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Unit A3 Judicial Cooperation in civil matters
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**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

ADDENDUM
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I. Introduction

This Addendum intends to amend the original study on “Comparative Law on the Rules Governing Conflicts of Jurisdiction and Laws on Matrimonial Property Regimes and the Implications for Property Issues of the Separation of Unmarried Couples in the Member States” prepared in May 2002.

The following text will update information given in the original study as well as add numbers and figures on matrimonial property in Austria. For a better understanding some of the information of the study might partially be repeated here.

II. New developments since May 2002

A. Reform commission on matrimonial property

In spring 2002 a **reform commission**¹ was established in the Ministry of Justice, that shall deal with the legal re-organisation of matrimonial property.

A concrete proposal of this commission affects **§ 97 EheG**: Up to now it was not possible to influence who will be allowed to keep the marital home after divorce. If for example a wealthy woman wants to marry a second time and her husband wants to move into her house she had no opportunity up to now to enter into a contractual agreement at the time of marriage with him to move out again after potential divorce. The judge could theoretically assign the house to the husband. In order to avoid cases similar to this example the reform commission proposed that pre-agreements concerning the division of matrimonial consumable property including the marital home shall be valid and prevail legal provisions². If according to such a pre-agreement vacation of the premises by one spouse will be necessary the judge may still grant the spouse a period of grace not exceeding two years to vacate the premises. The major

¹ The reform commission is headed by Dr. Gerhard Hopf, Ministry of Justice, and includes representatives from the Ministry of Justice, lawyers and notaries.

argument for this is, that children shall get acquainted with the situation of moving out. Further, it is held that an objection against acts that are contrary to honest practices shall be possible. The necessary formal requirements for such a pre-agreement are not yet decided. Lawyers do not approve the necessity of a notary's act as proposed by the notaries. However, this would guarantee impartial advice to the spouses whereas the involvement of only lawyers is often in favour of just one of the spouses.

§ 87 EheG shall be modified in the way that the marital home, which was brought into marriage or was inherited by one spouse may only be given to the other spouse on the basis of obligation relations.

Finally, the chapter on marriage contracts of the Civil Code shall be completely amended, leaving only the community of property and the marriage portion as possibilities for marriage contracts. Also testamentary contracts shall be abolished.

The time of introduction of these amendments is not yet assessable.

B. Further developments

The Minister of Justice proposed to introduce an **obligation to consult lawyers advice**, when wishing to divorce – either by common consent or not. This proposal was highly welcomed by the lawyers' community, but also highly criticised by family organisations who claim that this will make opportunities to divorce – especially for woman – much more difficult and will only rise costs for the clients and open new income opportunities for lawyers.

C. New publications

S. BECK, R. HORA, *Scheidung. Katastrophe oder Chance [Divorce. Catastrophe or Chance]*, (2001), Edition Va Bene.

² This proposal is also part of the current government's Government Program of the XXII. Legislative Period, no. 5 Justice (Regierungsprogramm der österreichischen Bundesregierung für die XXII. Gesetzgebungsperiode, Punkt 5, Justiz); see: <http://www.wirtschaftsbund.at/mediendatenbank/content/files/regierungsprogramm.pdf>.

A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft [Divorce, Marriage and Relationship]*, 7th ed. (2003), Vienna, LexisNexis ARD Orac.

A. DEIXLER-HÜBNER, *Die nichteheliche Partnerschaft – Grenzen des geltenden Rechts und Regelungsaufgaben für den Gesetzgeber [Unmarried Couples – Borders of Applicable Law and Demands for the Legislator]*, publication in honour of Dr. Weissmann (2003), Vienna, Manz Verlag.

H. GAISBAUER (ed.), *Lebenspartnerschaft [Partnership of Live]*, (2003), Vienna, Manz Verlag.

E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft [Unmarried Couples]*, (2002) Vienna, LexisNexis ARD Orac.

III. Interviews with practitioners

Generally, it can be held that lawyers and notaries only deal with a small number of international marriage cases (with Germany, former Yugoslavia, Turkey and Italy as the most frequently involved countries). The number of marriage contracts set up with notaries for instances is usually restricted to people who either are of property or – once divorced – want to avoid mistakes in their further marriages.

