

CONSORTIUM ASSER - UCL
Association momentanée

R.C. Schimmelpennincklaan, 20-22
2517 JN DEN HAAG
Nederland

Collège Thomas More
Place Montesquieu, 2, box 5
B - 1348 LOUVAIN-LA NEUVE
Belgique

COMMISSION EUROPÉENNE
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**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

**ADDENDUM
PORTUGAL**

TMC Asser Instituut
Tel 00 31 (0)70 34 20 300
Fax 00 31 (0)70 34 20 359
consultancy@asser.nl

Département de droit international UCL
Tél. 00 32 (0)10 47 47 73
Fax 00 32 (0)10 47 86 14
verwilghen@int.ucl.ac.be

ADDENDUM TO THE PORTUGUESE REPORT ON MATRIMONIAL PROPERTY

Frequency of Portuguese court decisions on the issue of recognition and execution of foreign judgments and foreign acts issued by public authorities.

We contacted the *Gabinete de Política Legislativa e Planeamento do Ministério da Justiça* [Office for Policy and Planning of the Ministry of Justice] in Lisbon. This Department collects and organizes the statistical data concerning Portuguese Court Decisions.

These data about the activity of the Portuguese courts during the years 1998, 1999 and 2000 can be accessed on-line at www.gplp.pt in pdf format. After the analysis of these data, we have found that during the year 2000 the Portuguese Courts have proffered 6 awards of revision and confirmation of foreign decisions, whereas in 1999, 15 decisions were made on this issue of recognition of foreign judgments and 12 in 1998. The statistics do not mention the legal issues specifically dealt with by the foreign court, or the final result of the Portuguese judicial decision concerning recognition or non-recognition of the foreign judgment.

After further investigation on the data base of the Department of Information of the Ministry of Justice (www.dgsi.pt) we have analyzed the decisions proffered by the Courts of Appeal of Lisbon, Porto and Coimbra in 1998, 1999 and 2000, that can be found on that data base (most of which consist of summaries only), concerning the recognition of foreign judgments. It is important to mention that in Portugal only a minority of decisions from superior courts are published (less than 30% according to an informal estimation made by some Portuguese Judges asked on this subject). Even worse is the fact that most of these decisions are published only in a short version or “Abstract“. Decisions of lower courts are not published at all.

We have found on www.dgsi.pt the 6 summaries of the 6 decisions of Decisions on the subject of recognition of foreign judgments made by the Portuguese Courts of Appeal on the year 2000. Only one of those 6 decisions was not confirmed, on the basis of the existence of a pending lawsuit in a Portuguese court on the same issue decided by the foreign judgment. Of these 6 decisions, 3 involved lawsuits on marriage issues. One was a divorce judgment, another a decision of conversion of legal separation in divorce,

and the third, finally, a judgment of annulment of marriage. Due to the fact, however, that only summaries of these decisions were published, it is impossible to verify to what extent problems of matrimonial property, namely of liquidation of matrimonial property, were object of these 3 processes of revision and confirmation of foreign judgments concerning marriage issues.

With respect to the year 1999, we can only find at the DGSJ homepage the summaries of 7 of the 15 decisions of revision and confirmation of foreign awards, proffered by the Portuguese Courts of Appeal on that year. Among those 7 decisions, 2 were not confirmed, on the basis of formal and procedural obstacles. 3 of these 7 decisions involved problems of divorce and invalidity of marriage. Due to the fact that only the summaries of these decisions were published it is impossible to verify to what extent issues of matrimonial property were involved.

With respect, finally to the year 1998, it is possible to find at the DGSJ homepage the summaries of 5 of the 12 decisions proffered by the Portuguese Courts of Appeal in lawsuits concerning the revision and confirmation of foreign judgments. The analysis of these 5 summaries reveals that all of these foreign decisions were fully recognized. 3 of them were sentences of divorce. In one of these 3 decisions the Portuguese Court of Appeal addressed the problem of determination of the Portuguese Court with jurisdiction for the process of inventory and partition of marital property located in Portugal, subsequent to the recognition of the foreign judicial decision of divorce that did not address this issue of liquidation of property in Portuguese territory.

