CROSS-BORDER COUPLES PROPERTY REGIMES IN ACTION BEFORE COURTS

UNDERSTANDING THE EU REGULATIONS 1103 AND 1104/2016 IN PRACTICE

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AUTHORS:

Paolo Bruno
Simona Vilkelytė
Alfonso Ybarra Bores
Agne Limante
David Carrizo Aguado
Vinciane Rosenau
Delphine Thienpont
Dafina Sarbinova
Nicolas Kyriakides
Nicholas Mouttotos
Danijela Vrbljanac
Tereza Kyselovská
Martin Kornel
Tuulikki Mikkola
Severine Cabrillac
Lucia Ruggeri
Giovanna Di Benedetto
Ilaria Riva
Maria Cristina Gruppuso
Alba Paños Pérez
Roberto Garetto
Benedita Sequeira
Filip Dougan
Luis F. Carrillo Pozo
Mercedes Soto Moya
María José Cazorla González

Dykinson, S. L.

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Publisher DYKINSON, S.L. Meléndez Valdés, 61 - 28015 Madrid
Telephone (+34) 91 544 28 46 - (+34) 91 544 28 69
e-mail: info@dykinson.com
http://www.dykinson.es
http://www.dykinson.com

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german.balaguer@gmail.com

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ÍNDICE

FOREWORD

After 2016, the European legal framework regarding cross-border couples changed: the approval of two specific instruments dedicated to the property regimes of married couples and to the patrimonial consequences of registered partnerships can be considered a turning point in European family law.

The lack of a unanimous point of view regarding family taxonomy justifies the choice of an enhanced cooperation procedure to give a partial, but effective, response to the issues and needs of cross-border couples.

Crisis in the European Union has strongly affected the path towards uniformity in European family law, but the adoption of the Regulations under review here can be considered a remarkable achievement. After the entry into force of Council Regulation (EU) 2016/1103 and Council Regulation (EU) 2016/1104, together called the Twin Regulations, professionals in the European Union can support couples with a new set of rules which define the jurisdiction and the applicable law following the principle of universality and enhancing the role of party autonomy.

As is well known, the EU has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the EU is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

In accordance with point (c) of Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), such measures may include those aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction. The measures concerning family law with cross-border implications will be established by the Council, acting in accordance with a special legislative procedure. The Council will act unanimously after consulting the European Parliament.

In this framework, the EU has facilitated understanding of and the application of the Twin Regulations and Council Regulation (EU) 650/2012 in matters of succession, which introduced the European Certificate of Succession, constituting three of the most complex and important European Regulations from the patrimonial perspective for the life of European families.

This book has the prime purpose of analysing practice through European and national case law from the entry into force of the Twin Regulations, adding hypothetical cases in

some of the countries participating in enhanced cooperation that do not yet provide for the direct application of the Regulations, and resolving them by basing judgments on private international law. The European family today is diverse, and proof of this is the different models and their evolution in recent decades, with family relationships being based not only on those constituted by marriage but also on those formed by couples living together in a stable manner.

We must also consider the increased mobility of citizens who do not always reside in the country where they were born or of which they are nationals, the most immediate consequence of which is the increasing number of transnational marriages, with the added difficulties of a marriage crisis. The private law applicable to the economic and matrimonial effects of separation, annulment, divorce and inheritance law varies depending on the state and the possible agreements reached by the parties.

The application of these Regulations, which are still unknown to many, causes difficulties due to the complexity of a subject that was traditionally linked to the national law of each country and that now goes beyond national borders in an area of freedom, security and justice in the Community, which guarantees the free movement of persons.

The objective of all the authors in this volume is to facilitate understanding of and the application of the Twin Regulations. For this purpose, the editors have divided the content into two parts. In the first, several authors analyse general questions such as the determination of the habitual residence of cross-border partners (by Paolo Bruno), and four EU Court of Justice judgments (by Simona Vikelytė, Alfonso Ybarra, Agne Limante and David Carrizo who comment on Case C-558/16 Mahnkop, Case C-218/16 Kubicka, Case C-80/19 and Case C-289/20).

The second part considers the application of the Twin Regulations in some Member States, presenting the case law and case studies from selected countries participating in the enhanced cooperation. From December 2015 to February 2016, Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden addressed requests to the Commission indicating that they wished to establish enhanced cooperation among themselves in the area of the property regimes of international couples and, specifically, of the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and also of the jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and asking the Commission to submit a proposal to the Council to that effect. With a letter to the Commission in March 2016, Cyprus, too, indicated its wish to participate in the establishment of enhanced cooperation. This book offers specific insight into the following Member States: Belgium (by Vinciane Rosenau and Delphine Thienpont), Bulgaria (by Dafina Sarbinova), Cyprus (by Nicolas Kyriakides), Croatian (by Danijela Vrbljanac), Finland (by Tuulikki Mikkola), France (by Severine Cabrillac), Germany (by Gioacchino Di Vita), Italy (by Lucia Ruggeri, Ilaria Riva, Giovanna Di Benedetto, Maria Cristina Gruppuso), Luxemburg (by Alba Paños), Malta (by Roberto Garetto), Portugal (by Benedita Sequeira), Slovenian (by Filip Dougan), Spain (by Luis Carrillo and Mercedes Soto), and Sweden (by María José Cazorla).

After more than two years since the entry into force of the Twin Regulations, it is difficult for practitioners to know which court in the country has jurisdiction in the field of applicable law, the level of recognition and enforcement of judgments on matrimonial property regimes, and the property effects that will arise. Indeed, it is confusing that, under the Regulations, the court of one state may be able to apply the law of another country, and that European families living in Europe do know the content of Article 22 of both Regulations, where it is regulated they may choose the court and applicable law.

Our intention is to systematically clarify the Twin Regulations and, in doing so, to facilitate access to and understanding of them by European citizens and professionals. We also hope to contribute to improving the life of families in times of marital crisis and of those in registered partnerships undergoing separation.

This research has been made possible by funding from the European Union's Justice Programme and this e-book has been published within the EU Justice Project EU-FamPro. We would like to thank all the professors, researchers and others who have collaborated to ensure that this study will facilitate the work of legal practitioners inside and outside Europe when applying the Twin Regulations.

It is hoped that readers will tell us through their comments and commentaries whether or not we have achieved our goal.

María José Cazorla González and Lucia Ruggeri

Almeria-Camerino, 4 June 2022

FIRST PART

A GENERAL OVERVIEW ON THE IMPLEMENTATION OF EU REGULATIONS 1103/2016 AND 1104/2016

SUBSIDIARY JURISDICTION IN REGULATION (EU) 2016/1104 AS A SAFETY NET FOR INTERNATIONAL COUPLES

Paolo Bruno[1]

DOI: 10.14679/1585

Summary: I. Jurisdiction rules in Regulation (EU) 2016/1104. II. Partners' habitual residence in the light of the ECJ's case law. III. A concrete example of difficulties in finding the competent judge in cross-border context. IV. A way forward: the provision on subsidiary jurisdiction. V. Conclusions.

Abstract: While in the complex architecture of the grounds for jurisdiction provided for in Reg. (EU) 2016/1104 habitual residence of the partners plays an important role as a connecting factor, in situations where the extreme mobility of international couples prevents the establishment of stronger links with a Member State, the Regulation provides them with the possibility to settle at least part of the claim. Subsidiary jurisdiction, working as a safety net for partners, allows the judge to rule on immovable property located in the State of the forum. The article endeavours to explore the ratio and scope of this provision.

I. JURISDICTION RULES IN REGULATION (EU) 2016/1104

Three years after they became applicable, Regulations (EU) 2016/1103 and 2016/1104 in matters of matrimonial property regimes and property consequences of registered partnerships have sparked considerably less debate than other European legislation in the field of family law[2].

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[1] Justice and Home Affairs Counsellor. Permanent Representation of Italy to the EU.

[2] On the two Regulations, see, *inter alia*: C. Ricci, *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giudiziario europeo*, Cedam, (2022); A. Bonomi, P. Wautelet (ed.) *Le droit européen des relations patrimoniales de couple*, Bruylant, (2021); I. Viarengo, P. Franzina (ed.) *The EU Regulations on the property regimes of international couples. A commentary*, Edward Elgar, (2020); P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffré Francis Lefebvre, (2019); S. Marino, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'Unione Europea*, Giuffré Francis Lefebvre, (2019); I. Viarengo, '*Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea*', in Rivista di diritto internazionale privato e processuale, 33, (2018); S. Marino, 'Strengthening the European civil judicial cooperation: the property effects of family relationships', in *Cuadernos de Derecho Transnacional,* 265-284, (2017), Vol. 9; O. Feraci, 'Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate', in *Rivista di diritto internazionale*, 529, (2016); P. Lagarde, 'Règlements 2016/1103 et 1104 du 24 Juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés', in *Rivista di diritto internazionale privato e processuale,* 676, (2016).

While the interpretation of European Regulations on matrimonial and parental responsibility matters, as well as on maintenance obligations, can rely on dozens of judgments of the Court of Justice of the EU and on an uncountable number of national decisions, the economic implications of familial ties – at least from a private international law point of view – became part of the European *acquis* quite recently, while the attempt to regulate them at international level did not enjoy great success[3].

One reason can be presumably found in the variety of national legislations that – unlike other aspects of family law – tend to regulate in very different ways the arrangements of the couples as far as their properties are concerned. Another reason may be related to the extreme complexity of their rules, especially those dealing with jurisdiction.

Whatever the reason is, these two important pieces of legislation are supposed to be of increasing importance in the years to come, and their structure deserves to be known much better, as they can prospectively be seen as a powerful tool to be made available to international couples.

In general terms, as for the Regulation that governs the property effects of registered partnerships, whose jurisdictional rules are similar to those of its "Twin" Regulation, it should be noted that Article 4 and 5 concentrate the jurisdiction on the judicial authorities competent in case of death of the partner and in case of dissolution of the partnership; in the latter, reference is made in Article 5 to the authorities seised of a request for dissolution or cancellation of a registered partnership (since the mere reference made in the other Regulation to Reg. (EC) 2201/2003 is impracticable). In Article 6, a general connecting factor is added to the analogous Article of the Regulation on matrimonial property regimes, which refers to the "*courts of the Member State under whose law the registered partnership was created*".

The following is also allowed: the choice of the *forum*, with as broad a view to coincidence between *forum* and *ius* as possible; jurisdiction based on the appearance of the defendant (who does not object, although aware of having the possibility to do so)[4]; the "alternative" competence of the authority chosen by the parties where a competent authority considers that its private international law does not recognise the registered partnership in question and therefore declines its competence[5]; a "subsidiary" competence of the territorially competent authority for the properties that are part of the property regime of the spouses; a *forum necessitatis* that can be invoked when a proceeding cannot reasonably be initiated or carried out or proves impossible in a third country (and, of course, a sufficient connection with the authority that intends to affirm its competence is present)[6]; a competence on the counterclaim, linked to that of the main claim; finally, the possibility for the parties to limit the jurisdiction

[3] Reference is made here to the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, which was signed by only five Member States and ratified by three of them.

[4] For an application of the similar provision of Reg. (EC) 2009/4 see Court of Justice of the EU, 5.09.2019, *R vs P*, C-468/18 in www.curia.europa.eu.

[5] A rather controversial provision, fiercely opposed by part of the Council during the negotiation but deemed indispensable by the rest of the delegations in order to find the right balance in the text. It is worth recalling that a substantially similar provision was inserted, with the same aim at reaching a global compromise, in Reg. (EU) 2010/1259 on the law applicable to divorce (see Article 13).

[6] Allow me to refer, specifically on this provision, to Bruno, P., *Article 11*, in Ruggeri, L., Garetto, R., (Eds.), *European Family Property Relations Article by Article Commentary on EU Regulations 1103 and 1104/2016*, Edizioni Scientifiche Italiane, (2021), 120-127.

of the judge by leaving out any assets located in a third country whose judge will presumably not recognise the decision on the property regime.

Overall, this is a rather complex system, which may actually lead to uncomfortable results for the parties in terms of proximity to the judge (as in the case of jurisdiction "assigned" to the judge who will instruct the case in matters of successions, and may be located in a very distant State) but which nevertheless is the result of a delicate negotiation balance, resulting from more than four years of confrontation between the delegations of the Member States.

The sensitivity of the issues covered by the Regulation, and the concerns of some delegations about the potential effects that the rules on property aspects could have on the management of the marriage and registered partnership which vary considerably within the European Union, led to the development of connecting factors that safeguard the procedural autonomy of the Member States and – at least in their intention – limit as much as possible a "creative" application of the rules on jurisdiction and avoid any potential denial of justice.

In this regard, we cannot but emphasise the importance of Article 9 of both Regulations, which – allowing the judge of a Member State to decline jurisdiction where its own legal system does not recognize the marriage or registered partnership in question (prescribing that it must do so "*without undue delay*") – offers a second chance to the parties. In fact, they will be able to re-submit the application before another judge among those indicated in the same Article, who will be free to decide without being conditioned by a possible previous rejection (the declination of competence, in fact, does not impinge on the merits of the claim or the validity or existence of the underlying familial tie).

Consistently, however, the declination of jurisdiction is not permitted if the legal system of the same Member State of the *forum* recognizes a decision of separation, divorce, annulment or dissolution of the marriage or registered partnership in question, since it would be a contradiction in terms of admitting (implicitly) that the respective relationships exist and refusing (expressly) to regulate their property effects.

II. PARTNERS' HABITUAL RESIDENCE IN THE LIGHT OF THE ECJ'S CASE LAW

Like in other Regulations in the field of civil judicial cooperation, also in Regulation (EU) 2016/1104 the entire system of jurisdictional rules is built around a pivotal notion: the habitual residence of the parties[7].

Literature and case law of European and national courts in this field are quite broad, and the delimitation of the concept sparked a lively debate; it is nonetheless worth recalling its first appraisal (which dates back to 1902, when the Hague Convention on guardianship[8]

[7] On the various aspects and application of this concept see, amongst all, Court of Justice of the EU, 29.11.2007, *Sundelind Lopez*, C-68/07; 2.04.2009, *A.*, C-523/07; 16.07.2009, *Hadadi*, C-168/08; 22.12.2010, *Mercredi*, C-497/10; 13.10.2016, *Mikołajczyk*, C-294/15; 17.10.2018, *U.D.,* C-393/18, all available in www.curia.europa.eu.

[8] See in https://www.hcch.net/en/instruments/conventions where the French version is available: *Convention du 12 juin 1902 pour régler la tutelle des mineurs*. For an interesting *excursus* on the evolution of this notion see also C. Spaccapelo, *Profili processuali e tutele della separazione e del divorzio delle coppie internazionali*, Pacini Giuridica, (2022), 41-43.

was elaborated) and its main features, as it contributes to understand the final choice of the legislator.

Firstly, it must be recalled that habitual residence is an autonomous and uniform concept whose content should be ascertained in the light of the factual circumstances of the case at stake. The reason for this is to be found in the inherent characteristics of this concept at national level, which in some cases shows similarities with the concept of domicile (while not identifying with it) and in others is more linked to the main centre of interests of a spouse, partner, or child.

It is little surprise, therefore, that both Brussels II*a* Regulation dealing with matrimonial and parental responsibility matters, and Maintenance Regulation – respectively – in Article 3(1)(a)(b) and Article 2(3) specify that the concept of habitual residence is replaced by that of domicile in those Member States which use this concept as a connecting factor in family matters.

Secondly, it is an exclusive concept, meaning that it contributes to establishing a strong connecting factor between the parties and the place where the competent jurisdiction is established. This implies that a party can have more than one simple residence, but just one habitual residence.

This principle has been recently established by the European Court of Justice in a case[9] where a husband of French nationality lodged an application for divorce before the French judge whereas his wife of Irish nationality contested that jurisdiction, assuming that the applicant's habitual residence was still in Ireland (although he had settled to France for professional reasons, he periodically visited their former common residence to stay with the children).

In that case, the Court of Justice held that from all the circumstances of the case it was possible to conclude that the applicant effectively had moved to France for exclusive professional reasons, but he had divided almost equally his time between the two Member States. Nevertheless, not only (from a merely literal point of view) do all the relevant provisions refer to habitual residence in singular rather than in plural, but the use of the adjective "habitual" also indicates that the residence must have certain permanence or regularity and that the transfer of a person's habitual residence to a Member State reflects the intention of the person concerned to establish there a permanent or habitual centre of his or her interests, with the intention that it should be of a lasting character.

In other terms, the concept refers to the place where the person had established, on a fixed basis, his or her permanent or habitual centre of interests. Consequently, the Court held that the aforementioned concept "*must be interpreted as meaning that a spouse who divides his or her time between two Member States may have his or her habitual residence in only one of those Member States, with the result that only the courts of the Member State in which that habitual residence is situated have jurisdiction to rule on the application for the dissolution of matrimonial ties*".

Further to this basic characteristic of the concept, the habitual residence entails both objective and subjective elements.

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[9] Court of Justice of the EU, 5 November 2021, *IB vs FA*, C-289/20 in www.curia.europa.eu.

As for the first, permanence or regularity are to be ascertained. As Advocate General Szpunar noticed in Case C-501/20[10], in terms of the key circumstances for establishing the habitual residence of a spouse, the environment of the individual concerned is particularly important, therefore the stability, regularity of the residence and the integration of the individual into the social and family environment are relevant.

As for the subjective element, namely the intention of the individual to establish the habitual residence in a specific place, it plays an important role in the collection of all the circumstantial evidence based on which the judge must decide whether or not the presence of a person in a certain place is to be considered stable. However, this element cannot by itself prevail over the objective element, otherwise legal certainty would be adversely affected[11].

In the light of the foregoing, we can conclude that the autonomous and uniform concept of habitual residence is a *de facto* notion, whose content has to be shaped depending on the factual circumstances of the cases. This conclusion entails both positive and negative consequences: on the one hand, the concept satisfies the need for preserving elasticity and discretion in the application of a general and abstract rule to the specificities of the case; on the other hand, it gives rise to discrepancies in the case law at national level which can somehow result in a certain unpredictability of the judicial authorities' decisions.

This necessarily short reconstruction of the concept of habitual residence, primarily based on the ECJ's decisions in cases dealing with matrimonial and parental responsibility matters, is still valid when considering the status of a partner and the property consequences of his or her registered partnership.

Although on this specific subject no judgment of the European Court of Justice has been delivered so far, there is no doubt that the bulk of features listed above is entirely applicable to the identification of a partner's habitual residence. Moreover, it is easy to predict that in a near future the Court will be called upon to elaborate on this – because of the increased mobility of partners, as it happens for spouses – and will confirm the case law quoted above.

As we have anticipated at the beginning of this essay, chapter II of Regulation (EU) 2016/1104 takes into consideration the habitual residence as a connecting factor both indirectly and directly.

It is indirectly considered in Article 4 which establishes a direct link with the judge competent in the event of the death of one of the partners (who, according to Article4 of Reg. (EU) 2012/650, is the judge of the Member State where the deceased had its habitual residence at the time of the death). The same logic applies for Article 5, which establishes that the decision on the property consequences should be dealt with by the judicial authority which is tasked to decide on the dissolution or annulment of that registered partnership.

The *ratio* behind these two provisions is to be found in a need to concentrate jurisdiction, in order to streamline the decision-making process of the competent judge who can avail himself of a clear picture stemming from all the evidence brought before him.

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[10] Opinion of Advocate General Szpunar, delivered on 24 February 2022 in case of *MPA vs LC D N M T,* C-501/20 also in www.curia.europa.eu.

[11] In this sense see ECJ, 8.06.2017, *OL vs PQ*, C-111/17 in www.curia.europa.eu.

However, it is also directly and expressly considered in Article 6 (jurisdiction in other cases), according to which "*where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of the Member State (a) in whose territory the partners are habitually resident at the time the court is seised, or failing that, (b) in whose territory the partners were last habitually resident, insofar as one of them still resides there at the time the court is seised, or failing that, (c) in whose territory the respondent is habitually resident at the time the court is seised (…)*".

This is a provision that can be invoked only when the attempt to concentrate the jurisdiction failed, either because proceedings on succession or dissolution of the familial tie are already terminated, or because they have not been lodged yet, or because the conditions required in Article5(2) are not fulfilled[12].

It is therefore evident that this important connecting factor is of major importance also as regards the allocation of the competence in cross-border proceedings focusing on the property side of a broader dispute between partners.

III. A CONCRETE EXAMPLE OF DIFFICULTIES IN FINDING THE COMPETENT JUDGE IN A CROSS-BORDER CONTEXT

The particular complexity of the jurisdictional rules in Regulation (EU) 2016/1104 can create a genuine sense of disorientation in practitioners, who can get lost in the intricacies of the different provisions that nevertheless, as we will try to demonstrate, address practical problems and provide for a valuable solution.

An example can be useful in order to navigate the entire system.

Let us assume that Carla, an Italian citizen living in Rome and working there in public administration, meets Fatima, a Moroccan citizen who resides temporarily in the same city, where she's been deployed by her employer to open the Italian branch of a company.

They fall in love and decide to enter into a registered partnership, governed by Italian law (Legge n. 76/2016).

A couple of years later Carla obtains a loan for the purchase of an apartment in Rome, which – in the absence of a different choice by the partners – automatically becomes an asset of the joint property provided for by the Italian law on civil registered partnerships.

A few months afterwards, Carla is selected for a post of Seconded National Expert to the European Commission in Brussels, but Fatima fiercely opposes the idea of Carla's relocation and threatens her with breaking their relationship.

Having accepted the offer, Carla leaves for Brussels, and Fatima continues to reside in their apartment (whose loan is however entirely reimbursed by Carla) for one year, after which the couple enter into an irreversible crisis which eventually leads Fatima to return to Morocco.

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[12] See on this point (although with reference to the corresponding provision of Reg. (EU) 2016/1103) <c. Ricci, *Giurisdizione,* n. 1 above, 200.

Carla discovers soon that, before leaving, Fatima – unbeknown to her – granted a couple of common friends the right to reside in the apartment, although temporarily.

Despite all the efforts to convince them to leave the flat and being impossible to contact Fatima (who in the meantime returned to her home country without communicating any detail of her exact location), Carla is facing a very complicate situation: she is still bound by the registered partnership with Fatima, whose whereabouts she does not know, and her apartment is unlawfully occupied by third persons.

Carla ultimately decides to lodge before the Italian judge a proceeding *in absentia* against Fatima, claiming the dissolution of the joint property and the eviction of the people from her apartment. The Italian judge is therefore faced with the intricacies of the jurisdiction rules of Reg. EU 2016/1104 and raises some doubts about his jurisdiction over the case[13].

The correct judicial approach to be followed should start from the analysis of the general grounds for jurisdiction, namely Article4 and 5, in an attempt to preserve the genuine objective of the Regulation: to ensure as much as possible the concentration of jurisdiction in order to favour the coincidence between *forum* and *ius*, so beneficial for the judge in his endeavour to solve the dispute and – at the same time – for the parties that will most likely obtain a fairer judgment.

In the present case, however, none of them is applicable. Fatima being still alive, Carla did not ask the judge to dissolve the registered partnership with Fatima, perhaps because she would like to give her a second chance. She only had recourse to the judge to secure a factual situation which is for her a source of trouble and economic distress.

Against this backdrop, the judge has to follow the order of the other grounds for jurisdiction and firstly try to ascertain whether he is competent according to the connecting factors in Article 6.

This provision lists a number of cascade criteria whose first in ranking (lett.a) refers to the judge "*in whose territory the partners are habitually resident at the time the court is seised*", which is not applicable in the case since Carla and Fatima do not have a common habitual residence at the moment she lodged the case (she's been living in Brussels for more than one year before the crisis).

It is therefore the turn of the second criterion (lett.b) which refers to the judge "*in whose territory the partners were last habitually resident, insofar as one of them still resides there at the time the court is seised*". Yet also this one is not useful to the judge, as – although Rome was the last common habitual residence – in the meantime Fatima left for an unknown destination and is no longer resident in Rome.

The third ground for jurisdiction (lett.c) leads to the judge "*in whose territory the respondent is habitually resident at the time the court is seised*", which is not only vaguely known by Carla (who was informed of her partner's return to Morocco, without any further

[13] We will not address here, as it is not relevant in this case, the issue of the different (internal) functional competence of the Italian judge over the dissolution of the registered partnership and the settlement of the joint property.

indication of the exact location) but clearly inapplicable as Article 6 specifies that jurisdiction shall lie with the courts of a Member State[14].

As for the fourth criterion (lett.d), namely the judge "*of the partners' common nationality at the time the court is seised*", it is evident that also this one is inapplicable in the case at stake: Carla and Fatima do not have a nationality in common.

The last connecting factor (lett.e) refers to the court of the Member State "*under whose law the registered partnership was created*", namely the Italian one. This is really a provision of paramount importance, purposedly introduced in order to give partners the possibility to rely on a judge who in the great majority of the cases will not have any reason for declining jurisdiction.

It is a common-sense provision, which relies on the fact that the law of a Member State which allows the registration of a partnership should necessarily also foresee its dissolution and the settlement of the property consequences thereof.

However, there can be procedural constraints which (although not amounting to an impossibility to obtain a decision on this point) may nevertheless make it difficult.

Therefore – only for the purpose of our example – let's add another layer of complexity and imagine that according to the Italian law the judge is prevented to rule on the sole property consequences of the registered partnership whereas the dissolution of the latter is not simultaneously invoked[15]. This means that, since we have already stated that Carla did not ask for the dissolution of her partnership, the Italian judge would dismiss the case.

In the present example, not even Article7 referring to the choice of court is applicable, as the couple did not make any agreement on this (nor Carla invoked it in her claim) and the same goes for Article8 which regulates the case of a defendant appearing before a non-competent judge without expressly contesting the lack of jurisdiction: however, the Italian proceeding is being conducted *in absentia*, thus there is no room for applying that provision.

The next ground for jurisdiction would be Article9, which sets out an alternative jurisdiction giving the possibility to the judge "*whose law does not provide for the institution of registered partnership*", to decline jurisdiction without undue delay: it is clearly not the case of Italian law, which foresees this familial tie and would be applied without problems.

As we have seen, in a hypothetical case like the one above, Carla would be practically deprived of her right to obtain a decision on the property consequences of her registered partnership, as none of the grounds for jurisdiction applies. This would be an unacceptable situation, involving her right to have access to justice as ensured by the EU Charter of Fundamental Rights and the European Convention on Human Rights.

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[14] It is also worth underlying that the provision refers exclusively to the territory of a Member State participating in the enhanced cooperation. Therefore, if Fatima had relocated to a third-State or to a non-participating EU Member State, the result would have been the same.

[15] This is not actually the case in Italian law, insofar as Article 193 of the Civil Code allow spouses (and partners, in the light of the reference to it made by Article 1(13) of Law 76/2016) to ask the judge in specific circumstances for a judicial dissolution of the joint property.

IV. A WAY FORWARD: THE PROVISION ON SUBSIDIARY JURISDICTION

The scenario described in the previous chapter is not to be considered as a mere academic exercise, or purely theoretical. We already anticipated that the increased mobility of international couples, be they married or engaged in a registered partnership, has created the conditions for stress-testing the architecture of the provisions in matters of jurisdiction.

Moreover, procedural constraints specifically linked to the national legislation could result in additional albeit unintentional obstacles.

