THE CONNECTING FACTOR OF THE PLACE OF CELEBRATION OF MARRIAGE IN SWISS PRIVATE INTERNATIONAL LAW

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I. The Reform Introducing Marriage for All in Switzerland

Swiss family law is on the verge of being profoundly changed by the adoption of marriage for all (*mariage pour tous*). The entry into force of this reform[1], which is scheduled for the summer of 2021, would, above all, entail a revision of Swiss civil law[2] (A.). Several substantial amendments to Swiss private international law are also being considered (B.).

A. The Modification of Swiss Civil Law

If the project introducing marriage for all into the Swiss legal order is adopted, there will no longer be any gender-based differentiation in the way a union is formalized in civil law. In terms of legislative technique, the plan is to introduce marriage for all into the Swiss Civil Code (SCC)[3] simply by rephrasing the relevant provisions in a neutral manner.[4]

The objective of this reform is limited to opening access to marriage for same-sex couples. At this stage, other legal aspects related to marriage are not concerned. The restriction of the scope of the reform is justified by a choice of legislative policy. The Swiss legislator[5] considers that unequal treatment of heterosexual and homosexual couples is more likely to be gradually eliminated by proceeding in stages. In particular, the regulation of survivors' pensions and access to medically assisted procreation are sensitive political issues that could jeopardize the reform as a whole, or delay its entry into force by several years, if they were

[1] This reform follows on from a parliamentary initiative dating from 2013: Parliamentary Initiative No 13.468, of 5.12.2013, tabled by the Groupe Vert'Libéral, available at https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20130468 (on 13.3.2020).

[2] See Parliamentary initiative "*Mariage civil pour tous*", Report of the Legal Affairs Committee of the National Council of 5.4.2019 (hereinafter: Marriage for All Report), BBl 2019, pp. 8127 ff. The preliminary draft and the explanatory report of the Legal Affairs Committee of the National Council on parliamentary initiative No 13.468 "*Mariage civil pour tous*" of 14.12.2019, as well as the results of the consultation procedure, are available at https://www.parlament.ch/fr/organe/commissions/commissions-thematiques/commissions-caj/consultation-caj-13-468 (on 13.3.2020). Draft new provisions contained in this proposal are indicated in this paper as "draft Art.".

[3] Swiss Civil Code of 10.12.1907 (SCC; SR 210).

[4] *E.g.* the text of Art. 94 SCC, which states that "[t]o be able to marry, the man and woman must have attained the age of 18 and have the capacity of judgement" would become "[t]o be able to marry, the prospective spouses must have attained the age of 18 and have the capacity of judgement" (author's own translation).

[5] On this subject, see FEDERAL COUNCIL, *Avis sur le Rapport du 30 août 2019 de la Commission des affaires juridiques du Conseil national concernant l'initiative parlementaire No 13.468 "Mariage civil pour tous"* of 29.1.2020, BBl 2020, pp. 1223 ff.

incorporated directly into the project to open up marriage to same-sex unions. Amending Swiss law on these points could be the subject of a second stage, with an expert report expected in 2021. The creation of a new status that would be an alternative to marriage, regardless of the sex of the partners, is also being studied and could be the subject of a third stage.

Under Swiss law, there are currently two different statuses for the couple: marriage, which is reserved for heterosexual couples, and registered partnership, which is an option available only to homosexual couples. Marriage is governed by the provisions of the Swiss Civil Code (Art. 90 *et seq*. SCC), whereas registered partnership is governed by a special law, the Partnership Act (PA)[6]. The introduction of registered partnership into Swiss law in 2007 was intended to offer homosexual couples an alternative to cohabitation, enabling them to claim family status vis-à-vis third parties and the state, so as to put an end to discrimination and ensure a degree of international cohesion.[7] Cohabitation is not specifically regulated in Swiss civil law.

The legal regime of registered partnership is modelled on that of marriage,[8] apart from certain "sensitive" points such as the possibility of having children.[9] The adoption of same-sex marriage would make the status of registered partnership obsolete. The Swiss legislator therefore intends to abolish the possibility of registering a partnership once civil marriage has been opened up to homosexual couples. The plan is to introduce a system of optional conversion of existing partnerships into marriages, which would require a joint declaration by the two partners, and would not be subject to a specific time limit.[10] The conversion could thus take place at any time. Pending a possible conversion, partnerships registered before the entry into force of the reform would remain subject to the Partnership Act, so that this law would remain in force as a kind of transitional regulation until all partnerships registered in Switzerland had been converted or dissolved.[11]

If this draft legislation is passed as it stands, the Swiss family of the 21st century would go from a trichotomy between marriage, registered partnership and cohabitation, to a dichotomy between marriage and cohabitation. In this event it

[6] Federal Act on Registered Partnership between Persons of the Same Sex of 18.6.2004 (Partnership Act; PA; SR 211.231).

[7] *Message relatif à la loi fédérale sur le partenariat enregistré entre personnes du même sexe* of 29.11.2002, BBl 2003, pp. 1192 ff (hereinafter: "Message PA"), at pp. 1271 f.

[8] It follows logically from this that heterosexual couples cannot be united in a registered partnership under Swiss law. The legislator has clearly expressed its intention not to offer heterosexual couples a "second-class marriage": Message PA (note 7), p. 1213.

[9] Since 1.1.2018, Swiss law has allowed the adoption of the child of the registered partner or same-sex cohabitant (Art. 264*c* SCC).

[10] Draft Art. 35 para. 1 PA: "The partners may at any time declare together to the civil status office that they wish to convert their registered partnership into marriage." (author's own translation). This optional conversion fulfils the constitutional guarantee of the right to marry, as the Constitution also guarantees the freedom not to have to marry. See Marriage for All Report (note 2), p. 8142.

[11] Marriage for All Report (note 2), p. 8135.

will have taken the Swiss legislator some fifteen years – since the introduction of registered partnership in 2007 – to eliminate the difference in status between heterosexual and homosexual couples. But even if the status of the couple is unified at the civil law level, the other areas of law will still (temporarily?) show a certain delay in adaptation. In reality, the scope of this reform is essentially terminological.

B. The Modification of Swiss Private International Law

The adoption of marriage for all would have a particularly important impact in private international law. In the field of marriage, the Private International Law Act (PILA)[12] takes over the distinction between marriage and registered partnership from Swiss substantive law. The provisions relating to marriage are contained in Chapter 3, while additional provisions, contained in Chapter 3*a*, govern the fate of registered partnerships with an international element. As in civil law, cohabitation has no status of its own in Swiss private international law. Its legal treatment therefore depends on its characterisation.[13]

The difficulty in private international law lies in the fact that conflict of law rules must be configured in such a way as to be able to deal with foreign legal institutions unknown to Swiss substantive law. The legal situation of couples is characterised, at the international level, by a great diversity of statuses. While most states only have traditional marriage between a man and a woman[14], some states have opened up marriage to same-sex couples, others have adopted a different status for homosexual couples (*e.g.* registered partnership under Swiss law), while yet others have introduced an alternative to marriage by allowing heterosexual and/or homosexual couples to formalize their union without going through marriage; these different options may be combined in certain legal systems.[15]

[12] Federal Act on Private International Law of 18.12.1987 (Private International Law Act; PILA; SR 291). For a general description of this law, see F. GUILLAUME, *Droit international privé – Partie générale et procédure civile internationale,* 4th ed., Neuchâtel 2018, No 7-10, pp. 10-15.

[13] On this subject, see F. GUILLAUME, Les statuts de couple en droit international privé suisse, in S. BEN HADJ/ G. KESSLER (eds), *Le concubinage – Entre droit et non droit*, Paris 2020 (forthcoming).