In the absence of published court decisions concerning the matrimonial property and its division in cases with international character we asked some judges about their personal experience on this subject. As we have reported and could confirm with one Judge of the Court of Appeal of Porto, courts of appeal deal with a completely insignificant number of cases with international character involving matrimonial property issues. For this reason, in our research we gave preference to judges in lower courts with specialized jurisdiction in family matters.

The judges we contacted have reported that the rare international cases of divorce and matrimonial property they had to decide, rarely posed any problems. These judges affirmed that probably the most complex problem was the problem of the division of matrimonial property located in Portugal subsequent to a divorce declared by a foreign court. This problem is, however, more theoretical than practical, considering that Portuguese courts usually address the problem of division of

matrimonial property located in Portugal, only after the recognition of the foreign judgment has taken place. If, for example, two Portuguese emigrants divorced abroad, where they have their habitual residence, the foreign court that decided about the divorce typically does not address the issue of the division of property located in Portugal. Parties in this kind of situation simply prefer to discuss the issue of the division of property located in Portugal, before the Portuguese Court of 1st Instance of the place where property is located, after the recognition of the foreign decision declaring the divorce has taken place. This attitude of the parties is justified by the fact that a foreign decision concerning matrimonial property located in Portugal may not be straightforwardly recognized in Portugal due to an uncertain understanding of the extent of the exclusive jurisdiction of Portuguese Courts with regard to property located in Portugal.

Above all we must emphasize that – despite the fact that Portugal is traditionally a country of emigrants – cases with international character in the field of family law are not that common.

A senior judge of the “Court of Family and Minors of Porto”, for example, told us that this Court deals with about 6 lawsuits with international character per year on each of its 9 sections, in a total of about 1000 lawsuits on each section per year. Most of these cases do not address the issue of matrimonial property in a way that poses any difficult problems for judges. The judge will simply have to determine which law governs the matrimonial property, and apply that regime in the case at hand.

According to a judge at the “Court of Family and Minors of Matosinhos” (a city near Porto with about 165.000 inhabitants) on the year 2002 in a total of 511 lawsuits decided, only 4 had relevant international contacts. One lawsuit involved the enforcement of a foreign judgment, another a problem of alimony and the other two cases dealt with problems of regulation of parental rights.

In Judicial Districts without Courts specialized in Family matters the Court with General Jurisdiction will intervene. In these Courts, especially in rural areas, the frequency of international cases of this kind is even more exceptional. Two judges in northern Portugal told us that sometimes (about once a year) one lawsuit arises concerning the division of matrimonial property, located in the District, of couples of Portuguese emigrants living abroad. In these (rare) cases the marriage had been previously dissolved by a decision made by a foreign court and that foreign judgment

did not deal with the problem of the division of matrimonial property located in Portuguese territory.

Number of International Marriages celebrated in Portugal and number of marriage contracts.

With respect to the number of international marriages celebrated in Portugal we contacted some Civil Registrars.

For example on the 1st Office of Civil Registration of Gaia, a city near Porto, serving a population of about 100.000 inhabitants, during the year 2001, were celebrated 31 marriages involving portuguese and foreign citizens in a total of 892 marriages. In those 31 marriages, only 5 couples opted for the regime of separation property in a marriage contract opting out of the default regime of Portuguese Family Law of community of property between spouses regarding assets and property non-gratuitously acquired during marriage. No marriage involving a foreign couple was celebrated on that year and also no “international” divorces took place on this Office.

In 2002 there were 41 marriages involving Portuguese and foreign citizens in a total of 816 marriages. 7 couples opted for the regime of separation of property in a marriage contract. Also during this year 2002 no divorces with international character took place on this Office.

These numbers reveal the tendency for a lower marriage rate in Portugal, as well as an increase in the number of international marriages celebrated in our country. This last fact is correlated with the recent increase in the number of immigrants in Portugal. The celebration of a marriage contract in the international marriages celebrated in Portugal is relatively insignificant and almost only for an option in favor of the regime of separation of property. A similar situation occurs in purely domestic marriages.

