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

**ADDENDUM**  
**SPAIN**

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## SPAIN

### **Addendum to the Report to the T.M.C. Asser Instituut**

#### **1. General Remarks.**

The frequency of decisions on conflict of laws issues relating to matrimonial property and the property of unmarried couples has been determined on the basis of research done going through the reported case-law rendered by the Spanish Constitutional Court (Tribunal Constitucional), Supreme Court (*Tribunal Supremo*) and regional (Tribunales Superiores de Justicia) and provincial (*Audiencias Provinciales*) courts, since this information is fully available in case-law databases in Spain. There is no information available as to inferior courts or first instance decisions. The research has also been conducted with recourse to the most relevant law review on private international law in Spain (*Revista Española de Derecho internacional*) and its periodical chronicles and commentaries on the Spanish legal decisions dealing with private international law issues. Given the quantity of information gathered following this procedure, we may suggest that the comments contained in this Addendum provide sufficient insight as to the problems encountered by legal practice in matrimonial property cases. Nevertheless, the situation is less clear with regard to conflict of laws issues on the property of unmarried couples and same-sex marriages, where dearth of case-law suggests the use of alternative means of information.

#### **2. Frequency of decisions on conflict of laws issues relating to matrimonial property.**

Our first remark goes to the effect that truly international conflict of laws issues should be distinguished from interregional conflict of laws relating to matrimonial property.

Interregional conflict of laws issues arise quite frequently in Spain because of the diversity among the different legal system that coexist in this country. It is worth reminding that these conflict of laws are to be solved following the same choice of law rules applicable to international conflict of laws, i.e., Arts. 9.2 and 9.3 Civil Code, albeit

the common nationality of the spouses at the time of marriage is to be replaced by the common *vecindad civil* as the prevailing connecting factor and, in absence of such a common personal factor, the law of the common habitual residence after marriage is to be applied. Therefore mixed marriages, i.e. between spouses with different *vecindad civil*, do often pose conflict of laws issues, especially in cases in which one of the spouses has *vecindad civil* in Catalonia or the Balearic Islands, where a system of absolute separation of matrimonial property is in force (Family Code Act of Catalonia, 15 July 1998; Civil Law Compilation of the Balearic Islands Legislative Decree 79/1990, 6 September), as opposed to the community of property regime applicable to spouses subject to the Spanish Civil Code. This is evidenced in Decisions of the Supreme Court dated of 6 October 1986, 15 November 1991, 23 December 1992 and 20 March 2000, where the issue at hand is the determination of the Catalan *vecindad civil* of the spouses and its effects on the matrimonial property regime of the spouses. Other decision in which the question is the ascertainment of the *vecindad civil* of the spouses, although in this case it is a conflict between the laws of Aragon and those from Navarre, is the Decision from the Superior Court of Aragon 10 March 1999; a similar case is presented in the Decision of the Provincial Court of Zaragoza, 10 July 1999, where the conflict of laws between the laws of Aragon and those of Navarre is solved with recourse to the rule of the common habitual residence after marriage.

Mobility of spouses is the cause of changes in *vecindad civil* quite frequently, what leads to additional mobile conflicts and adaptation cases. For matrimonial property regime purposes, the connecting factors employed by Art. 9.2 Civil Code are referred to the time of celebration of the marriage. More complex is the case in which the dissolution of the matrimonial property regime set out in a matrimonial agreement is also connected with testamentary or intestate succession and rules on forced heirship, a question subject to the *vecindad civil* of the deceased at the time of death according to Art. 9.8 Civil Code (see Decision of the Spanish Supreme Court from 20 March 2000).

In present practice, it could be said that interregional conflict of laws is the area wherein most designations of the law applicable for interregional conflict of laws purposes are currently being made by the spouses in a matrimonial agreement. A Catalan spouse may well wish to have his or her way and try to choose the law of Catalonia to avoid the community property regime of the Spanish Civil Code.