[14] Not to mention the fact that many states recognise polygamous marriage or, in a more limited number, polyandric marriage.

[15] See HCCH, Update on the developments in internal law and private international law concerning cohabitation outside marriage, including registered partnerships, General Affairs and Policy Council, Prel. Doc. No 5, March 2015 (hereinafter: "Update Cohabitation"), No 29-33, pp. 6 f.; SWISS INSTITUTE OF COMPARATIVE LAW, Avis sur la possibilité d'inscrire des unions étrangères dans le registre de l'état civil suisse (état au 13. 3.2017), E-Avis No 2017-06, available at http://www.e-collection.isdc.ch/zoom/4354/view?page=1&p=separate&tool=info and at https://www.bj.admin.ch/dam/data/bj/gesellschaft/zivilstand/dokumentation/avis14-018.pdf (on 13.3.2020). See also I. PRETELLI, Equivalence and recognition abroad of registered unions between two persons, *Cuadernos de Derecho Transnacional*, October 2019, Vol. 11, No 2, pp. 8-31; HCCH, Private

Moreover, in terms of legal effects, certain types of registered partnership have effects equivalent to those of marriage (*e.g.* registered partnership under Swiss law), while others limit the scope of the partners' rights, for example to property rights.[16] Finally, most states do not grant a status to cohabitation, which remains a *de facto* union, although some states nevertheless recognise legal effects of this form of living in partnership by granting rights or imposing obligations on cohabitants.[17]

Swiss private international law takes into account the existence of significant differences between national legal systems in the definition of statuses for the couple. The concept of "marriage", as defined in Swiss private international law, is for this reason significantly broader than the definition of marriage in civil law, with a view to including the wide variety of forms of marriage existing at international level. Religious, customary[18] and common law marriages fall within the scope of the aforementioned connection category.[19] The determining aspect is that the foreign institution in question must be equivalent to a marriage under Swiss law.[20]

The "registered partnership" connection category should also be defined sufficiently broadly to include all forms of living in partnership[21] that have civil law effects functionally equivalent to marriage[22] and that are not strictly speaking a marriage, however they are designated. This approach, advocated by legal scholars, has finally come to be accepted by the Swiss legislator.[23] It may be added that

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international law issues relating to cohabitation outside marriage (including registered partnerships) – Summary and brief analysis of the responses to the Questionnaire, General Affairs and Policy Council, Prel. Doc. No 4, February 2017 (hereinafter: "Cohabitation Questionnaire"), No 4, p. 2.

[16] See HCCH, Cohabitation Questionnaire (note 15), No 6, pp. 2 f.

[17] See HCCH, Cohabitation Questionnaire (note 15), No 24-35, pp. 6-8; see also K. WAALDIJK/ E. FASSIN, *Droit conjugal et unions de même sexe – Mariage, partenariat et concubinage dans neuf pays européens*, Paris 2008, pp. 20 f.

[18] See in particular, TF 5P.77/2002, 26.3.2002, ground 3.

[19] See M.-L. PAPAUX VAN DELDEN, in P. PICHONNAZ/ B. FOËX (eds), *Code civil I – Art. 1-359 CC. Commentaire romand*, Basel 2010, Art. 97 SCC, No 3, p. 701.

[20] C. WIDMER LÜCHINGER, in M. MÜLLER-CHEN/ C. WIDMER LÜCHINGER (eds), *Zürcher Kommentar zum IPRG*, 3rd ed., Zurich 2018, Art. 45 PILA, No 12, p. 833.

[21] On this subject, see A. BUCHER, in A. BUCHER (ed.), *Loi sur le droit international privé – Convention de Lugano. Commentaire romand*, Basel 2011, Art. 65*a*-65*d* PILA, No 15-20, pp. 545 f.

[22] A. BUCHER (note 21), Art. 65*a* PILA, No 11, p. 552. It should be noted that this author takes the view that some unions producing effects equivalent to those of a Swiss registered partnership, without being subject to an obligation of registration, can also be recognised in Switzerland under the same conditions as a registered partnership. Same opinion: C. WIDMER LÜCHINGER (note 20), Vorb. zu Art. 65*a*-65*d* PILA, No 19, p. 1199.

[23] Marriage for All Report (note 2), p. 8149. The Swiss legislator was initially of the opinion that the "registered partnership" connection category should be delimited by

such a union requires completion of a certain number of formalities carried out with a state institution (*e.g.* registration),[24] and must be exclusive, in that its existence must constitute an obstacle to the registration of a new partnership or the celebration of a marriage with a third party.[25]

The basic principle followed in Swiss private international law is the application to registered partnerships by analogy of the provisions governing marriage (Art. 65*a* PILA). This reference applies both to the registration of the partnership and to the general effects, the property regime and the dissolution of the partnership. The analogous application of the provisions of matrimonial law enshrines the equating in principle of registered partnership with marriage.[26] In addition, a few specific rules provide specific solutions to problems arising in the event of a mobile conflict, in particular because of the absence of regulation of the partnership in the foreign legal order designated by the conflict rules governing marriage.[27]

The Swiss legislator does not intend to delete Chapter 3*a* of the Private International Law Act as part of the current reform. The "registered partnership" connection category should therefore be maintained in private international law. As a result, there would be a significant difference between the civil law and the private international law regime. The purpose of maintaining the dual characterisation in private international law is to allow the apprehension of foreign legal institutions unknown to Swiss law that cannot be characterised as marriages. This liberal approach corresponds to the *favor recognitionis* rule aimed precisely at avoiding the creation of flawed legal situations in the field of family relations by the refusal to recognise a legal status validly acquired abroad.

The existence of two connection categories in private international law would not in principle prevent the continued equating of registered partnerships with marriage. It is laid down that the application by analogy of the conflict rules relating to marriage to legal statuses that would in private international law be characterised as registered partnerships is maintained (draft Art. 65*a* PILA).[28] Thus a partnership registered abroad, in a state offering couples the possibility of choos-

reference to the contours defined for registered partnership in substantive law: Message PA (note 7), p. 1259. The evolution of couple statuses in foreign legal orders changed this approach, which had become archaic.

[24] HCCH, Cohabitation Questionnaire (note 15), No 3, p. 2.

[25] See A. BUCHER, Le regard du législateur suisse sur les conflits de lois en matière de partenariat enregistré, in SWISS INSTITUTE OF COMPARATIVE LAW (ed.), *Aspects de droit international privé des partenariats enregistrés en Europe,* Geneva/Zurich/Basel 2004, pp. 137-147, at p. 138; L. BOPP, in H. HONSELL et al. (eds), *Internationales Privatrecht. Basler Kommentar*, 3rd ed., Basel 2013, Art. 65*a* PILA, No 6, p. 507.

[26] A. BUCHER (note 21), Art. 65*a* PILA, No 1, p. 550.

[27] Message PA (note 7), pp. 1258 f. See also A.R. MARKUS, Le droit international privé suisse du partenariat enregistré, in SWISS INSTITUTE OF COMPARATIVE LAW (ed), *Aspects de droit international privé des partenariats enregistrés en Europe,* Geneva/Zurich/Basel 2004, pp. 149-152.