Two cases brought before the ECJ, already quoted in the previous chapters of this essay – notably cases C-289/20 and C-501/20 – are good examples of how difficult can be, when dealing with couples that move around the globe but retain strong links with other countries, to find the competent judge.

However, the European legislator, when negotiating Regulation (EU) 2016/1104, took clearly into consideration this need and decided to foresee a sort of escape clause, whose aim is at squaring the circle in cases where all the major connecting factors fail to operate.

Article 10 of the Regulation in comment states, therefore, that "*Where no court of a Member State has jurisdiction pursuant to Articles 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to point (e) of Article 6, Article 7 or 8, the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both partners are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question*".

As Recital 39 confirms, it is with the aim of ensuring that the courts of all Member States may, on the same grounds, exercise jurisdiction in relation to the property consequences of registered partnerships, that the Regulation should provide in an exhaustive way the ground on which such subsidiary jurisdiction may be exercised.

The ground for subsidiary jurisdiction is not a brand new one: it has already been implemented by Reg. (EU) 2009/4 on maintenance obligations although, in the latter, Article 6 establishes a principle based on common citizenship of the parties, rather than on the presence of common immovable properties.

However, it has taken on a more defined physiognomy in the Regulation on succession where, for what is relevant here, the general rule that establishes the competence to decide on the entire succession (paragraph 1 of Article 10) is accompanied by the hypothesis (referred to in paragraph 2) of a jurisdiction reduced only to the inheritance assets present in the territory of the judge who intends to rule on the case where no judicial authority of a Member State is competent under paragraph 1.

As we have already underlined with reference to the analogous provision of the Succession Regulation, this provision brings advantages and disadvantages.

As for the advantages, the Succession Regulation essentially tends to avoid the denial of justice that could occur if the country of the last habitual residence of the deceased were to be considered competent only for the assets located in his territory, thus leaving those located outside in a legal "limbo". It also has the undoubted advantage of not requiring proof that a

similar procedure in the third country would prove impossible or too burdensome (as it is the case for Article 11 on the *forum necessitatis*).

Mutatis mutandis, the same *ratio* applies for Article10 of Regulation (EU) 2016/1104, which recognizes a limited jurisdiction in favour of the authorities of the Member States where there are common assets of the partners, making those authorities competent to decide not on the entire community of properties, but exclusively on the assets located in their own country of origin[16].

As for the disadvantages[17], a remark can be made: this provision goes in the direction of fragmentation of jurisdiction criteria, and can result in a dissociation between *forum* and *ius* (which, on the other hand, other provisions try to bring together); creates the conditions for a possible positive conflict of jurisdiction between Member States where the assets are located; ultimately can give rise to *forum shopping* in cases where common assets are disseminated in Member States and third States.

This said, it has also to be acknowledged that the possible drawbacks in its application do not seem to overcome the added value described above. In our opinion, every provision aimed at streamlining the smooth development of a judicial proceeding and giving the judge a tool for deciding at least part of the dispute should be welcomed; this is the interest of the parties and ultimately of the correct operation of the entire cross-border system of civil justice.

V. CONCLUSIONS

It cannot be doubted that private international law is a matter of growing complexity, as it reflects the increased mobility of mixed families which – thanks to the opportunities that a flexible labour market offers nowadays – may relocate several times, more often within (but not infrequently also outside) the European Union.

This situation triggers legal problems that only an efficient judicial cooperation may solve, or at least alleviate. However, for judges and lawyers to be ready to cope with the intricacies of EU Regulations and international conventions, spreading the knowledge on this matter is of paramount importance.

As far as the property consequences of the registered partnership are concerned, the European legislator has provided legal practitioners with a complex but very useful instrument, aimed at streamlining the solution of all the relevant problems a couple of partners can face.

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[16] The provision is somehow linked to that of Article 13 on the limitation of proceeding, which enables the judge who retains jurisdiction to rule only on the assets located in a Member State, leaving out of the judicial proceeding those located in a third State whereas it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State. However, this is subject to a request from at least one of the parties and cannot be done *ex officio*.

[17] Drawbacks of the application of this rule in the context of the Succession Regulation have been highlighted inter alia by O. Feraci., 'La nuova disciplina europea della competenza giurisdizionale in materia di successioni mortis causa', in *Cuadernos de Derecho Transnational*, 291-314, (2013).

Reg. (EU) 2016/1104 contemplates several grounds of jurisdiction, each one of them helping the parties of a civil proceeding to navigate among all the possible competent authorities.

The *fil rouge* which links them is, like in other EU Regulations in family law, the concept of habitual residence as a strong connecting factor between the parties and the territory of the Member State where the competent judge is located. In addition to this need of uniformity with other valuable instruments, the system of grounds for jurisdiction is shaped in such a manner as to avoid the risk for a couple being deprived of access to justice.

While the Regulation in question is relatively recent and therefore the European Court of Justice has not yet been called to interpret it directly, it has to be noticed that several provisions are identical to those of other civil justice instruments; legal practitioners can therefore count on the existing case law and on a conspicuous literature which will undoubtedly offer guidance and a solid base for reflection.

INTERACTION BETWEEN FAMILY LAW AND SUCCESSION LAW IN THE CJEU JUDGMENT IN CASE C-558/16 *MAHNKOPF*

Simona Vilkelytė[1]

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Summary: I. Introduction. II. The facts of the *Mahnkopf* case and the reference for a preliminary ruling. III. "*Zugewinngemeinschaft*" in German law. IV. The CJEU judgment. 1.Mutual exclusivity of the Succession Regulation and the Matrimonial Property Regulation. 2. Delimitating 'estates' and 'matrimonial property regimes' in '*Zugewinngemeinschaft*'. 3. Content and effects of the European Certificate of Succession. V. Consequences of the *Mahnkopf* decision for the situations where succession and matrimonial property law diverge. VI. Concluding remarks.

Abstract: The paper analyses Case C-558/16 *Mahnkopf*, where the CJEU was asked to clarify the delimitation of the rules on succession and matrimonial property regimes. In particular, the referring court sought to ascertain whether the surviving spouse's share of an estate under German family law provisions may be recorded in a European Certificate of Succession. These and linked questions are discussed herein.

I. INTRODUCTION

The European succession law is based on the premise that European individuals should be allowed to plan their succession ahead of time, particularly when it involves cross-border issues. To this end, the European Parliament and the Council of the European Union have adopted Regulation (EU) No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (the Succession Regulation)[2], that applies to the successions of natural persons who died on or after 17 August 2015. Since its entry into force, the Court of Justice of the European Union (the CJEU, the Court) has already had the opportunity to interpret the provisions of the Succession Regulation several times.[3] One of the first cases where the Succession Regulation

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[1] Researcher at the Law Institute Lithuanian Centre for Social Sciences.

[2] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. OJ L 201, 27.7.2012, p. 107–134.

[3] Case C-218/16, *Kubicka*, EU:C:2017:755; Case C-558/16, *Mahnkopf*, EU:C:2018:138; Case C-20/17, *Oberle*, EU:C:2018:485; Case C-658/17, *WB*, EU:C:2019:444; Case C-102/18, *Brisch*, EU:C:2019:34; Case C-80/19, *E. E.*, EU:C:2020:569; Case C-301/20, *Vorarlberger Landes- und Hypotheken-Bank*, EU:C:2021:528; Case C-422/20, *RK*, EU:C:2021:718.

was interpreted was the *Mahnkopf* case (C-558/16). In it, the question revolved around the delimitation of the rules on succession and the rules on matrimonial property regimes.

II. THE FACTS OF THE MAHNKOPF CASE AND THE REFERENCE FOR A PRELIMINARY RULING

The factual circumstances of the *Mahnkopf* case were quite simple. Mr Mahnkopf died on 29 August 2015. At the time of his death, he was married to Mrs Mahnkopf. Both spouses had German nationality and were habitually resident in Germany. They had one son. The spouses had not concluded a marriage contract, and the deceased had made no disposition of property upon death. The spouses were subject to the German statutory separate property regime with equalisation of accrued gains ("*Zugewinngemeinschaft*"), which means that each spouse keeps its own property, but gains that have been made during the marriage are equalised when a marriage ends (by a divorce or by the death of one spouse)[4].

After the death of her spouse, Mrs Mahnkopf initiated the inheritance procedure. At the request of Mrs Mahnkopf, the German probate court with jurisdiction in respect of Mr Mahnkopf's estate issued a national certificate of inheritance according to which the surviving spouse and the descendant each inherited one-half of the deceased's assets. The surviving spouse received a share of one half of the estate because under the German Civil Code (*Bürgerliches Gesetzbuch* - BGB), the surviving spouse's share on intestacy (as against descendants of the deceased) is ¼ (paragraph 1931(1) BGB) plus under the dissolution of the matrimonial property regime pursuant to the death of one spouse the surviving spouse is entitled to a lump-sum of ¼ of the estate (paragraph 1371(1) BGB).

Then Mrs Mahnkopf applied for a European Certificate of Succession (ECS), which she needed in order to record the transfer of ownership of the property located in Sweden to the heirs. This application was rejected by the national court, which held that paragraph 1371(1) of the BGB concerned questions relating to matrimonial property regimes, which did not fall within the scope of Succession Regulation.

Consequently, the deceased's spouse challenged this judgment by an appeal lodged with the Higher Regional Court, Berlin (Germany). The appeal court considered that consultation with the CJEU was needed and decided to refer the several questions for the preliminary ruling. The main preliminary question read as follows:

> "Is Article 1(1) of the Succession Regulation to be interpreted as meaning that the scope of the regulation ('succession') also covers provisions of national law which, like paragraph 1371(1) of the BGB, govern questions relating to matrimonial property regimes after the death of one spouse by increasing the share of the estate on intestacy of the other spouse?".

[4] The same applies in Germany to registered partners whose statutory matrimonial property regime is also the community of accrued gains (Section 6 of Act on Registered Life Partnerships). It should be noted, that this Act shall apply only to life partnerships entered prior to 1 October 2017 in the Federal Republic of Germany (before the introduction of marriage for the same-sex couples) and life partnerships entered abroad, to the extent that German law is applicable thereto.

The referring court also sought to ascertain whether the surviving spouse's share of an estate under paragraph 1371(1) of the BGB may be recorded in a European Certificate of Succession. In addition, the referring court wished to clarify what effects should be attached to any inclusion of information concerning that share in the contents of a European Certificate of Succession.

III. "ZUGEWINNGEMEINSCHAFT" IN GERMAN LAW

Under German law, the default (statutory) family property regime is the community of accrued gains (*Zugewinngemeinschaft*). In other words, unless spouses agree otherwise, the spouses live under the *Zugewinngemeinschaft* property regime if no different agreement was made. This default property regime is regulated in paragraphs 1363-1390 of the BGB.

Even if, at first sight, the *nomem iuris* of such a legal regime could make one suppose the immediate establishment of a joint property regime at the very moment of the conclusion of a marriage, this is not entirely true. Moreover, the *Zugewinngemeinschaft* regime may not be considered fully comparable to the separation of property regime. If the spouses live under the statutory regime, their property (brought to and acquired throughout the marriage) does not become common property. However, the accrued gains acquired during the marriage are equalised when the property regime ends (paragraph 1363, paragraph 2 of the BGB). There are different rules applying whether the statutory property regime ends by the death of a spouse or for other reasons (such as divorce) (paragraph 1371 et seq. of the BGB).[5]

The German legislator designed the *Zugewinngemeinschaft* model to ensure equilibrium between the need to guarantee certain individual freedom in the property management and the necessity to compensate for the disadvantaged economic condition of the economically weaker partner at the moment of the marriage dissolution. In case of death of a spouse, *Zugewinngemeinschaft* regulates the compensation of the gain during the marriage by increasing the legal portion of the inheritance of the surviving spouse by a quarter of the inheritance. This arrangement applies irrespective of the existence or the actual amount of any gain.

It should be noted that in the laws of the EU Member States, various strategies are used to protect the rights of the surviving spouse after the death of the other spouse. In order to do this, some states employ mechanisms that are typical of succession law, such as preferring the surviving spouse over the other heirs. Other countries place a greater emphasis on marriage property regulations while simultaneously disqualifying the spouse as an heir or limiting his or her succession rights.[6] However, it is difficult to find examples of such models in their pure form. Often, we come across a mixed model in which the concern to protect the surviving spouse's property interests is met by employing several instruments derived from both the law of succession and the law on matrimonial property. Such a complex approach is taken in order to ensure a coherent system, which would guarantee the desired balance between the

[5] T. Pertot, 'Germany ', In *Family Property and Succession in EU Member States: National Reports on the Collected Data*. Ed. by Ruggeri, l., Kunda, I, Winkler, S. Sveučilište u Rijeci, Pravni fakultet (University of Rijeka, Faculty of Law, Rijeka, Croatia, 2019), 724: 407-426.

[6] See in this regard E.D. Graue, 'The Rights of Surviving Spouses under Private International Law', *The American Journal of Comparative Law*, Vol. 15, 164-165, (1966-1967).

interests of the surviving spouse, the other heirs and legatees and the creditors. Succession and matrimonial property laws are generally balanced within a given legal system, even if it is not always apparent.

This gets more complicated in cases with cross-border elements. Where the facts of a case refer to the law of another state, the applicable law has to be determined by reference to EU private international law instruments or national private international law of the court or the authority hearing the case. Most legal systems provide for separate conflict-of-law rules for succession upon death and for the effects of marriage on the property relations between spouses. These rules often lead to different laws as a result of different connecting factors.

The question of whether equalisation of the accrued gains ("*Zugewinngemeinschaft*") is the question of matrimonial property or succession has caused the courts and academics headaches even before the adoption of the Matrimonial Property Regulation and the Succession Regulation. All solutions had been on the table: some had advocated classifying the issue as a part of succession law only, others had argued for characterising the issue as belonging to the field of matrimonial property law, and a minority opinion had developed a so-called 'double characterisation', i. e. accepting the spouse's share in the estate only if both applicable succession and matrimonial property law would countenance such solution. In 2015, the German Federal Court of Justice (Bundesgerichtshof – BGH)[7] decided that the 'flat-rate equalisation' of accrued gains was to be characterised as 'purely matrimonial property law' in the sense of private international law rules. For the BGH, the argued provision aims at winding up the matrimonial property regime as a special allocation of the spouses' property during and because of their marriage; it concerns the compensation of contributions made by the spouses and does not seek the distribution of the deceased's assets in view of close personal relations but merely makes use of a means taken from succession law.

After hearing the *Mahnkopf* case, CJEU presented its interpretation of such rules. The judgment changes not only the German legal practice but also gives rise to future legal problems linked to delimiting succession and matrimonial property issues.

IV. THE CJEU JUDGMENT

The request for a preliminary ruling was registered at the Court of Justice on 3 November 2016. On 13 December 2017, Advocate General Maciej Szpunar delivered his opinion, and on 1 March 2018, the judgment of the CJEU gave the answers to the preliminary questions raised by the Higher Regional Court of Berlin. Below, the main arguments of the CJEU are discussed.

1. Mutual exclusivity of the Succession Regulation and the Matrimonial Property Regulation

Although EU regulations typically clearly exclude certain issues out of their scope and each expressly defines its own scope of application, the problems with the delimitation of

[7] Bundesgerichtshof of 13 May 2015, IV ZB 30/14, BGHZ, *FamRZ 2015/14*.

instruments still appear.[8] The Succession Regulation and the Matrimonial Property Regulation govern two very closely connected areas of law. Even though the dividing line between the two instruments is relatively clear[9], and the Succession Regulation and the Matrimonial Property Regulation must be seen as complementary, and their scope should not overlap, both EU regulations give field for contradictions. The Succession Regulation indicates that the law applicable to succession also determines the estate claims of the surviving spouse or civil partner[10] and the Matrimonial Property Regulation states that it covers the disputes under property law because of separation of the couple or the death of one of the spouses[11].

Delimitation of these instruments was of material importance in the *Mahnkopf* judgment. The determination of the boundaries between them largely depends on the exact meaning of 'succession', on the one hand, and 'matrimonial property regime', on the other.

In his opinion[12], AG Szpunar suggests that the Matrimonial Property Regulation applies to issues relating *inter alia* to the determination of which property rights form part of an estate and not to an assessment of the rights of the surviving spouse as regards what already forms part of the estate. As an example, AG Szpunar states that if the spouses were linked by a regime based on joint ownership, under the law identified by the provisions of the Matrimonial Property Regulation it would be necessary to establish whether movable property acquired during the marriage is a joint asset and to which of the spouses it will be allotted after that regime has been dissolved (paragraph 77).

Taking into account the opinion of AG Szpunar, CJEU stated that although Matrimonial Property Regulation was adopted in order to cover, as stated in Recital 18 thereof, all civil-law aspects of matrimonial property regimes, including both the daily management of matrimonial property and the liquidation of the matrimonial property regime, in particular as a result of the couple's separation or the death of one of the spouses, it expressly excludes from its scope, pursuant to Article 1(2)(d), the 'succession to the estate of a deceased spouse'. In such a way, the mutual exclusivity of the regulations was underlined.

2. Delimitating 'estates' and 'matrimonial property regimes' in '*Zugewinngemeinschaft*'

The idea behind paragraph 1371(1) of the BGB is to achieve a settlement under matrimonial property law by way of inheritance law. This, however, blurs the line between matrimonial property and inheritance regulation. The Commission proposed that in the situation under consideration it was necessary to adopt a functional approach and refer to the

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[8] On delimination of pure property dispute and matrimonial property see C-67/17 *Todor Iliev v BlagovestaIlieva*; on delimination of successions and matrimonial property see C-558/16, *Mahnkopf*, on delimination of maintenance obligation and matrimonial property see C-220/95 *Van den Boogaard v Laumen*.

[9] Article 1(2)(d) of the Succession Regulation states that it is not applied to the questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage. Similarly, Article 1(2)(d) of the Matrimonial Property Regulation expressly excludes from its *ratione materiae* matters related to succession caused by death of the surviving spouse.

[10] Article 23(2) (b) of the Succession Regulation

[11] Recital 18, Article 3(1) (a) of the Matrimonial Property Regulation

[12] Opinion of A. G. Szpunar., in Case C-558/16, *Mahnkopf*, EU:C:2017:965.

purpose of the provision concerned in national law. The German Government argued that assessing whether the purpose of paragraph 1371(1) of the BGB related to 'estates' within the meaning of Article 1(1) of Succession Regulation or to 'matrimonial property regimes' within the meaning of Article 1(2)(d) thereof, the purpose of paragraph 1371(1) of the BGB was to effect the apportionment arising from a matrimonial property regime and therefore that it was a provision which fell within the scope of the law applicable to matrimonial property regimes. The fact that this was done by granting the surviving spouse a share of the estate was intended merely to simplify the apportionment between the heirs.[13]

After analyzing the case law concerning the rules on jurisdiction, AG Szpunar suggested that the exclusion of 'matrimonial property regimes' from the scope of the EU acts on judicial cooperation in civil matters related primarily to any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof, including the issue of the inclusion of individual assets in the deceased's estate or as property to be divided between the spouses (paragraph 91). A provision like paragraph 1371(1) of the BGB applies only upon the death of a spouse. After the death of the spouse, there can still be a division of assets between the estate and the property of the surviving spouse. However, the fundamental purpose of paragraph 1371(1) of the BGB does not appear to be to divide the assets or liquidate the matrimonial property regime.[14] It serves instead to define the position of the surviving spouse in relation to the other heirs. It determines the surviving spouse's share of the estate (paragraph 93).

The CJEU considered that paragraph 1371(1) of the BGB concerned not the division of assets between spouses but the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime but rather the determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Therefore, such a provision principally concerns the succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, the CJEU ruled that a rule of national law such as that at issue related to the matter of succession for the purposes of the Succession Regulation (paragraph 40).

In such a way, the CJEU opted for a broad understanding of the notion of 'succession'. This is in line with the earlier case law, for instance (albeit in a different context) the reasoning in the *Kubicka* case.[15] Since in the *Mahnkopf* case the CJEU stated that it is decisive that the objects of the claim are already part of the estate (paragraph 40), it seems that it considers that there must be a settlement under the matrimonial property law before the estate is formed.[16] However, this approach was not further elaborated.

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[13] Opinion of A. G. Szpunar, in Case C-558/16, *Mahnkopf*, EU:C:2017:965, para 36.

[14] *This statement was supported by the fact that the increase in the statutory share of the inheritance by a quarter is independent of whether the spouses have made any gains at all, it constitutes a particular 'bonus' for marriages which do not break down in the lifetime of the spouses.*

[15] Case C-218/16, *Kubicka,* EU:C:2017:755.

[16] B. Lurger, *The new EU regulations on property regimes of international couples,* ERA Conference "Panning cross-border succession", Trier, (2019).

3. Content and effects of the European Certificate of Succession

The Succession Regulation helps to eliminate obstacles to the free movement of persons within the internal market. This is reflected in the second and third sentences of Recital 7 of the Succession Regulation, which clarifies that in the European area of justice the rights of heirs and legatees, of other persons close to the deceased and of creditors of the estate must be effectively guaranteed. To that end, the Succession Regulation creates, according to Recital 8, a uniform certificate, namely the European Certificate of Succession. As is confirmed by Recital 67, it is intended to enable succession with cross-border implications within the European Union to be settled speedily, smoothly and efficiently. Recital 71 of the Succession Regulation further clarifies that the European Certificate of Succession should have an evidentiary effect and should be presumed to demonstrate accurately elements that have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death, but the evidentiary effect of the Certificate should not extend to elements which are not governed by this Regulation, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased.

In the *Mahnkopf* case, the Higher Federal Court of Berlin refused to enter the data related to '*Zugewinngemeinschaft*' into the European Certificate of Succession. The Higher Federal Court considered that this information was related to matrimonial property, which is not regulated by the Succession Regulation.

In such a case – if in the European Certificate of Succession there is no recording of increased share – the European Certificate of Succession is 'incomplete'. However, pursuant to Article 68(h) of the Succession Regulation, the European Certificate of Succession also includes "information concerning the matrimonial property regime or equivalent property regime", that is why, even if an increased share is considered as the issue of matrimonial property, it could be entered into the European Certificate of Succession. However, this would not solve the main problem because the effect of such information is quite limited. Under Article 69(2), the effects of the European Certificate of Succession, and in particular its evidentiary effects and the presumption of accuracy that attaches to it, only concern "elements which have been established under the law applicable to the succession or under any other law applicable to specific elements". Thus, if the law applied to the matrimonial property regime differs from the one applied to succession, the information concerning increased share as the issue of the matrimonial property will not have any evidentiary effect.

After concluding that paragraph 1371(1) of the BGB should be regulated by the law of succession instead of the law applicable to matrimonial property, AG Szpunar stated that classification of the share falling to the surviving spouse under paragraph 1371(1) of the BGB as succession-related allows information concerning that share to be recorded in the European Certificate of Succession, with all the effects described in Article 69(2) of the Succession Regulation. On the other hand, treating that provision as a matter covered by the law applicable to matrimonial property regimes would not allow information on the surviving spouse's share to be covered by the presumption of accuracy and the effectiveness of the provisions of the Succession Regulation, which create the European Certificate of

Succession, would not thus be assured (paragraph 102). The same position was reiterated in the judgment of the CJEU.[17]

Such a conclusion in the *Mahnkopf* case ensures the consistency of outcomes when there is no danger that the European Certificate of Succession may not produce effects in the other Member States because that Member State applies divergent conflict-of-law rules. But it also confirms that the effects of the European Certificate of Succession do not extend to the information it contains concerning the marriage contract and/or the matrimonial property regime. Such a position could be understood before the entry into force of the Matrimonial Property Regulation, as trying to prevent inaccurate benefits of the evidentiary effects and the presumptions attached to the European Certificate of Succession, when information concerning the matrimonial property regime had to be determined under the law designated by the national choice of rules in force in the Member State of the forum. However, after harmonising conflict-of-law rules, this reasoning is not applicable anymore as far as the participating Member States are concerned. Therefore, as noted by Bonomi, "the effects of the European Certificate of Succession should now also extend to information relating to matrimonial property, as far as the European Certificate of Succession is issued in a Member State participating in the enhanced cooperation and used in another participating Member State. A specific provision to that effect could have been included in the Matrimonial Property Regulation".[18]

V. CONSEQUENCES OF THE *MAHNKOPF* DECISION FOR THE SITUATIONS WHERE SUCCESSION AND MATRIMONIAL PROPERTY LAW DIVERGE

While the law applicable to the matrimonial property is, in principle, stable due to the connecting factor of the first common habitual residence of the spouses (first connecting factor if no choice of law was made), the law applicable to succession might be changed much more easily – it suffices that the deceased spouse had acquired a new habitual residence before his or her death. Thus, the extension of the Succession Regulation to the detriment of the Matrimonial Property Regulation, which was provided by the CJEU in the *Mahnkopf* case, in some cases might disappoint legitimate expectations of the surviving spouse with regard to the allocation of accrued gains. Moreover, there may be different outcomes of overcompensation or lack of compensation the surviving spouse could receive when German succession law is applied together with foreign matrimonial property law or foreign succession law is applied together with German matrimonial property law.

In the cases where German succession law is applied with foreign matrimonial property law, the provision of increased share of the surviving spouse, which after the *Mahnkopf* case is a part of German succession law, may be applied only if under the foreign law the spouses lived in a matrimonial property regime which corresponds to the matrimonial property regime of the community of accrued gains presupposed by the German provision. It is, therefore, a question of whether the German community of accrued gains can be substituted by a

[17] CJEU, 1.3.2018, in case C-558/16, *Mahnkopf*, ECLI:EU:C:2018:138, 42.

[18] A. Bonomi, *The Regulation on Matrimonial Property and its operation in succession cases – its interaction with the Succession Regulation and its impacts on non-participating Member States*, Problemy Prawa Prywatnego Międzynarodowego T. 26, (2020), 77.

foreign matrimonial property regime. This does not require 1:1 correspondence, but rather a functional congruence of the property regimes in question. For example, if the matrimonial property regime settled under the rules of the property law is a joint property[19], there is no room for the application of paragraph 1371(1) of the BGB, as otherwise, the surviving spouse would receive double compensation.[20] But if under the foreign matrimonial property law, the property of spouses is always separated, and matrimonial property rights are settled by inheritance law, the surviving spouse is denied the benefits of both legal systems. That is why the institute of adaptation should be considered.

In a situation where the foreign succession regime coincides with German property law, divergence is particularly problematic where foreign law grants the surviving spouse hardly any share in the estate because it protects him or her by means of the matrimonial property regime. Since after the *Mahnkopf* decision, German matrimonial law no longer contains a mechanism for winding up the matrimonial property regime, the surviving spouse will lack compensation.

It should, however, be kept in mind the primary function of all these provisions – to ensure the interests of the surviving spouse. Even if, in practice, this is not always a smooth process, the surviving spouse should be sufficiently compensated by other forms of adaptation.

VI. CONCLUDING REMARKS

In its judgment in the *Mahnkopf* case, CJEU concluded that the German law provision on equalisation of the accrued gains ('*Zugewinngemeinschaft*'), which German national courts saw as part of the matrimonial property regime, in the context of EU law fell under the succession law. Applying the functional approach to the evaluated legal provision, CJEU concluded that the main purpose of the provision was not to divide the property of the spouses because of the termination of the matrimonial property regime but rather to determine the size of the share of the estate to be allocated to the surviving spouse. Even if such characterisation of this provision facilitates the proper functioning of the European Certificate of Succession in the cases where the same applicable law governs both succession and matrimonial property regime, difficulties may arise when succession and matrimonial property law diverge, and substitution or adaption of different mechanisms should be applied.