Interviews were held with two lawyers and one notary³. The main outcome – although sometimes contradictory – was the following:

A. Marriage and divorce

Generally, it can be held that life circumstances become more and more complicated. Couples of different nationality marry in a third country and live perhaps in a fourth country. They might own property in any of these countries or even a fifth one.

³ For a list of interviewed practitioners see Annex 1.

Problems are mentioned concerning international private law rules. Such rules usually lead to the application of one national law. This could as well be the law of a third (i.e., non-member) state, such as especially Turkey and former Yugoslavia. Relations to candidate countries are much less complicated. Problems increase if property of land in a foreign country is involved. National judges often feel overstrained and ask for expensive and time consuming expert's opinions. Furthermore valuation of property in the foreign country is considered highly complicated, as foreign experts have to be engaged; proceedings take especially long⁴ and national lawyers and parties have no means to interfere for a speed up of proceedings.

Generally, it can be said that the harmonisation of jurisdiction and enforcement within **Brussels II** opened the doors for new problems caused by the non-harmonisation of material law. The **reduction of jurisdiction** following from Brussels II often leads to competition for the pendency of the claim, as this could have different consequences concerning the applicable law (forum shopping).

It is also thought that the acceptance in the EU of the possibility to designate the applicable law prior or during the marriage will in practice cause new problems.

Uniform rules on jurisdiction and enforcement of decision of courts of other EU Member states in respect to matrimonial property will also require unification of the choice of law rules, although problems mostly occur with third states (e.g., Turkey, where judgements are not recognised).

Further **harmonisation of connecting factors** in international private law would be desirable, so for instance a divorce in Austria has different consequences than in United Kingdom (e.g., concerning maintenance payments). The general unification or harmonisation of provisions in respect to matrimonial property is, however, seen sceptically, as this might lead to a creeping amendment of national law.

⁴ Already the division of property following a divorce according to internal Austrian law might take some four to five years and is considered to be much too long. Taking account to the fact that divorce proceedings themselves usually take three years in average, the spouses might undergo already their next divorce, before even the previous is settled. This adds to complications.

Also **harmonisation of the regulation of marriage contracts** could be useful. The number of marriage contracts in Austria is very low, although increasing. Those spouses who wish to enter into a marriage contract, do so in one jurisdiction and mirror the same contract in another relevant jurisdiction, in order to be sure about its validity. A register for marriage contracts is not considered important.

It was also claimed that there is **a lack of international co-operation** especially concerning enforcement of preliminary injunctions for securing property claims. So an Austrian court cannot grant a preliminary injunction on a Swiss Bank.

B. Unmarried couples

There are no alternatives in Austria for the traditional marriage, such as partnership registration etc. The most important problem in practice is the **regulation of property relations of unmarried couples after a break-up**, especially for instance concerning common credits, common apartments or common cars. Currently there exist no legal provisions on the division of property in such a case, therefore general law of obligations is applicable. This means that for anything ever bought by one of the partners proof needs to be produced in the court, and no solutions of reasonableness are possible. Usually the person who holds the principal property value is also obliged to pay back to the credit institution the credit for this respective item of property. Especially for instance regarding a car the quick and huge loss of value should be considered as well. Currently for instance division could be like this: One partner keeps the common apartment and pays back credit rates for it; the value of the apartment will remain or even increase. The other partner keeps the common car and pays back credit rates for it; the value of the car, however, will quickly decrease and in case of an accident will be reduced to zero, whereas the credit rates still have to be paid. Although it is argued that the property values are equal at the time of division, a certain element of unfairness cannot be denied in this case. Nevertheless, the introduction of partnership registers is not seen as essential, as this would introduce second class marriages. It is also argued by practitioners that provisions for unmarried couples logically cannot be solved in a different way as this would mean to compel an unmarried couple into a framework of provisions, which they originally intended to avoid by not marrying.