[28] Draft Art. 65*a* PILA: "The provisions of Chapter 3 apply by analogy to registered partnerships." (author's own translation). See Marriage for All Report (note 2), p. 8164.

ing between the institutions of marriage and registered partnership, would be characterised as a registered partnership under Swiss private international law and could be recognised as such in Switzerland.[29]

The reform envisages taking over the special conflict rules that are currently provided for registered partnerships and incorporating them directly into Chapter 3 of the Private International Law Act devoted to marriage. This will result in the repeal of most of the rules currently contained in Chapter 3*a* of the Act. The equating of the registered partnership regime with that of marriage will be complete in private international law. The conflict rules governing marriage will, as now, also be applicable to registered partnerships (draft Art. 65*a* PILA). In addition, the marriage provisions of the relevant substantive law will be applicable to registered partnerships in the absence of specific regulations (draft Art. 65*c* PILA).

The legislator intends to amend several conflict rules governing marriage to take into account the fact that same-sex marriage is still relatively uncommon in foreign legal orders and may even be considered contrary to public policy. This is the current situation, for example, in Switzerland, where foreign same-sex marriages cannot yet be recognised as such. Swiss private international law prescribes the conversion of such unions into registered partnerships upon recognition in the Swiss legal order (Art. 45 para. 3 PILA). The registered partnership is the status reserved by Swiss law for homosexual couples. The intention is that this lack of recognition, based on the public policy exception, will be repealed if marriage for all is adopted. This amendment reflects the parallel status of private international law and civil law in the field of family law. The values prevailing in civil law inevitably have repercussions on the rules of private international law.[30] If the reform is passed, same-sex marriages validly celebrated abroad would be recognised in Switzerland as marriages. The characterisation of these unions as marriages would henceforth be self-evident, and no specification in the legal text would be necessary.[31]

II. The Place of Celebration of Marriage as a New Connecting Factor in the Swiss Private International Law Act

With the adoption of marriage for all in Switzerland, the legislator plans to supplement the conflict rules governing marriage in order to provide the necessary coordination between the Swiss legal order and foreign ones. This objective is

[29] See F. GUILLAUME (note 13).

[30] See in particular, A. BUCHER (note 21), Art. 65*a*-65*d* PILA, No 1, p. 541; F. GUILLAUME, Une proposition de réglementation du partenariat insérable dans la LDIP, in F. GUILLAUME/ R. ARN (eds), *Cohabitation non maritale,* Geneva 2000, pp. 180-199, at p. 184.

[31] Marriage for All Report (note 2), p. 8145.

achieved essentially by using the connecting factor of the place of celebration of marriage, which would be added in several legal provisions. This reform would introduce an important novelty into the Private International Law Act which, in its present wording, uses this connecting factor in the context of marriage only very exceptionally (A.). On the other hand, this connecting factor is already widespread in partnership matters, with several articles referring to the place of registration of the partnership (B.).

A. The Quasi Non-Existence of the Connecting Factor of the Place of Celebration of Marriage

The connecting factor of the place of celebration of marriage is currently almost non-existent in Swiss private international law. When the Private International Law Act was adopted in 1987, the legislator favoured the connecting factor of the domicile of the spouses or of one of the spouses. It also conferred a limited scope on the connecting factor of the nationality of the spouses or of one of the spouses. The only reference to the connecting factor of the place of celebration of marriage was in Art. 45 para. 1 PILA, which prescribes the principle of recognition of marriages validly celebrated abroad. In most cases, the condition of validity of the marriage will be examined in the light of the law of the state where the marriage was celebrated. A marriage which is not valid in that state, but which is recognised as valid in another state, be it the state of nationality or the state of domicile of the spouses, should also be recognised in Switzerland.[32]

In 2012 the celebration of marriage was introduced as a connecting factor into the rules of direct and indirect jurisdiction governing the annulment of marriage, particularly in the case of forced marriage (Art. 45*a* PILA). The Swiss authorities are thus competent to annul a forced marriage celebrated in Switzerland. In addition, a foreign decision annulling a marriage which comes from the foreign state of the celebration of marriage is recognised in Switzerland.

The celebration of marriage is used as a temporal reference in the context of the rules governing the choice of the law applicable to the matrimonial property regime. The spouses may choose to submit their matrimonial property regime to the law of the state in which they are or will be domiciled after the celebration of their marriage (Art. 52 PILA). Where the spouses have not made a choice of law, the law applicable to the matrimonial property regime is determined mainly on the basis of the spouses' current domicile (Art. 54 PILA). The reference to the current domicile has the advantage of applying the law of the social environment in which the spouses are living at the time when a question relating to their legal status arises. However, it has the disadvantage of entailing a change in the law governing their matrimonial property regime in the event of a move abroad (Art. 55 PILA).

To avoid this problem, the European legislator has chosen to use the celebration of marriage as a temporal reference for determining the law applicable

[32] A. BUCHER (note 21), Art. 45 PILA, No 8 f., p. 441, and references cited.

to the matrimonial property regime in the absence of a choice of law.[33] By stipulating that the matrimonial property regime is governed by the law of the state in which the spouses had their habitual residence after the celebration of their marriage, or in the alternative, the common national law of the spouses at the time of the celebration of marriage, or in the further alternative, the law of the state with which the spouses had the closest connection at the time of the celebration of marriage, the European Regulation on Matrimonial Property Regimes avoids any change in the matrimonial property regime without the agreement of the spouses. A change of domicile or nationality of one or both spouses therefore has no effect on the law applicable to their matrimonial property regime. The permanence of the legal status is guaranteed in European private international law, unlike the Swiss system, which favours mobile conflicts. The mutability of the matrimonial property regime, as provided for in Swiss private international law in the absence of a choice of law, may seem surprising.[34] However, this system has the advantage of always applying to the matrimonial property regime the law of the state with which the spouses have the closest connection.[35]

This sporadic use of the place of celebration of marriage in the Private International Law Act contrasts with the legislator's plan to generalize this connecting factor by incorporating it into four new legal provisions (draft Art. 50, 52, 60*a* and 65 para. 1 sub-para. c PILA). The reform of marriage in civil law would create a break in the systematics of marriage in private international law. But this break would not be as strong as it appears at first sight.

B. A New Connecting Factor Originating from the Rules on Registered Partnership

The introduction of same-sex marriage into Swiss legislation raises, to a certain extent, the same questions in terms of private international law as the introduction of registered partnerships.[36] As the provisions governing marriage apply by

[33] See Art. 26 of Regulation (EU) No 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 (Matrimonial Property Regimes Regulation; OJ L 183, 8.7.2016, p. 1). See also Recitals 45 and 49 of the Matrimonial Property Regimes Regulation.

[34] The spouses can avoid the automatic modification of the law governing their matrimonial property regime by making a choice of law (Art. 52 PILA). The chosen law is not affected by a change in the domicile of one or both of the spouses (Art. 53 para. 3 PILA; see also Art. 55 para. 2 PILA).

[35] European law takes into account the interest in applying the law of the state with which the spouses have the closest connection, at the request of one of the spouses and under certain restrictive conditions (Art. 26 para. 3 of the Matrimonial Property Regimes Regulation).

[36] See Message PA (note 7), pp. 1258 f.

analogy to registered partnerships (Art. 65*a* PILA)[37], the main connecting factor applicable to registered partnerships is the domicile of one or both of the partners.

The Swiss legislator has refrained from applying the connecting factor of the place of registration of the partnership as the main factor, recognising that in view of "current mobility, it is [...] possible that the state of registration may, after a certain time, lose importance for the partners if both establish their domicile in another country. The connection to the state of registration would then no longer correspond to the situation and would seem unrealistic".[38] Preference was therefore given to the connecting factor of domicile, as in the case of marriage, which allows the legal regime of the partnership to be linked to the state with which the partners have the closest connection at the time when a question relating to their legal status arises.

