Matrimonial Property Regimes and Estate Planning in Cross-Border Contexts

Philippe Kenel
[Doctor of Law, lawyer in Pully-Lausanne, Geneva and Brussels, Partner, Valfor Avocats]

Daniel Gatenby
[LL.M. Tax, lawyer in Pully-Lausanne and Geneva, Valfor Avocats]

Swiss law requires that, after a married person passes away, the couple's matrimonial property regime must be settled before dividing the estate. Depending on the regime in place, the surviving spouse may receive a substantial portion of the assets during this liquidation process and later receive an additional share from the deceased spouse's estate. Many countries simply do not have matrimonial property regimes or apply the separation of property regime ex officio. Others have different regimes than ours. This article emphasises the importance of considering the matrimonial property regime when planning succession, especially in cross-border situations.

Matrimonial property regimes under Swiss law

In the absence of a marriage contract, the spouses are by default subject to the regime of participation in acquired property (Art. 181 of the Swiss Civil Code (CC)). Under this regime, each spouse has his or her personal assets, i.e. the assets owned before the union and those received by gift or inheritance even during the marriage. Alongside these assets, there is also acquired property, which refers to property obtained during the marriage, such as each spouse's income and any returns generated from their personal property. Upon the death of one of the spouses, the matrimonial property regime is liquidated and the survivor retains his or her personal property as well as half of the acquired property (Art. 215 CC). The deceased spouse's personal property and his or her share of the acquired property

are included in the estate, which is then divided among his or her heirs. In a marriage contract, the spouses may agree on a different distribution of the acquired property on death, for example that it be attributed in full to the surviving spouse (Art. 216 para. 1 CC). However, such a conventional division cannot affect the reserved portion of a non-common child (Art. 216 para. 3 CC). The Civil Code provides that certain heirs, including descendants, are entitled to a share of the estate – known as the reserved portion (forced heirship rules)– which the deceased cannot freely dispose of (Art. 470 and 471 CC). However, a provision that infringes upon an heir's reserved portion isn't immediately invalid; instead, the affected heir can contest it. For example, a non-common child may take legal action against the surviving spouse he does not receive his or her reserved portion due to said provision.

The spouses have the possibility, by means of a marriage contract, of choosing one of the two other matrimonial regimes provided for in the Civil Code: the regime of separation of property, according to which each spouse retains ownership of his or her property (Art. 247 et seq. CC), or the regime of community of property, involving the pooling of all the assets of the spouses with the exception of their personal property (Art. 221 et seq. CC). Under the separation of property regime, no liquidation takes place on the death of the first spouse. The survivor simply keeps his or her property and the deceased's property becomes part of the estate. In community of property, the common property is divided in half on the death of the first of the spouses. Parties may stipulate an alternative distribution through a marriage contract; however, such arrangements cannot infringe upon the reserved shares entitled to their descendants (Art. 241 para. 3 CC). Distinct from the regime of participation in acquired property, the community of property regime extends protection to all descendants, including common descendants.

Depending on the assets of each spouse at the time of the marriage and their respective income during the union, the application of one or the other of these regimes has a very strong impact on the situation of the surviving spouse upon the death of the first of the spouses.

Matrimonial property law in Swiss private international law

The Federal Act of 18 December 1987 on Private International Law (PILA) provides that the matrimonial property regime is governed by the law chosen by the spouses (Art. 52 para. 1 PILA), who may choose the law of their State of common domicile or of the domicile they will have together after the celebration of the marriage (Art. 52 para. 2 let. a PILA), the law of the State in which marriage was celebrated (Art. 52 para. 2 let. b PILA), or the law of the State of which one of them is a national (Art. 52 para. 2 let. c PILA). The legislator intended to grant spouses autonomy to select the law governing their matrimonial property regime, while restricting this choice to specific jurisdictions with which they are connected. It is important to clarify that, although not expressly

stated by the law, any selection of applicable law must pertain to the entire patrimony; partial application is prohibited. This ensures that the patrimonial relations between spouses remain governed by a single legal framework, thus preventing unnecessary complexity.