The positive result of the *Mahnkopf* judgment is that the adopted position facilitates the application of the Succession Regulation and helps to ensure the *effet utile* of the European Certificate of Succession. However, with the characterisation of paragraph 1371(1) of the BGB as belonging to inheritance law, the CJEU did not eliminate the problem of the interfaces between inheritance law and property law.

Moreover, while the *Mahnkopf* decision specifically concerned the increased share of the surviving spouse, a matter of German law, and the effects of the European Certificate

[19] For instance, in France, Italy and Lithuania the property acquired by each spouse during the marriage constitutes a joint estate which, at the end of matrimonial regime, is distributed equally between the surviving spouse and the estate of the deceased.

[20] Ch. Kohler, *Intersections between succession law and property regimes of international couples: implications of the Mahnkopf judgment*, ERA Conference "Panning cross-border succession", Trier, (2019).

of Succession, its criteria of delimitation of succession and matrimonial property could also have an impact on other cases. Such could be, for example, *avantages matrimoniaux*, dispositions included in marriage contract in contemplation of the death of a spouse, often used in France, or choice of the surviving spouse between a share of the estate or a usufruct in the entire estate, the instrument valid in France and Catalonia, or revocation of wills by marriage by common law.

THE JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (SECOND CHAMBER) OF 12 OCTOBER 2017 (CASE C-218/16, *ALEKSANDRA KUBICKA*)

Alfonso Ybarra Bores[1]

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Summary: I. Introduction: The Court of Justice of the European Union and the European Succession Regulation. II. Facts in the *Kubicka* case. III. Polish legacy 'by vindication' versus German *Lex rei sitae/Lex regristrii.* 1. The guiding principles of Regulation 650/2012 and the *Kubicka* case. 2. The limits of succession status and property matters. 3. The limits of succession and registration matters. 4. The unnecessary adaptation of the rights *in rem* in the *Kubicka* case. IV. Findings.

Abstract: This paper analyses the judgment of the Court of Justice of the European Union of 12 October 2017 (*Kubicka* case), the first judgment in interpretation of Regulation 650/2012. Within the framework of an international succession of a deceased of Polish nationality, resident in Germany, owner of immovable property in that country and with a will drawn up in Poland, the judgment addresses the delimitation of the area covered by matters that, under Regulation 650/2012, are subject to *lex successionis* and others that, conversely, fall outside the scope of this law and instead under *lex rei sitae* or *lex registrii*.

I. INTRODUCTION: THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN SUCCESSION REGULATION

The subject of this paper is the analysis of the judgment of the Court of Justice of the European Union of 12 October 2017, handed down in Case C-218/16 (*Aleksandra Kubicka*[2]). This was the first judgment of the Court of Luxembourg in direct interpretation of the provisions of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012, on the jurisdiction, applicable law, recognition and enforcement of decisions

[1] Professor of Private International Law; Pablo de Olavide University Seville (Spain). ORCID ID.: 0000-0001-6129-1161. Researcher ID. WOS: AAA-8284-2019. Email: aybabor@upo.es.

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[2] ECLI:EU: C:2017:755.

and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter Regulation 650/2012)[3].

However, as Ángeles Lara Aguado points out, even before the *Kubicka* judgment was handed down, the matter of succession had already been addressed by the Court of Justice of the European Union, albeit in passing, in order to negatively delimit the material scope of Regulation 650/2012 as opposed to other European regulations which address similar issues, and to rule out questions related to parental responsibility for minors and marriage being categorised as succession matters, despite the fact that, as already noted, all of these were related to questions purely concerning succession[4]. This is the specific case of the judgment (Third Chamber), of 6 October 2015, Case C-404/14, *Matoušková*[5], of the judgment (Sixth Chamber) of 19 April 2018, Case C-565/16, *Saponaro*[6] and of the judgment of 13 October 2016 (Second Chamber), Case C-294/15, *Mikołajczyk*[7].

In general, the Court of Justice activity to date with regards to Regulation 650/2012 can be characterised, firstly, by the diversity of cases brought before it, and secondly, by the prevalence of issues related to its scope - the *Kubicka* judgment in particular - and to concepts and definitions, and lastly, by the evident prominence of the German authorities. The judgments handed down at the time of completion of this paper and following the *Kubicka* judgment, in chronological order, are: the judgment of 1 March 2018 (2nd Chamber), *Mahnkopf* case (C-558/16)[8]; judgment of 21 June 2018 (2nd Chamber), *Oberle* case (C-20/17)[9]; judgment of 17 January 2019 (6th Chamber), *Brisch* case (C-102/18)[10]; judgment of 23 May 2019 (Chamber

[3] *OJEU* No 201, of 27 July 2012, 107-134. In general, on Regulation 650/2012 see, inter alia, T. Ballarino, 'Il nuovo regolamento europeo sulle successioni', *Journal of International Law*, 4, 1116-1145 (2013); A. Bonomi' 'Il regolamento europeo sulle successioni', *Rivista di diritto internazionale privato e processuale*, 2, 293-324 (2013); A. Bonomi and P. Wautelet, *Le droit européen des successions: commentaire du Règment nº 650/2012 du 4 juillet 2012* (Brussels, Bruilant, 2013); J. Carrascosa González, *The European Succession Regulation 650/2012 of July 4, 2012, critical analysis* (Granada, Comares, 2014); L.F. Carrillo Pozo, 'The European Regulation 650/2012 before the paradigm shift of inheritance law', *Mexican Journal of Comparative Law*, 151, 51-83 (2018); A. Daví and A. Zanobetti, 'Il nuovo diritto internazionale privato dellesuccessioni nell'Unione europea', *Cuadernos de Derecho Transnacional*, vol.5-II, 5-139 (2013); J.M. Fontanellas Morell, 'El nuevo Reglamento europeo en materia de sucesiones', *Revista Española de Derecho Internacional*, 1, 284-290 (2013); P. Franzina and A. Leandro (coords.), *Il Diritto internazionale privato europeo delle successioni mortis causa* (Milán, Giuffré, 2013); J.L. Iglesias Buhigues and G. Palao Moreno (coord.), *Sucesiones Internacionales. Comentarios al Reglamento UE 650/2012* (Valencia, Tirant Lo Blanch, 2015); A. Lara Aguado (coord.), *Sucesión mortis causa de extranjeros y españoles tras el Reglamento (UE) 650/2012: problemas procesales, notariales, registrales y fiscales* (Valencia, Tirant lo Blanch, 2020) and M. Medina Ortega, 'Consonancias y disonancias en el Derecho europeo de sucesiones', *La Ley Unión Europea*, 87, (2020).

[4] A. Lara Aguado, 'Claves del Reglamento (UE) 650/2012 a la luz de la jurisprudencia del TJUE: de la especialización a la (in)coherencia a través del mito del principio de unidad y las calificaciones autónomas unívocas', *Revista Española de Estudios Internacionales*, 39, 8 (2020).

[5] CJEU of 6 October 2015, *Matousková*, C-404/14 (ECLI:EU:C:2015:653).

[6] ECLI:EU:C:2018:265.

[7] ECLI:EU:C:2016:772.

[8] ECLI:EU:C:2018:138.

[9] ECLI:EU:C:2018:485.

[10] ECLI:EU:C:2019:34.

1), *WB* case (C-658/17)[11]; judgment of 16 July 2020 (Chamber 1), *EE* case (C-80/19)[12]; judgment of 1 July 2021 (6th Chamber), *Vorarlberger Landes* case (C-301/20)[13]; judgment of 9 September 2021 (Chamber 1), *UM* case (C 277/20)[14]; judgment of 9 September 2021 (6th Chamber), *RK* case (C-422/20)[15] and lastly, judgment of 7 April 2022 (5th Chamber), *WILL* case (C-645/20)[16]. In addition, two requests for a preliminary ruling on Regulation 650/2012 are currently pending before the Court of Justice[17].

Having provided an overview of the extensive activity undertaken by the Court of Justice of the European Union with regards to Regulation 650/2012 since its implementation on 17 August 2015[18], we shall next address the interesting and complex case dealt with by the Court in its judgment of 12 October 2017, commentary of which comprises the main body of this chapter.

II. FACTS IN THE *KUBICKA* CASE

The judgment of the Luxembourg Court of 12 October 2017 was based on a request for a preliminary ruling by the *Sąd Okręgowy w Gorzowie Wielkopolskim* (Gorzów Wielkopolski Regional Court, Poland), in the context of proceedings brought by Ms. Aleksandra Kubicka before a notary located in Słubice (Poland), in order to draw up a notarially recorded will establishing a legacy 'by vindication' relating to immovable property, located in Germany, of which she was a co-owner[19].

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11 ECLI:EU:C:2019:444.

12 ECLI:EU:C:2020:569.

13 ECLI:EU:C:2021:528.

14 ECLI:EU:C:2021:708.

15 ECLI:EU:C:2021:718.

16 ECLI:EU:C:2022:267.

17 Specifically, this is the preliminary ruling of 20 November 2020 (case C-617/20) and of 4 June 2021 (Case C-354/21). Meanwhile, with regards to the preliminary ruling of 12 August 2020 (case C-387/20), sought by a Polish notary public, the Court dismissed this as manifestly inadmissible (*OJEU* C 471/12, of 22 November 2021).

18 For an in-depth study of the case law of the Court of Justice on Regulation 650/2012 during the first years of its application, see A. Lara Aguado, 'Claves del Reglamento (UE) 650/2012 a la luz de la jurisprudencia del TJUE: de la especialización a la (in)coherencia a través del mito del principio de unidad y las calificaciones autónomas unívocas', *Revista Electrónica de Estudios Internacionales*, 39, (2020) and A. Ybarra Bores, 'El Tribunal de Justicia de la Unión Europea y el Reglamento sucesorio europeo', in *El Tribunal de Justicia de la Unión Europea y el Derecho internacional privado*, A.L. Calvo Caravaca and J. Carrascosa González (Cizur Menor, Aranzadi, 2021) 393-418.

19 On the *Kubicka* judgment, see, inter alia, S. Álvarez González, '*Legatum per vindicationem* y Reglamento (UE) 650/2012', *La Ley Unión Europea*, 55, 1-20 (2018); R. Cabanas Trejo and L. Ballester Azpitarte, 'Breve nota sobre la Sentencia del Tribunal de Justicia de la Unión Europea C-218/16 (*Kubicka*) of 12/10/2017 (a propósito del testamento de un no residente en España', *Diario La Ley*, 1-3 (2017); E. Castellanos Ruiz, 'Ámbito de aplicación de la *lex successionis* y su coordinación con la *lex rei sitae-lex registrationis*: a propósito de los legados vindicatorios', *Cuadernos de Derecho Transnacional*, Vol. 10, 1, 70-93 (2018); I. Castiñeira Soto, 'Dibujando los contornos entre la ley sucesoria y la ley de situación de los bienes en el contexto del Reglamento (UE) nº 650/2012', *Revista de Derecho Civil*, Vol. V, 2, April-June, 377-395 (2018); Z. Crespi Reghizzi, 'Succession and Property Rights in EU Regulation Nº 650/2012', *Rivista di diritto internazionale privato e processuale*, 633-661 (2017); J. Kleinschmidt, 'Erfahrungen mit der Europäischen Erbrechtsverordnung–Umdenken im internationalen Erbrecht', in T. Pfeiffer, Q.C. Lobach and T. Rapp, *Europäisches Familien- und Erbrecht* (Baden-Baden, Nomos, 2020) 131-164; A. Lara

The request for a preliminary ruling concerned the interpretation of Article 1(2)(k) and (l) and Article 31 of Regulation 650/2012. As we shall see, what is to be discussed is a problem particular to cross-border successions that are governed by a law different to that of the place in which the deceased's assets are located. In other words, it is a question of determining the material scope of the Regulation as regards the relationship between the law of succession *(lex successionis)* vis-a-vis the law of the place where the property is located (*lex rei sitae*) and the law of the register (*lex registrii*), which coincides with the former.

Ms. Kubicka, a Polish national residing in Frankfurt am Oder, Germany, was married to a German national, the couple having two minor children. The spouses were joint owners in equal shares of a piece of land located in the said German town, on which their family residence was built. Mrs. Kubicka drew up a will before a notary public in Słubice (Poland), including in it a legacy 'by vindication' (*legatum per vindicationem*), that is, a legacy with direct material effect - permitted by Polish law, *ex* Article 981(1) of the Civil Code[20] - in favour of her husband, concerning her share of the rights in the aforementioned jointly-held property[21]. Under the Polish Civil Code, legacy 'by vindication' means that, after the death of the deceased, the legatee directly acquires the legacy when succession takes place[22]. At the same time, Ms. Kubicka expressly ruled out recourse to an ordinary legacy (*legacy 'by damnation*'), as provided for by Article 968 of the Polish Civil Code, as such a legacy would entail difficulties in relation to the representation of her minor children - who would in time inherit - as well as additional costs which she hoped to avoid[23].

The notary in question refused to draw up the will on the ground that creation of a will containing a legacy 'by vindication' was contrary to German legislation and the case law relating to rights *in rem* and land registration[24], which must be taken into consideration under Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012. The notary remarked that in

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Aguado, 'Claves del Reglamento (UE) 650/2012 a la luz de la jurisprudencia del TJUE: de la especialización a la (in)coherencia a través del mito del principio de unidad y las calificaciones autónomas unívocas', 'n 18 above', 18-29; J.J. Marín López, 'Polonia invade Alemania: la sentencia Kubicka, primera interpretación del Reglamento Europeo de Sucesiones por el Tribunal de Justicia de la Unión Europea', *El Notario del siglo XXI*, 76, November/December, https://www.elnotario.es/ (2017); G. Palao Moreno, 'El Reglamento europeo de sucesiones: primeros pasos de su interpretación por el TJUE y de su aplicación práctica en España', in S. Álvarez González et al., *Relaciones transfronterizas, globalización y Derecho* (Madrid, Civitas, 2020), 435-450 y P. Tereszkiewicz and A. Wysocka-Bar 'Legacy by Vindication Under the EU Succession Regulation No 650/2012 Following the Kubicka Judgment of the ECJ (10 December 2018)', *European Review of Private Law* 4-2019, 875- 894 (2019).

[20] The testator, in accordance with Article 22(1) of Regulation 650/2012, could choose Polish law as the law applicable to the succession (*professio iuris*).

[21] Regarding the rest of the assets forming part of her estate, Ms. Kubicka, in accordance with the provisions of the *lex successionis*, wished to maintain the statutory order of inheritance established by the Law chosen to govern the sucession, i.e., Polish law, whereby her husband and children would inherit it in equal shares.

[22] This rule is the same as the rule contained in Spanish legislation, Article 882(1) of the Spanish Civil Code.

[23] On the basic differences in effects between the *legatum per vindicationem* and the *legatum per damnationem*, see S. Álvarez González, '*Legatum per vindicationem* and Regulation (EU) 650/2012', 4-5, *cit*. note 19, and, at greater length, I. Espiñeira Soto, 'Dibujando los contornos entre la ley sucesoria y la ley de situación de los bienes en el contexto del Reglamento (UE) nº 650/2012', 380-382, n 19 above.

[24] As pointed out by E. Castellanos Ruiz, we must not forget that Article 345 of the Treaty on the Functioning of the European Union states that "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.". This is so due to the highly disparate existing systems in terms of transfer of property, thus it is not easy to unify Private International Law on this matter ('Ámbito de aplicación de la *lex*

Germany, registration of a legatee in the land registry could only be carried out by means of a notarial instrument, relating to the transfer of ownership of the property between the heirs and the legatee, foreign legacies 'by vindication' being subject to adaptation, under Article 31 of Regulation 650/2012, and being considered legacies 'by damnation'.[25] In our view, the notary's refusal to formalise the will is open to criticism, because in reality he acted as though he were a German notary, overstepping his powers by attributing to *lex rei sitae* an effect beyond its scope, unjustifiably putting *lex rei sitae* and the registration issues above the application of the succession law - his own, Polish law - which governed the transfer of inheritance rights[26].

After the notary's dismissal of Ms. Kubicka's appeal against the decision refusing to draw up the will in the terms indicated[27], she then turned to the Regional Court of Gorzów Wielkopolski. However, this court considered that, in accordance with Article 23(2)(b) and (e), and Article 68(m) of Regulation 650/2012, legacies 'by vindication' fell within the scope of Polish succession law, although it was unclear as to what extent the law in force in the place where the asset to which the legacy related was located – German law – could limit the material effects of a legacy 'by vindication' as provided for in the chosen succession law.

Bearing in mind that, pursuant to Article 1(2)(k) of Regulation 650/2012, the nature of rights *in rem* is excluded from the scope of said Regulation, legacy 'by vindication', provided for by *lex successionis*, cannot create rights which are not recognised by *lex rei sitae* of the asset to which the legacy relates. However, it is necessary for the Polish court to determine whether that same provision also excludes from the scope of the Regulation any possible grounds for acquiring rights *in rem*. In that regard, the Polish court considers that the question of acquisition of rights *in rem* by means of a legacy 'by vindication' is governed exclusively by succession law, in this case, Polish law[28].

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successionis y su coordinación con la *lex rei sitae-lex registrationis*: a propósito de los legados vindicatorios', 72, n 19 above.

[25] This interpretation by the Polish notary stemmed from the explanatory memorandum of the German law which amended the national law in accordance with the provisions of Regulation 650/2012 [*Internationales Erbrechtsverfahrensgesetz* (Law on international procedures in matters of Succession Law), of 29 June 2015 (*BGBl.* I, 1042)].

[26] In this regard, A. Lara Aguado maintains that the Polish notary should have limited himself to formalising the will, in any case warning Ms. Kubicka of the problems that the execution of the legacy in Germany could pose at the time ('Claves del Reglamento (UE) 650/2012 a la luz de la jurisprudencia del TJUE: de la especialización a la (in)coherencia a través del mito del principio de unidad y las calificaciones autónomas unívocas', 21, n 4 above. Meanwhile, S Álvarez González wonders if perhaps the Polish notary would have to advance a judgment of the compatibility of any testamentary provisions authorised by him with the public policy of each of the Member States (or third States) in which they potentially had to become effective. His conclusion is that this would not appear to be very sensible ('*Legatum per vindicationem* y Reglamento (UE) 650/2012', 7, n 19 above.).

[27] Basically, in the challenge Ms. Kubicka alleged that the provisions of Regulation 650/2012 should be subject to independent interpretation, regardless of those provisions that may arise from the internal interpretation by each Member State, and that in essence, none of those provisions justify restricting the provisions of succession law by depriving a legacy 'by vindication' of material effects.

[28] For the referring court, Polish legal literature on the matter takes the same position, while the explanatory memorandum of the German draft law on international succession law and amending, amongst other provisions, the provisions of the *Gesetzesentwurf der Bundesregierung*, as already noted (n 25 above.), provided that Regulation 650/2012 did not oblige German law to recognise a legacy 'by vindication' on the basis of a will drawn up under the law of another Member State.

Similarly, and referring to Article 1(2)(l) of Regulation 650/2012, the Regional Court of Gorzów Wielkopolski also considers whether the law applicable to registers of movable or immovable rights may have any impact on the succession consequences of the legacy. It thus considers that if the legacy is recognised as producing material effects in succession matters, the law of the Member State where such a register is kept would only govern the means by which the acquisition of an asset under succession law is proven, albeit without having an effect on the acquisition itself.

In short, the Polish court considers that the interpretation of Article 31 of Regulation 650/2012 also depends on whether the Member State of the place in which the asset to which the legacy relates is located has the authority to question the material effect of that legacy, which arises under the chosen succession law. Therefore, it considers that application of Article 31 of the Regulation, in circumstances such as those in the main proceedings, is contingent upon the Member States having the said authority. Hence, the Regional Court of Gorzów Wielkopolski finally referred a question to the Court of Justice of the European Union for a preliminary ruling on whether Articles 1(2)(k) and (l) or Article 31 of Regulation 650/2012 should be interpreted as permitting the refusal to recognise the material effects of the legacy 'by vindication' (*legatum per vindicationem*), as provided for by the Polish law of succession, where it concerns the ownership of immovable property located in a Member State - Germany - whose law, unlike Polish law, does not provide for legacies with direct material effect, but does provide for legacy 'by damnation' (*legatum per damnationem*).

III. POLISH LEGACY 'BY VINDICATION' VERSUS GERMAN LEX REI SITAE/ LEX REGRISTRII

1. The guiding principles of Regulation 650/2012 and the *Kubicka* case

We shall refer to certain rules of Regulation 650/2012 that are considered relevant in view of the solution advocated by the Court of Justice in this case. Firstly, in accordance with Article 1(1) of Regulation 650/2012, the latter shall apply to successions of the estate of deceased persons, and Article 3(1)(a) defines that succession means 'succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession'. There is no doubt that the facts addressed in the *Kubicka* judgment concern a testate succession.

Meanwhile, under Regulation 650/2012, the testator may designate the law of the State whose nationality he possesses as the law governing the entire succession (Article 22(1), the Regulation also enshrining the principle of unity of the law applicable to succession (Article 23(1). Thus, for reasons of legal certainty and in order to avoid fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State (Recital 37). Therefore, this law shall govern, in particular, the transmission to the heirs and, where appropriate, to the legatees of the property forming part of the estate (Article 23(2)).

However, Article 1(2) of Regulation 650/2012 lists various matters that are excluded from the scope of the Regulation, including, under point (k), 'the nature of rights *in rem*' and, under point (l), 'the recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register'.

As we shall see below, the interpretation of these three provisions by the Court of Justice shall constitute the basis of the judgment in this case.

2. The limits of succession status and property matters

In that respect, with regards in the first instance to the question of whether Article 1(2)(k) of Regulation No 650/2012 must be interpreted as precluding a refusal to recognise, in Germany, the material effects of a legacy 'by vindication' provided for in Polish law, it must be noted that the aforementioned provision excludes from the scope of the Regulation 'the nature of rights *in rem*'[29]. Moreover, the existence and number of rights *in rem* in the legal system of the Member States (*'numerus clausus'*) are also covered by the scope of that provision. Indeed, Regulation 650/2012 does not affect the limited number of rights *in rem* recognised in the national law of some Member States, and a Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law (Recital 15).

In the present case, it should be pointed out that both the legacy 'by vindication', provided for by Polish law and the legacy 'by damnation', provided for by German law, constitute methods of transfer of ownership of an asset.[30] Therefore, the direct transfer of a property right by means of a legacy 'by vindication' concerns only the arrangement by which that right *in rem* is transferred at the time of the testator's death, which is precisely what Regulation No 650/2012 seeks to allow, where it is in accordance with the law governing succession - in this case, Polish law (Recital 15).

The Court held that such methods of transfer of ownership were not covered by Article 1(2)(k) of Regulation 650/2012 and that the provision was therefore to be regarded as precluding the refusal in Germany to recognise the material effects produced by the legacy 'by vindication' when succession takes place in accordance with Polish law. Ultimately, and in a positive sense, the Court of Justice considered that legacies 'by vindication' which were lawfully set up should be permitted pursuant to *lex successionis* regardless of the provisions to this regard under *lex rei sitae*.

Santiago Álvarez González believes that this interpretation is not problematic in the case at hand, however, in the 'opposite direction' it would require more nuances. Indeed, if we

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[29] As is apparent from the explanatory memorandum to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and the creation of a European certificate of succession [COM(2009) 154 final, 5], said provision of Regulation 650/2012 covers both the classification of property and rights, and the determination of the prerogatives of the holder of such rights.

[30] In other words, as the Advocate General noted in points 46 and 47 of his findings in the *Kubicka case*, both cases involve a right *in rem*, the right to property, which is recognised in both of the legal systems concerned.

were to suppose a legacy 'by damnation' under German law of immovable property that was located, for example, in Spain, if we remain consistent with the foregoing, the requirements or conditions for the transfer of ownership of the said asset to the legatee would be governed by German law as *lex successionis*. And in such a case it would not seem very consistent to require registration in the Spanish registry as a condition for transfer of the immovable property. It is as though the rule laid down by Regulation 650/2012 and confirmed by the *Kubicka* judgment only worked properly in one direction: in cases where the *lex successionis* made fewer demands than those envisaged in the *lex rei sitae* / *lex registrii*, but not vice versa. For the aforementioned author, this is an aspect that, due to its complexity, would require further analysis[31].

3. The limits of succession and registration matters

Furthermore, concerning the question of whether Article 1(2)(k) of Regulation No 650/2012 should be interpreted as precluding a refusal to recognise the material effects of a legacy 'by vindication', it should be noted that, under this provision, the recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register, is excluded from the scope of this regulation.

In this regard, according to Recital 18 of the Regulation, it should be the law of the Member State in which the register is kept (for immovable property, the *lex rei sitae*) which determines under what legal conditions and how the recording must be carried out. Moreover, where the acquisition of a right in immovable property must be recorded in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State (Recital 19).

Based on the foregoing, the Court of Justice concludes that, given that Article 1(2)(l) of Regulation 650/2012 only refers to the recording in a register of rights in immovable or movable property - including the legal requirements for such recording, and the effects of recording or failing to record such rights therein - the requirements for the acquisition of said rights are not however found among the matters excluded from the scope of said Regulation in accordance with the aforementioned provision. The Court thus resolves the matter relating to this 'grey area' straddling *lex successionis* on the one hand and *lex rei sitae* and *lex registrii* on the other[32].

Two additional arguments are offered by the Court of Justice to support the expressed opinion. On the one hand, the principle of unity of the succession law, provided for in Article 23 of Regulation 650/2012 - and in particular in paragraph 2(e) - which stipulates that the said law shall govern the heirs, and when applicable, the legatees of the assets, rights and

[31] S. Álvarez González, '*Legatum per vendicationem* y Reglamento (UE) 650/2012', 14, n 19 above.

[32] In this respect, I. Espiñeira Soto concludes that, after the *Kubicka* judgment, and given that the typical real effect of legacy 'by vindication' is the direct transfer of the property to the legatee from the moment of the deceased's death, it must be concluded that the legal-real mutation - the acquisition of the asset - has occurred extra-registrally prior to registration ('Dibujando los contornos entre la ley sucesoria y la ley de situación de los bienes en el contexto del Reglamento (UE) nº 650/2012', 384, no 19 above.

obligations. On the other hand, the interpretation offered is consonant with the objective pursued by Regulation No 650/2012, referred to in Recital 7 of that Regulation, under which it seeks to facilitate the proper functioning of the internal market by eliminating obstacles to the free movement of persons who want to claim their rights arising from a cross-border succession. According to that Recital, in the European area of justice, citizens must be able to organise their succession[33].

Thus, for the Court of Justice, Article 1(2)(l) of Regulation 650/2012 precludes non-recognition in a Member State whose legal system does not recognise the institution of legacy 'by vindication' – in this case, Germany – of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law - in this case, Polish law[34].