The place of registration of the partnership is a subsidiary connecting factor. This approach takes into account the fact that the status of registered partnership does not exist in all legal orders.[39] This connecting factor is thus found in all the special provisions applicable to registered partnerships (Art. 65*b*, 65*c* and 65*d* PILA). There is a social need to lay down legal provisions that can be applied to all couples whose legal status is recognised. This need for certainty provides the necessary justification for departing from the ideal of the proximity principle in favour of the guarantee of the existence (even as a subsidiary jurisdiction) of a forum and legal provisions that are applicable to the legal relationships of the partners.

This legislative option has been taken up in the project of opening up marriage to same-sex couples, with the similar aim of taking account of the disparity in the statuses of couples existing in the national laws of the various states.[40] In order to avoid gaps in the legal jurisdiction, the applicable law and the recognition of foreign decisions on legal relationships resulting from same-sex marriage, the Swiss legislator plans to transpose most of the solutions developed for registered partnerships into Chapter 3 of the Private International Law Act devoted to marriage.[41] The connecting factor of the place of registration of the partnership would thus be replaced by that of the place of celebration of marriage. This would result in the repeal of the special provisions applicable to registered partnerships referring to the place of registration of the partnership, since it would henceforth be possible to apply directly by analogy the new provisions referring to the place of celebration of marriage.[42] When being applied to legal relationships resulting from a registered partnership, this connecting factor would be interpreted as referring to the place of registration of the partnership.

[37] See *supra* I.B.

[38] Message PA (note 7), pp. 1258 f. (author's own translation).

[39] See Message PA (note 7), pp. 1260 f.

[40] Marriage for All Report (note 2), pp. 8144-8146.

[41] Marriage for All Report (note 2), p. 8146.

[42] Application by analogy is prescribed by draft Art. 65*a* PILA (the text of which is reproduced in note 28). See Marriage for All Report (note 2), p. 8150.

III. The Jurisdiction of the State of Celebration of Marriage

The legislator plans to introduce the connecting factor of the place of celebration of marriage in several new provisions of the Private International Law Act in order to prevent negative conflicts of jurisdiction (A.) and give greater recognition to foreign decisions (B.). These new provisions will generally maintain the parallelism between direct and indirect jurisdiction (C.).

A. The Introduction of a New Divorce Forum

Draft Art. 60*a* PILA will open a new forum for divorce proceedings[43] in Switzerland at the place of celebration of marriage (1.). This jurisdiction will be subsidiary and subject to special circumstances (2.).

1. Draft Article 60a PILA

Draft Art. 60*a* PILA states that:

> "Where the spouses are not domiciled in Switzerland and neither of them is a Swiss national, the Swiss courts at the place of celebration of marriage also have jurisdiction to hear an action for divorce or legal separation, provided the action cannot be brought before the court of the domicile of one of the spouses, or cannot reasonably be required to be brought there."[44]

2. The Subsidiary Jurisdiction at the Place of Celebration of Marriage

Draft Art. 60*a* PILA reproduces the substance of Art. 65*b* PILA, which establishes jurisdiction in Switzerland at the place of registration of the partnership for actions relating to the dissolution of the partnership. This forum was considered necessary in order to avoid a negative conflict of jurisdiction when the couple, neither of whose members is a Swiss national, is domiciled in a foreign country in which the status of registered partnership does not exist.[45] As in Art. 65*b* PILA, the

[43] All the provisions of the Private International Law Act relating to divorce also apply to legal separation. For the sake of brevity, we have deliberately omitted throughout this paper any further discussion of issues relating to legal separation.

[44] Author's own translation.

[45] A. BUCHER (note 21), Art. 65*b* PILA, No 4, p. 554, who expressed himself in this way with respect to Art. 65*b* PILA. It should be noted that jurisdiction also covers questions relating to secondary effects of divorce (Art. 63 PILA) and to the amendment of, or supplement to, the divorce judgment (Art. 64 PILA); see A. BUCHER (note 21), Art. 65*b* PILA, No 6, p. 554.

jurisdiction of the Swiss courts at the place of celebration of marriage is subsidiary to the jurisdiction of the Swiss courts at the domicile of one of the spouses (Art. 59 PILA), and to the jurisdiction of the Swiss courts at the place of origin of a spouse of Swiss nationality (Art. 60 PILA).

It is interesting to review the existing fora in divorce matters in order to analyse their relationship with draft Art. 60*a* PILA. Swiss private international law provides for general jurisdiction in international divorce matters at the domicile of one of the spouses. The Swiss courts at the domicile of the defendant spouse have jurisdiction in principle to hear an action for divorce (Art. 59 sub-para. a PILA). The Swiss courts at the domicile of the plaintiff spouse also have jurisdiction provided that he or she has been residing in Switzerland for a year or is a Swiss national (Art. 59 sub-para. b PILA). These two fora are alternatives when both spouses are domiciled in Switzerland.[46]

A subsidiary jurisdiction of the Swiss courts of the canton of origin[47] is provided for when (at least) one of the spouses is a Swiss national[48], on condition that the spouses are not domiciled in Switzerland and it is not possible to bring an action for divorce abroad at the domicile of one of the spouses, or it would not be reasonable to require that divorce proceedings be brought there (Art. 60 PILA).[49] In order to meet the need to provide a jurisdiction for the couple in crisis, this forum is open to hear divorce proceedings brought by both the Swiss spouse and his or her spouse.[50] Divorce proceedings may be brought at this forum on the basis of either a unilateral application or a joint application.[51] There is no requirement for the condition that it is impossible to bring proceedings before the courts at the domicile of one of the spouses to be met for both spouses.[52]

The condition relating to the impossibility of bringing divorce proceedings before the courts at the domicile of one of the spouses needs to be presented in more detail. The impossibility of seizing the courts at the place of domicile must be accepted on grounds relating to the jurisdiction of the courts of the spouses' domicile, for example where these courts do not have jurisdiction, or where a judgment obtained in that forum would not be recognised in Switzerland.[53] It must be accepted that the forum of origin must also be available where, despite the

[46] A. BUCHER (note 21), Art. 59 PILA, No 2, p. 489.

[47] The jurisdiction of the Swiss courts at the "place of origin" provided for in Art. 60 PILA refers to the link that every Swiss citizen has with a canton and a municipality.

[48] Swiss nationality is the sole determining factor when a person has one or more foreign nationalities (Art. 23 para. 1 PILA). TF 5A_248/2010, 11.6.2010, ground 4.2.

[49] TF 5A_706/2014, 14.1.2015, ground 3.2. A. BUCHER (note 21), Art. 60 PILA, No 6, p. 494.

[50] A. BUCHER (note 21), Art. 60 PILA, No 2, p. 493.

[51] TF 5A_706/2014, 14.1.2015, ground 3.2.

[52] C. WIDMER LÜCHINGER (note 20), Art. 60 PILA, No 17, pp. 1087 f.