Further **no maintenance claims can be made by unmarried partners**, not even if they have been responsible for household and children. However, one can lose maintenance rights against the former spouse in case of entering into an unmarried relationship with a new partner. The argument for this is, that the former partner should not finance a later partnership of his former spouse.

Another practical problem is that **unmarried couples have no inheritance rights**. So for instance if one partner dies without leaving a last will, his/her common share in for instance a house goes to his/her relatives. Even if a couple has lived together for years there is no statutory right of the surviving partner in the estate of the late partner without being married to each other. But even if an unmarried couple has set up a testamentary agreement, conditions are far worse than for married couples: Unmarried partners are not considered to be relatives in a legal sense, therefore, if they inherit, they fall under the highest brackets for inheritance tax. Dependant on the amount of property the taxes could amount up to 60 % of the property. Spouses have to pay only 15% taxes in the same situation. In case the late partner had an unmarried relationship, but was still formally married to his spouse, this spouse will be entitled to one third of the late person's property.

IV. Numbers and figures

Concerning official numbers and figures on matrimonial property in Austria we launched an inquiry with the Austrian Ministry of Justice asking for⁵:

- The number of (international) marriages
- The number of marriage contracts that are entered into
- The proportion of various regimes that are chosen by spouses
- Number and potential frequency of decisions in view of international marriages
- Number of recognitions of foreign decisions in view of international marriages
- Potential other information on international matrimonial property issues.

⁵ Letter to Dr. Gerhard Hopf, Ministry of Justice, dated 27 February 2003 (see Annex 2 for the original German letter).

The answer of Ministry of Justice⁶ was the following:

The Ministry of Justice can only provide answers to the questions concerning the number of international marriages and the number of recognitions of foreign decisions.

In the year 2001 a total number of **8,591 marriages** have been entered into, whereby at least one person was a non-Austrian citizen.

Concerning recognition of foreign decisions on marriages the following can be said: Until the entering-into force of the Brussels II-Regulation on 1 March 2001 jurisdiction for recognition of foreign decision on marriages (not, however, on matrimonial property, as this is excluded from the scope of the Brussels II-Regulation) laid with the Ministry of Justice. Until then about 1,500 decisions per year (80 % of which concerned German decisions) had to be made. Since 1 March 2001 decisions on marriages in the EU-member states are recognised automatically. Concerning non-EU-member states recognition since 1 March 2001 lies with the responsibility of the courts (§§ 228a – 228d AußStrG⁷). Therefore the number of decisions to be made by the Ministry of Justice will decrease dramatically (in the coming presumably down to about 300 to 500 per year), and finally be completely replaced by court decisions.

The number of marriage contracts cannot be determined as there is no register for such contracts in Austria.

As international relations of marriages cases are not taken down at the courts, the number and potential frequency of decisions on international marriages cannot be determined.

⁶ Reply letter from Dr. Gerhard Hopf, Ministry of Justice, dated 10 March 2003 (see Annex 3 for the original German letter).

⁷ Law on Non-Contentious Legal Proceedings (Außerstreitgesetz – AußStrG), RGBl 1854/208 BGBl in the version BGBl I 2001/98.

Annex 1
List of interviewed practitioners

1. Dr. Andreas A. **Lintl**
Lugeck 7/14
1010 Vienna
and: Pritchard Englefield Solicitors
14 New Street
London, EC2M 4HE
United Kingdom

Austrian lawyer admitted to the Viennese bar since 1992, and also qualified as an English solicitor.

2. Dr. Harald **Festl**
Notary's Candidate
Public Notary Dr. Bernhard Kirchl
Gatterburggasse 10
1190 Vienna,

3. Dr. August **Schulz**
Law Firm Mardetschläger
Westbahnstrasse 35 A
1070 Vienna

Annex 2
Letter to the Ministry of Justice, dated 27 February 2003



CENTER OF LEGAL COMPETENCE

Herrn
Sektionschef Dr. Gerhard Hopf
Bundesministerium für Justiz
Museumsstraße 7
1070 Wien

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A-1040 Wien
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Wien, am 27. Februar 2003

Internationales Ehegüterrecht

Sehr geehrter Herr Sektionschef, lieber Gerhard !

