁵. It is obvious that the definition is similar to the wording of Art. 9 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I Regulation”).³⁶

³¹ Art. 30, 31 Matrimonial Property Regulation. Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 233.

³² Bogdan even considers them “*as two sides of the same coin*”. See Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des Cours 2010*. Vol. 348. Leiden-Boston: Martinus Nijhoff Publishers, 2011, pp. 182, 184. Similarly Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, pp. 170–171.

³³ Wilderspin, M. Overriding mandatory provisions. In: Basedow, J., Rühl, G., Ferrari, F., Miguel Asensio, P. De (eds.). *Encyclopedia of Private International Law: Vol. 2*. Cheltenham: Edward Elgar Publishing, 2017, p. 1330.

³⁴ Art. 30 para. 1 Matrimonial Property Regulation.

³⁵ *Ibid.*, Art. 30 para. 2.

³⁶ See Art. 9 para. 1 Rome I Regulation.

In terms of the characterisation, the concept of “overriding mandatory provisions” should cover rules of imperative nature.³⁷ The Matrimonial Property Regulation refers to “*provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests*”, which implies that there is a high standard for the characterisation of a rule as overriding mandatory provision.³⁸ In the recital of the Preamble to the Matrimonial Property Regulation, rules for the protection of the family home are explicitly mentioned as an example of overriding mandatory provisions.³⁹ *Sonnenberger* considers this approach as reasonable.⁴⁰ In addition, the rules regarding solidarity between spouses for the household debts, or the rules applicable to emergency situations may be considered as overriding mandatory provisions.⁴¹ Consequently, a matrimonial property regime according to which the family’s debts are not shared between the two spouses or a regime that does not protect the family home may be found in a particular Member State as being contrary to overriding mandatory provisions of the state concerned.⁴²

It may however be doubtful, whether some national rules should be qualified as overriding mandatory provisions or rather as rules the purpose of which is protecting both public and private interests. In this context, *Clavel* and *Jault-Seseke* state, “*as long as a rule is crucial for safeguarding public interest, the mere fact that it is also driven by considerations of protection has no impact on its*

³⁷ Recital 53 Preamble to the Matrimonial Property Regulation.

³⁸ Art. 30 para. 2 Matrimonial Property Regulation. See *Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity*. In: *Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 236.

³⁹ Recital 53 Preamble to the Matrimonial Property Regulation. Similarly *Hein, J. von. Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques. European Property Law Journal*. 2017, No. 2, p. 149.

⁴⁰ *Sonnenberger, H. J. Overriding Mandatory Provisions*. In: *Leible, S. (ed.). General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 122.

⁴¹ *Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity*. In: *Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 242.

⁴² Explanatory Handbook on Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *Notaries of Europe* [cit. 26. 8. 2019]. <https://www.notaires.fr/sites/default/files/Matrimonial-property-handbook-29012019-EN.pdf>

*classification. This conclusion is important in the field of matrimonial property regimes, where public order of direction and protection are intimately related*⁴³.

Even though the Matrimonial Property Regulation reflects the wording of Art. 9 of the Rome I Regulation, the scope of Art. 30 of the Matrimonial Property Regulation is only limited to the application of overriding mandatory provisions of the forum. It does not refer (either explicitly or implicitly) to overriding mandatory provisions of any other state.⁴⁴ The advantage of the adopted solution (i. e. limitation of the exception to the application of the law otherwise applicable solely to overriding mandatory provisions of the forum law) is that it reduces the legal uncertainty deriving from the application of this exception. On the other hand, given the multiplicity of grounds for determination of jurisdiction of courts⁴⁵, it is difficult to foresee overriding mandatory provisions of which state will influence the application of the law otherwise applicable to the matrimonial property regime.⁴⁶

Last but not least, the exception to the application of the law applicable to the matrimonial property regime should be strictly interpreted in order to remain compatible with the general objective of the Matrimonial Property Regulation. Moreover, exception based on overriding mandatory provisions may only be used in exceptional cases.⁴⁷

5 Public policy exception

As has already been stated above, the substantive family law is not unified within the EU. The reason is that family law matters are closely connected to the legal systems of particular states and the EU lacks competence in this area. Therefore, the public policy exception has still its place in family law. The public policy exception remains an instrument which,

⁴³ Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 242.

⁴⁴ *Ibid.*, pp. 235–236, 243.

⁴⁵ For more details see Art. 4–11 Matrimonial Property Regulation.

⁴⁶ Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, pp. 245–246.

⁴⁷ *Ibid.*, p. 236.

albeit exceptionally, may be used by the courts of the Member States to protect their fundamental values.⁴⁸

The public policy exception is a corrective necessary for the traditional “value-neutral” approach to private international law that the EU legislator takes.⁴⁹ This instrument allows judges to decline the application of a provision of a foreign law to avoid unacceptable results from the forum law perspective.⁵⁰ In EU private international law, conflicting interests are however at stake. On the one hand, the use of the public policy exception helps to secure the national values and legal cultures of the Member States. On the other hand, the public policy exception can be seen as an obstacle (or limit) to the objectives that EU private international law aims to create, i. e. legal certainty to enhance free movement of citizens and their trust in the EU legal order.⁵¹ The same is true for matters of matrimonial property regimes.

