US Matrimonial Regime. Its relevance after European Regulation No. 1103/2016

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UNIT 1

Brief introduction about U.S. matrimonial regimes: the difference between common law States and separation property State
Summary

- Brief introduction about US matrimonial regimes
- Difference between common law states and separation property states
- Rules for conflicts of law
- Application of these rules in Europe pursuant to the EU Regulation
In the United States, the matrimonial property regime is not a federal subject. Hence, it is regulated by **each State differently**. Federal law deals only with those matters considered of public interest, such as:

- Alimony rights in favour of children
- Children welfare
- Adoption rules
With regards to the spouse property regime, American States are divided into two categories:

- Separate property states (in grey)
- Community property states (in red)
USA - Communion property States

Louisiana, California, Arizona, Texas, Washington, Idaho, Nevada, New Mexico, Wisconsin,

Opt-in c.p. States:
- Alaska
- Tennessee
- South Dakota
Separate Property State

These States are defined “common law property regimes” because the separation of property between the spouses was the most spread regime in common law countries.

The same rules still apply to Commonwealth States like UK, India, Australia and New Zealand, as well as to the majority of US States and Canadian Districts.

Under common law principles, property rights of spouse were left unaffected by marriage.

Hence, each spouse would retain the assets they owned before entering into a marriage and will continue possessing as separate property anything acquired during the course of the marriage.

If spouses buy something together, an ordinary tenancy in common is created, and each can freely dispose of their half interest in the property.
Separate Property State

At the end or dissolution of marriage, generally each spouse has a right of credit toward the other one equal to the value of the goods acquired during their marriage in their name (marital property).

It is a right of credit, not a property law right. The property stays with the spouse that actually purchased it, unless it is transferred pursuant to a judicial decree.
Communion Property States

In these States, goods acquired during the marriage are communal property of both spouses.

Each spouse owns a present undivided one-half interest in the community property.

A spouse may not alienate, encumber, or lease to a third person his undivided interest in the community or in particular things of the community prior to the termination of the regime.
1. Definition of Community Property
In absence of a different agreement, any income or acquisition of one of the spouse, including wages, profits, rental fees, are community property, if earned during the marriage.

2. Definition of Separate property
Properties owned before marriage by each spouse or received in donation, specific devise or heirship are exclusive property of them.

3. The Community Presumption
Any property acquired during the marriage is presumed to be community property. The other spouse has the burden to demonstrate the contrary.
4. The Commingling rule
When personal goods of one spouse are “commingled” with goods that are communal property, these becomes “community property” (i.e. restauration of a building (separate property) with the proceeds of both spouses).

5. Administration
The spouses jointly manage their property.
Communion Property States

(Lousiana statute)

The community property comprises:
- property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse;
- property acquired with community things;
- property donated to the spouses jointly;
- natural and civil fruits of community property;
- damages awarded for loss or injury to a thing belonging to the community;
and all other property not classified by law as separate property.
770 - Separate property of a married person includes all of the following:

1. All property owned by the person before marriage.
2. All property acquired by the person after marriage by gift, bequest, devise, or descent.
3. The rents, issues, and profits of the property described in this section.

A married person may, without the consent of the person’s spouse, convey the person’s separate property.
Communion

Each spouse is entitled to half of anything acquired during marriage

Separation

Each spouse is the sole owner of things he purchases alone during marriage

AT DISSOLUTION:

The communion is severed and each spouse keeps $\frac{1}{2}$ share of what was acquired during marriage

Each spouse is recognized a right of credit equal to half of the value of properties acquired by the other spouse during marriage
UNIT 2

American rules for conflict law
Conflicts of law

The coexistence of these two systems creates the potential for a vast number of conflict of laws.

Traditionally, the general rule states that the applicable law is the one of the State with the most significant relationship to the property and the parties.
Conflicts of law - Movables

- In the context of matrimonial regime for movables, this law is the law of the State of:

- **First domicile** for property acquired before marriage.
- **Matrimonial domicile** at the time of acquisition of the movable.
Conflicts of law

Matrimonial domicile?

- Previously intended as the place where the parties intended to live after marriage.
Very criticized rule, as it left too much uncertainties and power to intentions.
- First Restatement of Conflict of Laws: set the husband’s domicile.
- Gender equality brought a more modern view:
  i) the law of the spouses’ common matrimonial domicile;
  ii) if they live separately, the domicile of the spouse who acquired the property.
Conflicts of law

Example:

A and B are married and lives in Texas (communion property State). A acquired a car before the marriage, according to Texas law he is the sole owner. B acquires a car during marriage, A and B are co-owners of this car.