Im Rahmen eines EU-Projektes zum Thema „Comparative Rules Governing Conflicts of Jurisdiction and Laws on Matrimonial Property Regimes and the Implications for Property Issues of the Separation of Unmarried Couples in the Member States“ entstand unter der Projektleitung von o. Univ.-Prof. Dr. h. c. Dr. *Walter H. Rechberger* und in Zusammenarbeit mit Mitarbeitern des CLC ein Länderbericht über die Rechtslage zum Ehegüterrecht und Recht unverheirateter Personen in Österreich.

Die EU-Kommission verlangt nun zur Abrundung der Studie eine Ergänzung des österreichischen Länderberichts um detaillierte Informationen über die Praxis in internationalen Eherechtssachen, so insbesondere:

- Anzahl internationaler Eheschließungen.
- Anzahl von abgeschlossenen Eherechtsverträgen.
- Angaben über die Häufigkeit des Eingehens von Gütergemeinschaften oder anderen vom gesetzlichen Güterstand abweichenden Vereinbarungen.
- Anzahl und Häufigkeit von Entscheidungen in internationalen Eherechtssachen.
- Anzahl von Anerkennungen ausländischer Urteile.
- Etwaige andere Angaben über internationale Eherechtssachen.

Da uns diese Daten bisher nicht zugänglich waren, ersuchen wir auf diesem Wege höflich, uns darüber Informationen zukommen zu lassen, die wir in den Länderbericht aufnehmen können bzw uns gegebenenfalls mitzuteilen, dass derartige Informationen in Österreich nicht zur Verfügung stehen. Ich verbleibe mit herzlichem Dank im Voraus und

mit freundlichen Grüßen

Dr. Otto Oberhammer
Obmann des Vorstandes

Annex 3
Reply Letter from the Ministry of Justice, dated 10 March 2003



REPUBLIK ÖSTERREICH
BUNDESMINISTERIUM FÜR JUSTIZ

EINGELANGT

13. MRZ. 2003

CENTER OF LEGAL
COMPETENCE (CLC)

SChef Dr. Gerhard Hopf

GZ 30.057/1-I.9/2003

Wien, am 10. März 2003

Sehr geehrter Herr Sektionschef!

Lieber Otto!

Zu Deiner Anfrage vom 27.2.2003 kann ich leider nur Zahlen zu den internationalen Eheschließungen und zur Anerkennung ausländischer Urteile liefern:

Dem Statistischen Jahrbuch Österreichs 2003 lässt sich entnehmen, dass im Jahr 2001 in Österreich 8.591 Ehen geschlossen wurden, in denen zumindest einer der Ehepartner nicht österreichischer Staatsbürger war.

So lange das Bundesministerium für Justiz für die Anerkennung ausländischer Urteile zuständig war (bis 28.2.2001), waren zuletzt etwa 1500 Entscheidungen pro Jahr zu fällen. Mit dem Inkrafttreten der Brüssel II-Verordnung (Verordnung über die Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung für die gemeinsamen Kinder der Ehegatten) am 1.3.2001, die eine automatische Anerkennung von Eheentscheidungen unter den Mitgliedstaaten vorsieht, wird diese Zahl beträchtlich abnehmen und, wenn das Anerkennungssystem beibehalten wird, sich bei 300 bis höchstens 500 pro Jahr einpendeln. Etwa 80 % der vom Justizministerium ausgesprochenen Anerkennungen haben nämlich deutsche Entscheidungen betroffen.

Die Anzahl von Ehepakten wird nicht zu ermitteln sein, weil diese ja nirgends registriert werden (müssen).

Da internationale Bezüge einer Ehesache nicht zu den Kriterien gehören, die im Register des Gerichts erfasst werden, kann auch die Anzahl und Häufigkeit von Entscheidungen in internationalen Ehesachen nicht angegeben werden.

Mit freundlichen Grüßen

A handwritten signature in black ink, appearing to read "Dr. Ferdinand Hof". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke.

Herrn
SChef i.R.
Dr. Otto Oberhammer
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