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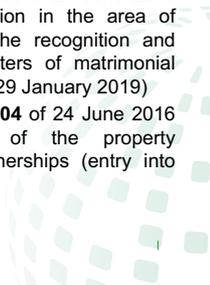
*Pre-Nuptial Agreements in The
Netherlands*
SANDRA VERBURGT

Monday 18 february 2019



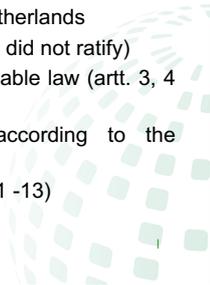
Civil Law in Europe and MPR's

- **Hague Convention of 14 March 1978** on the Law Applicable to Matrimonial Property Regimes
- **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 (entry into force: 29 January 2019)
- **Council Regulation (EU) 2016/1104** of 24 June 2016 implementing ... in matters of the property consequences of registered partnerships (entry into force: 29 January 2019)



**Hague Convention of 14 March 1978
on the law applicable to matrimonial
property regimes**

- France, Luxemburg and The Netherlands
- (Austria and Portugal signed but did not ratify)
- Hierarchy in conflict rules applicable law (artt. 3, 4 and 5)
- Change of applicable law according to the "carriage" system (artt. 7 and 8)
- Requirements on validity (artt. 11 -13)



**Hague Convention of 14 March 1978:
applicable law rules (artt. 3, 4 and 5)**

- Choice of applicable law (art. 3)
- Law of State in which both spouses establish their first habitual residence after marriage (art. 4) (*marital domicile*), unless...
- ...declaration art. 5: law of the State of the common nationality of the spouses
- None of the above: internal law of the State with which, taking all circumstances into account, MPR is most closely connected.



**Hague Convention of 14 March 1978:
“Carriage” system (artt. 7 and 8)**

- Change of applicable law (art. 7):
 - habitual residence is established in State of their common nationality,
 - None of the above: internal law of the State with which, taking all circumstances into account, MPR is most closely connected.
 - Establishing marital domicile under art. 4 (vs law of nationality under art. 5 para 2 under 3)
- Effect only for the future (art. 8)



**Hague Convention of 14 March 1978:
Requirements on validity (artt. 11 - 13)**

- Validity choice of law:
 - by express stipulation (as to form art. 13), or
 - arise by necessary implication from the provisions of a marriage contract. (art. 11)
- Validity Marriage contract as to form (art. 12)
 - If it complies either with the internal law applicable to the matrimonial property regime, or
 - with the internal law of the place where it was made
 - writing, dated and signed by both spouses



Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- Hierarchy jurisdiction rules:
 - Choice of law by express stipulation (art. 7)
 - In case of divorce: jurisdiction on basis of residence (art. 5 para 2 sub a and b), choice of law clause (art. 7) or appearance respondent (art. 8)
 - In case of succession (art. 4 and 6)
- Subsidiary jurisdiction (*lex rei sitae*) (art. 10)
- Forum necessitatis (art. 11)

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- Scope applicable law rules (artt. 20-21):
 - Universal application (art. 20)
 - Unity of the applicable law (art. 21): shall apply to all assets falling under that regime, regardless of where the assets are located.
- Choice of Law (artt. 22-25)
 - Choice of law (habitual residence either spouse/both or common nationality) (art. 22)
 - Formal validity on choice of applicable law (art. 23) and contract itself (art. 25): in writing, dated and signed by both spouses + formal requirements habitual residence

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- Applicable law in the absence of choice by the parties (art. 26 para 1):
 - a. Law of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
 - b. Law of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
 - c. Law with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.
- Double common nationality (art. 26 para 2)

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- By way of exception and upon application by either spouse, law of another State, provided that (art. 26 para 3):
 - 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;
 - both spouses had relied on the law of that other State in arranging or planning their property relations.

Nature of marital contracts in civil law system vs. common law systems

- Civil law system:
 - Primary function of a Dutch pre-marital agreement is to provide for rules on how the spouses shall deal with capital and wealth during their marriage.
 - Secondary function of a Dutch pre-nuptial agreement is how to deal with capital and wealth after marriage, either through death or divorce / separation (estate planning).

Nature of marital contracts in civil law system vs. common law systems

- Common law system:
 - to anticipate on a future divorce.



Requirements for a Dutch pre-marital agreement

- Marriage contracts may both be made prior marriage (pre-nuptial agreements) and during marriage (post-nuptial agreements).
- In order to be valid, that marriage contracts will be entered into by notarial instrument, signed by parties and notary.
- Pre-nuptial agreements are enforceable and fully binding the parties. The agreement will also be binding third parties, provided that the pre-nuptial agreement has been entered into the Matrimonial Property Registry (article 1:120 paragraph 2 BW Dutch Civil Code).



Requirements for a Dutch pre-marital agreement

- Registration is also possible when a choice has been made for a foreign matrimonial property system and when there is a foreign marital contract, which applies to the parties' matrimonial system (article 10:45 Dutch Civil Code).
- If there is no registration of the foreign marital contract creditors may assume that the parties are subject to the Dutch statutory community of property.
- Be aware that the statutory matrimonial system in the Netherlands has changed since 1 January 2018.



Requirements for a Dutch pre-marital agreement

- Statutory matrimonial system prior 1 January 2018:
 - All assets (also inherited property), all debts of both parties, both pre-marital and post-marital assets do be part of the community of property
- Statutory matrimonial system since 1 January 2018:
 - Limited community of property. Excluded from the community are inherited property, pre-marital property, excluded gifts
 - Three different capital systems during marriage: private capital husband, private capital wife and community of property



Deviation of the statutory system

- By pre- or post-marital agreement
- Variety of options; allowed as long as the agreement is not contrary to bonos mores and public policy
- Since the change of the matrimonial regime since 1 January 2018 spouses shall also enter into a pre-nuptial agreement if they wish to marry in a full community of property (regime prior 2018)
- Government: legislation to make this easier (tick a box on the application to marry at the City Hall)



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