4. The unnecessary adaptation of the rights *in rem* in the *Kubicka* case

Lastly, and with regard to the interpretation of Article 31 of Regulation 650/2012, it must be remembered that, in accordance with this Article, when a person invokes a right *in rem* to which he is entitled under the law applicable to the succession - Polish law - and the law of the Member State in which the right is invoked - German - does not recognise the right *in rem* in question, that right shall, where necessary and insofar as possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and interests pursued by the specific right *in rem* and the effects attached to it.

For the Court, the right *in rem* that Mrs Kubicka wishes to transfer by means of a legacy 'by vindication' is none other than the right of ownership of her share in the immovable property located in Germany. It is not in dispute that German law recognises the right of ownership with which the legatee would be vested under Polish law. Article 31 of Regulation No 650/2012 is not concerned with the method of transfer of rights *in rem*, including, inter alia, legacies 'by vindication' or 'by damnation', but only with the content of rights *in rem*, determined by the law governing succession (*lex causae*), and their reception in the legal order of the Member State in which they are invoked (*lex rei sitae*). Therefore, insofar as the right *in rem* transferred by the legacy 'by vindication' is the right of ownership, which is recognised as such in German law, there is no need for the adaptation provided for in Article 31 of Regulation No 650/2012.

It follows that Article 31 of Regulation No 650/2012 is not applicable in this case, for which reason the Court of Justice concludes that this provision precludes refusal of recognition,

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[33] In this context, to accept that Article 1(2)(l) of Regulation No 650/2012 allows the acquisition of ownership of an asset by legacy 'by vindication' to be excluded from the scope of that regulation would lead to the fragmentation of the succession, which is incompatible with the wording of Article 23 of the same regulation and with its objective.

[34] Moreover, the Court of Justice notes that Regulation 650/2012 establishes the creation of a certificate that must allow every heir, legatee or entitled person to prove in another Member State his status and rights, in particular the attribution of a specific asset to the legatee mentioned in said certificate. In accordance with Article 69(1), the certificate shall produce its effects in all Member States, without any special procedure being required, paragraph 2 stating that the person mentioned in the certificate as the legatee shall be presumed to have the status and hold the rights mentioned therein, with *no conditions and/or restrictions other than those stated in the certificate.*

in a Member State whose legal system does not provide for legacies 'by vindication', of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law.

IV. Findings

In the *Kubicka* case, the Court of Justice reached the conclusion that Article 1(2)(k) and (l) and Article 31 of Regulation 650/2012 preclude the refusal to recognise by an authority of a Member State – Germany – the material effects of a legacy 'by vindication', which is recognised by the law governing succession – Polish – chosen by the testator in accordance with Article 22(1) of the aforementioned Regulation, when that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State whose law does not provide for legacies with direct material effect when succession takes place.

The question of the acquisition of rights *in rem* through a legacy 'by vindication' is governed by succession law – Article 23(2)(e) – and both the legacy 'by vindication', provided for by the *lex successionis*, and the legacy 'by damnation' provided for by the law of the state where the immovable property is located, constitute methods of transfer of an asset which do not affect the content of the law but rather its means of acquisition, and given that the right of ownership is a right *in rem* recognised in both of the legal systems concerned in this case, Article 31 of Regulation 650/2012 is therefore not applicable. The Court of Justice has settled the question as to whether the methods of transfer of succession (*modus adquirendi*) were excluded from the scope of Regulation 650/2012, and it has done so firmly in the negative. There is no such differentiation in the context of the Regulation – if the transfer of ownership has taken place pursuant to *lex successionis*, such transfer should be respected within the framework of *lex rei sitae*. Given that succession law permits the legatee to directly acquire ownership of the asset bequeathed, the provisions of *lex rei sitae / lex registrii* for this purpose are irrelevant, because this matter is not governed by this law.

Questions strictly relating to registration concern the recording in a register of the rights in an immovable or movable property, the legal requirements for such recording, the authorities in charge of checking that all requirements are met, whether or not the documentation presented is sufficient and contains the necessary information, and the effects of the recording or failure to record such rights, i.e., whether the recording is declaratory or constitutive in effect. However, Article 1(2)(l) of Regulation 650/2012 does not refer to the requirements for the acquisition of rights *in rem* in the assets, therefore these are not excluded from its scope.

In short, the Court of Justice makes an interpretation of the provisions set forth which, from the outset, aims to safeguard the general objectives of Regulation 650/2012. Moreover, the said interpretation leads to an expansion of the substantive scope of *lex successionis* to the detriment of *lex rei sitae*, which may be justified by the existence of a unification of rules in matters of succession and by the absence of uniform regulation in questions related to rights *in rem*.

Therefore, since its first judgment on Regulation 650/2012, the Court of Justice has sought to make clear the prevalence of two basic principles which it also considers to be closely connected: firstly, the unity of succession, regardless of the nature of the assets and

where these are located, and secondly, the general and all-encompassing effectiveness of the European Succession Certificate, although the considerations made by the Court of Justice in the *Kubicka* case regarding the certificate are not relevant to the settlement of the case. Above all other considerations, the Court's commitment to ensuring free movement in the complex field of cross-border successions in the broadest and most flexible way seems to be evident. To this end, the Court of Justice has made an interpretation that can be described as strict yet reasonable with regard to the exclusions that apply in matters of rights *in rem* and registration, appropriately resolving the issues raised and offering a solution consonant with the objective pursued by Regulation No 650/2012 - all this, as noted, on the basis of a non-restrictive interpretation of the scope of *lex successionis* as the law governing the transfer of rights of ownership of the assets of the estate.

NOTARIES AS 'COURTS', HABITUAL RESIDENCE AND SEVERAL OTHER CONCEPTS OF THE SUCCESSION REGULATION IN THE CJEU JUDGMENT IN CASE C-80/19 E.E.

Agne Limante[1]

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Summary: I. Introduction. II. The facts of the case and the reference for a preliminary ruling. III. The CJEU judgment. 1. Succession with cross-border implications. 2. Impossibility of multiple habitual residences. 3. Criteria to establish the habitual residence. 4. Definition of the term 'court' and the position of notaries. 5. Different implications of the Succession Regulation to 'courts' and 'other authorities'. 6. Choice of law and choice of forum. IV. The case back in the Supreme Court of Lithuania. V. Concluding remarks.

Abstract: This paper discusses the CJEU's judgment in Case C-80/19 E.E. presenting its legal and factual basis, analysing the key aspects of the CJEU ruling, and tracing the case back to the national level. The author of the paper focuses on the interpretation of the CJEU with regard to the understanding of the cross-border nature of the succession case, the concept of habitual residence, the status of notaries acting as 'courts', the coverage of jurisdictional rules, authentic instruments and the choice of court and applicable law.

I. INTRODUCTION

The Succession Regulation brought long-awaited uniformity in the European private international law relating to succession[2]. Similar to the EU private international family law instruments, it did not unify the material rules in the EU Member States. However, it established a coherent framework for the conflict of law rules. In particular, in questions of cross-border succession, the Succession Regulation provides extensive harmonised rules on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments.

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[1] Chief Researcher at the Law Institute. Lithuanian Centre for Social Sciences.

[2] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. OJ L 201, 27.7.2012, 107–134.

At the time of writing this paper, the Regulation has been applicable for almost seven years (it applies to successions of persons who died on or after 17 August 2015), and national and CJEU case law on the Succession Regulation is still constantly developing. In the first years of applying the Succession Regulation, the central part of the CJEU's case law on this instrument evolved around the European Certificate of Succession and the concept of 'court'. However, in more recent cases, additional challenges have begun to emerge.[3]

The case C-80/19 *E.E.*[4], which is the focus of this paper, continued the saga of cases where the CJEU was called upon to elaborate on the concept of 'court' and the extent to which notaries in succession proceedings perform functions similar to those of courts and are thus governed by the Succession Regulation's jurisdictional rules and other provisions. In addition, the judgment also shed light on several other key notions of the Succession Regulation, such as the concept of 'habitual residence' of the deceased as well as the provision on the choice of court and applicable law.

II. THE FACTS OF THE CASE AND THE REFERENCE FOR A PRELIMINARY RULING

The case C-80/19 *E.E.* originated from the preliminary reference made by the Supreme Court of Lithuania (lith. *Lietuvos Aukščiausiasis Teismas*). The dispute before it concerned a succession proceeding of a Lithuanian woman who lived and died in Germany and who owned real estate in Lithuania. A few years before her death, in 2011, this woman married a German national and moved to live with him to Germany. E.E., the woman's under-aged son from her previous relationship (and whose father had died earlier), also moved to Germany to live together with his mother and her new husband. In 2013, the woman returned to Lithuania and set up a will at a notary public office in Lithuania. In her will, she designated her son E.E. as the heir to her entire estate, which consisted of an apartment she owned in Lithuania.

The woman passed away in 2016. After the death of his mother, E.E. contacted the notary office in Kaunas (Lithuania). He requested to initiate the succession procedure and to issue him a certificate of succession rights. However, the notary refused to draw up that certificate referring to Article 4 of the Succession Regulation. Since the deceased had her habitual residence in Germany at the time of death, the notary considered that the respective German authorities were competent to deal with the case. Disagreeing, E.E. challenged the notary's refusal before a national court.

The first instance court which had to deal with the case took into account the strong links of the deceased with Lithuania. The court saw it important that she was a Lithuanian national and owned immovable property in Lithuania; she had preserved ties with Lithuania and had drawn up her will there. The court thus ruled in favour of E.E., citing the principles of reasonableness and fairness.

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[3] See, for instance, Case C-404/14 *Matouškova*, EU:C:2015:653; Case C-218/16 *Aleksandra Kubicka*, EU:C:2017:755; Case C-558/16 *Mahnkopf*, EU:C:2018:138; Case C-20/17 *Oberle*, EU:C:2018:485; Case C-658/17 *WB*, EU:C:2019:444.

[4] Case C-80/19 *E.E.*, EU: C: 2020:569.

Disagreeing with such interpretation, the notary appealed. In the appeal proceedings, the spouse of the deceased submitted a statement to the court supporting E.E.'s position. He argued that his deceased spouse had stronger links with Lithuania: she had lived both in Lithuania and in Germany, before her death, she had visited her home country periodically and spent a lot of time there, she did not own any property in Germany, and no inheritance proceedings were pending in that country. Moreover, the husband informed the court that he did not have any claim on the succession to the property of his spouse and agreed to the jurisdiction of the Lithuanian courts. Despite this, the appeal court ruled in favour of the notary and set aside the ruling of the court of the first instance. The appeal court considered that the court of the first instance had unreasonably relied on general principles and wrongly interpreted the laws. Then, E.E. lodged an appeal in cassation, and the case reached the Supreme Court.

Considering that the content of several provisions of the Succession Regulation relevant to the dispute between the parties was not entirely clear and the doctrines of *acte clair* and *acte éclairé* could not be applied, the Supreme Court of Lithuania decided to stay the proceedings and refer for a preliminary ruling. It submitted to the CJEU six preliminary questions on the interpretation of the Succession Regulation.

- First, the referring court asked to clarify whether, considering the factual circumstances of the case, the succession at stake was to be regarded as a 'succession with cross-border implications' within the meaning of the Succession Regulation.
- Second, the referring court raised a question of whether a Lithuanian notary, who opens a succession case, issues a certificate of succession rights and carries out other actions necessary for the heir to assert his or her rights, meets the definition of 'court' under Article 3(2) of the Regulation. The court additionally clarified that in their activities, notaries respect the principles of impartiality and independence; furthermore, their decisions are binding upon themselves or judicial authorities and their actions may be the subject of judicial proceedings.
- Third, if Lithuanian notaries fall under the definition of 'court', should certificates of succession rights issued by them be regarded as being decisions within the meaning of Article 3(1)(g) of the Succession Regulation and must jurisdiction for that reason be established under the rules of the Succession Regulation for the purpose of issuing them.
- Fourth, if Lithuanian notaries did not fall under the definition of 'court', the Supreme Court wanted to know whether Lithuanian notaries could issue national certificates of succession without following the rules of jurisdiction established in the Regulation and if these were deemed to be authentic instruments with legal effects in the other Member States.
- Fifth, the referring court asked to clarify if the habitual place of residence of the deceased could be established in only one specific Member State.
- And lastly, the Supreme Court of Lithuania posed some questions regarding the choice of Lithuanian law and on the choice-of-court agreement by the parties concerned.

III. THE CJEU JUDGMENT

The request for a preliminary ruling was registered at the Court of Justice on 4 February 2019. On 26 March 2020, Advocate General Campos Sánchez-Bordona delivered his opinion, and on 16 July 2020, the judgment of the CJEU gave the answers to the preliminary questions raised by the Supreme Court of Lithuania. Below, the main elements of the CJEU judgment are discussed.

1. Succession with cross-border implications

The first preliminary question of the Supreme Court of Lithuania asked the CJEU to clarify the meaning of the term' succession with cross-border implications'.

The term 'succession with cross-border implications' is mentioned in the preamble of the Succession Regulation, where it is stated that the Regulation seeks to remove 'the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications' (see Recital 7). Moreover, it is stated that the Regulation aims to settle successions with such implications speedily, smoothly and efficiently (Recital 67).

In his opinion, AG Campos Sánchez-Bordona highlighted that though the Regulation did not contain a definition of 'succession having cross-border implications' or a list of elements, the objective of the Regulation suggested that its provisions should be "evaluated flexibly so as to enable them to cover any succession the organisation of which (by the deceased) or the processing of which (after the deceased's death) is hampered by the presence of links to more than one State" (paragraph 33). The links with more than one state can be evidenced in many ways. In *Oberle* (C-20/17)[5], for instance, the CJEU has found that the situation of 'successions with cross-border implications' exists in case the estate includes assets located in several Member States.

As in the *E.E.* case the deceased was a Lithuanian national resident in Germany (the habitual residence question is discussed below) with her real estate located in Lithuania, the Court found it easy to rule that the succession in question was not purely domestic. The CJEU concluded that succession had cross-border implications as the deceased's habitual residence and her major assets were located in different Member States (paragraph 45).

2. Impossibility of multiple habitual residences

One of the most notable features of the instruments developed by the European Union legislator in the framework of European private international family law and personal status matters is the increasing use of the habitual residence connecting factor for establishing jurisdiction or applicable law. The habitual residence is also a central connecting factor in the Succession Regulation (see Article 4 on jurisdiction and Article 21 on applicable law).

[5] Case C-20/17 *Oberle*, EU:C:2018:485.

It has long been speculated whether a person may have more than one habitual residence for the purposes of EU instruments, or only a single habitual residence is possible. The Supreme Court of Lithuania expressly raised this question in the *E.E.* case with reference to the framework of the Succession Regulation.

In his opinion, AG Campos Sánchez-Bordona argued that the arguments of predictability, legal certainty, prevention of contradictory outcomes and the fact that the applicable law was intended to govern the succession as a whole in order to prevent its fragmentation, "support the proposition that there should be a single place of habitual residence" (paragraph 42). He also suggested that "the provisions of the Regulation would no longer be of any use if it were found to be the case that, for the purposes of settling the issues which the Regulation attempts to resolve, a person may have a place of habitual residence in various States at the same time" (paragraph 44).

The CJEU was of the same opinion. Even though admitting that determining the deceased's habitual residence may prove complex, the Court ruled that the Succession Regulation is built on the concept of a single habitual residence of the deceased (paragraph 40). In this way, the Court expressly ruled out the possibility of multiple habitual residences for the purpose of the Succession Regulation[6].

3. Criteria to establish the habitual residence

It is widely agreed that habitual residence is an autonomous concept and should be given a European meaning. Habitual residence is determined in each case by the factual circumstances that link the individual to a state[7]. This means that a person's location in a specific region is determined not by referring to a legal rule, but rather by recognising and analysing the necessary factual linkages and his or her social ties seeking to verify if a close and stable connection with a state exists.

Similar to other EU instruments, the Succession Regulation does not provide an expressive definition of 'habitual residence'. However, though this connecting factor is not defined in the Regulation's main text, Recitals 23 and 24, among other sources, offer important clues on

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[6] Such a position was criticised, for instance, by M. Pazdan and M. Zachariasiewicz, 'The EU succession regulation: achievements, ambiguities, and challenges for the future', *Journal of Private International Law*, 17:1, 74-113 (2021). These authors argue that both the Advocate General and the Court offer a somewhat limited view of what the concept of multiple places of habitual residence entails. They claim that the possibility to have multiple places of habitual residence should not be entirely excluded, although it might occur only in exceptional circumstances.

[7] On criteria to be used in family cases see: Case C-523/07 *A*, EU:C:2009:225; Case C-497/10 PPU *Mercredi*, EU: C:2010:829; Case C-376/14 PPU *C v. M*, EU:C:2014:2268; Case C-499/15 *W and V* v. *X*., EU:C:2017:118; Case C-111/17 PPU *OL v PQ*, EU:C:2017:436; Case C-512/ 17 *HR*, EU:C:2018:513. See also: M.-Ph. Weller and B. Rentsch, "'Habitual Residence': A Plea for ' Settled Intention'", in S. Leible, ed., *General Principles of European Private International Law* (Wolters Kluwer, 2016); A. Limante, 'Establishing Habitual Residence of Adults under the Brussels IIa Regulation: Best Practices from National Case-law', *Journal of Private International Law* Vol. 14, No 1 (2018): 160-181 // https://doi.org/10.1080/17441048.2018.1442128; Th. Kruger, "Finding a Habitual Residence", in I. Viarengo and F. C. Villata, eds., *Planning the Future of Cross Border Families: A Path Through Coordination* (Hart Publishing, 2020).

determining the deceased's habitual residence at the time of death[8]. As noted by AG Campos Sánchez-Bordona, these recitals reveal that habitual residence must be determined based on a general assessment of the circumstances of the deceased's life during the years preceding his death and at the time of his death (paragraph 49).

Recitals 23 and 24 of the Regulation's preamble were the key provisions around which the reasoning of the CJEU in *E.E.* revolved to determine the criteria for establishing the habitual residence of the deceased. In particular, the CJEU referred to Recitals 23 and 24, suggesting the national referring court to consider both of them in an order they are listed to establish the habitual residence of the deceased.

The wording of the judgment allows claiming that the Court set a cascade of criteria for establishing habitual residence. In particular, reading the judgment of the CJEU, one might identify the following steps to establish the habitual residence of the deceased:

- Performing the overall assessment of all the factual circumstances of the life of the deceased;
- Verifying where the centre of interests of the deceased person's family and his social life was;
- If the doubt still exists – taking into account the nationality and location of assets.

Firstly, the CJEU reiterated Recital 23 providing that to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the state concerned and the conditions and reasons for that presence. These facts should demonstrate a close and stable relationship with the state in question. They should show that the deceased's presence was not temporary or intermittent, and that the person's residence indicates some degree of social and family integration.

Secondly, the CJEU referred to Recital 24, noting that in a case where determining the deceased's habitual residence may prove complex (where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his state of origin), the authority should verify where the centre of interests of the deceased person's family and his social life was.

Then, only if this is still not enough to establish habitual residence, the secondary set of criteria – nationality and location of assets – should be taken into account. It should, however, be underlined that, as stated by AG Campos Sánchez-Bordona, the deceased's nationality and the location of his assets are only ancillary determiners of habitual residence. Nevertheless, they might prove crucial in more complicated cases, for instance, where an elderly person spends half of the year in a warmer climate zone (and has already built a social life there) and the other half in his or her home jurisdiction[9].

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[8] The concept of 'habitual residence' in the context of succession was also analysed by academics. See, for instance: J. Re, 'Where Did They Live? Habitual Residence in the Succession Regulation' 54, *Rivista di diritto internazionale privato e processuale*, No 4, 978 (2018); M. Pazdan and M. Zachariasiewicz, n 5 above.

[9] M. Pazdan and M. Zachariasiewicz, n 5 above.

4. Definition of the term 'court' and the position of notaries

Another set of preliminary questions concerned the definition of 'court' and the position of notaries in this regard. It should be noted that the scope of the notion 'court' and the possibility of the notaries to be classified as 'courts' varies depending on the context of a particular case. For instance, in a later case of *OKR* (C-387/20), the Court made it clear that the notion of 'court' in the meaning of Article 3(2) of the Succession Regulation is broader in scope than the notion of 'court' in the context of Article 267 TFEU[10] (paragraph 31). In this case, the CJEU concluded that 'for the purposes of the present reference for a preliminary ruling', a notary cannot be classified as a 'court' within the meaning of Article 267 TFEU (paragraph 34). On the contrary, such classification is possible in the context of the Succession Regulation.

As regards succession matters, in some of the EU Member States succession is dealt with through courts, while in others – through notaries or other authorities. This variety of national approaches and models resulted in the current wording of the Succession Regulation, which allows for a more flexible interpretation of the term 'courts'. As noted by AG Campos Sánchez-Bordona, in the awareness that the Member States have different arrangements for distributing powers to deal with matters of succession, the concept of 'court' in Article 3(2) adopts an approach that combines an institutional or organic understanding of that term with a functional approach to its use. It covers not only judicial authorities but also all other authorities and legal professionals with competence in matters of succession which exercise judicial functions and which satisfy the conditions laid down by that provision[11].

As a result, in accordance with Article 3(2) of the Succession Regulation[12], the term 'court' means any judicial authority; however, it also includes non-judicial authorities or legal professionals with competence in matters of succession, where they exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of judicial authority, provided that they satisfy the conditions listed in that provision[13]. This latter group – non-judicial authorities or legal professionals with competence in matters of

[10] The preliminary reference procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts, through which the Court provides national courts with the criteria for the interpretation of EU law which they need in order to decide the disputes before them. In order to be able to refer a matter to the Court in the context of the preliminary ruling procedure, the referring body must be capable of being classified as a 'court or tribunal' within the meaning of Article 267 TFEU (for the criteria, see Case C-503/15 *Margarit Panicello*, EU:C:2017:126).

[11] Case C-658/17 *WB*, EU:C:2019:444, para. 40.

[12] Article 3(2) of the Succession Regulation foresees: "For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate: (a) may be made the subject of an appeal to or review by a judicial authority; and (b) have a similar force and effect as a decision of a judicial authority on the same matter."

[13] Under Article 79, each Member State is obliged to inform the European Commission about whether such an authority exists in their legal system and if that is the case, who that authority is. The European Commission compiles such information and makes it available on the European Judicial Network in civil and commercial matters. However, failure by a Member State to notify the Commission of the exercise of judicial functions by a

succession – and in particular their situation puzzles national authorities. This was also the case in *E.E.*

It should be reminded that whether and to what extent the term 'court' used in the Succession Regulation include notaries dealing with succession, had already been raised before the CJEU. The often-cited case is *WB* (C-658/17), in which the Polish court sought clarification on the concept of 'court' within the meaning of the Succession Regulation. The CJEU ruled that Polish notaries did not qualify as 'courts' since they did not exercise 'judicial functions'. In particular, the CJEU concluded that a notary who drew up a deed of a certificate of succession at the unanimous request of all the parties to the procedure conducted by the notary did not constitute a 'court' within the meaning of Article 3(2). Consequently, such a deed does not constitute a 'decision' within the meaning of Article 3(1) (g).

It appears that the most complicated element in the definition of the term 'court' is the requirement that such non-judicial authorities or legal professionals should be exercising judicial functions. The term 'exercise judicial functions' was interpreted by the CJEU in earlier cases. The Court has ruled that the exercise of judicial functions means that the person concerned has the power to rule of his own motion on possible points of contention between the parties concerned[14]. For an authority to be regarded, in the light of the specific nature of its activities, as exercising a judicial function, it must be given the power to decide a legal dispute[15]. This is not the case where the powers of the professional concerned are entirely dependent on the will of the parties. Therefore, an authority must be regarded as exercising judicial functions where it may have jurisdiction to hear and determine disputes in succession matters[16].

Such a standard is not easy to fulfil for a considerable part of European notaries. This was confirmed in *E.E.*, where, similar to *WB* (C-658/17) case, the CJEU found that a Lithuanian notary was not to be regarded as a 'court' within the meaning of Article 3(2) of the Succession Regulation because it did not have the right to exercise judicial functions (para 54). As made clear by the AG Campos Sánchez-Bordona, a Lithuanian notary does not have the competence to adjudicate on the issues in dispute between the parties. He has no power to establish matters of fact that are not clear and obvious, or to rule on facts in dispute; where there are doubts about the content of the will, it is not for him to explain it and he cannot endorse an interpretation offered by one of the heirs or, in the event of disagreement between them, determine which understanding of the text reflects the actual intention of the deceased. In the event of any dispute or doubt, a Lithuanian notary must refrain from making any decisions, it being for the court to adjudicate in that regard (para 81-82 of the AG Opinion).

Taking into account such considerations, the CJEU concluded (subject to verification by the referring court) that Lithuanian notaries did not exercise judicial functions when issuing certificates of succession. However, the CJEU ruled that it was up to the referring court to determine whether those notaries acted by delegation or under the control of judicial

certain authority (e.g. notaries), as required under Article 79, is not decisive for their classification as a 'court'. See Case C-658/17 *WB*, EU:C:2019:444.

[14] Case C-414/92 Solo *Kleinmotoren*, EU:C:1994:221, paragraphs 17 and 18.

[15] Order of 24 March 2011, Case C-344/09 *Bengtsson*, EU:C:2011:174, paragraph 19 and the case-law cited.

[16] Case C-20/17 *Oberle*, EU:C:2018:845, paragraph 44.

authority and whether, consequently, they could be classed as 'courts' within the meaning of that provision.

5. Different implications of the Succession Regulation to 'courts' and 'other authorities'

The question of whether a particular authority qualifies as a 'court' under the Succession Regulation is crucial in two main aspects:

- In the context of international jurisdiction; and
- In the context of the rules governing the circulation of the instruments (documents) it produces.

Firstly, 'courts' are bound by the jurisdictional rules of the Regulation and should establish their jurisdiction on the basis of the provisions of the Succession Regulation. This does not apply to 'other authorities', such as notaries, unless they are exercising judicial functions or act pursuant to a delegation of power by a judicial authority or under the control of such an authority (Article 3(2), Recital 22). Secondly, the circulation rules of the documents are different. 'Court' decisions circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions (Article 39). However, other documents circulate in accordance with the provisions on authentic instruments (Article 59)[17].

The question of whether Lithuanian notary is to be regarded as 'court' was material in the *E.E.* case. If the Lithuanian notary were to be classified as 'court' (this was left for the national court to ascertain), such notary would be bound by jurisdictional rules of the Regulation. Naturally, this would mean that the jurisdiction would lie with the authorities of the habitual residence of the Lithuanian woman. Moreover, as stated by the CJEU, a certificate of succession issued by a notary would then be regarded as a 'decision' within the meaning of Article 3(1) (g) of the Regulation[18] (paragraph 60).

The situation would be very different if the Lithuanian notary were not to be classified as 'courts' within the meaning of Article 3(2) of the Succession Regulation. In that case, explained the CJEU, those notaries would not be subject to the rules of jurisdiction laid down by the Succession Regulation, and they would not, moreover, be required to determine which courts would, where necessary, have jurisdiction to adjudicate by virtue of the provisions under Chapter II of that Regulation (paragraph 66). In simple words, in the *E.E.* case, the notary in question would be entitled to deal with the case and to issue the inheritance certificate requested by E.E.

The CJEU clarified that in case Lithuanian notary was not to be classified as 'court' within the meaning of Article 3(2) of the Succession Regulation, such a notary could issue a national

[17] This is clarified in Recital 22, which provides that "acts issued by notaries in matters of succession in the Member States should circulate under this Regulation. When notaries exercise judicial functions they are bound by the rules of jurisdiction, and the decisions they give should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments."