[53] ATF 126 III 327. A. BUCHER (note 21), Art. 60 PILA, No 6 f., p. 494; B. DUTOIT, *Droit international privé suisse. Commentaire de la loi fédérale du 18 décembre 1987,* 5th ed., Basel 2016, Art. 60 PILA, No 3, p. 233; L. BOPP (note 25), Art. 60 PILA, No 8, p. 461.

possibility of divorce proceedings in the state of domicile, the applicable law would prevent the divorce from being granted or would lead to effects of the divorce which would be unjust.[54] The impossibility of acting abroad may be *de jure* or *de facto*.[55] The examination of this impossibility therefore requires that the circumstances of the specific case be considered, in particular whether the spouses have a close connection with Switzerland.[56] This jurisdiction must be limited to cases where there is a specific need for protection for (at least) one of the spouses.[57]

Draft Art. 60*a* PILA follows the requirement of impossibility laid down in Art. 60 PILA, so that the above considerations regarding the forum of origin will also apply to this provision. This is already the case for the interpretation of Art. 65*b* PILA, which opens a forum in Switzerland for the dissolution of partnerships registered in that country when the partners are not domiciled in Switzerland and neither of them is a Swiss national, in order to guarantee the partners the possibility of severing the "matrimonial" bond that unites them.[58] Following the same logic, the new provision will extend the jurisdiction of the Swiss courts to allow them to grant a divorce if neither spouse is domiciled in Switzerland nor is a Swiss national. Draft Art. 60*a* PILA makes it possible to guarantee spouses who have celebrated their marriage in Switzerland the possibility of obtaining the dissolution of their union in Switzerland, in order to prevent the emergence of a negative conflict of jurisdiction.[59] Jurisdiction is then based only on the fact that the marriage was celebrated in Switzerland. In most cases this will be the only link connecting the spouses' situation to this country. In view of the very subsidiary nature of jurisdiction at the place of celebration of marriage, the Swiss nationality of one of the spouses or the domicile in Switzerland of one of them will be an obstacle to the application of draft Art. 60*a* PILA.

The jurisdiction laid down in draft Art. 60*a* PILA is located at the place of celebration of marriage[60], in the same way as in Art. 65*b* PILA, which fixes the forum at the place of registration of the partnership[61]. It should be clarified that a marriage resulting from the conversion of a registered partnership will be considered, for its legal effects, as if it had been celebrated as a marriage at the time of the registration of the partnership, except for the matrimonial property regime.[62]

[54] A. BUCHER (note 21), Art. 60 PILA, No 9 f., pp. 494 f.; B. DUTOIT (note 53), Art. 60 PILA, No 3, p. 233; L. BOPP (note 25), Art. 60 PILA, No 7, p. 461.

[55] B. DUTOIT (note 53), Art. 60 PILA, No 3, p. 233.

[56] B. DUTOIT (note 53), Art. 60 PILA, No 3, p. 233.

[57] TF 5A_706/2014, 14.1.2015, ground 3.2.

[58] A. BUCHER (note 21), Art. 65*b* PILA, No 5, p. 554.

[59] Marriage for All Report (note 2), p. 8150.

[60] This place is determined by the civil register district in which the spouses chose to celebrate their union (Art. 97 SCC).

[61] A. BUCHER (note 21), Art. 65*b* PILA, No 5, p. 554.

[62] Marriage for All Report (note 2), p. 8143. The legislator intends to make marriages resulting from conversion subject to the regime of participation in acquired

This would result in the place of registration of the partnership corresponding to the place of celebration of marriage.

As Art. 60*a* PILA will be incorporated into the Chapter of the Private International Law Act dedicated to marriage, this new provision will not only apply to homosexual couples who married in Switzerland when they had a domicile there and subsequently moved abroad, but also generally to all spouses who married in Switzerland and who are now domiciled in a state which is hostile (for one reason or another) to their marriage.[63] Furthermore, the Swiss authorities at the place of celebration of marriage will also have jurisdiction to supplement or amend a divorce judgment pronounced abroad (draft Art. 64 para. 1 PILA).

This new divorce forum will also have repercussions on the conflict rules applicable to matrimonial property regimes. The Swiss authorities which have jurisdiction to pronounce the divorce also have jurisdiction for the liquidation of the matrimonial property regime following the divorce (Art. 51 sub-para. b PILA). The Swiss authorities at the place of celebration of marriage will thus have jurisdiction to hear actions and to order measures relating to matrimonial property regimes in the context of divorce proceedings (draft Art. 51 sub-para. b PILA). The spouses may also agree on the court that will have to decide any potential or existing dispute arising out of their matrimonial property regime.[64] The spouses can thus ensure that the jurisdiction at the place of celebration of their marriage coincides with the application of Swiss law.[65] If the choice of court agreement forms part of a marriage contract, the formal requirements of that marriage contract must be fulfilled. It should be noted that a choice of court agreement in favour of the authorities at the place of celebration of marriage is also permitted under European private international law.[66]

All divorces pronounced in Switzerland are governed by Swiss law (Art. 61 PILA). The spouses do not have the possibility of choosing the law applicable to the divorce. There are no plans to change this rule. Swiss law differs on this point from European private international law, which subjects divorce to the law of the state of habitual residence of both spouses or, failing that, to the law of the last habitual residence of both spouses under certain conditions or, failing that, to the law of the state of which both spouses have the nationality or, failing that, to the law of the forum.[67] In addition, European law allows the spouses to choose the law

property (Art. 196 *et seq.* SCC) – which is the default matrimonial property regime in Swiss law – only from the time of conversion, unless otherwise agreed (draft Art. 35*a* para. 3 PA).

[63] Marriage for All Report (note 2), p. 8164.

[64] See Art. 5 PILA.

[65] The proposal introduces the possibility for spouses to choose the law of the state of celebration of marriage for their matrimonial property regime (draft Art. 52 para. 2 sub-para. b PILA). See *infra* IV.A.

[66] Art. 7 of the Matrimonial Property Regimes Regulation.

[67] Art. 8 of the Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation; OJ L 343, 29.12.2010, p. 10).

applicable to the divorce from a limited choice of laws, corresponding to those listed above for the objective connection.[68]

B. The Introduction of New Rules of Indirect Jurisdiction in Matters of Divorce and Effects of Marriage

The reform will also have an impact on the rules of indirect jurisdiction. Under Swiss private international law, recognition of a foreign decision can only take place following an examination of the jurisdiction of the authority that issued the decision.[69] This review of the foreign jurisdiction allows the Swiss authorities to refuse recognition of a decision where the foreign judge has admitted jurisdiction and only a very loose connection exists between the judge and the parties and the facts in dispute.[70] The Swiss legislator intends to amend two rules of indirect jurisdiction, namely Art. 65 PILA, which concerns recognition of decisions relating to divorce (1.), and Art. 50 PILA, which governs recognition of decisions relating to the effects of marriage (2.). Contrary to the other grounds of indirect jurisdiction that currently exist in these matters (3.), the jurisdiction of the state of celebration of marriage will be accepted only if particular circumstances are met (4.).

1. Draft Article 65 para. 1 PILA

Art. 65 PILA is the rule of indirect jurisdiction for divorce. The reform will introduce a reformulation of this text by adding sub-paragraphs a and b, without any substantial change. But the addition of a new sub-paragraph c to draft Art. 65 para. 1 PILA will incorporate a new rule of indirect jurisdiction permitting the recognition of a divorce pronounced in the state of celebration of marriage:

> "Foreign decisions of divorce or legal separation shall be recognised in Switzerland if they:
>
> a. were rendered in the state of domicile or habitual residence, or in the state of nationality, of one of the spouses;
>
> b. are recognised in one of the states referred to in sub-paragraph a; or
>
> c. were rendered in the state of celebration of marriage provided that the action could not be brought before the courts of one of

[68] Art. 5 of the Rome III Regulation.

[69] Art. 25 sub-para. a PILA: "A foreign decision is recognised in Switzerland: a. if the jurisdiction of the judicial or administrative authorities of the state in which the decision was rendered is given." (author's own translation). See also Art. 26 PILA.

[70] See *e.g.* F. GUILLAUME (note 12), No 97, pp. 226-229.