The Matrimonial Property Regulation contains an *ordre public* clause in its Art. 31. This provision allows courts and other competent authorities dealing with matters of matrimonial property regime in the Member State to refuse the application of a provision of the foreign law determined by the unified conflict-of-law rules, if, in a given case, such application is manifestly incompatible with the public policy (*ordre public*) of the forum.⁵²

⁴⁸ Similarly Meeusen, J., Pertegás, M., Straetmans, G., Swennen, F. General Report. In: Meeusen, J., Pertegás, M., Straetmans, G., Swennen, F. (eds.). *International Family Law for the European Union*. Antwerp-Oxford: Intersentia, 2007, p. 19. Similarly Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 310. More to this see Poillot-Peruzzetto, S. The Exception of Public Policy in Family Law within the European Legal System. In: Meeusen, J., Pertegás, M., Straetmans, G., Swennen, F. (eds.). *International Family Law for the European Union*. Antwerp-Oxford: Intersentia, 2007, pp. 279–302.

⁴⁹ Gössl, S.L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 86. Similarly Vischer, F. General Course on Private International Law. In: *Recueil des Cours 1992*. Vol. 232. Leiden-Boston: Martinus Nijhoff Publishers, 1992, p. 100. Similarly Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, p. 169.

⁵⁰ Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 305, 313.

⁵¹ Similarly Gössl, S.L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 92.

⁵² Recital 54 Preamble to the Matrimonial Property Regulation, Art. 31 Matrimonial Property Regulation.

It should be noted that the provision on the public policy exception underwent some modifications during the legislative process. In the original 2011 proposal for the Matrimonial Property Regulation, the courts were given a possibility to set aside “the foreign law” (or “a rule of the law”) as a whole. It was also proposed that the public policy exception should not be used to refuse application of the law of another EU Member State, “*if the application of the public policy exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination*”⁵³. This means that the public policy exception was meant to be restricted to cases, in which the law of a third state applies.

In the final text, however, the Matrimonial Property Regulation only refers to setting aside of “a provision” of the law applicable to the matrimonial property regime. Moreover, it does not distinguish between situations in which the law applicable is the law of another Member State and situations in which the applicable law is the law of a third state.⁵⁴

The wording “in a given case” refers to the assessment *in concreto* of the public policy exception. It is therefore possible to apply a foreign law as the law applicable, which is *in abstracto* against the fundamental values of the *lex fori*, but which, in a given case, leads to an acceptable solution.⁵⁵

⁵³ Recital 25 Preamble, Art. 23 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *EUR-Lex*. Published on 16 March 2011 [cit. 1. 8. 2019]. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0126>

⁵⁴ Recital 54 Preamble to the Matrimonial Property Regulation, Art. 31 Matrimonial Property Regulation. Similarly Recital 25 Preamble, Art. 23 Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes – Political agreement [online]. *Council of the European Union*. Published on 26 November 2015 [cit. 1. 8. 2019]. <http://data.consilium.europa.eu/doc/document/ST-14651-2015-INIT/en/pdf>; Recital 54 Preamble, Art. 31 Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *EUR-Lex*. Published on 2 March 2016 [cit. 1. 8. 2019]. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0106>

⁵⁵ Člavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 237.

Even though the public policy exception is traditional private international law instrument, it is not interpreted uniformly in all EU Member States.⁵⁶ According to the case law of the Court of Justice of the European Union (“CJEU”)⁵⁷, the concrete content of the public policy is to be determined by the respective national legal systems. The CJEU is only guarding its limits.⁵⁸ It is however important to note that the public policy exception “*shall not be used to set aside the lex causae just because its content is not similar to the one of the lex fori*”.⁵⁹ The existence of different matrimonial property regimes in particular states (ranging from the regimes of community of property to the system of separation of property) should *per se* not be sufficient to breach the public policy of the forum.⁶⁰ The public policy exception in matters of matrimonial property regimes will probably be relevant with regard to discriminatory rules (e.g. rules discriminating based on sex). The public policy exception may therefore be used to disregard foreign matrimonial property regime, which is not favourable to wife.⁶¹ For example, if the law applicable only recognizes the husband as possible owner of property or as being the only spouse with the competence to administer or dispose of the assets, or if the law applicable allocates a greater portion to the husband than to the wife in the event of liquidation of the matrimonial property regime.⁶² However,

⁵⁶ Similarly in the context of international conventions see Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des Cours 2010. Vol. 348*. Leiden-Boston: Martinus Nijhoff Publishers, 2011, p. 168.

⁵⁷ See for example Judgment of the Court of Justice of 28 March 2000, Case C-7/98, para. 22, 23; Judgment of the Court of Justice (Grand Chamber) of 28 April 2009, Case C-420/07, para. 56, 57; Judgment of the Court of Justice (First Chamber) of 25 May 2016, Case C-559/14, para. 39, 40.

⁵⁸ Similarly Gössl, S. L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 87.

⁵⁹ Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 236.

⁶⁰ In such a case, adaptation of *lex causae* would be solution that is more suitable. Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 238.