[18] In accordance with Article 3(1) (g) of the Succession Regulation, the term 'decision' covers any decision in a matter of succession given by a court of a Member State, whatever the decision may be called.

succession certificate according to national jurisdiction rules, which might disregard the habitual residence of the deceased (paragraph 80)[19]. Such national succession certificate then constitutes an authentic instrument (if the referring court finds that those certificates satisfy the conditions laid down in Article 3(1)(i) of the Succession Regulation), and its evidentiary force has to be accepted in the other Member States under Article 59(1) of the Regulation.

6. Choice of law and choice of forum

The Succession Regulation foresees a possibility for a party autonomy enabling the choice of law and choice of court. It provides that a person may choose the law to govern his succession as a whole the law of the state whose nationality he possesses at the time of making the choice or at the time of death (Article 22). Such a choice would overrule the application of the law of the habitual residence of the deceased under Article 21(1). Regarding the choice of court, the heirs can opt for the courts of a Member State whose law had been chosen by the deceased (Article 5, Article 7).

In the *E.E.* case, the Supreme Court of Lithuania's last preliminary question sought to determine if the deceased had chosen the law of Lithuania, and the heirs had chosen the jurisdiction of Lithuanian courts.

E.E.'s mother had not expressly chosen the law applicable to her succession in her will. Her will only provided that it should be governed by Lithuanian law. However, it is important to note that the will was drawn up before a notary in Lithuania in 2013, that is before the Succession Regulation entered into force. Therefore, the transitional provisions of the Succession Regulation, in particular, Article 83(4) were important. This Article states that if a disposition of property was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen under this Regulation, that law should be deemed to have been chosen as the law applicable to the succession. Consequently, the CJEU considered that the law under which that will was drawn up (Lithuanian law) was chosen as the law applicable to the succession (para. 94).

Another question concerned the choice of court. It had to be ascertained whether the potential heirs (the deceased's son E.E. and the deceased's husband) had chosen the jurisdiction of Lithuanian courts. According to the Succession Regulation, they could have done so by signing a choice-of-court agreement (Article 5) or through express declarations in which they accepted the jurisdiction of the court seised (Article 7). In this case, no separate agreement was concluded, thus it had to be evaluated whether the conditions of Article 7 were fulfilled. The CJEU left the question to be decided by the referring court.

[19] In Case C-20/17 *Oberle* the question of competence of national authorities to issue certificates of succession was addressed. The Court ruled that Article 4 of the Succession Regulation must be interpreted as precluding legislation of a Member State "which provides that, although the deceased did not, at the time of death, have his habitual residence in that Member State, the courts of that Member State are to retain jurisdiction to issue national certificates of succession, in the context of a succession with cross-border implications, where the assets of the estate are located in that Member State or the deceased was a national of that Member State".

IV. THE CASE BACK IN THE SUPREME COURT OF LITHUANIA

After the CJEU delivered its preliminary ruling, the case returned to the Supreme Court of Lithuania. As a result, on 4 November 2020, the Supreme Court of Lithuania adopted the ruling No e3K-3-422-378/2020, which finally settled the dispute.

Following the CJEU guidance, the Supreme Court of Lithuania ruled that the deceased was habitually resident in Germany. The court saw it important that the deceased declared her emigration to Germany, married there, she and her minor son lived in Germany, where she later died. The length and regularity of stay as well as the fact that family residence was there, in the opinion of the Supreme Court, suggested her habitual residence in Germany and not in Lithuania. The court then ruled that this situation amounted to a 'succession with cross-border implications'.

Then, the Supreme Court had to verify whether Lithuanian notaries fell under the concept of 'courts' within the meaning of the Succession Regulation. Analysing the national provisions on the role and rights of the notaries, the Supreme Court concluded that the issuance of a national certificate of the right of inheritance did not imply exercising judicial functions in the Republic of Lithuania. The Court underlined that a notary just confirmed the undisputable subjective rights, but he did not have authority to resolve possible disputes. The Supreme Court of Lithuania thus concluded that a notary in Lithuania did not fall under the notion of 'court' within the meaning of the Succession Regulation.

Such a conclusion led the Supreme Court to rule that a Lithuanian notary was competent to issue a national succession certificate without referring to the jurisdictional rules of the Succession Regulation. The court also confirmed that Lithuanian law should apply to the case and that the parties had accepted the jurisdiction on Lithuanian courts (E.E by applying to Lithuanian court and his step-father by issuing a respective statement (Article 7(c) of the Regulation).

V. CONCLUDING REMARKS

The *E.E.* case contributes to the existing case law by providing a more detailed explanation as to when notaries qualify as 'courts' and by establishing that multiple habitual residences are not permitted under the Succession Regulation. It also offers further guidance on the concept of the deceased's habitual residence and clarifies the hierarchy of the criteria used to identify it.

Another important point brought up by the CJEU is that when issuing national certificates of succession in countries where notaries do not exercise judicial functions for the purposes of the Succession Regulation (such as Lithuania and Poland), the notaries are not bound by the Regulation's jurisdictional rules. In such cases, the notaries should follow national rules to verify if they are competent to issue national succession certificates.

THE ASYMMETRY IN 'DUAL' HABITUAL RESIDENCE RESULTING FROM CROSS-BORDER DIVORCE. AN APPROXIMATION TO THE COMPETENT JUDICIAL AUTHORITY TO THE THREAD OF *IB* CASE 289/20

David Carrizo Aguado[1]

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Summary: I. Prolegomena. II. Decisive passages and operative part of case *IB* (C-289/20). III. Articulation of the habitual residence forum in light of Regulation (EU) 2019/1111. 1. Contextualisation. 2. General development. 3. Legal interpretation of the term "habitual residence of the spouse". IV. Final remark.

Abstract: It is a well-known fact that Regulation (EU) 2019/1111, like its predecessors, does not contain a definition of the concept of habitual residence. In its absence, we must not apply the internal interpretative criteria of national legal systems but must resort to the well-known autonomous interpretation. Namely, to understand a provision of European Union law, we must not only take into account the literal wording but also the context in which it is set and the objectives pursued by the regulation to which it belongs. In this delicate framework of action, the trail blazed by the IB case of 25 November 2021 has allowed for an interpretation of Article 3(1)(a) that had not previously existed. In this regard, the question arises as to whether this decision provides legal certainty and security in international divorces when one of the spouses has a connection in two European countries or, on the other hand, whether it turns out to be a decision that shows the difficulty involved in European private international family law. It also raises the question that, perhaps, the European legislator should have addressed the concept of habitual residence with the advent of Regulation (EU) 2019/1111. This ruling is not the only reflection that has aroused interest in the issue of which court should hear divorce petitions, given the reality that many people in Europe are currently living between two European countries and have a close relationship with both. It is not a trivial matter because there are comparable characteristics for determining "habitual residence" when it involves two different States.

[1] Assistant Professor of International Private Law University of León. Work carried out within the framework of the R&D&I Project: "Retos de la regulación jurídico-patrimonial del matrimonio y de otras realidades (uniones de hecho) en los planos supraestatal y estatal (REJURPAT)", code PID2019-106496RB-I00, within the framework of the *Programas Estatales de Generación de Conocimiento y Fortalecimiento Científico y Tecnológico del Sistema de I+D+i*. PI: Dr. D. Andrés Rodríguez Benot.

I. PROLEGOMENA

The increased mobility of citizens within the European Union has led to a considerable surge in families with a transnational dimension[2], particularly those whose members have different nationalities or reside in different Member States[3]. Thus, the rise of globalisation has increased the number of cases in family jurisdiction in which there is at least one international element.

In 2020, there were 80,015 annulments, separations and divorces, a decrease of 16.1% from the previous year at a rate of 1.7 per 1,000 inhabitants. It is worth noting that the highest annual rate declines in the number of annulments, separations and divorces were recorded in the quarters in which mobility was restricted by the pandemic caused by COVID-19. In 82% of divorces of couples of different sexes, both spouses were of Spanish nationality. In 10.6% of cases, one of the spouses was a foreign national, and in 7.4%, both were foreigners[4].

In disputes that involve a foreign element, it should be borne in mind that each disputed measure may be subject to the application of different international instruments in terms of jurisdiction. This, in turn, may lead to jurisdictional dispersion of the lawsuit with the negative consequence of a multiplication of the applicable rules and the competent State courts, which may oblige individuals to litigate in different countries depending on the legal protection sought[5].

Moreover, the sources of institutional production are becoming increasingly more important, which is not due to the classic principle of hierarchy of regulation but to the coherence of the legal system, which has opted to move toward a system of legal integration in areas characterised by globalisation in the shaping of legal relations.

In fact, within the framework of the transfer of sovereignty to European institutions, significant steps are being taken to strengthen Community freedoms, which in this field are mainly related to the free movement of persons, judicial decisions and respect for fundamental rights[6].

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[2] In recent decades, family law has been affected by migratory movements and the internationalisation of the private relationships of people whose lives are connected to more than one country: C. Azcárraga Monzonís, 'Relacion familiares internacionales. New challenges in a globalised world', *The Forum*, 15, 99-116, (2014).

[3] In this context, the right to family life, which needs to be reconciled with the exercise of the right to move and reside in another State, is a crucial element conditioning and enabling people's mobility. Cross-border mobility of persons requires adequate protection of their right to family life, which implies, consequently, the possibility to move and reside with family members in another State: P. Jiménez Blanco, 'Movilidad transfronteriza de personas, vida familiar y Derecho internacional privado' *Electronic Journal of International Studies*, 35, (2018).

[4] National Statistics Institute (INE), 'Statistics on Annulments, Separations and Divorces. Year 2020'. Press release of 27 September 2021.

[5] E. Santana Pérez, 'Experiencias de los tribunales en materia de responsabilidad parental y retención ilícita de menores: algunos retos y cuestiones controvertidas', in C. Otero García-Castrillón, *Civil Justice in the European Union. Evaluación de la experiencia española y perspectivas de future*, Madrid: Dykinson, (2017), 233.

[6] M. Guzmán Peces, 'La competencia judicial en materia de nulidad, separación y divorcio; responsabilidad parental y sustracción civil de menores en Derecho internacional privado español', in M. Guzmán Zapater and

In this respect, it should be borne in mind that the presence of a "foreign ingredient" in the proceedings does not necessarily imply that only the rules of private international law in force are applied[7], nor that their application is correct[8].

Nevertheless, private international family law is very much alive, characterised by the work of various international organisations[9]. Thus, the secular leadership of the Hague Conference on Private International Law should not be overlooked as it implies that the EU has become aware of the need to organise this sector *ad intra in* order to achieve its integration objective, although without losing sight of the need to coordinate *ad extra* with institutions such as the aforementioned Conference[10].

II. DECISIVE PASSAGES AND OPERATIVE PART OF THE CASE IB (C-289/20)

Case C-289/20, *IB*, of 25 November 2021,[11] will be the central focus of this investigation. Therefore, it is interesting to know the factual situation to address the complex legal relationships that are intertwined in the contentious international divorce action brought by one of the spouses.

The husband, whose initials are IB, a French national, and his wife FA, an Irish national, married in 1994 in Bray, Ireland. When the divorce proceedings were initiated, their three children had reached the age of majority.

On 28 December 2018, IB filed for divorce with the French Courts of First Instance. However, by order of 11 July 2019 and in accordance with FA's claims, the family court judge of that court declared that he had no territorial jurisdiction to rule on the spouses' divorce, inasmuch as he considered that the mere establishment of IB's place of work in France was

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M. Herranz Ballesteros, *Crisis in international matrimonial property and its effects in Spanish and European Union law. Estudio normativo y jurisprudencial,* (Valencia: Tirant lo Blanch, 2018), 243-244.

7 It is a regulatory framework that has reached a notorious complexity and that, in essence, makes it difficult for legal operators to put into practice: F.J., Forcada Miranda, 'La creciente complejidad del Derecho internacional de Familia', *Familia y sucesiones: cuaderno jurídico*, 106, 15, (2014).

8 Indeed, it seems clear that access to quality justice in international cases depends on the social, cultural and economic background of the litigants to a greater extent than in domestic cases: in C., González Beilfuss, 'Experiencias de los tribunales españoles en los procesos relativos a crisis matrimoniales: algunos retos y cuestiones controvertidas', in C. Otero García-Castrillón, *Civil Justice in the European Union. Evaluación de la experiencia española y perspectivas de future*, Madrid: Dykinson, (2017), 199-201.

9 On the one hand, the EU has established itself in a material sector that until recently was alien to it, acting with a regional and universal perspective. While exercising exclusive competence in the external sphere, numerous Regulations have been adopted to be bound by the Conventions promoted by the Hague Conference on Private International Law: B. Campuzano Díaz, 'La política legislativa de la UE en DIPr de familia. An overall assessment', *Cuadernos de derecho transnacional*, 5, 2, 263, (2013).

10 Palao wisely points out that, if anything characterises the regulation of family law in international situations in the context of the European Union, it is its plural, fragmentary and unfinished nature. This applies both to the matters covered by the various European instruments that have been drawn up and to their disparate areas of territorial application: G. Palao Moreno, 'Los reglamentos europeos en materia de familia: Cuestiones abiertas y problemas prácticos', in Mª V. Cuartero Rubio and J.M. Velasco Retamosa, *Los reglamentos europeos en materia de familia: Cuestiones abiertas y problemas prácticos* (Valencia: Tirant lo Blanch, 2021), 24.

11 EU:C:2021:955.

not sufficient to indicate his intention to establish his habitual residence there, despite the tax and administrative consequences and the living habits arising therefrom.

Thus, on 30 July 2019, IB lodges an appeal with the *Cour d'appel de Paris*. Its claim hinges on the territorial declaration of the Paris District Court as the competent court. The appellant's main argument is that he has been working in France since 2010. In addition, he moved into a flat - belonging to his father - on a stable and permanent basis in May 2017, which led to an active social life in France. Against this dark backdrop, the wife maintains that the possibility of the family settling in France has never been contemplated. According to the applicant, the family's habitual residence is in Ireland. IB has never changed his residence and only changed the address of his place of work. Moreover, the fact that IB has been working and earning an income in France for more than six months is not sufficient to establish his habitual residence within the meaning of Article 3(1)(a) of Regulation (EU) 2019/1111. In particular, according to the facts recounted by IB, the husband continued to travel to the family home in Ireland until the end of 2018, so much so that he lived the same life in Ireland as before the onset of the litigation. Furthermore, the husband consulted a lawyer in Ireland when the spouses were considering divorce in September 2018.

According to the referring court, the spouses' family home was in Ireland, where the family had settled in 1999 and acquired a property that constituted the marital home. Furthermore, on the date on which IB initiated the divorce proceedings, FA was still habitually resident in Ireland, there had been no separation prior to the initiation of those proceedings, and there was no evidence that the spouses had any common intention of moving their marital home to France. In contrast, many factors pointed to IB's personal and family ties with Ireland, where he traveled every week to join his wife and children.

In the said convoluted context, the court considers that IB's connection with Ireland does not preclude the existence of a connection with France, to which, since 2017, he has traveled every week to work. The referring court states, like the court of First Instance, that, in fact, IB has had, for many years, two residences, a family residence in Ireland and a business residence in France, so the elements of IB's connection with France are neither occasional nor circumstantial and that, in the referring court's view, IB established the centre of its business interests there at least since 15 May 2017.

In those circumstances, however, the referring court states that, although IB may be regarded as having established a stable and permanent residence in France for at least six months before the application was brought before the *Tribunal de Grande Instance de Par*is, he had not lost his residence in Ireland, where he retained family ties and spent regular periods of time for personal reasons. Ultimately, that court concludes that the Irish and French courts have equal jurisdiction to rule on the divorce of the spouses concerned.

The domestic court rightly points out that the Luxembourg court[12] has provided criteria for determining jurisdiction in cases where two Member States may have jurisdiction to hear

[12] CJEU of 16 July 2009, Case C-168/08, *Hadadi* (EU:C:2009:474). Among others, P. Lagarde, 'L'application du règlement Bruxelles II bis en cas de double nationalité', note de Jurisprudence - Cour de justice des Communautés européennes 16 juillet 2009, Hadadi, *Revue trimestrielle de droit europeen*, 46, 3, (2010), 769-774; S. De Vido, 'The relevance of double nationality to conflict-of-laws issues relating to divorce and legal separation in Europe', *Cuadernos de derecho transnacional*, 4, 1, (2012), 222-232.

the divorce application. Nevertheless, it should be made clear that this case concerned the application of the criterion of nationality, whose objective definition means that two spouses may be nationals of two Member States. Case C-289/20, on the other hand, relies on the concept of habitual residence to determine the competent judicial authority.

Therefore, the Court of Appeal submits the question referred for a preliminary ruling: for the purposes of Article 3 of Regulation (EU) 2019/1111 and the application thereof, can such a spouse be regarded as having his or her habitual residence in two Member States, so that, if the conditions laid down by that Article are satisfied in two Member States, the courts of those two Member States have equal jurisdiction to rule on the divorce?

III. ARTICULATION OF THE HABITUAL RESIDENCE FORUM IN THE LIGHT OF REGULATION (EU) 2019/1111

1. Contextualisation

As can be seen in Article 3 of the regulatory text at the head of this section, there are seven alternative forums[13] of international jurisdiction applicable to international separation, annulment and divorce disputes[14]. It is sufficient that one of these forums is present for the courts of the Member State concerned to declare that they have jurisdiction[15].

In the opinion of Calvo Caravaca and Carrascosa González, the aforementioned Regulation has made the grave mistake of not admitting the parties' choice of court. This results in one spouse seeking to go to a court in one State before the other spouse has a chance to do so, a *Race to the Courthouse*, thus, and thus litigation in the courts of one Member State may be convenient and inexpensive for one spouse, but expensive and inconvenient for the other[16]. In contrast, another doctrinal sector understands that the result generated by the alternativity of the forums is a *privilege* for the plaintiff spouse deriving from the fact of being the first to file the lawsuit[17].

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[13] ...of which six are based on the habitual residence of one or both spouses: B. Cuartero Rubio and J.M. Velasco Retamosa, *Los reglamentos europeos en materia de familia: Cuestiones abiertas y problemas prácticos*, (Valencia: Tirant lo Blanch 2021), 271.

[14] According to Castellanos, the first seven forums are copied, with very little success, from Regulation (EC) 2201/2003, given that most of them are inapplicable because they cover cases already regulated by the aforementioned Regulation: E. Castellanos Ruíz, *La competencia de los tribunales en el derecho de familia internacional. European Regulations 2201/2003 - Regulation 2019/1111and 4/2009*, Valencia: Tirant lo Blanch, (202)1, 42.

[15] Regulation (EU) 2019/1111 contributes to creating an area of freedom, security and justice in which the free movement of persons is guaranteed. To this end, in Chapters II and III, the Regulation lays down in particular rules governing jurisdiction and the recognition and enforcement of judgments on the dissolution of marriage to ensure legal certainty.

[16] This unfair consequence would be remedied, at least partially, if the European legislator allowed the spouses to choose the competent court, as the competent court would be efficient for both litigants, and the costs of international litigation would decrease for both: A-L. Calvo Caravaca and J. Carrascosa González, *Tratado de Derecho Internacional,* (Valencia: Tirant lo Blanch, 2020).

[17] The configuration of the forums of jurisdiction based on the criterion of the autonomy of the will would make it possible to eliminate the privileged situation of the plaintiff, which, in addition to operating in favour of coordination, would facilitate, under equal conditions for both spouses, access to justice: Mª.A. Sánchez Jiménez,

2. General development

Before analysing the particular features of the habitual residence forum, in particular the sixth paragraph, it should be bear in mind that, although the first to fourth paragraphs of Article 3(1)(a) expressly refer to the criteria of the habitual residence of the spouses and the habitual residence of the defendant, both Article 3(1)(a), fifth paragraph, and Article 3(1)(a), sixth paragraph, allow the rule of habitual residence to be applied. However, Article 3(1)(a), fifth paragraph, and Article 3(1)(a), sixth paragraph, both allow the *forum actoris* rule of jurisdiction to be applied[18].

This provision is intended to safeguard the interests of the spouses and is in line with the aim pursued by the European rule itself, which is based on the establishment of flexible rules to take account of the mobility of persons and also to protect the rights of the spouse who has left the Member State of the common habitual residence while ensuring that there is an actual link between the person concerned and the Member State exercising jurisdiction.

In any case, it must be understood that the legal shield lies in pursuing a balancing of two principles: legal certainty and access to the courts to dissolve the marriage. The balance between the two principles would be upset if the habitual residence of a spouse in two Member States were allowed since *multiple residences* would harm legal certainty, given the criterion for determining international jurisdiction would be mere residence, not habitual residence[19].

3. Legal structure of the term "habitual residence of the spouse"

a) Preliminary idea

The residence that is sought to be specified on the basis of Article 3(1)(a) is not the mere stay but the true and accurate "habitual residence" of a person. The European High Court understands that the term "*habitual*" must generate stability or regularity and cannot simultaneously include several Member States[20]. In other words, the habitual residence would be the place where the person has his or her "permanent centre of interests." It should be made clear that to distinguish habitual residence from the mere temporary presence, it must, in principle, be of a particular duration to show sufficient stability. The Regulation, however, does not provide for a minimum duration[21].

'El Reglamento (UE) 2019/1111 y la continuidad de los foros de competencia en materia matrimonial: resultados en el contexto actual', *Anuario Español de Derecho Internacional Privado*, 19-20, 301-325, (2019).

18 The CJEU of 13 October 2016, Case C-294/15, *Mikołajczyk* (EU:C:2016:772), states that the latter provisions do indeed confer jurisdiction on the courts of the Member State in whose territory the applicant's habitual residence is situated to rule on the dissolution of the marriage.

19 Clarification made by the European Court in Case C-289/20, *IB* at paragraph 43.

20 Admission of the situation where a spouse may simultaneously be habitually resident in several Member States increases the difficulties in determining the courts that may rule on the dissolution of the marriage and thus makes it more complex for the court seised to verify its own jurisdiction: paragraph 46 of Case C-289/20, *IB*.

21 In order to determine the habitual residence of a couple, the constant and continuous physical presence of the couple in a given State is essential. The place where each of them lives on a daily basis and where their children live, if they have any; the place where they carry out their usual work activity, as well as the stable cohabitation they have developed; also the place where the common assets of both spouses and those held separately by each

A fortiori, the duration of a stay can only serve as an indication when assessing the stability of residence. In addition, the assessment must be made in light of the totality of the factual circumstances specific to each case[22].

b) **Interrelation with other legal instruments**

Both Article 3(c) of Council *Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* and [23] Article 5 of Council *Regulation (EU) 2016/1103 of 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*[24] refer to the jurisdiction set out in Article 3(1)(a) of Regulation (EC) 2201/2003, which as is well known will be repealed by Regulation (EU) 2019/1111 as of 1 August 2022. In the context of proceedings for dissolution of marriage, both regulations establish ancillary powers for the court hearing the case to rule on specific maintenance claims or particular property matters.

Thus, if a spouse were to be recognised as simultaneously having more than one habitual residence in the above sense, it would undermine the foreseeability requirement of the rules of jurisdiction, which are contained in the two Regulations mentioned above[25].

However, the well-known case of 16 July 2009, Case C-168/08 *Hadadi*, in which the Luxembourg court holds that, where each of the spouses is a national of two of the same Member States, Article 3(1)(b) of Regulation (EU) 2019/1111 precludes the exclusion of the jurisdiction of the courts of one of those Member States solely on the ground that the claimant has no other connection with that State[26].

c) **Interpretation through analogy**

Concerning parental responsibility, Regulation (EU) 2019/1111 gives a prominent procedural role to the child, the habitual residence being the criterion for determining

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of them are located. L.A. Pérez Martín, 'La residencia habitual en el nuevo derecho económico europeo de familia a la luz la Jurisprudencia del TJUE de 2018' in P. Domínguez Lozano and M. J. Elvira Benayas, *European Private International Law: Dialogues with Practice* (Valencia: Tirant lo Blanch, 307, 2020); T. Kruger, 'Finding a habitual residence', in I. Viarengo and F. Villata, *Planning the future of cross border families. A path through coordination* (Oxford: Hart Publishing, 2020), 122-125.

[22] This is the position of the CJEU of 22 December 2010, Case C-497/10, *PPU - Mercredi* (EU:C:2010:829).

[23] OJEU, 7 of 10 January 2009.

[24] OJEU, 183 of 8 July 2016.

[25] In the case of cross-border maintenance provision, the CJEU has stated that the proximity between the competent court and the maintenance creditor constitutes, inter alia, objectives of Regulation (EC) 4/2009: Case C-41/19, *FX* (EU:C:2020:425) of June 2020; Case C-400/13, *Sanders and Huber-Sanders*, of 18 December 2014.

[26] Ms. Juliane Kokott, as Advocate General in this case, clarified that the most effective nationality should be the one that, based on additional criteria such as habitual residence, creates the closest connection with the courts of one of the Member States whose nationality the spouses hold. Only the courts of the Member State of the most effective nationality shall have jurisdiction pursuant to Article 3(1)(b) of the Regulation. Under this provision, the forum of the Member States of the least effective nationality would have to be excluded.

jurisdictional forums[27]. The primary binding factor of the Community rule is the child's location. It can be stated that the child's habitual residence is the gravitational axis of the system that decides international jurisdiction. As Campuzano argues, habitual residence plays a fundamental role in EU regulations and international conventions in which the EU participates, either directly or through its Member States. However, to preserve its factual nature, it has been decided not to define this concept, leaving it to the authorities in charge of applying each rule and defining it according to the circumstances of the case[28].

It should be noted that the interpretation of the concept of habitual residence is undoubtedly controversial, as it has had to be resolved according to the specific circumstances of various cases brought before the courts and tribunals[29]. Thus, habitual residence is a factual and not a legal *notion*[30].

On this issue, it is interesting to note the variation in the notion of habitual residence in the case law of the Court of Justice of the European Union[31]. Undoubtedly, the dye that permeates such a parameter is based on where the child has a particular social and family integration, which may be equally transferable to the claimant spouse.

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[27] The same was true of its predecessor: S. Ortiz Herrera, 'Tratamiento de la responsabilidad parental en el Reglamento 2201/2003: un avance hacia la integración y armonización del derecho civil en Europa', *RDUNED. Revista de derecho UNED*, 3, 191-192, (2008).

[28] B. Campuzano Díaz, 'A new judgment of the CJEU on the concept of habitual residence under Regulation 2201/2003: judgment of 17 October 2018, UD and XB, AS. 393/18 PPU', *Cuadernos de derecho transnacional*, 11, 2, 466 (2019); C. Marín Pedreño, *Sustracción internacional de menores y proceso legal para la restitución del menor*, Editorial Ley 57, (Málaga 2015), 25.