Practice also reveals the importance of transitory choice of law rules. The Spanish private international rules on the law applicable to matrimonial property (Arts. 9.2 and 9.3 Civil Code) have undergone two major revisions during the last thirty years (1974 and 1990) and this leads to additional difficulties. This comment can also be applied to interregional conflict of laws. Indeed, this is the background of the case decided by the Spanish Constitutional Court, 14 February 2002, in which the preference in favour of the law of the husband's nationality (community of property in the circumstances of the case) under the 1974 conflict of laws regulation of the Civil Code was held unconstitutional. This landmark decision puts an end to case-law in which the law of the husband's nationality or *vecindad civil* was applied (Decisions of the Provincial Courts –Audiencias Provinciales- of Barcelona, 21 October 1998, 20 November 2001 and Tarragona, 17 Febrero 2000). In connection with this, any reform should clearly indicate that the new choice of law rules should only be effective for spouses who married after the reform. Other cases relating to transitory choice of law rules may be found in Decision of the Provincial Court (*Audiencia Provincial*) of Malaga, 17 May 1995, and in Decision of the Provincial Court of Palma de Mallorca, 23 December 1994.

To sum up, the importance of the interregional conflict of laws on matrimonial property in the case of Spain is a practical concern that should be highlighted well above any other consideration.

Most common problems that arise with respect to true international conflict of laws matrimonial property, as evidenced by the reported judicial decisions may be the following.

Donations or gifts between foreign spouses have led to some case-law in which issues of characterization have arisen to the effect of distinguishing matrimonial agreements, subject to Art. 9.3 Civil Code, and donations between spouses, subject to Art. 10.7 Civil Code. The case of donations between foreign spouses, done in the case of existence of a prior marriage agreement, is reported in Decision of the Supreme Court 5 June 2000, where it is set out that freedom to choose the law applicable to a

matrimonial agreement according to Art. 9.3 Civil Code cannot be extended to gifts or donations between spouses.

It is also of quite practical importance the determination of the matrimonial property regime in cases where immovable property belonging to both or any of the spouses is to be sold in Spain. The Registry of Immovable property requires the filing of the matrimonial property regime of the spouses and this leads to case-law on registry issues, as in Resolution of *Dirección General de los Registros y del Notariado* 13 January 1999.

### **3. Frequency of decisions on conflict of laws issues relating to the matrimonial property of unmarried couples.**

It is to be noted that no single decision has been reported on conflict of laws issues regarding the property of unmarried couples. Nevertheless, we should again distinguish between international conflict of laws issues and interregional conflict of laws. Absence of case-law on international situations may be soon put against the background of increasing case-law on interregional conflict of laws issues, since the entry into force of numerous regional legislations on unmarried couples has occurred in the last ten years in Spain (Catalonia, Aragon, Navarre, Balearic Islands, Valencia, Madrid, Andalusia). Indeed, this increasing level of concern is expressed by the Unconstitutionality Question number 5297/2000 (BOE 15 November 2000) filed before the Spanish Constitutional Court in which the unilateral scope of application of the Equal Protection of stable couples Act of Navarre has been challenged on constitutional grounds. To this effect, we may also cite the Decision of the Provincial Court (*Audiencia Provincial*) of Navarre, 12 June 2002, in which the court applied Art. 9.2 Civil Code analogically to the case of an unmarried couple and held the application of the Spanish law, the common habitual residence of the couple being outside Navarre, instead of the Navarre Act on the subject, and eventually held the absence of an unmarried stable couple under the circumstances of the case.

From the internal law perspective there is an urgent need to see an Act passed by the Spanish National Parliament on the legal regime of unmarried couples. Up to now

only some Autonomous Communities have regulated the issue and only four of them (Catalonia, Aragon, Navarre and Balearic Islands) have developed an authentic private law regime. This does not mean that, outside those Autonomous Communities, unmarried couples are living in a legal vacuum, case-law is filling in the void, but at the cost of greater uncertainty, unpredictability and practical problems for daily practice.