> the states referred to in sub-paragraph a, or could not reasonably be required to be brought there." [71]

2. Draft Article 50 PILA

Art. 50 PILA is the rule of indirect jurisdiction for the effects of marriage. The reform will introduce a reformulation of this text by adding sub-paragraph a, without any substantial change. But the addition of a new sub-paragraph b to draft Art. 50 PILA will incorporate a new rule of indirect jurisdiction permitting the recognition of a foreign decision or measures rendered in the state of celebration of marriage:

> "Foreign decisions or measures relating to the effects of marriage shall be recognised in Switzerland if they:
>
> a. were rendered in the state of domicile or habitual residence of one of the spouses; or
>
> b. were rendered in the state of celebration of marriage provided that the action could not be brought before the courts of one of the states referred to in sub-paragraph a, or could not reasonably be required to be brought there." [72]

3. The Subsidiary Indirect Jurisdiction of the State of Celebration of Marriage

In divorce matters, Art. 65 para. 1 PILA makes the recognition of foreign decisions of divorce subject, in the first place, to the jurisdiction of the authorities of the state of domicile, habitual residence or nationality of one of the spouses (sub-para. a). A decision rendered in another state is also subject to recognition in Switzerland if it has previously been recognised in one of these states (sub-para. b). The reform will introduce the possibility of also recognising a decision rendered in the state of celebration of marriage (draft Art. 65 para. 1 sub-para. c PILA). In our view, it will not be necessary to check in advance the possibility of recognising such a decision in the state of domicile, habitual residence or nationality of one of the spouses.

Draft Art. 50 PILA establishes a new ground of indirect jurisdiction for decisions or measures relating to the effects of marriage similar to the one being applied in divorce matters.

The new content of draft Art. 65 and 50 PILA is directly inspired by Art. 65*d* PILA. This provision admits the indirect jurisdiction of the authorities of the state of registration of the partnership, provided that the action could not be brought before the courts of the state of domicile, habitual residence or nationality of one of the partners, or could not reasonably be required to be brought there. The indirect jurisdiction of the state of registration of the partnership is justified by the

[71] Author's own translation.

[72] Author's own translation.

need to ensure legal support for homosexual couples whose union is not recognised in all legal systems, and in particular in the state of their domicile.[73] The condition of impossibility which is required in draft Art. 65 and 50 PILA will be examined in a similar way to that provided for in draft Art. 60*a* PILA.[74] Proof of this impossibility must be provided by the spouse or former spouse requesting the recognition of a foreign decision.

Art. 65*d* PILA, governing the recognition of foreign decisions and measures relating to a partnership, is dictated by the principle of subsidiarity. A foreign decision rendered in the state of registration of the partnership can only be recognised in Switzerland if the condition of the impossibility of bringing the divorce proceedings elsewhere is demonstrated. Subsidiarity is intended to avoid abuse of rights, for example when one of the partners seeks to escape the natural forum – in particular the jurisdiction of the state of the domicile – in order to obtain the dissolution of the marriage in the state in which it was celebrated, while the spouses have not retained any connection with that state.[75] The legislator plans to repeal Art. 65*d* PILA, the content of which has been included in draft Art. 65 and 50 PILA. The subsidiarity of this ground of indirect jurisdiction is thus present identically in these new provisions.

The amendment of Art. 65 and 50 PILA will also have an impact on the recognition of decisions relating to the matrimonial property regime rendered in the context of measures of protection of the conjugal union or in the context of a divorce. The rules of indirect jurisdiction in these matters are the same as those prescribed for the effects of marriage or divorce (Art. 58 para. 2 PILA).

C. The Parallelism between the Rules of Direct and Indirect Jurisdiction

Swiss private international law has "a certain reciprocal action between the rules of direct and indirect jurisdiction" [76], so that the existence of the jurisdiction of Swiss authorities leads in principle to the admission of the indirect jurisdiction of foreign authorities in accordance with the same connecting factors. The question whether this parallelism between the rules of direct and indirect jurisdiction will be maintained in the reform should be examined.

1. The Rules of Direct and Indirect Jurisdiction in Divorce Matters

In the field of international divorce, two connecting factors are currently used to establish the jurisdiction of the Swiss authorities: the domicile and the nationality

[73] Message PA (note 7), p. 1261.

[74] See *supra* III.A.2.

[75] See A. BUCHER (note 21), Art. 65*d* PILA, No 2 and No 5, pp. 569 f.

[76] Message concernant une loi fédérale sur le droit international privé (loi de DIP) of 10.11.1982 (hereinafter: "Message PILA"), BBl 1983, pp. 255 ff, at p. 317 (author's own translation).

of the spouses. The domicile is regarded as the ordinary rule of direct jurisdiction, *i.e.* the expression of the principle of proximity.[77] The domicile represents the couple's centre of life.[78] The connecting factor of nationality serves to guarantee a forum in Switzerland only when the spouses are faced with the impossibility, or great difficulty, of access to justice in the country of their domicile.[79] The application of the connecting factor of the place of celebration of marriage (draft Art. 60*a* PILA) will further extend the jurisdiction of the Swiss authorities by admitting a (very) subsidiary jurisdiction when both connecting factors of domicile (Art. 59 PILA) and nationality (Art. 60 PILA) fail to guarantee the spouses a forum for breaking the matrimonial bond which has been enshrined in the Swiss legal order. This new rule of direct jurisdiction will ensure the existence of a forum in Switzerland when the connecting factors of domicile and nationality do not guarantee the right to divorce.

The new rule of indirect jurisdiction follows the same general logic. The place of celebration of marriage serves as a subsidiary connecting factor in the event that no proceedings can be brought before the courts of the domicile, habitual residence or nationality of one of the spouses, or cannot reasonably be required to be brought there (draft Art. 65 para. 1 PILA). This new provision constitutes the counterpart of draft Art. 60*a* PILA for the case where the marriage was not celebrated in Switzerland. The rule of indirect jurisdiction of the place of celebration of marriage thus constitutes an emergency solution. This connecting factor is not likely to be applied frequently, especially since most states do not use this factor to admit the jurisdiction of their courts to grant divorce. European private international law, for example, gives priority to the connecting factors of the habitual residence and nationality of the spouses, without providing for any jurisdiction of the authorities of the state of celebration of marriage to grant a divorce.[80]

The parallelism between the rules of direct and indirect jurisdiction in divorce matters is therefore maintained in the reform.

[77] See *e.g.* F. GUILLAUME (note 12), No 9, p. 14. See also P. LAGARDE, Le principe de proximité dans le droit international privé contemporain. Cours général de droit international privé, *RCADI* 1986 I (196), pp. 9-237, at p. 26, which defines this principle in relation to the recognition of foreign decisions as "subordinating the effectiveness of a decision to the closeness of the links which connect it to the authority that rendered it." (author's own translation).

[78] A. BUCHER (note 21), Art. 59 PILA, No 5, p. 490.

[79] A. BUCHER (note 21), Art. 60 PILA, No 6, p. 494.

[80] Art. 3 of Regulation (EU) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II*bis* Regulation; OJ L 338, 23.12.2003, p. 1). This rule is not affected by the revision of this regulation by Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels II*ter* Regulation; OJ L 178, 2.7.2019, p. 1).

2. The Rules of Direct and Indirect Jurisdiction in Effects of Marriage Matters

Unlike draft Art. 65 PILA, draft Art. 50 PILA is not the counterpart of a rule of direct jurisdiction similar to draft Art. 60*a* PILA. Since the jurisdiction of the Swiss authorities at the place of celebration of marriage has not been extended to actions or measures relating to the effects of marriage, the existence of a forum in Switzerland will remain limited to cases where one of the spouses is domiciled in Switzerland (Art. 46 PILA) or is a Swiss national (Art. 47 PILA).