[29] As the specialised doctrine perfectly points out, it is essential to establish a suitable definition, as each legal instrument uses an autonomous and specific concept of habitual residence, which has not been interpreted in a coinciding manner by the case law. *Vid.* Mª.C. Chéliz Inglés, *International Child Abduction and Mediation. Retos y vías prácticas de solución*, (Valencia: Tirant lo Blanch, 2018), 44-46. Some authors advocate establishing a concept of habitual residence with European profiles in cases in which the habitual residence of the parties is not unique and can take place in different states of the European Union: A. Del Ser López and D. Carrizo Aguado, 'Rules of international jurisdiction in matters of parental responsibility: analysis of the forum of the habitual residence of the child' and study of 'residual jurisdiction', *Revista Aranzadi Unión Europea*, 10, 67, (2019); L.A. Pérez Martín, 'Determinación y trascendencia de la residencia habitual en las crisis familiares internacionales' in M. Guzmán Zapater and M. Herranz Ballesteros, *Crisis in international matrimonial property and its effects in Spanish and European Union law. Estudio normativo y jurisprudencial (*Valencia: Tirant lo Blanch, 2018), 959; The conceptualisation of the term has been orchestrated by the Court of Justice of the Union: J.M. de la Rosa Cortina, *Sustracción parental de menores. Civil, criminal, procedural and international aspects* (Valencia: Tirant lo Blanch, 2010), 200.

[30] J. Carrascosa González, 'Litigación internacional, responsabilidad parental y foro de la residencia habitual del menor en un estado miembro. Un estudio jurisprudencial' in Mª.A. Cebrián Salvat and I. Lorente Martínez, *Protección de menores y derecho internacional privado*, (Granada: Comares, 2019), 322-323.

[31] In any case, one idea that remains unchanged is in those cases in which the decision and will of the parents are not considered in any way when it comes to establishing residence. As an example of the evolution that has taken place in the case law of the Court of Luxembourg, in its CJEU of 2 April 2009, Case C-523/07, A (EU:C:2009:225), the European judge affirmed that the habitual residence of a minor, within the meaning of Article 8(1) of Regulation (EC) 2201/2003, must be determined on the basis of a set of factual circumstances that are particular to each case. In that case, the child had been moved by his parents from one Member State to another and was taken into care shortly afterward. Similarly, in the CJEU of 22 December 2010, Case C-497/10 PPU, *Mercredi* (ECLI:EU:C:2010:829), the Court reiterated that the residence of a two-month-old infant corresponds to the place that reveals a level of integration of the child in a social and family environment.

Accordingly, the European Court of Justice has held that, in addition to the child's physical presence in a Member State[32], other factors must be considered, indicating that such presence is by no means of a temporary or occasional nature[33]. Indeed, the Luxembourg judge is, we understand, paying some attention to the fact that the determination of the habitual residence of a child in a specific Member State requires, at the very least, that the child has been physically present in that Member State[34]. It should be pointed out that, where there is no physical presence of the child in the Member State concerned, certain circumstances, such as the intention of the *de facto* custodial parent or the possible habitual residence of one or the other parent in that Member State, cannot be given overriding importance for the interpretation of the concept of "habitual residence" to the detriment of objective geographical considerations. Such a failing would run the risk of overlooking the intention of the EU legislation[35].

The above notwithstanding all this, in cases where the child was in a different State prior to the wrongful removal or retention, the "social centre of life" will determine its framing as habitual residence[36].

IV. FINAL REMARK

In the numerous family disputes with a transnational element that our courts and tribunals are currently resolving, significant doubts arise when determining international jurisdiction based on the forum of habitual residence. This rule presents questions that must be interpreted in the light of the circumstances of each specific case, despite the considerable difficulties that remain evident, not only concerning the case in question but also in others that may arise from the increasingly common reality of a globalised world in which it is perfectly

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[32] The fact that the child does not have a habitual residence due to a lack of physical presence in a Member State, nor the existence of courts of a Member State better placed to hear the child's cases even if the child has never resided in that State, will make it possible to establish the child's habitual residence in a Member State in which he or she has never been present: CJEU of 17 October 2018, Case C-393/18 PPU, UD (EU:C:2018:835). For a notable study of the same, see. L.A. Pérez Martín, 'Residencia habitual de los menores y vulneración de derechos fundamentales. Judgment of the Court of Justice of 17 October 2018, Case C-393/18, PPU', European Union Law, 66, 2019.

[33] These factors include the duration, regularity, conditions and reasons for the child's stay in the territory of a Member State and the child's nationality: *Vid.* CJEU of 2 April 2009, Case C-523/07, *A* (EU:C:2009:225). However, the relevant grounds vary depending on the child's age: CJEU of 22 December 2010, Case C-497/10 PPU, *Mercredi* (EU:C:2010:829).

[34] CJEU of February 2017, Case C-499/15, *W and V* (EU:C:2017:118). On the same subject, *vid.* S. Álvarez González, 'Competencia judicial internacional para la modificación de sentencia en materia de responsabilidad parental y de obligaciones alimenticias. CJEU of 15 February 2017, Case C-499/15: W and V', *European Union Law*, 47 (2017); E. Viganotti, 'La notion de "résidence habituelle" de l'enfant selon la CJUE', *Gazette du/ Palais*, 40, 24-26 (2018); L. Idot, 'Compétence en matière de responsabilité parentale', *Europe*, 12, 43-44 (2018).

[35] CJEU of 28 June 2018, Case C-512/17, *HR* (EU:C:2018:513). In this regard, P. Gruber, 'Der gewöhnliche Aufenthalt von Säuglingen und Kleinkindern (zu EuGH, 28.6.2018,- C-512/17, unten S. 248, Nr. 21)', *IPRax: Praxis des Internationalen Privat- und Verfahrensrechts*, 39, 3, 217-221 (2019).

[36] In this sense, C.Mª. Caamiña Domínguez, *La sustracción de menores en la Unión Europea (*Colex: Madrid, 47, 2010).

conceivable for a person to carry out their professional and private activities in more than one State while spending a similar amount of time in each of them.

Naturally, it should be made clear that this regulatory instrument aims to adjust its rules to the reality of sensitive and highly conflictive matters such as matrimonial crises. Evidence of this is the vast number of forums of Article 3 of Regulation (EU) 2019/1111, marked by their flexibility and alternative nature, as well as their objective and non-hierarchical scope, in a context where the possibility of exercising express or tacit free will is absent[37].

However, habitual residence must be understood as a criterion of jurisdiction that makes it possible to maintain the axiom of *harmony* and *balance* in order to preserve respect for the rights of both contracting parties in a State. Indeed, jurisdiction favoring the court of the plaintiff spouse's habitual residence makes it the appropriate court to protect that party's rights. The spatial situation of the judge, close to the actor's nucleus or centre of life, will mean that the decision will ensure that his or her emotional ties are guaranteed.

However, in the light of the intricate *IB* case where the connection presented by the claimant spouse is objectively similar in two countries, it could be asked whether the legislator should have covered this lack of clarity on the occasion of the enactment of the very recent Regulation (EU) 2019/1111[38]. A consolidated doctrinal sector considers that, perhaps, it would not solve much, as the continuous interpretative doubts in these types of cases are likely to continue to exist since each case needs to be analysed and its value recognised according to its particular circumstances, which differ considerably from one case to another[39]. On the other hand, some authors claim that it is necessary to specify which criteria - personal, family, social, professional, property and/or economic - should be considered to determine the habitual residence of a citizen with an itinerant lifestyle[40].

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[37] From this point of view, the admission of a dual habitual residence of the applicant spouse would be in line with the objectives and dynamics of the competence structure of Regulation (EU) 2019/1111 in its intention to adapt to the reality of international marital unions. This is reported by J. Maseda Rodríguez, 'Competencia judicial internacional en materia de crisis matrimoniales: cónyuge que comparte su vida en más de un Estado miembro y concepto de residencia habitual. Judgment of the Court of Justice, Third Chamber, of 25 November 2021 (Case C-289/20: IB)', *European Union Law*, 101 (2022).

[38] Excellently, Palao believes that the rules of international jurisdiction in matters of legal separation, divorce and annulment in Europe need to be revised and updated and that various attempts - both institutional and academic - have been made since the beginning of the millennium in this direction. Therefore, it must be understood that the European legislator's commitment to such an ad hoc and uncompromising revision of Regulation (EU) 2019/1111 is a missed opportunity to carry out the necessary updating of the model of jurisdiction in matrimonial matters: G. Palao Moreno, 'La "revisión" de las normas de competencia judicial en materia matrimonial en el Reglamento (UE) 2019/1111. A New Missed Opportunity', in J.R. de Verda and Beamonte, A. Carrión Vidal and G. Muñoz Rodrigo, *Estudios de Derecho Privado en homenaje al profesor Salvador Carrión Olmos*, (Valencia: Tirant lo Blanch, 2022), 902. On a first approach to the doubts and interpretative problems, R. Espinosa Calabuig, 'Matrimonial matters,' in I. Viarengo and F. Villata, *Planning the future of cross-border families. A path through coordination*, (Oxford: Hart Publishing, 2020), 54.

[39] I. Antón Juárez, 'The habitual residence of the spouse in a cross-border divorce: could a multiple habitual residence preserve legal certainty? CJEU of 25 November 2021, C-289/20, Ib v. Fa.', *Cuadernos de derecho transnacional,* 14, 1, 589, (2022).

[40] L.A. Pérez Martín, 'Concreción de la residencia habitual de los cónyuges en las crisis matrimoniales europeas, episodio 1: aún con vida entre varios Estados, solo hay una residencia habitual', *Cuadernos de derecho transnacional*, 14, 1, 442, (2022).

In any event, admitting that a spouse may simultaneously reside habitually in several Member States would increase the difficulties in identifying in advance the courts that may rule on the dissolution of the marriage, thus complicating the verification of their jurisdiction by the court seised. This situation would only increase the risk of it being a simple and not a habitual residence. The latter is understood in the terms already set out, thus distorting the nature of this connection to the point of transforming it into an illusory residence used to determine international jurisdiction, which would be the cause of the dissolution of the marriage but would also increase the risk of it being *a simple residence and not a habitual* one. The result would be an ostensible imbalance in the position of the applicant spouse vis-à-vis the requested spouse insofar as it would increase the possibilities of resorting to *forum actoris*.

SECOND PART

CASE LAW AND CASE STUDIES FROM SELECTED COUNTRIES OF THE ENHANCED COOPERATION

REGULATIONS 2016/1103 AND 2016/1104 IN PRACTICE: ANALYSIS FROM A BELGIAN PERSPECTIVE

Vinciane Rosenau / Delphine Thienpont[1]

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Summary: I. Introduction. II. First question: the international jurisdiction of Belgian courts on the attribution, the valuation and the settlement of right of ownership of an immovable property located in Belgium. III. Second question: the respective scope of the Succession Regulation and the Matrimonial Property Regimes Regulation. IV. Third question: the European definition of 'matrimonial property regime', the inclusion of the primary regime and the concept of overriding mandatory rules. V. Fourth question: qualification problems. VI. Conclusion.

Abstract: The implementation of the Twin Regulations has not yet been the subject of much case law in Belgium. However, their application raises various questions that will have to be decided in national or European courts. This contribution deals with four issues that arised, or are likely to arise, in Belgian case law: the international jurisdiction of Belgian courts on the attribution, the valuation and the settlement of right of ownership of an immovable property situated in Belgium, the delimitation of the scope of the Succession Regulation and the Matrimonial Property Regimes Regulation, the determination of which issue of the so-called 'primary regime' falls within the scope of Regulation 2016/1103 and which of these issues can be qualified as 'overriding mandatory rules' and, finally, the potential reclassification of a registered partnership as a marriage and its consequences on the Regulation to be applied. As will be seen, those four issues all converge to the idea of articulation between European and national legal instruments.

I. INTRODUCTION

The implementation of the Matrimonial Property Regimes Regulation[2] and the Registered Partnerships Regulation[3] has not yet been the subject of much case law in Belgium. This is

[1] Both authors are *Assistantes UCLouvain*, as well as *collaboratrice notariale* in the case of Rosenau.

[2] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

[3] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

quite easy to explain since they only came into force on 29 January 2019. In Belgium, this is also due to the solutions they provide for. Indeed, Belgian practitioners are already familiar with most of these solutions through the Belgian Code of Private International Law, in force since 1 October 2004.[4]

However, it remains true that their application in Belgium raises, or will certainly raise, various issues that will have to be decided in national or European courts. Some of these questions already seem to be answered in the light of the case law of the Court of Justice of the European Union.

Without claiming to be exhaustive, we selected for this modest contribution four issues that arose, or are likely to arise, in Belgian case law. The first concerns the grounds of jurisdiction of national courts to hear cases regarding the settlement of the right of ownership of an immovable property located on their territory after this property has been attributed to one of the ex-spouses in the context of the liquidation of their matrimonial property regime (I). The second relates to the delimitation of the respective scope of application of the Succession Regulation and the Matrimonial Property Regimes Regulation (II). The third is about the autonomous definition of 'matrimonial property regime' and the concept of 'overriding mandatory rules' in Regulation 2016/1103 (III). Finally, the fourth question concerns the qualification in Belgian law of partnerships registered abroad and its consequences on the Regulation to be applied (IV).

II. FIRST QUESTION: THE INTERNATIONAL JURISDICTION OF BELGIAN COURTS ON THE ATTRIBUTION, THE VALUATION AND THE SETTLEMENT OF RIGHT OF OWNERSHIP OF AN IMMOVABLE PROPERTY LOCATED IN BELGIUM

The judgment of the Brussels Court of First Instance of 11 May 2020[5] is the only judgment published to date relating to the Matrimonial Property Regimes Regulation. In this case, an application was lodged with the court for enforcement of a foreign decision attributing to one of the ex-spouses an immovable property located in Belgium. The court was also seised of several counterclaims, among which the other ex-spouse asked for the appointment of an expert in order to determine the value of the said property.

The facts can be summarised as follows. Both parties have Dutch nationality, and the wife is also an Italian national. They got married on 25 July 2006 in the Netherlands. On 18 July 2006, they concluded a marriage contract which stated that their matrimonial property regime was governed by Dutch law. Two years later, they bought an immovable property located in Belgium, more specifically in Brussels, each of them being undivided co-owner of one half. By judgment of 16 August 2011, the District Court of The Hague pronounced the parties' divorce. The same court awarded the property in Brussels to the ex-husband, provided that he paid his ex-wife financial compensation worth half the estimated value of the property.

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4 J.-L. Van Boxstael, 'Le règlement européen "régimes matrimoniaux" et la pratique notariale', in F. Tainmont and J.-L. Van Boxstael eds, *Tapas de droit notarial 2018. Les régimes matrimoniaux* (Bruxelles: Larcier, 2018), 189, 191.

5 Civ. Bruxelles (3e ch.), 11 mai 2020, *Revue@dipr.be*, 2020, 31.

Although no appeal was lodged against the award of the property to the ex-husband, the valuation of the said property was the subject of lively discussions during the proceedings. On several occasions, the husband invited the wife to sign the deed of transfer of ownership in the presence of a notary, but she refused. The husband finally brought the case before the Brussels Court of First Instance in order to force his ex-wife to visit a notary. The wife contested the jurisdiction of the Belgian court and filed several counterclaims, one of which aiming at appointing an expert in order to determine again the value of the property.

This case offered the court an opportunity to examine the conflict of jurisdiction rules provided for in various European regulations. The relevant legal instrument will vary depending on the issue at stake.

First, the Brussels Court of First Instance examines the main application. As regards the liquidation of the matrimonial property regime, the conflict-of-jurisdiction rules have to be found in Regulation 2016/1103. According to it, the Belgian judge has no international jurisdiction to hear the case when the only connection the parties have with Belgium is the ownership of immovable property in its territory. As pointed out by the Brussels Court of First Instance, a distinction must however be made between the dispute and the decision concerning the division of property, on the one hand, and the issue relating to the definitive establishment of the right of ownership of the said property, on the other hand.

The first issue consists in determining who acquires the rights in rem and what payment obligations the parties have towards each other. This is a matrimonial property issue, since it concerns the distribution of immovable property between the ex-spouses on the basis of their pre-existing matrimonial relationship. This matter is governed by Regulation 2016/1103. Following its rules, the issue concerning the award of the property to one of the ex-spouses could not have been decided in a Belgian court.

The second issue is a corollary question arising from the (settled) liquidation and distribution of the matrimonial property regime. The question is how the rights *in rem* will ultimately be transferred or settled: in our case, what must the ex-husband do to become the only owner of the immovable property? This is no longer a matrimonial matter, but rather a matter of real rights. And yet, the Matrimonial Property Regimes Regulation excludes from its material scope 'any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register' (Article 1(2)(h)). The issue is rather governed by Regulation 1215/2012.[6] Under its Article 24(1), the court of the State in which the immovable property is situated shall have exclusive jurisdiction in proceedings relating to rights *in rem* in this property. A Belgian judge does therefore have jurisdiction to hear an application relating to the establishment of the right of ownership of a property located in Belgium which was allocated to one of the ex-spouses in the context of the liquidation and distribution operations carried out abroad. Contrary to what the wife claims, the Brussels Court of First Instance therefore declares itself competent to hear the main application aimed at forcing the wife to go to a notary for the transfer of ownership.

[6] European Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, particularly Article 24.

Second, the Brussels Court of First Instance turns to the counterclaims of the wife, in particular the one aiming at obtaining an expert appraisal of the value of the property. Rightly in our view, the court considers that this issue depends on the matrimonial matters decided in the Dutch courts. The relevant legal instrument is therefore Regulation 2016/1103, under which the Belgian judge has no jurisdiction in this case. The court points out that it could be different in only one respect, namely if the request for a new valuation of the property was to be considered as a 'provisional measure' within the meaning of Article 19 of this Regulation. In the specific case brought before it, the court however states that the counterclaim cannot be qualified as 'provisional measure' aiming at provisionally settling, securing or freezing the situation and the rights of the parties, especially because there is no risk of loss or disappearance of the property whose valuation is requested. The Belgian judge therefore declares itself incompetent to hear this counterclaim.

In our opinion, this case settled by the Brussels Court of First Instance sheds considerable light on the rules of international jurisdiction with which we are sometimes faced. The substance of the dispute is extraneous to Belgian law, but it turns out that the situation is actually related to this law because some matrimonial elements are present in Belgium. As indicated by the court, it does not have jurisdiction to judge on the merits of the dispute concerning the liquidation and the distribution of the matrimonial property regime. However, the court has jurisdiction to assist the parties in enforcing foreign decisions, which is fortunate. The Belgian judge is also competent to perform provisional measures that are strictly necessary in the circumstances of the case brought before him, but he shall refrain from performing measures that involve deciding on the merits.

It is probably important to recall that the court could just as easily hear such issues of international jurisdiction in a case involving the liquidation of a property regime between two people who concluded a registered partnership. In a very similar way to the Matrimonial Property Regimes Regulation, the Registered Partnerships Regulation indeed excludes from its scope of application 'any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register' (Article 1(2)(h)). It also organises a specific ground of jurisdiction for provisional measures (Article 19).

III. SECOND QUESTION: THE RESPECTIVE SCOPE OF THE SUCCESSION REGULATION AND THE MATRIMONIAL PROPERTY REGIMES REGULATION

As in other countries, the delimitation in Belgium of the respective scope of the Succession and the Matrimonial Property Regimes Regulations is not as easy as it may seem. Admittedly, both Regulations tend to delimit their scope as clearly as possible. The Succession Regulation[7] excludes from its scope 'questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable

[7] European Parliament and Council Regulation (EU) 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

effects to marriage' (Article 1(2)(d)). As to the Matrimonial Property Regimes Regulation, it excludes from its scope 'the succession to the estate of a deceased spouse' (Article 1(2)(d)).

In practice, it is however difficult to qualify the various family institutions when they are at the crossroads of the two fields.[8] This problem is not new. Jean-Louis Van Boxstael explains: 'Dans la détermination du statut du conjoint survivant, et des droits, notamment d'ordre patrimonial, qu'il peut faire valoir à l'endroit des autres héritiers du défunt, le "régime matrimonial" et la "succession" se sont toujours regardés en chiens de faïence car le décès n'est pas seulement l'occasion de l'ouverture de la succession : il est aussi, et avant cela, celle de la dissolution du régime matrimonial'.[9]

The Succession Regulation itself echoes this. Its Recital 12 states that 'this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters,[10] and property regimes of relationships deemed to have comparable effects to marriage. The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries'.

This issue was at stake before the Court of Justice of the European Union in the Mahnkopf case.[11] The dispute concerns paragraph 1371(1) of the BGB (German Civil Code). This provision provides as follows: "If the property regime is ended by the death of a spouse, the equalisation of the accrued gains shall be effected by increasing the surviving spouse's share of the estate on intestacy by one quarter of the estate; it is irrelevant in this regard whether the spouses have made accrued gains in the individual case'.[12] One of the questions referred to the Court by the national judge is whether the scope of the Succession Regulation 'also covers provisions of national law which, like paragraph 1371(1) of the [BGB], settle questions relating to matrimonial property regimes after the death of one spouse by increasing the other spouse's share of the estate on intestacy'. Contrary to the German national courts, which considered this to be a rule of matrimonial property law, the Court of Justice of the European Union considers it to be a rule of succession law which therefore falls within the material scope of the Succession Regulation.

The Court's reasoning is mainly based on two considerations, which have to do with the objectives pursued by the German rule, on the one hand, and with the objectives pursued by the Succession Regulation, on the other hand. First of all, the Court refers to the observations

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[8] A. Bonomi and P. Wautelet, 'Article 1. – Champ d'application', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) n° 2016/1103 et 2016/1104* (Bruxelles: Bruylant, 2021), 139, 167.

[9] J.-L. Van Boxstael, n 4 above, 197: 'In determining the status of the surviving spouse and the rights, in particular property rights, that he or she can assert against the other heirs of the deceased, the "matrimonial property regime" and the "succession" have always looked daggers at each other, because death is not only a cause of the opening of the succession: it is also, and before that, a cause of dissolution of the matrimonial property regime'.

[10] Emphasis added.

[11] Case C-558/16 *Doris Margret Lisette Mahnkopf*, [Judgment of 1 March 2018], available at www.eur-lex.europa.eu.

[12] ibid, §18.

of the German Government, which states that paragraph 1371(1) of the BGB 'applies only where the marriage comes to an end because of death; it has the aim of allocating on a fixed basis assets acquired during the marriage, compensating for the disadvantage that results from the statutory property regime of community of accrued assets being interrupted by the death of a spouse, while avoiding in that way the need to determine precisely the composition and value of the assets at the beginning and end of the marriage'.[13] It follows that the main purpose of that provision of national law is not 'the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Such a provision therefore principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime'.[14] The second consideration has to do with the aims of the Succession Regulation, and more specifically the aims of the European Certificate of Succession. The Court considers that the achievement of those objectives 'would be impeded considerably in a situation such as that at issue in the main proceedings if it did not include full information relating to the surviving spouse's rights regarding the estate'.[15]

In the light of those considerations, the Court finally answers the question referred to it in the affirmative. It states that 'a national provision, such as that at issue in the main proceedings, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of that regulation'.[16]

It follows from this case law that the Succession Regulation covers any mechanism whose main objective is not to address the property situation of the spouses between them in the division of their assets but is rather to fix the rights which the surviving spouse is entitled to claim against the other heirs of the predeceased in the division of the inheritance.

In Belgian law, that means that contractual institutions or 'Valkeniers' agreements[17] are classified in the succession field. This classification seems however more complicated when 'matrimonial benefits' are at stake. As a reminder, these are mechanisms which, most often under a community of property regime,[18] derogate from the rules on the composition of assets ('clause d'apport' or 'clause de préciput') and/or derogate from the rules on the equal division of assets. Such mechanisms can be linked to both matrimonial property regimes

13 n 11 above, §39.

14 n 11 above, §40.

15 n 11 above, §43.

16 n 11 above, §44.

17 Article 1388, al. 2 of the Belgian Civil Code: 'Les époux peuvent, par contrat de mariage ou par acte modificatif, si l'un d'eux a à ce moment un ou plusieurs descendants issus d'une relation antérieure à leur mariage ou adoptés avant leur mariage ou des descendants de ceux-ci, conclure, même sans réciprocité, un accord complet ou partiel relatif aux droits que l'un peut exercer dans la succession de l'autre. Cet accord ne porte pas préjudice au droit de l'un de disposer, par testament ou par acte entre vifs, au profit de l'autre. Il ne peut en aucun cas priver le conjoint survivant du droit d'habitation portant sur l'immeuble affecté au jour de l'ouverture de la succession du prémourant au logement principal de la famille et du droit d'usufruit des meubles meublants qui le garnissent, incessible, limité à ce qui est nécessaire à son titulaire et à sa famille, pour une période de six mois à compter du jour de l'ouverture de la succession du prémourant'.

18 A Belgian law extended the application of the theory of matrimonial benefits to separation of property regimes: Loi du 22 juillet 2018 modifiant le Code civil et diverses autres dispositions en matière de droit des régimes matrimoniaux et modifiant la loi du 31 juillet 2017 modifiant le Code civil en ce qui concerne les successions et les libéralités et modifiant diverses autres dispositions en cette matière, *M.B.*, 27 juillet 2018, 59435.

and successions. They take effect when the matrimonial property regime is liquidated, but only when the liquidation follows the death of one spouse. Depending on the circumstances, joint children[19] or children from a previous relationship[20] may claim to be considered in determining their rights as forced heirs.

It will be for the judges and the Court of Justice to decide this question for each form of matrimonial benefit brought before them. Two authors propose in this respect an interesting approach. On the one hand, the issue of the validity and effects of the matrimonial benefit would remain governed by the Matrimonial Property Regimes Regulation during the marriage. On the other hand, the Succession Regulation would become relevant only when the rights of the heirs of the deceased spouse are at stake, mainly in order to enable them to assert their rights in the reserved share of the estate.[21] In our view, such an approach should be favoured as it best takes account of the specificities and objectives of these mechanisms and of the European Regulations on which they depend.

This difficulty has so far only concerned married couples in Belgian law. It might however be extended soon to unmarried couples. There is indeed a strong political will in Belgium to reform the legal cohabitation regime. If this legislative amendment were to succeed, it would allow legal cohabitants to enjoy benefits fairly comparable to those provided so far to spouses. As a result, the same analysis could be applied to the future benefits between registered partners if the reform were implemented. Belgian and foreign practitioners will certainly be interested to see how we go about this issue in the next years.

IV. THIRD QUESTION: THE EUROPEAN DEFINITION OF 'MATRIMONIAL PROPERTY REGIME', THE INCLUSION OF THE PRIMARY REGIME AND THE CONCEPT OF OVERRIDING MANDATORY RULES

Another issue that could be raised by the Matrimonial Property Regimes Regulation relates to the application of the overriding mandatory rules. As no judge has yet given a ruling on the matter, let us start with a simulated case.

Marc and Nathalie, who have been a couple for several years, are embarking on a long journey through Europe. They marry in November 2019. At the time of the conclusion of their marriage contract, they designate the law of their habitual residence as applicable to their matrimonial property regime. A year later, they move to Belgium, where they still live. After their first child's birth, they decide to buy a car to facilitate the family's commute. Marc goes to a car dealer and signs a sales contract. However, he fails to pay the price in the time limits which were agreed on. When he finds out that Marc is insolvent, the car dealer turns to Nathalie and puts her on notice to pay the price. Nathalie retorts that she does not have to pay, as the law the spouses designated as applicable to their matrimonial property regime does not set up a rule of joint liability between them for household debts. The creditor then brings the case before the Belgian jurisdictions in order to claim payment of the amount due.