The same could be said of the need for conflict of laws rules on unmarried couples and same-sex marriages, though case-law is still silent on this issue. Maybe the trend already developed by case-law with respect to interregional cases, i.e., the analogical application of art. 9.2 Civil Code, will bring some positive results. This is to be said of unmarried couples, on the contrary, same-sex marriages present a much more difficult approach. Public policy of the forum might quite possibly be employed to exclude the application of a foreign law on same-sex marriages. In general, such marriages, even if validly celebrated in a foreign country according to the local laws (*lex loci actus*) shall hardly obtain any recognition or effect in Spain.

#### **4. International Jurisdiction.**

Jurisdictional issues in matrimonial property cases do not usually arise isolated from divorce or separation claims. Nevertheless, the application of Art. 22 LOPJ (*Ley Orgánica del Poder Judicial*) and the interpretation of the tacit submission rule to the Spanish Courts were the subject of Decision of the Provincial Court (Audiencia Provincial) of the Balearic Islands, 18 July 1995. The special or subject-matter forum in Art. 22.3 of the same Act (applicable to divorce, separation, nullity and personal and property regime of marriages) was interpreted in Decision of the Provincial Court of La Coruña, 5 March 1997, for matrimonial property regime purposes.

These jurisdictional rules applicable to marriage disputes in LOPJ shall be applicable even after the entry into force of Brussels II Regulation, the subject of matrimonial property being outside the material scope of the Regulation. This situation may be troublesome for practitioners. Jurisdictional rules for divorce, separation or nullity of marriage shall be for most cases found in Brussels II Regulation, but jurisdictional rules for determining the dissolution of the matrimonial property regime, being one of the most important effects of divorce sought by the spouses, shall be kept

within another set of jurisdictional rules. In this sense, the current wording of Art. 22.3 LOPJ, containing the special forum rule for matrimonial disputes, would be susceptible of a major reform, unless another European Community Regulation could possibly deal with the forum adjudication rules applicable to matrimonial property.

## **5. Recognition of foreign Judgments relating to matrimonial property or the property of unmarried couples.**

The recognition of foreign judgments procedure set out in Art. 954 et seq. of the Spanish Act on Civil Procedure 1881 (*Ley de Enjuiciamiento Civil*) poses no special problems to the enforcement of foreign decisions. The Supreme Court, being competent to hear such cases, has fallen on a certain automatism or laxity that favours the enforcement of foreign decisions, especially in cases of foreign divorces, and that trend may also be extended to matrimonial property foreign decisions stemming from divorce cases.

Account must also be taken of the existence of a number of bilateral Conventions in force in Spain to the effect of facilitating the enforcement and recognition of foreign judgments and of the fact that these Conventions, unlike Brussels II Regulation, may include within their scope of application the often inter-connected issues of divorce and dissolution of the matrimonial property regime. This is the case of Decision of the Supreme Court, 10 September 1996, where the bilateral Convention between France and Spain, 28 May 1969, is applied to a divorce decision awarded in France that included the adoption of some matrimonial property division measures: the sale of immovable property in Spain. The French divorce decision was recognised and enforced in Spain following the regime set out in the bilateral Convention.

Therefore, we may conclude that it appears to be no special difficulty in having a foreign divorce decision dealing also with the matrimonial property of the spouses enforced in Spain. The general enforcement and recognition regime found in Art. 954 LEC 1881 might be characterized as simple, not being burdened with controls of the competence of the court of origin or the law applied by the same court. In this sense, it might be said that the general regime may turn out easier for practitioners than some bilateral conventional regimes; the major obstacle being the fact that only the Supreme

Court in Madrid, and not any other court in the rest of the country, has jurisdictional internal competence to hear recognition of foreign decisions cases.

There is again no case law reported on the issue of recognition of foreign decisions on the property of unmarried couples. Same-sex marriages would, in principle, be against the public policy of the forum and this exception would run against the recognition and enforcement in Spain of a foreign judicial decision on same-sex marriages.