Matters pertaining to the effects of marriage are among the few where the rules of indirect jurisdiction are not aligned with the rules of direct jurisdiction. This situation already exists in the current law, as Art. 50 PILA does not provide a ground of indirect jurisdiction of the national states of the spouses. This lack of parallelism between the rules of direct and indirect jurisdiction will be accentuated in the context of the reform. It will be possible to recognise a decision coming from the state of celebration of marriage, but still not from the national states of the spouses, despite the fact that the Swiss authorities of the place of celebration of marriage will have no jurisdiction to hear actions or order measures relating to the effects of marriage.

The fact that the legislator does not wish to extend the jurisdiction of Swiss authorities to matters related to the effects of marriage, even though the marriage was celebrated in Switzerland, seems to us to be an expression of the principle of proximity. Where the spouses are not domiciled in Switzerland and are not Swiss nationals, the mere fact of celebration of marriage in this country does not represent a sufficient connection to justify the jurisdiction of Swiss authorities for matters related to the effects of marriage. The need for protection of the spouse seeking the help of the judge is in fact experienced mainly in the state in which he or she lives. Granting jurisdiction to Swiss authorities on the basis that the marriage was celebrated in Switzerland would not be very useful for a spouse in need of protection abroad. Indeed, if the authorities of the state of the spouse's domicile do not grant him or her this protection, it is unlikely that a decision rendered in the state of celebration of marriage could be recognised in that first state. Moreover, questions relating to the effects of marriage are not seen as sufficiently urgent to justify the introduction of a subsidiary forum based on the principle of necessity. It will be recalled in this context that the jurisdiction of Swiss courts with regard to maintenance obligations between spouses is determined by the Lugano Convention[81] when the defendant is domiciled in the territory of a Contracting State, which is true in the majority of cases.

The Swiss legislator is more magnanimous in matters of indirect jurisdiction, as it will allow recognition of foreign decisions rendered in the state of celebration of marriage, provided however that the action could not have been brought in the state of domicile or habitual residence of one of the spouses (draft Art. 50

[81] Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention; LC; SR 0.275.12). See Art. 2 para. 1 LC and Art. 5 para. 2 LC.

PILA). Recognition of a decision or of measures relating to the effects of marriage originating in the national state of one of the spouses will still not be possible in Switzerland. This lack of parallelism between the rules of direct and indirect jurisdiction is decried as a solution that is "too categorical".[82]

IV. The Application of the Law of the State of Celebration of Marriage

With regard to the rules of conflict of law, the legislator plans to introduce the connecting factor of the place of celebration of marriage only in the field of matrimonial property regimes. In matters of divorce, Swiss law is imperatively applicable where the Swiss authorities have jurisdiction (Art. 61 PILA). Since the Private International Law Act was revised in 2017, the legislator has ruled out the possibility of applying the common foreign national law of the spouses, which allows the forum and the applicable law to always coincide.[83] It is therefore logical that the legislator does not plan in the current reform to reintroduce the possibility of applying a foreign divorce law. As regards the effects of marriage, the legislator prescribes the application by analogy of the rules on marriage laid down in the applicable foreign law, even if that law does not recognise same-sex marriage.[84] In the field of matrimonial property regimes, connection to the law of the state of celebration of marriage is envisaged only if the spouses have agreed to apply that law (A.). Furthermore, the reform indirectly confirms the Swiss legislator's attachment to the principle of the unity of the matrimonial property regime (B.).

A. The Choice of the Law of the State of Celebration of Marriage for the Matrimonial Property Regime

The reform will introduce a new provision which will allow spouses to submit their matrimonial property regime to the law of the state of celebration of marriage (1.). This law is additional to the law of the state of domicile and the law of the national states, which the spouses may already choose to apply to their matrimonial property regime by means of a choice of law agreement (2.).

[82] A. BUCHER (note 21), Art. 50 PILA, No 2, p. 462. See also M. COURVOISIER, in H. HONSELL *et al.* (eds), *Internationales Privatrecht. Basler Kommentar*, 3rd ed., Basel 2013, Art. 50 PILA, No 8, p. 412.

[83] Message concernant la révision du Code civil suisse (Partage de la prévoyance professionnelle en cas de divorce) of 29.5.2013, BBl 2013, pp. 4341 ff, at p. 4379.

[84] Marriage for All Report (note 2), p. 8147. See Art. 48 PILA and Art. 49 PILA.

1. Draft Article 52 PILA

Art. 52 PILA determines the law applicable to the matrimonial property regime and, more specifically, the scope of autonomy of will in this area. Swiss private international law allows the spouses to proceed to a choice of law, while restricting their freedom to a limited range of laws that may be chosen. As the law stands, the spouses have a choice between the law of their domicile after the celebration of marriage and the national law of one of the spouses (Art. 52 para. 2 PILA). The reform will introduce a reformulation of this text by adding sub-paragraphs a and c, without any substantial change. But the addition of a new sub-paragraph b to draft Art. 52 PILA will incorporate a new law that could be chosen by the spouses: the law of the state of celebration of marriage. In addition, the second sentence of Art. 52 para. 2 PILA has been moved to a new paragraph 3 without substantial modification. Draft Art. 52 para. 2 PILA provides that:

> "The spouses may choose:
> a. the law of the state in which they are both domiciled or will be domiciled after the celebration of marriage;
> b. the law of the state in which the marriage has been celebrated; or
> c. the law of a state of which one of them is a national." [85]

2. The Principle of Party Autonomy in Matrimonial Property Regime Matters

In the absence of a choice of law agreement, matrimonial property regimes are governed in Switzerland by the law set out in Art. 54 PILA. According to this provision, a matrimonial property regime is governed by the law of the state of domicile (or last domicile) of the spouses or, failing that, the common national law of the spouses or, failing that, Swiss law, more precisely the regime of separation of property (Art. 247 *et seq.* SCC). These connecting factors are examined when the question of the legal status of the spouses arises.

This system is, moreover, identical with the one recently adopted in European private international law, which also provides for a system of alternative connecting factors, prescribing the application of the law of the state of the habitual residence of the spouses (or, under certain circumstances, of the last habitual residence of the spouses) or, failing that, the common national law of the spouses or, failing that, the law of the state with which the spouses have the closest connection.[86] However, unlike the Swiss system, the European system sets the temporal connection at the time of celebration of marriage.[87]

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[85] Author's own translation.

[86] Art. 26 of the Matrimonial Property Regimes Regulation.

[87] See *supra* II.A.

Unlike the European legislator, the Swiss legislator has preferred to anchor the spouses in the legal environment in which they live, with the consequence that the transfer of the spouses' domicile entails a change in the law governing their matrimonial property regime.[88] In this context, it is all the more advantageous to remedy legal uncertainty by choosing the law applicable to the matrimonial property regime. A choice of law has the advantage of securing the applicable law.[89]

The validity of the choice of law is subject to a certain proximity of the spouses to the state whose law they chose to apply to their matrimonial property regime.[90] For this reason, the choice is restricted to the law of the state of domicile of the spouses after the celebration of marriage and the law of the state of which (at least) one of the (future) spouses is a national. All the national laws of the spouses may be chosen irrespective of the closeness of the spouse's connection with the state in question.[91] Restricting the scope of the eligible laws could indicate the legislator's wish to protect the weaker party from the application of an unknown law whose content would be difficult to establish without legal advice.[92] The same restriction on the choice of eligible laws is found in European private international law. Spouses may choose to submit their matrimonial property regime to the law of the state of habitual residence or to the law of the state of nationality of one of the (future) spouses at the time of the conclusion of the choice of law agreement.[93]

Partners have an additional choice of eligible laws since they may also choose the law of the state in which the partnership was registered (Art. 65*c* para. 2 PILA). The addition of this connecting factor comes from the absence of registered partnership legislation in some legal orders. The purpose of this extended choice of eligible laws is thus to guarantee the partners the possibility of choosing the law of a state in which the institution of registered partnership exists.