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19 Article 1464, al. 2 of the Belgian Civil Code.

20 Article 1465 of the Belgian Civil Code.

21 A. Bonomi and P. Wautelet, n 8 above, 148-149.

To settle the case, it is therefore of paramount importance for the judge to determine which substantive law should be applied to the rule of joint liability between spouses for household debts. In such a situation, it seems to us that two main questions need to be solved.

First of all, it must be determined in which legal instrument the conflict-of-law rules are to be found. The Belgian judge will therefore have to verify whether the dispute falls within the material scope of application of the Matrimonial Property Regimes Regulation. If not, he will turn to the Belgian Code of Private International Law. This will have a direct impact on the law applicable to the litigation, as the conflict-of-law rules are not the same in both texts.

The Belgian Code clearly distinguishes between the law applicable to the 'primary regime', on the one hand, and the law applicable to the 'secondary regime', on the other hand. Well known from the Belgian practitioners, the term 'primary regime' refers to a set of rights and obligations that are imposed on all spouses by virtue of their marriage and from which it is impossible to derogate by contract.[22]

In Belgian private international law, the so-called primary regime is excluded from the category of the matrimonial property regimes (Section 4 of the Belgian Code of Private International Law) and is rather ranked among the personal effects of the marriage (Section 3 of the Belgian Code of Private International Law). As a result, two different laws are likely to apply, on the one hand, to the primary regime and, on the other hand, to the secondary regime. While the so-called primary regime is, in principle, governed by the law of the State of the spouses' habitual residence at the time of the referral (Article 48(1)(1)), the secondary regime is governed by the law chosen by the spouses (Article 49) or, in the absence of choice, by the law of their first habitual residence after the marriage (Article 51(1)).

In the simulated case we are analysing, Article 48(1)(1) would lead to the application of Belgian law, with no possibility for the spouses of designating another law as applicable. Consideration would then have to be given to Article 222 of the Belgian Civil Code, which provides for joint liability between spouses for household debts.

The application of Regulation 2016/1103 could lead to a different solution. Under its Article 22, spouses have indeed the (limited) possibility of choosing the law applicable to their matrimonial property regime.

In order to know whether the issue of joint liability for household debts falls within the material scope of the Regulation, it is necessary to consider Article 1(1), and Article 3(1)(a). Article 1(1) indicates that the Regulation applies to matrimonial property regimes. Article 3(1)(a), defines this term as covering 'a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution'. Recital 18 underlines that the notion should be interpreted autonomously, without regard to the various approaches

[22] B. Añoveros Terradas, 'Choice of Law in International Premarital Agreements. A Comparison Between the US and the European System (Part II)', 1 *European Review of Private Law*, 107, 135 (2020); A. Bonomi, G. Kessler and P. Wautelet, 'Article 3. – Definitions', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) n° 2016/1103 et 2016/1104* (Bruxelles: Bruylant, 2021), 209, 250 and 257 ; A. Dionisi-Peyrusse, 'Autonomie de la volonté et loi applicable aux régimes matrimoniaux : le règlement du 24 juin 2016 relatif aux régimes matrimoniaux', in A. Panet, H. Fulchiron and P. Wautelet eds, *L'autonomie de la volonté dans les relations familiales internationales* (Bruxelles: Bruylant, 2017), 245, 254 ; J.-L. Van Boxstael, n 4 above, 193.

enshrined in the national law of the States.[23] Recital 18 adds that the definition encompasses 'not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law'. Article 27 also helps to determine the limits of the concept, by listing in a non-exhaustive manner the matters governed by the law applicable under the Regulation.

Based on these elements, there is no doubt that the scope of the new Regulation covers not only the secondary but also the primary regime.[24] Applying the same private international law rules to both regimes is certainly a major innovation compared to the Belgian Code of Private International Law.[25]

Nevertheless, it is important to specify that not all the issues of the primary regime fall within the scope of the Regulation. The demarcation line is now the personal or property nature of the relationship between the spouses, as the Regulation is intended to apply to all property issues arising between them. Within the primary regime, it is therefore necessary to identify issues that have a property dimension. And yet, the distinction is not always easy, as some issues closely combine property aspects and personal aspects.[26]

The issue of a potential joint liability between spouses for household debts does not seem to raise any particular difficulty. This problem is clearly of property nature and falls within the material scope of the Regulation.

Once the judge has established that the issue of joint liability between spouses for household debts does fall within the scope of Regulation 2016/1013, he must identify the substantive law under which the litigation will be resolved.

In doing so, he has to consider the provisions of Chapter III. As mentioned above, Article 22 provides for an option-based choice of the law for the matrimonial property regime. As a result, Marc and Nathalie were able to validly choose a national law that does not set up a rule of joint liability between spouses for household debts, provided that this law is that of

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[23] L. Barnich, 'Deux nouveaux règlements européens de droit international privé : quelques changements à venir en matière de régimes matrimoniaux et de partenariats', *Revue du notariat belge*, 146, 165 (2017); A. Bonomi and P. Wautelet, n 8 above, 109 ; A. Bonomi, G. Kessler and P. Wautelet, n 21 above, 251.

[24] B. Añoveros Terradas, n 22 above, 129; L. Barnich, *Deux nouveaux règlements* n 23 above, 168 and 179; N. Chikoc Barreda, 'La protection du logement familial pendant le mariage et lors de la crise conjugale à l'épreuve de la définition des régimes matrimoniaux dans le règlement 2016/1103', *Revue internationale de droit comparé*, 883 (2018), 888; P. De Page and I. De Stefani, *Traité de droit civil belge. Tome IX – Les régimes matrimoniaux.* (Bruxelles: Bruylant, 2019), II, 942 ; A. Dionisi-Peyrusse, n 22 above, 253 ; S. Pfeiff, 'La nouvelle réglementation européenne relative aux régimes matrimoniaux. Étude des règles de compétence et de conflit de lois', in N. Dandoy, Y.-H. Leleu, S. Pfeiff and A.-C. Van Gysel eds, États généraux du droit de la famille III. Actualités législatives et judiciaires en 2017 et 2018 (Bruxelles: Larcier, 2018), 127, 138 ; J.-L. Van Boxstael, n 4 above, 193 ; L. Weyts, 'Een eerste notariële "tour d'horizon" van de Europese Verordeningen op de Huwelijksvermogensstelsels en geregistreerde partnerschappen', *Tijdschrift voor Notarissen*, 909, 913 (2017).

[25] L. Barnich, *Deux nouveaux règlements* n 23 above, 168 and 179 ; M. Muylle and B. Verheye, 'De Huwelijksvermogensverordening : krachtlijnen voor de notariële praktijk', *Notariaat : Notarieel en fiscaal maandblad*, 81, 87 (2019); S. Pfeiff, n 24 above, 138 ; J.-L. Van Boxstael, n 4 above, 193.

[26] L. Barnich, *Deux nouveaux règlements* n 23 above, 166 ; A. Bonomi and P. Wautelet, n 8 above, 144 ; A. Bonomi, G. Kessler and P. Wautelet, n 22 above, 259 ; N. Chikoc Barreda, n 24 above, 891-892 ; S. Pfeiff, n 24 above, 139-140 ; P. Wautelet, 'Chapitre IV – Questions de pratique notariale', in Y.-H. Leleu ed, *Chroniques notariales. Volume 70* (Bruxelles: Larcier, 2019), 200, 207.

the State in which one of the spouses had his habitual residence at the time of the choice or of which one of them was a national at the time of the choice.

The judge's reasoning should however not stop there. He must take account of Article 30 of the Regulation, which states that its provisions shall not 'restrict the application of the overriding mandatory provisions of the law of the forum'. States thus have the possibility of dismissing the application of the foreign law and making their own rules prevail, provided that they fit within the definition of Article 30(2) of the Regulation. The application of the overriding mandatory rules of the forum limits the party autonomy and derogates from the principle of unity of the law applicable to their matrimonial property regime.[27]

There is a consensus in the literature that most of the provisions of the primary regime can be qualified as 'overriding mandatory rules'.[28] Controversy still exists, however, as to *which of those provisions* can pretend to such a qualification.

In Recital 53, the Regulation cites, as an example, the rules for the protection of the family home. Without giving any other example, it adds that the concept of 'overriding mandatory provisions' requires a strict interpretation. How should this be understood? In the Belgian literature, most authors seem to advocate for the application of several other rules as overriding mandatory provisions. Mention is made, among others, of the right of each spouse to receive his or her income alone (Article 217 of the Civil Code), the right of each spouse to open a bank account in his or her own name without the consent of the other (Article 218 of the Civil Code) or the obligation of each spouse to contribute to the costs of the marriage in proportion to his or her means (Article 221 of the Civil Code).[29]

In the simulated case we are analysing, a difficulty could arise regarding the possibility for the Belgian judge of applying Article 222 of the Belgian Civil Code as an overriding mandatory rule. If the judge qualifies Article 222 as such, Nathalie will have to pay the amount due to the car dealer. Otherwise, the issue will be governed by the law the spouses designated as applicable to their matrimonial property regime. As this law does not set up a rule of joint liability between spouses for household debts, Nathalie will not have to pay.

This is a complex question, and the practitioners will need some help from case law in determining the rules that may or may not be qualified as 'overriding mandatory provisions'.[30]

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[27] B. Añoveros Terradas, n 22 above, 129 ; L. Barnich, *Deux nouveaux règlements* n 23 above, 168 ; N. Chikoc Barreda, n 24 above, 884 ; P. De Page and I. De Stefani, n 24 above, 943 ; A. Dionisi-Peyrusse, n 22 above, 260 ; M. Muylle and B. Verheye, n 25 above, 101 ; P. Wautelet, n 26 above, 208 ; L. Weyts, 'Op wandel doorheen de twee nieuwe Europese Verordeningen inzake huwelijksvermogensstelsels en geregistreerde partnerschappen vanuit internationaal en notarieel perspectief', *Tijdschrift voor Notarissen*, 3, 9 (2019).

[28] B. Añoveros Terradas, n 22 above, 129, 130 and 135 ; A. Bonomi, G. Kessler and P. Wautelet, n 22 above, 265 ; J.-L. Van Boxstael, n 4 above, 194 ; P. Wautelet, n 26 above, 208 ; L. Weyts, *Een eerste notariële "tour d'horizon"* n 24 above, 913.

[29] L. Barnich, *Deux nouveaux règlements* n 23 above, 168-169 ; P. De Page and I. De Stefani, n 24 above, 942 ; M. Muylle and B. Verheye, n 25 above, 101 ; S. Pfeiff, n 26 above, 168 ; K. Rokas, 'Article 30. – Lois de police', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) n° 2016/1103 et 2016/1104* (Bruxelles: Bruylant, 2021), 1025, 1027.

[30] M. Muylle and B. Verheye, n 25 above, 101 ; S. Pfeiff, n 23 above, 168 ; K. Rokas, n 29 above, 1033.

V. FOURTH QUESTION: QUALIFICATION PROBLEMS

To understand the problems that may arise before the Belgian judge, let us imagine a simulated case. Two men decide to formalise their union as a registered partnership abroad, in a country where marriage is not open to same-sex couples. Two weeks later, one of them moves to Brussels where he starts working in the European Parliament. Shortly afterwards, the other one joins him and they move in together. When a dispute arises concerning property effects of their partnership, one of them refers to the Belgian judge claiming the application of foreign law under Regulation 2016/1104. The other one asks for the application of Belgian law.

In order to settle the case, the Belgian judge must determine which legal instrument provides for the conflict-of-law rules. One must logically think that the tribunal will apply the Registered Partnerships Regulation, as the litigation is about a registered partnership. However, it depends on how this registered partnership will be received in the Belgian legal order. Indeed, national policies in this area are heterogeneous,[31] which may cause some difficulties.

In its Article 1(1), Regulation 2016/1104 states that it applies to the property consequences of registered partnerships. Article 3(1)(a) defines 'registered partnership' as 'the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation'. However, it is essential to specify that, according to Recital 17, the concept requires a strict interpretation which is relevant only when dealing with issues relating to property effects of a registered partnership, which therefore fall within the material scope of the Regulation. Article 1(2) lists a series of issues that are excluded from its scope of application. Among those, we find the existence, validity or recognition of a registered partnership (Article 1(2)(b)). According to Recital 21, these preliminary questions are covered by the national law of the Member States.

As a first step, the court seised will therefore have to decide how the registered partnership at stake must be received in the Belgian legal order. This actually involves two sub-questions: first, the question of *qualification*, and second, the question of *recognition*.

In order to identify the rules governing the recognition of a private international law situation he has to decide about, the judge must first of all classify the situation in a connection category. In the course of this *qualification* process, it may happen that a same-sex marriage is reclassified as a registered partnership or, conversely, that a registered partnership is reclassified as a marriage.[32]

The Belgian Code of Private International Law distinguishes between the rules on marriage and the rules on registered partnership. It refers to the latter as 'relationship of cohabitation'. Article 58 defines it as 'a situation of cohabitation that requires registration with a public authority and that does not create a bond equal to marriage'.

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[31] https://europa.eu/youreurope/citizens/family/couple/.

[32] L. Barnich, *Deux nouveaux règlements* n 23 above, 179 ; Id, 'Les partenariats – questions de droit international privé', *Recueil général de l'enregistrement et du notariat*, 475, 478 (2018); A. Bonomi, G. Kessler and P. Wautelet, n 22 above, 246 ; S. Pfeiff, n 24 above, 135-136 ; L. Weyts, *Een eerste notariële "tour d'horizon"* n 24 above, 912-913 ; Id, *Op wandel* n 27 above, 12.

To assist practitioners in interpreting these terms, a ministerial circular of 29 May 2007 clarifies the notion of 'relationship of cohabitation equal to marriage'. It establishes that one should treat as a marriage any foreign institution which gives rise to registration and which is regulated in an identical or almost identical manner to marriage as regards its conditions of establishment, the procedures for its dissolution, and its effects with regard to the person and property. The circular states however that it does not apply when the national law from which the relation of cohabitation originates also allows the partners to marry.[33]

Once the qualification stage is over, the judge will examine the question of *recognition* of the union at stake. The recognition of a relationship of cohabitation is governed by Articles 27 and 60 of the Belgian Code of Private International Law. Reading them together indicates that this relationship will be recognised in Belgium if it has been validly established under the law of the State in which it was registered. As to the recognition of a marriage, it is governed by Articles 27, 46 and 47 of the Code, according to which the marriage will be recognised in Belgium provided that the substantive conditions of the national laws of the spouses and the formal conditions of the law of the place of celebration have been respected. In our analysis, let us assume that recognition does not pose any difficulty. The foreign institution will be recognised and will produce legal effects in Belgium.

As a second step, the Belgian judge will have to determine the law applicable to the litigation according to the conflict-of-law rules provided for in the relevant legal instrument. In order to determine which of the Twin Regulations should govern the property effects of the union at stake, it is necessary to consider the material scope of application of both Regulations.

As mentioned above, Regulation 2016/1104 applies to the property consequences of registered partnerships (Article 1(1)). The 'registered partnership' is defined as 'the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation' (Article 3(1)(a)). Recital 17 specifies that this definition is relevant solely for the purpose of the Regulation.

As to Regulation 2016/1103, it applies to matrimonial property regimes (Article 1(1)) but it does not define the notion of 'marriage'. This notion is rather defined by the national laws of the States (Recital 17).

In our simulated case, no particular difficulty arises if the Belgian judge does not reclassify the registered partnership as a marriage. In such a situation, the relevant legal instrument will be Regulation 2016/1104. Conversely, if the registered partnership is reclassified as a marriage, the judge might hesitate between both Regulations. On the one hand, he could logically apply Regulation 2016/1103, since the foreign institution is considered as a marriage in Belgian national law. On the other hand, the union at stake fits within the autonomous definition of 'registered partnership' provided for in Regulation 2016/1104.

Therefore, the qualification issue raises difficulties when determining which of the Twin Regulations has to be applied. Although the content of both is almost identical, some differences might be of importance.

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[33] Circulaire modifiant la circulaire du 23 septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé, *M.B.*, 31 mai 2007.

Lacking a choice of law made by the spouses, Regulation 2016/1103 lays down a rule with subsidiary connecting factors. In our simulated case, the law applicable to the matrimonial property regime will be Belgian law, since the first common habitual residence of the two men is in Belgium (Article 26(1)(a)). The plaintiff will therefore not be able to obtain the application of foreign law.

Still in the absence of a choice of law, Regulation 2016/1104 provides for the application of the law of the State under which the registered partnership was created (Article 26(1)). In our simulated case, the law applicable to the property consequences of the registered partnership will be foreign law. Nevertheless, the defendant could ask the judge to implement the exception clause provided for in Article 26(2) and hope to obtain the application of Belgian law. He would then have to demonstrate that their last common habitual residence was in Belgium for a significantly long period of time and that they relied on Belgian law in arranging or planning their property relations, without any guarantee that the judge will grant his request.

Despite their strong similarity, the Twin Regulations therefore do not determine in the same way the law applicable to the property effects of the union concerned. In view of the national sensitivities of each State,[34] it is understandable that they both exclude from their scope of application the preliminary questions of the existence, validity and recognition of a marriage or a registered partnership (Article 1(2)(b) and Recital 21). It is also understandable that Regulation 2016/1103 refrains from giving the concept of 'marriage' a European definition (Recital 17) and that Regulation 2016/1104 limits the definition of 'registered partnership' to the sole purpose of its application (Recital 17). Nevertheless, the fact remains that it causes some difficulties.

Indeed, when a union is classified as a 'registered partnership' in one State and as a 'marriage' in another State, the law applicable to the property effects of that union might be governed by the Registered Partnerships Regulation in one State, and by the Matrimonial Property Regimes Regulation in the other State. In addition to contravening the aim of unification of private international law pursued by the Twin Regulations, this is a source of legal insecurity for spouses or partners who are not able to predict with certainty which law will apply to the property effects of their relationship.[35]

To overcome the abovementioned difficulties, some authors propose to qualify the foreign union according to the law of the State in which it has been created, in order to respect the conceptions in force in that State. Thus, the Belgian authorities would no longer be allowed to assimilate to marriage a partnership that has been registered in a State whose law distinguishes between the two institutions.[36]

The difficulties described above will rarely occur before the Belgian authorities. Indeed, as mentioned above, the ministerial circular of 29 May 2007 explicitly indicates that there is no place for assimilating to a marriage a partnership registered in another State if the

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[34] A. Bonomi and P. Wautelet, n 8 above, 118.

[35] L. Barnich, *Deux nouveaux règlements* n 23 above, 152 ; Id, *Les partenariats* n 32 above, 482 ; S. Pfeiff, n 24 above, 135.

[36] L. Barnich, *Deux nouveaux règlements* n 23 above, 152 ; Id, *Les partenariats* n 32 above, 482 ; C. Kohler, 'La segmentation du statut personnel comme vecteur de l'autonomie de la volonté en matière familiale et successorale', in A. Panet, H. Fulchiron and P. Wautelet eds, *L'autonomie de la volonté dans les relations familiales internationales* (Bruxelles: Bruylant, 2017), 73, 88 ; S. Pfeiff, n 24 above, 135.

partners were also able to marry according to the law of that other State. In recent years, the opening of same-sex marriage has however emerged in the legislation of many States.[37] Among these, we find the countries that the Belgian circular mentions in a non-exhaustive manner as countries whose registered partnership could in any case be reclassified as a marriage (Germany, Denmark, Finland, Iceland, Norway, the United Kingdom and Sweden). The qualification issue could nevertheless continue to arise when it comes to partnerships registered in a country whose law does not provide for same-sex marriage. In view of the above, there is no doubt that the recharacterisation process of a registered partnership as a marriage will continue to require the utmost caution from the authority called upon to rule on the matter.

VI. CONCLUSION

As mentioned in the introduction of this contribution, the application of the Matrimonial Property Regimes and the Registered Partnerships Regulations has not yet been the subject of abundant case law in Belgium. Our decision to deal with only four issues that appear to be the most emblematic of the difficulties arising from the application of the Twin Regulations might lead to think that it would be difficult to propose any conclusion. However, it seems to us that these four issues all converge to the same idea: that of articulation and dialogue.

Firstly, the implementation of both Regulations requires a reflection on their articulation with other European legal instruments. Indeed, a lot of disputes might combine property aspects and other aspects.

As pointed out by the Brussels Court of First Instance in the Belgian case law we analysed, the question of how to ultimately transfer the right of ownership of an immovable property is a matter of real rights which is therefore governed by Regulation 1215/2012. This Regulation will be relevant for the Belgian judge whenever it is a question of enforcing a foreign decision on property division relating to an immovable property located in Belgium.

Another question might arise as to which of the Matrimonial Property Regimes Regulation or the Succession Regulation has to be applied to various national institutions. In order to settle a case, the court seised must determine whether the institution at stake is more of an inheritance nature or of a matrimonial nature.

Secondly, the implementation of the Twin Regulations requires a reflection on its articulation with the national legal instruments which still apply to couples who married or concluded a registered partnership before the Regulations entered into force, without having made a choice of law since then. For each specific situation, practitioners will have to determine the applicable rules as well as the solutions to be adopted. These might differ greatly from one legal instrument to another, as has been shown by the analysis of the notion of 'matrimonial property regime' and more specifically the notion of 'primary regime'. It will also be necessary to determine more clearly which issues relating to matrimonial property regimes can pretend to the qualification of 'overriding mandatory rules'.

[37] https://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm.

Lastly, the implementation of the Twin Regulations requires to think about the articulation and dialogue between legal systems. The issues of recognition, qualification and possible reclassification of foreign marriages and registered partnerships is a perfect example of that.

This important idea of articulation and dialogue is at the heart of the European project of private international law. It is therefore not specific to the Twin Regulations, but it is still probably particularly relevant to these two legal instruments. Being the most recent, they indeed need to fit into an already well-established legal arsenal. In any event, there is no doubt that the Member States, under the supervision of the Court of Justice of the European Union, will manage to give to these Regulations the consideration they deserve. In doing so, they will continue building the edifice of European private international law according to the famous Monnet-Schuman method of 'petits pas'.

CASE LAW OF BULGARIAN COURTS IN CROSS-BORDER MATTERS OF MATRIMONIAL PROPERTY REGIMES

Dafina Sarbinova[1]

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Summary: I. Introduction. II. Former domestic jurisdictional rule. The case law of Bulgarian courts on the jurisdiction of the court in matrimonial property matters. III. Domestic rules on applicable law. Case law of the Bulgarian court in determining the applicable law in matrimonial property relations. IV. Hypothetical case studies under Regulation (EU) 2016/1103. V. Conclusion.

Abstract: Bulgaria participates in all EU law instruments in the field of private international law, including the acts adopted through the procedure of enhanced cooperation. Nevertheless, since Regulation (EU) 2016/1103 is applying only for a relatively short period of time, the predominant part of Bulgarian courts practice is based on domestic private international law rules. Both jurisdictional and conflict of law rules on matters of matrimonial property regimes are incorporated in the Private International Law Code of 2005 ("PILC"). In addition, while domestic jurisdictional rules are fully displaced by Regulation (EU) 2016/1103, the domestic rules on determining the applicable law to matrimonial proprietary relationships may still be relevant for situations involving spouses who have married before 29 January 2019. Additional complexity introduces the fact that before the accession into EU, Bulgaria has entered in numerous bilateral treaties for legal assistance in civil and family law matters with third countries (notably with much practical importance are the bilateral treaties with Russia and Ukraine, respectively) which rules take precedence over PILC and Regulation (EU) 2016/1103.

The overview of court practice reveals that until recently, Bulgarian court experienced difficulties in the qualification of the division of property in case of divorce (as dispute related to the marriage versus dispute related to rights *in rem*) which situation was remedied by the Order of the Court of Justice of EU in Case C-67/17, *Iliev.* The larger portion of the existing Bulgarian case law on determining the applicable law to matrimonial property relations is based on the domestic rules in PILC since it is still relevant in most of the cases. In addition to the objective connecting factor which is in favour of the common nationality of the spouses, the domestic conflict of law rule provides for the possibility for unlimited choice of law by the spouses. Bulgarian courts tend to uphold implicit choice of Bulgarian law when the matrimonial agreement is

[1] PhD, Senior Assistant Professor in Private International Law at Sofia University 'St. Kliment Ohridski'

drafted under the terms of Bulgarian family law. This is true also in case the applicable law is determined by the rules of a bilateral treaty with third countries.

I. INTRODUCTION

Bulgaria is a Member State participating in the enhanced cooperation under Regulation (EU) 2016/1103 since the initial application of this EU law instrument in the field of private international law. Nevertheless, brief presentation of domestic jurisdictional and applicable law rules in the matter of matrimonial property regimes is necessary at least for two reasons. Firstly, since Regulation (EU) 2016/1103 has been applicable only for a relatively short period of time (as of 29 January 2019), the predominant part of the case law of Bulgarian courts up to this moment is grounded on domestic private international law rules. And secondly, the domestic rules on determining the applicable law to matrimonial proprietary relationships are still relevant for situations involving spouses who married before 29 January 2019 and have not specified the law applicable to their matrimonial property regime pursuant to the new regulation.[2].

The jurisdictional rule for disputes in matrimonial property matters is examined here only to the extent needed for the understanding of the existing Bulgarian national case law. Due to the universal reach of the rules in Regulation (EU) 2016/1103, domestic jurisdictional rules fully disapply as of 29 January 2019.

Since 2005, Bulgarian private international law has been codified in one main domestic legislative instrument - the Private International Law Code 2005 [Кодекс на международното частно право] ("PILC")[3]. It was adopted before the accession of Bulgaria to the European Union ("EU") in 2007 with an ambition to regulate in a comprehensive manner the applicable law to private law relations with an international element, as well as the international jurisdiction of Bulgarian courts and the recognition and enforcement of foreign judgments in Bulgaria[4].

Bulgarian PILC is influenced by the modern continental private international law rules - in particular the Italian law of 1995 and the Belgian code of 2004 as well as the conventions adopted under the auspices of the Hague Conference of Private International Law. Further it was meant to harmonise Bulgarian law with EU laws in the field of private international law which were applicable at the time of drafting of the Code – like the 1980 Rome Convention, the draft Rome II Regulation and Regulation (EC) 44/2001[5].

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[2] As per Article 69(3) of Regulation (EU) 2016/1103.

[3] Promulgated in State Gazette No 42 from 17 May 2005, as amended subsequently.

[4] Before the adoption of the PIL Code separate conflict-of-laws provisions featured in several legislative acts including the Family Code of 1985 (repealed).

[5] V. Stancheva – Mincheva, *Commentary on Private International Law Code. Comparison with European Union Acts* (Sofia, Sibi, 2010) and V. Stancheva – Mincheva, 'The Reform of the Bulgarian Private International Law Implemented with Codification of 2005', in *Changes in the Bulgarian Legal System in the Light of International Relations, International Law and EU Law, Essays Collection in honor of Prof. Dr. Yordanka Zidarova*, (Sofia University Publishing, 2021), 35-64.