When foreign citizens from countries outside the European Union want to marry in Portugal, Portuguese authorities face some difficulties with the evaluation of their capacity to marry. This is due to the fact that some States, notably Brazil and South Africa, do not issue certificates of matrimonial capacity for their own citizens who want to marry abroad even though they do not have sometimes an established residence outside their country of origin.

The situation of Brazilian citizens living in Portugal and willing to marry in Portugal is noteworthy. If they have their domicile in Portugal their capacity to marry is therefore assessed according to Portuguese law as if they were Portuguese, even though the law governing this issue should, *prima facie*, be the law of their nationality. Doubts arise, however, in the Offices of Civil Registration regarding the understanding of what is necessary to consider a certain citizen domiciled in Portugal. Usually the domicile is understood as the voluntary domicile and therefore, *grosso modo*, as the habitual residence of the individual if he/she is legally in Portuguese territory.

If the Brazilian citizen not domiciled in Brazil wants to marry in Portugal but does not have, up till now, habitual residence in Portugal, the situation becomes more complicated, because the Brazilian authorities as we said, will most likely not pass the certificate of matrimonial capacity. In this case the matrimonial capacity will have to be analyzed through a special process organized by the Office of Civil Registration for that specific purpose, with the participation of two witnesses. This process, taking about 2 to 3 weeks long, is often not enough to avoid situations of bigamous marriages.

With respect to citizens from countries of the European Union no special problems arise regarding the verification of their matrimonial capacity in Portugal because their countries of citizenship issue the certificates of capacity to marry.

We can verify however that in some cases, involving for example Danish citizens with their habitual residence in Portugal and with the desire to marry in our country, when the Danish authorities pass the certificate of marital capacity, the capacity will be determined according to Danish law, even though this solution does not correspond to the solution presented on the Portuguese Civil Code on *renvoi* (art. 18.º, n.º 1 and 2).

Also from a practical point of view, and with respect to the matrimonial property regime of foreign citizens married in Portugal, perhaps one of the most difficult problems has to do with the inscription in the Portuguese Civil Registration of foreign matrimonial property regimes, different from those admitted by Portuguese Law. For example if a Portuguese citizen married a German citizen in Germany, according to the *Zugewinnngemeinschaft* regime, the Civil Registrar in Portugal will not mention that regime as the matrimonial property regime of the couple. At best the Civil Registrar may consider that the Portuguese citizen is married under the Portuguese regime of community of property between spouses regarding assets and property non-gratuitously

acquired during marriage, which clearly does not correspond or match the German regime of *Zugewinnngemeinschaft*.

This fact might have important consequences in the future when, for example, the spouses want to divorce in Portugal and the Portuguese court has to apply the matrimonial property regime of the couple. The fact that according to the Portuguese Civil Registration Services the couple is considered married under the Portuguese default regime of community of property will entail negative consequences for the couple who will have to clarify that the matrimonial property regime is not what it appears *a priori* to be.

Frequency of the application of rules on the recognition of foreign legal acts by Portuguese authorities other than courts (public notaries for example)

The Office of the Ministry of Justice for Policy and Planning (www.gplp.pt) organizes statistical data concerning the activity of notaries, of Civil Registrars and of Registrars for Immovable Property and Cars. These data regard only the quantity of acts passed, without any mention to its international character as well as to the acts involving the recognition or enforcement of foreign acts.

According to the information provided by Officials of Registration Services for Immovables, they hardly ever have to recognize legal acts of division of matrimonial property located in Portugal celebrated by the spouses during their process of divorce before foreign non-judicial authorities. It is however possible that this situation occurs.

It is impossible however to provide an accurate number to describe the proportion between the amount of situations of recognition, by portuguese courts, of foreign judicial acts, and the amount of situations where other portuguese authorities are called to recognize foreign legal acts. This is due to the fact that we simply do not have, with respect to the recognition of foreign acts, any statistical data regarding the activity of public notaries and Registral Services.