The choice of law must be made by written agreement or must be clearly stated in the marriage contract (Art. 53 para. 1 PILA). It may be made, amended or revoked at any time (53 para. 3 PILA). If it is subsequent to the marriage, it is retroactive to the day of the marriage, unless otherwise agreed (Art. 53 para. 2 PILA). Despite the strict wording of Art. 53 par. 1 PILA, which may suggest that the election must be the result of an express clause, an tacit election is allowed, in the sense that it is sufficient that the marriage contract clearly refers to provisions of a substantive law that may be taken into account.

In the absence of a choice of law, it is the law of the common domicile of the spouses that governs their matrimonial property regime (Art. 54 para. 1 let. a PILA) or, if they no longer have a common domicile, the law of the State of their last common domicile (Art. 54 para. 1 let. b PILA). If they have never had a common domicile, their common national law applies (Art. 54 para. 2 PILA). Finally, in cases that should remain exceptional in which they have never been domiciled in the same State and do not have a common nationality, the law provides that the Swiss regime of separation of property applies ex officio (Art. 54 para. 3 PILA).

If there is no marriage contract or agreement stating otherwise, when spouses move to another State, the law of their new domicile retroactively applies from the date of marriage (Art. 55 paras. 1 and 2 PILA). The attachment to the domicile is based on the idea that the spouses must be subject to the law of the State in which the centre of their life is located. If they were to remain subject to the law applicable in the State of their former domicile, they would risk having their matrimonial property regime governed by a law with which they no longer have any connection. The retroactive application of the law is intended to avoid a dispersion of the property relations between spouses which, in the event of numerous moves to different jurisdictions, could be particularly difficult to apprehend.

In international relations, PILA provides that a marriage contract is formally valid if it complies with the conditions laid down by the substantive law or the law of the place where the deed was executed (Art. 56 PILA). Substantive validity, including admissibility, validity and content, is a matter for the law applicable to the matrimonial property regime. Consequently, the validity of a foreign marriage contract is generally not subject to dispute; however, challenges may occur when the contract includes provisions concerning inheritance matters, as will be discussed in the following section.

Effects on inheritance planning

The principles set out above have potentially major consequences for the inheritance planning put in place by the spouses. The objective connection of the spouses' common domicile to the law may present certain difficulties. Indeed, in the absence of a marriage contract or a specific agreement, each move of the couple to a new State implies a change in the applicable law and, generally, a change in the matrimonial regime. This can lead to considerable differences if the legal regimes of the States of departure and arrival are very different, especially since the law provides for a retroactive application of the new regime to the date of marriage. For example, spouses who are English nationals who have not entered into a marriage contract and who settle in Switzerland will see their matrimonial regime change from separation of property (applied de facto since England does not have matrimonial regimes) to the Swiss regime of participation in acquired property. Instead of keeping separate property, spouses may unexpectedly end up with a regime that splits all marital income between them when one dies, which may not have been accounted for in their inheritance planning.

In addition, the need to coordinate the matrimonial property regime with inheritance law in estate planning is essential, especially when marriage contracts include inheritance provisions. In such a case, it is important that any restrictions imposed by the law applicable to the succession are complied with, even in the foreign marriage contract. If Swiss law governs succession, the marriage contract, even if it is governed by foreign law, should comply with the prohibition on depriving common or non-common descendants of their reserved portions, as provided for in Swiss law as the case may be (Art. 216 para. 2 and 241 para. 3 CC). For instance, if a marriage contract between spouses who are French citizens includes a clause granting full rights to the surviving spouse according to French law, this would be prohibited as described above. The heir whose reserved share is affected by this marriage contract can seek legal action to recover it. It is important to highlight that, in this example, if the deceased had chosen to apply French law to their estate (as permitted under Art. 91 para. 1 PILA), the restriction would be removed, provided that the individual did not also possess Swiss nationality at the time of death. Specifically, a person holding Swiss nationality cannot circumvent the mandatory provisions on reserved shares set forth in the Swiss Civil Code by electing the law of another country of which they are also a national (see Art. 91 par. 1 *in fine* PILA).

Conclusion

It is vital to review wealth and estate plans when moving to a new jurisdiction, as changing domicile can greatly impact existing arrangements. Since matrimonial property regimes are closely related to inheritance law, both should be coordinated carefully. Married couples should reassess their previous planning to ensure it meets their needs and make adjustments where required. ■