C and D are married, C lives in NY and D in Florida. If C buys a car, NY matrimonial regime should apply. If D buys a car, Florida matrimonial regime should apply.
Conflicts of law - Immovables

Restatement Second of the Conflict of Laws:

The effect of marriage upon an interest in land acquired by either of the spouses is determined by the law that would be applied by the law where the estate is located (lex rei sitae).

The **situs rule** is commonly adhered by the courts, although it is under increasing attack from American commentators. Indeed, there is no reason why it should regulate the matrimonial regime of the spouses in the place of the State of the matrimonial domicile.
Conflicts of law

The effects of a change of domicile on movables.

-Immutability: a subsequent change of residence is irrelevant to property rights. The property regime is fictionally frozen at the date of the marriage.

-Mutability: patrimonial rights change automatically as the parties change their matrimonial domicile for property acquired both prior and after the change of domicile.

-Partial mutability: changes in matrimonial domicile only affects property rights acquired after the move. Controlling rule in the USA. The domicile at the time of the acquisition is the controlling law.
Conflicts of law

Problem of partial mutability:
- It generates administrative problems. Part of the estate is regulated by one law, and part by another one.
- Evidence problem. Spouses have to demonstrate in which moment one particular property has been acquired.
- Widow’s famine problem: in common law states, the spouse financial needs are safeguarded at time of dissolution of marriage. But if the spouses move to a communion property States, since the property stays separated, the spouse has no relief at time of dissolution of marriage.
Conflicts of law

Example:

A and B are married in Michigan (separate property).

A buys investments for 50.000,00 $ in Michigan.

The couple then move to Texas (communion property)

Everything acquired after the move becomes community property (the investment is excluded).

The investment acquires a value of 1.000.000,00 $, and the husband dies while the couple lives in Texas.

Under Michigan law, B would have had a forced heirship rights, hence B would have had an interest in ½ of the investment.

Under Texas law, the spouse would have been co-owner of the investment if it was acquired while the spouses were living in Texas. But in this situation, B is left without a penny.
Conflicts of law

California solution:

California tried to solve these problems adopting a **complete mutability** rule in 1917: the change of domicile of a couple would affect the regimen of property also acquired prior to the move.

In 1934 the California Supreme Court considered the rule unconstitutional, as it was in violation of due process, disturbing a person’s vested property rights.

Therefore, in 1935 California passed a new law on **succession** to solve the problem of the “widow’s famine”, giving succession rights to a spouse previously domiciled outside California. These rights were equal to the community rights a spouse would have had if they were domiciled in California during the acquisition of property (**quasi-community property rule**).

This rule was expanded also to real property and to divorcing spouse, and passed Constitutional scrutiny.
Conflicts of law

California solution:

“Quasi-community property” means all real or personal property, wherever situated, acquired before or after the operative date of this code in any of the following ways:

(a) by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.
Conflicts of law

Opposite problem:
A different problem emerges when a couple moves from a community state to a separation State.
The surviving spouse, indeed, would benefit from a double succession/matrimonial property windfall:
- being co-owner of assets for ½ share have a forced heirship interest in the succession.
US Matrimonial regime

How this applies to purchases of immovables located in Europe by American couples?
UNIT 3

The EU Regulation No. 1103/2016 and its application to American couples
EU Regulation No. 1103/2016

The Regulation applies to matrimonial property regimes.

Art. 69: This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3.

2…

3. Chapter III (about applicable law) shall apply only to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019.
EU Regulation No. 1103/2016

Universal application:

Art. 20

The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.

Therefore, the Regulation applies also to American couples buying real estates in the European Union.
The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located.

It excludes the application of the *lex rei sitae*, contrary to what the law applicable could state.