⁶¹ *Ibid.*, pp. 238–239.

⁶² Explanatory Handbook on Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *Notaries of Europe* [cit. 26. 8. 2019]. <http://www.notaries-of-europe.eu/>

further requirements, such as the gravity of the breach, value of the interests involved, or the connection between the case and the forum, have to be considered before the public policy exception can be used.⁶³

The public policy exception may only be used in exceptional cases (as an *ultimum remedium*⁶⁴). Moreover, the application of the public policy exception according to the Matrimonial Property Regulation is limited by the principle of non-discrimination, i. e. it is not possible to set aside the foreign law, when doing so would be contrary to the Charter of Fundamental Rights of the European Union, especially its Art. 21 on the principle of non-discrimination.⁶⁵ This implies that the primacy of EU law can force a national court to apply the law of another state, which is against its national public policy.⁶⁶ For example, a court of the EU Member State, which does not recognize same-sex marriages, may be prevented from using the public policy exception to refuse the application of the law of another state that establishes property rights of same-sex couples, if it would amount to a violation of the principle of non-discrimination.⁶⁷

⁶³ Similarly Gössl, S.L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 90.

⁶⁴ Boer, T.M.de. Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community. In: Malatesta, A., Bariatti, S., Pocar, F. (eds.). *The External Dimension of EC Private International Law in Family and Succession Matters*. Padova: Cedam, 2008, p. 296; Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des Cours 2010*. Vol. 348. Leiden-Boston: Martinus Nijhoff Publishers, 2011, p. 170.

⁶⁵ Recitals 54, 73 Preamble to the Matrimonial Property Regulation. For further details see Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G.P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 237.

⁶⁶ Similarly Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 318.

⁶⁷ Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G.P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 237. Similarly in the context of inheritance law see Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, pp. 318–319.

6 Conclusion

Given the diversity in substantive family law in particular legal systems and the absence of EU competences in this area, the unification of substantive family law in Europe is not attainable. This is also true for matrimonial property regimes. Nevertheless, the EU legislator is progressing in unifying private international law rules in family law matters. The rules for the determination of the applicable law to the matrimonial property regime are unified in the Matrimonial Property Regulation, which is applicable in participating EU Member States by way of enhanced cooperation as of January 2019. The objective of the unified conflict-of-law rules in matters of matrimonial property regimes at EU level is to mitigate (or bridge) differences in substantive matrimonial property law in particular legal systems and provide spouses with legal certainty and predictability, the law of which state is applicable to their matrimonial property regime, or as the case may be, its dissolution.

Like the other European conflict-of-law rules, the unified conflict-of-law rules in matters of matrimonial property regimes have universal character in the determination of the applicable law. Therefore, the national courts of the EU Member States may not exceptionally be compelled to apply foreign matrimonial property law in matters of matrimonial property regimes having cross-border implication.

The aim of this contribution was to analyse institutes of overriding mandatory provisions and the public policy exception, which are provided for in the Matrimonial Property Regulations as limits to the application of the law otherwise applicable pursuant to the unified conflict-of-law rules. The question the author was addressing in this paper was whether these instruments of the general part of private international law provide for sufficient safeguard mechanisms to protect the fundamental values and public interests of the forum law in matters of matrimonial property regimes.

Even though the interpretation of the public policy exception may differ in particular EU Member States and lead to divergent results, it is a traditional instrument of private international law, which serves to protect the fundamental values and interests of the forum law. Its application in matters of matrimonial property regimes should therefore not be problematic. The public policy

exception may be used to disregard the application of the law otherwise applicable to the matrimonial property regime. In practice, however, the public policy issues will usually arise in case of recognition and enforcement as a ground for non-recognition of a decision.⁶⁸ For this reason, the public policy doctrine has undeniably its place in the Matrimonial Property Regulation.

Nevertheless, it follows from the analysis that legal regulation is not so self-evident and unproblematic as regards the overriding mandatory provisions. Even though overriding mandatory provisions are usually used in the context of contractual obligations⁶⁹, overriding mandatory provisions of the *lex fori* are also utilized in the Matrimonial Property Regulation. Unfortunately, it is not clear which rules will be qualified as overriding mandatory provisions for the purpose of the Matrimonial Property Regulation. The Matrimonial Property Regulation itself only refers to the rules for the protection of the family home.

In each case, all exceptions to the application of the otherwise applicable law to the matrimonial property regime should be strictly interpreted, even if they are driven by considerations of public interest.

To conclude, the uniform conflict-of-law rules do not eliminate legal discrepancies in substantive matrimonial property law in particular legal systems. Nevertheless, by unifying the conflict-of-law rules in matters of matrimonial property regimes in the Matrimonial Property Regulation and preserving the possibility to apply the public policy exception, the EU legislator is trying to achieve both unity and diversity of matrimonial property regimes.

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⁶⁸ See Recital 54 Preamble to the Matrimonial Property Regulation, Art. 37 letter a) Matrimonial Property Regulation.

⁶⁹ See Art. 9 Rome I Regulation. On the other hand, overriding mandatory provisions are not included in the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations or in the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

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