The opening up of marriage to same-sex couples creates the same need. Draft Art. 52 sub-para. b PILA thus offers the spouses the possibility of choosing the law of the state of celebration of marriage. This provision will reinforce the autonomy of the parties[94] and put an end to inequality based on the sexual orientation of the couple.[95] All spouses will be able to choose to apply the law of the state of celebration of marriage to their matrimonial property regime if they wish to do so.

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[88] See *supra* II.A.

[89] See Art. 53 para. 3 PILA and Art. 55 PILA. See *e.g.* C. WIDMER LÜCHINGER (note 20), Art. 52 PILA, No 5, p. 987.

[90] A. BUCHER (note 21), Art. 52 PILA, No 2, p. 468.

[91] See Art. 52 para. 2, 2nd sentence PILA. A. BUCHER (note 21), Art. 52 PILA, No 3, p. 468; B. DUTOIT (note 53), Art. 52 PILA, No 6, p. 214.

[92] C. WIDMER LÜCHINGER (note 20), Art. 52 PILA, No 10, p. 989.

[93] Art. 22 of the Matrimonial Property Regimes Regulation.

[94] Marriage for All Report (note 2), p. 8163.

[95] See A. BUCHER (note 21), Art. 65*c* PILA, No 10, p. 558, who notes that registered partners have greater autonomy of will than spouses under Art. 65*c* PILA.

The reform will introduce a paradigm shift in the role of the connecting factor of the place of marriage in the field of matrimonial property regimes. Until now, the place of celebration of marriage has been a temporal reference point within Art. 52 PILA, which only refers to the law of the state of domicile of the spouses after the celebration of marriage.[96] The choice offered to the future spouses to apply the law of the state of their future domicile thus constituted a choice of law subject to a resolutory condition, namely the fact of the spouses actually residing in said state after the celebration of marriage.[97] Understood in this way, the celebration of marriage constitutes part of the resolutory condition. The inclusion of the possibility of choosing the law of the state in which the marriage has been celebrated (draft Art. 52 para. 2 sub-para. b PILA) among the eligible laws adds a territorial dimension to this connecting factor.

Finally, it should be noted that the Swiss legislator does not intend to introduce the place of celebration of marriage as an objective connecting factor for determining the law governing matrimonial property regimes. It is not expected that the content of Art. 54 PILA will be modified by the reform. In our view, this stems from the fact that the place of celebration of marriage does not establish a close connection with the spouses, since it does not reflect the couple's centre of life.

B. The Choice of Law and the Principle of Unity of the Matrimonial Property Regime

Swiss private international law follows the principle of the unity of the matrimonial property regime, which means that all the spouses' property is governed by a single law. It follows that the spouses cannot make a partial choice of law, *i.e.* a choice of law limited only to certain elements of the marital property.[98] The spouses are not allowed to elect, in particular, the *lex rei sitae* for real property falling under the matrimonial property regime.[99]

It should be noted that partners whose "matrimonial" property regime is currently governed by Swiss law have a high degree of autonomy of will as regards the organization of their property. They benefit from a very liberal regime allowing them to agree freely on the manner in which they wish to liquidate their property regime in the event of dissolution of the partnership (Art. 25 para. 1 PA).

[96] See *supra* II.A.

[97] A. BUCHER (note 21), Art. 52 PILA, No 8, p. 469; M. COURVOISIER (note 82), Art. 52 PILA, No 11, p. 425.

[98] M. COURVOISIER (note 82), Art. 52 PILA, No 5, p. 425, who states that such a choice of law does not meet the principle of typicality of matrimonial property regimes, causes enormous problems for the liquidation of the regime and does not meet any particular need.

[99] Message PILA (note 76), p. 341; A. BUCHER (note 21), Art. 52 PILA, No 10, pp. 469 f.; B. DUTOIT (note 53), Art. 52 PILA, No 3, p. 213; C. WIDMER LÜCHINGER (note 20), Art. 52 PILA, No 29, p. 995.

The Partnership Act does not provide for a *numerus clausus* with regard to the property regime of the partners. They are granted greater freedom in their planning than spouses in terms of substantive law. This freedom is reflected, in terms of private international law, in the possibility for the partners of incorporating into their property agreement any legal provision of their choice, including rules deriving from foreign law.[100] They are also free to subject only part of their property to a law of their choice, which allows them to establish the principle of division. For their part, spouses are bound by the principle of unity of the applicable law. As this very liberal solution does not appear in the marriage for all proposal, the reform will drastically reduce the freedom of homosexual couples to organize their property. It is now clear therefore that the Swiss legislator does not intend to attach any significance to the principle of division of the applicable law. Spouses are not, and will not be, allowed to make a choice of law limited to certain elements of the marital property.

The Swiss solution is aligned with European private international law, which also follows the principle of unity of the applicable law. The law governing the matrimonial property regime applies to all property covered by that regime, whatever its nature and irrespective of its location.[101] It is therefore not possible to make a partial choice of law in European law either.

V. Conclusion

This presentation has outlined the changes in Swiss private international law that would result from the entry into force of marriage for all in Switzerland, and highlighted the future role that the connecting factor of the place of celebration of marriage will play.

The introduction of a new connecting factor into a system of private international law necessarily upsets the established balance. However, taking over the existing connecting factor of the place of registration of the partnership, by applying across the board the factor of the place of celebration of marriage, does not seem to raise any particular difficulties. The reference to the approaches developed for registered partnerships allows of a logical and coherent incorporation of same-sex marriage into the Swiss Private International Law Act. It should not be forgotten that these legislative changes are the result of the transposition of provisions that have already been the subject of doctrinal and case-law developments, which will inevitably be used in the interpretation of the new provisions.

The equivalence of registered partnerships with marriage will be complete, as the provisions on marriage will be applied to a partnership where the designated law does not contain specific provisions on partnership (draft Art. 65*c* PILA). The provisions of the Swiss Partnership Act will no longer apply as currently provided

[100] A. BUCHER (note 21), Art. 65*c* PILA, No 10, p. 558.

[101] Art. 21 of the Matrimonial Property Regimes Regulation.

for. This new rule will give rise to problems of adaptation, but this is not a new situation in private international law.

It is interesting to note that the new conflict rules will affect not only homosexual couples, but also heterosexual couples. The reform aims to reduce the significance of the sexual orientation of the couple in the overall thinking on private international family law. Although the new provisions are, at first glance, designed for homosexual couples, it is certain that they will also be useful to heterosexual couples. Examples that spring to mind are the creation of a new divorce forum and the introduction of the possibility of subjecting the matrimonial property regime to Swiss law when the marriage has been celebrated in Switzerland.

The changes in Swiss private international law will also benefit heterosexual and/or homosexual couples who have formalised their union abroad in a form other than marriage. The characterisation of such unions as registered partnerships under private international law will allow the application to them by analogy of the conflict rules laid down for marriage. The Swiss legislator has removed a doubt by specifying, in the context of the current revision, that the "registered partnership" connection category can in future include unions between persons of the same or different sex.[102] A foreign partnership between a man and a woman can therefore be characterised as a registered partnership in Switzerland. All that remains for the Swiss legislator to do is to give serious consideration to the introduction of an alternative to marriage, which could benefit couples interested in placing their union under the aegis of the law rather than under the uncertain legal regime of cohabitation.

[102] Marriage for All Report (note 2), p. 8149.