For American couples, therefore, the matrimonial regime applicable for movables should also regulate the matrimonial regime of immovables bought in Europe.
EU Regulation No. 1103/2016

Applicable law:

Art. 26

1. In the absence of a choice-of-law agreement, the law applicable to the matrimonial property regime shall be the law of the State:

   (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

   (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

   (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

The articles sets an immutability rule: any subsequent move of residence SHOULD not affect the applicable law.
EU Regulation No. 1103/2016

Art. 27

1. The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

So, again, it excludes the *lex rei sitae* in case the USA law is the applicable law.
States with more than one legal system — territorial conflicts of laws

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

Therefore, for USA couples, the move of residence from one State to another will affect also the rule applicable to the matrimonial regime.
EU Regulation No. 1103/2016

In summary

Art. 21 and 27 excludes the application of the lex rei sitae
Art. 26 sets an “immutability rule” for the applicable law
BUT
Art. 33 recognises that, for States that have multiple territorial units, the internal conflict-of-laws rules apply.
EU Regulation No. 1103/2016

Questions:
Does art. 33 prevail over article 21 and 26 (exclusion of lex rei sitae)?

If the answer to this question is yes, then for American couple, the lex rei sitae should still apply.

However, the rational of art. 33 of the EU Regulation is to define which law among territorial units should be applied, not to override the misapplication of the renvoi.

Art. 33 says that “the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.” It seems to exclude the renvoi to another country.
Hypo 1:
A and B married in 2010 and have been living in Florida (separation of property) ever since.

A and B come to Italy to buy a house in Rome.
EU Regulation *does not* apply.
Italian International Private Law applies to this case

(Specifically, Italian law accepts the renvoi of the lex rei sitae, therefore the matrimonial regime for the purchase will be regulated by Italian law - communion of property)
Hypo 2:
C and D married last week and have been living in Florida (separation of property) ever since.

C and D come to Italy to buy a house in Rome.
EU Regulation does apply.

Their matrimonial domicile is considered to be the State of Florida. Therefore, according to Art. 26, that law regulates the matrimonial regime of the purchase of property (they will buy in separation of property)
EU Regulation No. 1103/2016

Hypo 2:

E and F married last February while living in Florida (separation of property). They move their residence and domicile to California (communion of property) one month ago.

E and F come to Italy to buy a house in Rome.

EU Regulation does apply.

Under art. 26, the first habitual residence was Florida.

However, applying Art. 33, the relevant law applicable to their matrimonial domicile is considered to be the California Law (they will buy in communion of property)
UNIT 4

Choice of law, effects on third parties and conclusions
Choice of the applicable law

1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

   (a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

   (b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.
Choice of law

Article 24

Consent and material validity

1. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the *law which would govern it pursuant to Article 22* if the agreement or term were valid.

2. Nevertheless, a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.
Validity of matrimonial Agreement in the USA

- Prenuptial agreements are regulated differently in each State.

- The majority rule, in states that have adopted the Uniform Premarital Agreement Act, is that financial disclosure is optional. The only exception is an UNCONSCIONABLE agreement. Even in that case, the unconscionable agreement is enforceable if the aggrieved party expressly and voluntarily waived disclosure.

- The minority rule requires full and fair disclosure: both parties are supposed to disclose all the assets and debts that they are bringing into the marriage for the agreement to be valid.

- A majority of the States of the U.S. allow for postnuptial agreements to determine the same matters as could be covered in prenuptial agreements. But a minority of states prohibit postnuptial agreements. E.g Ohio Rev. Code § 3103.06.
EU Regulation

Article 28

Effects in respect of third parties

1. … the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law.
Article 28

2. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

(a) that law is the law of:

   (i) the State whose law is applicable to the transaction between a spouse and the third party;

   (ii) the State where the contracting spouse and the third party have their habitual residence; or,

   (iii) in cases involving immoveable property, the State in which the property is situated;
EU Regulation

Article 28

2. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

(b) either spouse had complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of:

(i) the State whose law is applicable to the transaction between a spouse and the third party;

(ii) the State where the contracting spouse and the third party have their habitual residence; or

(iii) in cases involving immovable property, the State in which the property is situated.
3. Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the third party shall be governed:

(a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or

(b) in cases involving immovable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.
EU Regulation

3. Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the third party shall be governed:

(a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or

(b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.
In conclusion

1. The matrimonial regime law applicable to American couples move if they change their domicile within the United States

2. If an American couples come to your firm you should ask the following:
   - when did the couple marry? Before or after 29th January 2019
   - did they enter into a prenuptial agreement or similar agreements concerning the law applicable to their matrimonial regime?
   - what was their first common habitual residence?
   - where is their present matrimonial domicile?
In conclusion

If your country where the purchased immovable is located is a **community property** States, be aware of Article 28.

If in doubt about the matrimonial regime of an American couple (i.e. if the spouses are living in two different States), it is preferable to **prefer the community property solution**, to protect third parties’ rights.
THANK YOU