II. FORMER DOMESTIC JURISDICTIONAL RULE. THE CASE LAW OF BULGARIAN COURTS ON THE JURISDICTION OF THE COURT IN MATRIMONIAL PROPERTY MATTERS

Domestic jurisdictional rules can be found in Chapter 2, Part 2, Articles from 4 to 28 (inclusive) PILC. The provision of Article 4(1) provides for a general competence of Bulgarian courts when the defendant has habitual residence, statutory seat, or principal place of business in Bulgaria, or either the claimant or defendant is a Bulgarian national or a legal person registered in Bulgaria. These jurisdictional grounds are *mutatis mutandis* relevant also in matrimonial matters and are in fact reinforced in the specific provisions of Articles 7 and 8, according to which Bulgarian courts have jurisdiction to hear disputes in matrimonial property matters, if *one of the spouses is a Bulgarian national or is habitually resident in Bulgaria* (Article 7 PILC). Presently (as of 29 January 2019) these jurisdictional rules are superseded by the provisions of Regulation (EU) 2016/1103 and remain applicable only for cases outside the scope of this EU law instrument.

The review of the court practice on the jurisdictional grounds reveals discrepancies in *the qualification of the division of property in case of divorce*. Under the rules of the statutory matrimonial property regime of Bulgarian family law[6], former spouses become joint owners of the matrimonial property subject to partition rules applicable to classical co-ownership. Bulgarian court has taken two divergent approaches in the qualification of the claims for partition of the matrimonial property of former spouses which under Bulgarian family law, as already noted, transforms into classical joint property after the divorce. The problematic issue crystalises in the question whether these claims *fall under the scope of application of Article 8 PILC (now respectively, Regulation (EU) 2016/1103) as disputes related to the marriage* or *under the scope of Regulation (EC) 44/2001/ Regulation (EU) 1215/2012 to the extent the subject matter of the disputes relate to rights in rem.*

The Bulgarian Supreme Court of Cassation used to consider partition claims in case of divorce to fall within the scope of application of Regulation (EC) 44/2001/ Regulation (EU) 1215/2012. In Ruling No 395 of 9 August 2010 of the Supreme Court of Cassation under civil case No 140/2009, the court reaches the conclusion that Bulgarian court is not competent to hear the dispute for partition of real estate between former spouses under Article 8 PILC to the extent that this claim does not concern matrimonial relations between spouses but *in rem* rights in real estate. This is the reason why the court considers that the relevant ground for jurisdiction is found under Article 22(1) of Regulation (EC) 44/2001. This reasoning is also adopted in Ruling No 27 of 21 January 2012 under civil case No 603/2011 of the Supreme Court of Cassation, as well as in other acts of the courts of lower instance like Court Judgement No 561 of 30 November 2011 under civil case No 964/2010 of the District Court – Dobrich[7].

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[6] This regime represents a joint ownership of all assets, acquired during the marriage. The matrimonial property regime is indivisible. These assets are jointly owned by both spouses, regardless of in whose name they were acquired, if acquired by means of a joint contribution by both spouses. The joint contribution of the spouses may take the form of investment of funds and labour, childcare and housework. Joint contribution is presumably subject to proof to the contrary.

[7] On the issue of the qualification of the judicial partition – B. Musseva, *International Jurisdiction in Case of Judicial Partition – Collision between Property Law, Matrimonial Property Regimes, and Inheritance*, In Essays Collection, (Sofia University Press, 2019), 409-426 (in Bulgarian).

This problem with the qualification should be considered to be resolved with by CJEU in Order of the Court (Sixth Chamber) of 14 June 2017, in Case C-67/17, *Iliev,* ECLI:EU:C:2017:459. The referring Bulgarian first instance court made a request for a preliminary ruling concerning the interpretation of Article 1(2)(a) of Regulation (EU) 1215/2012 in the context of an action brought by a former spouse (the husband) before the referring court seeking the liquidation of a motor vehicle purchased by the other former spouse (the wife). The answer of CJEU to this request was unequivocal that "… Article 1(2)(a) of Regulation No 1215/2012 must be interpreted as meaning that a dispute such as that in the main proceedings, relating to the liquidation of property — acquired during marriage by spouses who are nationals of a Member State but domiciled in another Member State — after a divorce has taken place, does not come within the scope of that regulation but comes rather within the scope of matrimonial property regimes and, consequently, within the scope of the exclusions listed in Article 1(2)(a) of that regulation."[8]

Aligned with the answers given by CJEU in *Iliev* is also Ruling No 135 of 12 July 2018 under civil case No 1757/2018 of the Supreme Court of Cassation as well as the most recent case law on the matter[9]. In Ruling No 45 of 20 April 2021 under civil case No 583/2021 of the Supreme Court of Cassation, the dispute in question concerned the division of real estate situated in Greece co-owned by former spouses, both Bulgarian nationals, domiciled in Bulgaria. The court notes that Article 24(1) of Regulation No 1215/2012 is not relevant here since the dispute concerns property relations related to marriage and in particular its dissolution. It is ruled that even though the matrimonial relationship does not concern an international couple (to the extent both spouses are Bulgarian nationals, habitually resident in Bulgaria), the dispute still implies a cross border situation since the real estate which represents the subject matter of the dispute is located in another country. This factual situation results in the jurisdiction of Bulgarian court *based on Article 6(a) of Regulation (EU) 2016/1103.* This jurisdictional ground applies as there is no agreement under Article 7 of the Regulation and the preconditions for the application of Articles 8 and 9 are not met.

In other acts of the court, like Ruling No 1594 of 23 April 2013 under civil case No 383/2012 of theDistrict Court – Blagoevgrad, Bulgarian court notes that Regulation (EC) 44/2001 expressly excludes from its sphere of application the property relations between spouses (Article 1(2)(a)). The claim with which the court is confronted in this instance seeks to declare the invalidity of a transaction concerning *in rem* rights in real estate located in Bulgaria concluded by one of the spouses and without the consent of the other spouse (both spouses with habitual residence in Germany). This claim is qualified by the court as dispute concerning property relations between spouses which does not trigger the issue of exclusive jurisdiction under Article 22(1) of Regulation (EC) 44/2001. The difference here compared to the previous cases was that the claim concerned matrimonial property relations exercised during the lifetime of the marriage and not a question for division of property following the

[8] Paragraph 33.

[9] Nevertheless, there are also recent examples of court resolutions (not of last instance) that follow the old case law. In Ruling No 80 of 14 February 2022 under civil case No 16/2022, *District Court – Plovdiv* has stated that the dispute concerning real estate bought by one of the former spouses in Bulgaria during the lifetime of the marriage has as subject matter *in rem* rights in real estate, which results in the in the inapplicability of Regulation (EU) 2016/1103 and the respective applicability of Article 24(1)(1) of Regulation (EU) 1215/2012.

divorce of the spouses. In this instance, Bulgarian court rules that its jurisdiction should be based on Article 8 PILC.

In Court Judgement No 142 of 25 October 2021 under civil case No 211/2021 of the District Court – Razgrad, Bulgarian court declares itself competent to hear a dispute concerning the use of the family home[10] on the ground of Article 8 PILC since this dispute relates to the personal and property relations between the spouses. The court provides arguments for the disapplication of Regulation (EC) 2201/2003 in this case but does not give any consideration on the application of Regulation (EU) 2016/1103 which should have been effective at the time the Bulgarian court was seised on the matter.

III. DOMESTIC RULES ON APPLICABLE LAW. CASE LAW OF THE BULGARIAN COURT IN DETERMINING THE APPLICABLE LAW IN MATRIMONIAL PROPERTY RELATIONS

The provision of Article 79(2) PILC determines the law applicable to matrimonial proprietary relationships by reference to the law applicable to personal (*in personam*) relations between the spouses. Thus, both personal and proprietary relations of the spouses are governed by their common *lex patriae*. For spouses with different nationalities, the law of the country in which they have common habitual residence or, in the absence of such habitual residence, the law of the state with which both spouses are most closely connected applies (Article 79(1) and (2), respectively).

Under the rules of PILC, the national law of a natural person (*lex patriae*) is the law of the state of his or her citizenship. The citizenship of certain country is determined by the law of that country and not by *lex fori* (except in case they coincide). Citizenship is a leading and self-sufficient criterion for determination of applicable law to *the personal status of natural persons*, irrespective of the different habitual residence or domicile which they may have. For a person holding dual or multiple citizenship one of which is Bulgarian, Bulgarian law is considered as national law for the purposes of application of PILC (Article 48(1) and (2) PILC). If a person is a national of two or more foreign countries, the law of the country of his or her habitual residence is considered as *lex patriae*. And lastly, if the person does not have a habitual residence in any country of which he or she is a national, national law is detected by the application of the closest connection test (Article 48(3) PILC).

In addition, spouses are given the *right to choose the applicable law to their property relationships to the extent this is admissible under the objectively applicable law* (Article 79(3) and (4) PILC). Further, the subsequent provisions of Articles 80-81 provide for the formal and substantive requirements of the choice of law agreement and the effect of such choice against third parties.

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[10] Specific rule applies under Bulgarian family law with respect to the use and the disposal of the *family home*, i.e. when the family home constitutes personal property of one of the spouses, disposal requires the consent of the other spouse unless the two spouses own another home which is co-owned or personally owned by each one of them. In the absence of consent, disposal can take place with the authorisation of the district judge if it is established that the disposal is not detrimental to the children who have not reached the age of majority and to the family. This rule is relevant for all types of matrimonial property regimes except for the contractual regime and to the extent something different has been provided in the matrimonial property agreement.

The choice of applicable law should be evidenced in writing, dated, and signed by the spouses. The entry into and the validity of the agreement on choice of law are governed by the chosen law. The choice may be made before or after entry into marriage and the spouses may change or revoke their choice of law. Where the choice has been made after entry into marriage, such choice is effective as from the time of entry into the marriage unless otherwise agreed between the parties. The choice of applicable law to the matrimonial propriety relations between the spouses is enforceable against third parties solely if they were aware of the application of the chosen law or were not aware due to their negligence. In addition, enforceability against third parties applies to rights *in rem* in immovable property solely if the requirements for recording/registration established by the law of the country in which the property is situated have been met.

Party autonomy was introduced in matrimonial property relations for the first time in Bulgarian PIL with the adoption of the said Article 79 PILC in 2005. This happened four years before the adoption of the Family Code of 2009, which respectively provides for substantive regulation of the matrimonial agreement in Bulgarian family law[11]. The choice of applicable law under Article 79 PILC is not limited to a range of legal systems related to the legal relationship in question.

The provision of Article 79 PILC allows the choice of applicable law to matrimonial property relations to the extent this is permissible under the objectively applicable law. From the perspective of Bulgarian PIL, this conflict-of-laws rule represents a significant breakthrough in domestic law regulation of matrimonial property relations since it introduces party autonomy in broader range of private law relations with an international element, for which only objective connecting factors have been normally considered appropriate.

For example, under this rule, spouses – a Bulgarian and a French national, with common habitual residence in Italy, may choose French law as applicable to their property relations. This is also permissible according to Article 30 of Law no 218/1995 (Reform of the Italian system of private international law) to the extent the law of the country of which one of the spouses is a national is chosen. Under French domestic law, such spouses of Bulgarian and French nationality may enter a marriage contract to settle their matrimonial property relations.

In this situation, by applying the discussed rule of PILC, Bulgarian court was considered bound to recognize the consequences of such matrimonial agreement, even at the time this legal institute did not exist under Bulgarian law as it was reintroduced in Bulgarian legal system only with the Family Code of 2009. In this sense, the opinion that matrimonial agreement concluded in another country where this legal institute is known and the law of this other country has been chosen to govern the agreement in compliance with the conditions

[11] The option of spouses to conclude a matrimonial agreement is new to Bulgarian family law (since 2009). A matrimonial agreement may be concluded by spouses either before or during their marriage. The matrimonial agreement is limited to stipulations regarding the division of property between the parties, such as: the parties' rights to the property acquired during the marriage; the parties' rights to the property they owned before the marriage; the manner in which the property, including the family home, is managed and disposed of; the sharing of expenses and obligations by the parties; the property-related consequences in the event of divorce; the spouses' maintenance during the marriage and in the event of divorce; the maintenance of the children born of the marriage.

set in Article 79 PILC, should not be recognised in Bulgaria before 2009 due to contradiction with imperative legal norms of domestic law related to public policy could not be shared[12].

In this instance, it must also be considered the intensity of the relationship between the legal situation and the country, which is supposed to recognize certain relationship that did not arise under its law or an institution that is not known or even contradicts with mandatory rules of domestic law. In the above example, the choice of law applicable to property relations between spouses should be deemed admissible under Article 79 PILC Code even before 2009, provided that both spouses are foreigners or one of the spouses is a Bulgarian national and the other spouse is a foreign national. If the two spouses are Bulgarian nationals, but have habitual residence abroad, the choice of applicable law of a third country is not allowed under PILC before 2009 since preference is given to the common domestic law of the spouses.

The preconditions for the valid choice of applicable law under the rules of PILC could be outlined in the following terms: the matrimonial property relationship should have an international element; the consent to the choice of law should be explicit and in writing, it may be reached both before the entering into and during the marriage; in any case the choice of law must be admissible by the objectively applicable law. This last precondition is a deviation from the general premise that party autonomy does not depend on its admissibility by the objectively applicable law. In matrimonial property relations, however, it is necessary for the Bulgarian court to consider the admissibility of the choice of law according to the conflict-of-law rule which determine the objectively applicable law. However, the conclusion and validity of the choice of law agreement is governed solely by the chosen law in compliance with the in-writing form requirement under Article 80(1) PILC. The applicable law chosen to matrimonial property relations under PILC is not limited to the law of a country to which the relationship relates, however the objectively applicable law could set such limits.

Explicit rule is envisaged in Article 81 with respect to the effect of the law chosen by the spouses against third parties. Legal relations arising under the chosen law may be opposed to third parties only if the latter were aware of the application of the chosen law or were not aware due to their negligence. A spouse may challenge a transaction entered into by the other spouse in violation of the chosen foreign law only if he or she proves that the third party knew about the agreement on choice of law and nevertheless relied on the application of another law, such as the objectively applicable law or law of the country where the real estate is situated (for transactions related to *in rem* rights in real estate), or third party was not aware of this fact due to his/her negligence. Nevertheless, this opposition applies with respect to *in rem* rights in real estate only if the registration requirements established by the law of the country in which the property is located are met. In this case, the rules on registration under *lex rei sitae* have the character of overriding mandatory rules and such rules have precedence over the chosen law.

A practical problem for the purpose of ensuring the effectiveness of choice of law against third parties may be that according to the domestic law regulation on the recording requirements concerning the register of matrimonial property relations[13], there is no

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[12] A. Staneva**,** *The Matrimonial Agreement*, (Sofia: Ciela, 2nd. Ed., 2011), 13.

[13] Ordinance No 11 of 16 September 2009 on the procedure for keeping, storing, and accessing the register of property relations of spouses, issued by the Minister of Justice, promulgated, SG, No 76 of 25.09.2009, in force since 1.10.2009.

explicit option to make a note on the choice of applicable law or to indicate the property matrimonial regime under the conditions of foreign law or the entry of circumstances regarding a subsequent amendment of the applicable law[14]. Under the existing legislation, the good faith of third parties could not be justified only by a reference made by them for entered circumstances in the register of property relations between spouses, even when the civil marriage certificate is drawn up in Bulgaria by a Bulgarian civil status official. The same practical problem remains with the application of the provisions related to the opposition to third parties under Regulation № 2016/1103.

The larger portion of the existing Bulgarian case law on determining the applicable law to matrimonial property relations is based on the domestic rules in PILC since it is relevant for situations involving spouses who married before 29 January 2019 and have not specified the law applicable to the matrimonial property regime pursuant to Regulation № 2016/1103.

Thus, for example in Judgement No. 91 of 15 September 2020 under civil case. No. 4040/2019 of the Supreme Court of Cassation, the court had to consider the matrimonial property regime applicable for each of the counterparties to a preliminary contract for the sale of real estate in Bulgaria, concluded between two Belgian nationals, resident in Belgium. Since each party has entered into marriage with another Belgian national in 1993, respectively 2001, Bulgarian court determined the matrimonial property regime with respect to each of the parties under Belgian law as the law of the common nationality of the spouses under Article 79 PILC.

In Ruling No 2387 of 7 July 2021 under civil case No. 1638/2021, the District Court – Varna repeals the refusal of the authority competent to keep the Register of property relations between spouses to record a matrimonial agreement between spouses of Kazak nationality with habitual residence in Bulgaria. The Kazak nationals also had administrative permission for permanent stay in Bulgaria. The court based its ruling on the premise that by entering into a matrimonial agreement under the terms of Bulgarian Family Code even without explicit clause for choice of law, the spouses have implicitly chosen Bulgarian law to apply to their property relations under the terms of Arts. 79 and 80 PILC. Here, it is also worth noting that even though the marriage was concluded in 2001, the matrimonial agreement between the spouses was entered into 2021. This fact should have resulted in also considering the application of Regulation № 2016/1103 due to the universal character of its conflict of law rules.

This approach of recognition of the validity of implicit choice of law to matrimonial relations under the terms of PILC was adopted also in the earlier in time Judgement No. 1137 of 4.07.2017 under civil case No. 2204/2016 of District Court – Varna. The dispute concerned the partition of real estate owned by spouses who are Russian nationals, resident in Bulgaria. The spouses have entered into matrimonial agreement in Bulgaria which also covered the relations concerning the real estate subject to proceedings.

[14] Eventually, this may be noted in the field "Note" in Article 7(1)(6), where other circumstances relevant to the regime of the property relations of the spouses are subject to entry.

Since Russia is a country with which Bulgaria has a bilateral treaty for legal assistance in civil and family law matters[15], the jurisdictional rules under this bilateral treaty should have precedence over PILC. In fact, this is also the situation with respect to the rules of Regulation (EU) 2016/1103 when it comes to relations with third (non-EU) states as determined under Article 62 of the regulation. Bulgaria has entered into circa 20 bilateral treaties of legal assistance with third countries most of which are countries from the former Soviet bloc while the rest are neighbouring countries[16].

In the bilateral treaties of legal assistance, the applicable law is defined in relatively detail and uniform manner to both personal and property relations between the spouses, without possibility of choosing the applicable law[17]. Bilateral treaties contain a set of general and some special hypotheses[18]. According to the general principle reflected, for example, in the bilateral treaties with Poland and respectively, Romania, property relations between spouses are governed by the law of the contracting state of which they are nationals.

Some bilateral treaties also contain special hypotheses that can be summarised in several categories. Where the spouses are nationals of one of the contracting states, but have their residence in the other contracting state, the law of the state in which they have their residence shall apply to their property relations. This is situation with the treaty for legal assistance with Russia. Where one of the spouses is a national of one of the contracting states and the other is a national of the other, the law of the state in which the spouses were lastly resident apply.

In the case where both spouses are nationals of the same contracting state but each of them resides in a different contracting state, the law of the state of their common nationality is again applicable. Where one of the spouses is a national of one of the contracting states and the other of the other contracting state, while one of the spouses is resident in one contracting state and the other in the other contracting state, the law applicable to their property relations is the law of their last common residence (like in the treaty for legal assistance with Russia). This brief overview shows that bilateral treaties for legal assistance adopt the criteria common nationality of the spouses as the leading criterion, and only the bilateral treaty with Russia gives priority to the law of the state at the last common residence of the spouses.

In terms of the discussed judgment, Bulgarian court has firstly applied the provision of Article 23(1) of the bilateral treaty with Russia under which matrimonial property relations of spouses who are nationals of one of the contracting states (in this case - Russia), but with permanent residence on the territory of the other contracting state (in this case - Bulgaria), are

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[15] Treaty between the People's Republic of Bulgaria and the Union of Soviet Socialist Republics for Legal Assistance in Civil, Family and Criminal Matters from 1975.

[16] These countries are in alphabetic order: the Republic of Azerbaijan, Albania, Algeria, Armenia, Belarus, Vietnam, Georgia, Yemen, China, Korean Democratic Republic, Cuba, Libya, Lebanon, Macedonia, Mongolia, Syria, Russia, Tunisia, Turkey, Uzbekistan, Ukraine, Federal Republic of Yugoslavia. Not all bilateral treaties contain direct jurisdictional and applicable law rules, but all bilateral treaties contain a general rule which provides for equal treatment related to the legal (incl. before the courts) defense of the personal and proprietary rights of the citizens and the legal entities incorporated under the law of one of the contracting states in the other contracting state when it comes to filing of claims in the courts of the other contracting state. The habitual or other place of residence of the person is irrelevant for the application of this rule of legal defense.

[17] Y. Zidarova, 'Personal and property relations between spouses according to the conflict-of-laws rules in the treaties for legal assistance concluded by the Republic of Bulgaria', *Legal Thought Magazine*, 4 (1968), 34-45.

[18] N. Natov, *Private International Law. Special part*, (Sofia, 1996), 391.

governed by the law of the state in which the spouses are resident. Under the circumstances of the case the court reaches the conclusion that Bulgarian family law applies which also provides for the possibility of conclusion of matrimonial agreement between the spouses. In addition, the court finds further arguments in the provision of Article 79(4) PILC which allows the parties in cross-border cases to choose the applicable law to their matrimonial property relations. The fact that the spouses have drafted their matrimonial agreement in line with the provisions of Bulgarian Family Code, lead the court to interpret the intent of the spouses in the sense that Bulgarian law apply to their property relations.

The option for choosing the applicable law when the cross-border situation is related to Russia is further discussed in Judgement No. 117 of 16 November 2016 under civil case No. 658/2016 of the Supreme Court of Cassation. It is acknowledged that the bilateral treaty with Russia has precedence over PILC and under its terms the applicable law to the matrimonial property relations of the spouses that are Russian nationals with permanent residence in Bulgaria, is Bulgarian law. The treaty however does not envisage possibility for choice of law. In this case, the court takes the view that the assessment of the validity of the choice of law agreement concerning property relations between the spouses should be made in accordance with the determined objective applicable law. Pursuant to the interpretation of the court, in this case the objective applicable law does not include only substantive law, but also conflict-of-laws rules. Thus, if the Russian spouses were resident in Bulgaria at the time of the conclusion of matrimonial agreement, the existence and validly of this agreement should be determined by Bulgarian law, including the private international rules of Bulgarian law.

Bulgarian court has applied the rule of Article 79 PILC which determines as a leading criterion the common nationality of the spouses also in Resolution No 64 of 22 February 2022 under civil case No 3791/2021 of the Supreme Court of Cassation. The dispute concerns the partition of real estate owned by spouses who are Ukrainian nationals. In respect to the property relations between the spouses, the court applied Ukrainian law. Under the same factual situation, the Bulgarian court also applied the law of the common nationality of the spouses to their property relations – which is English law – determined by the conflict-of-laws rule of Article 79 PILC in Judgment No. 103 of 1 August 2019 under civil case 2619/2017 of the Supreme Court of Cassation.

The issue of applicable law to matrimonial property relations is relevant in most of the cases in the context of partition claims between former spouses or claims for establishment of the ownership (sole or joint) of property acquired or disposed during the lifetime of the marriage. In addition to these situations, applicable law to matrimonial property relations is also ascertained in cross-border disputes related to inheritance, especially when the marriage has ended due to the death of one of the spouses and there are also other interstate heirs of the deceased person.

This was the factual situation under Judgement No 883 of 23 October 2019 under civil case No 684/2019 of District Court – Bourgas. The court was confronted with the question to determine the shares of the two interstate heirs of the deceased Belgian national with residence in Belgium – a surviving spouse and a descendant of the deceased, with respect to a real estate property in Bulgaria. First, the court identified itself competent to hear the case on the ground of Article 12 PILC since the claim was for court partition of co-ownership of real estate in Bulgaria. The court also considered the relevance of Regulation (EU) 650/2012, but

refused its application under the circumstances, because the deceased died before 17 August 2015, which delineates the temporal application of the Succession Regulation.

As the marriage was concluded in 2002, the Bulgarian court applied Article 79(2) PILC to determine the applicable law to the property relations of spouses of different nationality with common habitual residence. Since both spouses had common habitual residence in Belgium, the court determined Belgium law as applicable to the property relations of the spouses which resulted in common matrimonial property of the real estate in Bulgaria acquired during the time of the marriage. In addition to the ½ share for the former spouse pursuant to the applicable matrimonial regime under Belgian law, she was entitled to additional ¼ share as a surviving spouse with one descendant under the rules of Bulgarian inheritance law, in other words the surviving spouse was entitled to a total of ¾ shares in the real estate situated in Bulgaria.

The court found that the applicable law for determining the inheritance quotas is Bulgarian on the ground of Article 89(2) PILC. This conflict-of-laws rule states that succession to immovable property is governed by the law of the country in which the said property is situated. Bulgarian domestic rules of applicable law to inheritance follow the dualistic approach in determining the applicable law to movable and immovable property in contrast to the unity approach adopted in the Succession Regulation.

IV. HYPOTHETICAL CASE STUDIES UNDER REGULATION (EU) 2016/1103

As noted, Bulgarian courts are mostly confronted with questions of international jurisdiction and determination of applicable law to cross-border matrimonial property relations in disputes concerning partition of real estate acquired during the marriage or the determination of the ownership of such assets.

As a hypothetical case study where Regulation (EU) 2016/1103 applies, the following example may be given which is inspired by actual court judgment described above (Ruling No 45 of 20 April 2021 under civil case No 583/2021 of the Supreme Court of Cassation) that was resolved partially by the application of domestic rules due to the recent applicability of the EU law legal instrument. The facts under the hypothetical case study are structured in terms of time in a way to result in the application of Regulation (EU) 2016/1103.

Bulgarian nationals, habitually resident in Bulgaria, entered into marriage in 2020 and acquired a summer house in Greece in 2021. After sudden deterioration of their marriage, the spouses jointly filed an application for divorce in April 2022 before a Bulgarian court. The court seized with the divorce claim also had to decide on the property relations between the spouses and in particular on the division of their property acquired during the marriage. The aspect of the matrimonial property regime concerning the real estate in Greece bears a cross-border element because even if the spouses are not an example of an international couple, the location of the property in another state internationalises this particular property relation.

In the process of determining its jurisdiction on the matter, the Bulgarian court would apply the rules of Regulation (EU) 2016/1103. Firstly, it has to consider the application of the jurisdictional rule of Article 4 of the Regulation. To the extent its jurisdiction with respect to the application for divorce is not based on Regulation (EC) No 2201/2003, but on domestic

procedural law, since the divorce does not have an international element, the jurisdiction of the Bulgarian court may be based on Article 6(a) of Regulation (EU) 2016/1103 as the spouses were habitually resident in Bulgaria at the time the court was seized.

The second question with which the court needs to deal concerns the applicable law to the matrimonial property relations with relevance to the partition of the real estate in Greece. To the extent the spouses have not chosen the law and on the ground of Article 26(1)(a), Bulgarian law should govern the relation in its capacity of the law of the state of the spouses' first common habitual residence after the conclusion of the marriage.

The second hypothetical case study presented in this paper relates to the third countries dimension in the application of Regulation 2016/1103. According to the facts of this hypothetical case, a Bulgarian national left Bulgaria in 2015 and went to work in the field of tourism at a hotel in Dubai (UAE). In 2016, she met a citizen of the United Arab Emirates, and she soon became his third wife under the terms of family law in UAE. In January 2022, there was a sudden deterioration in the relation between the spouses and the Bulgarian national returned to Bulgaria without any intention to go back to the UAE. She wants to file for divorce, for maintenance from her husband, as well as for the settlement of property relations in connection with the termination of the marriage, since the husband had bought an apartment in Sofia, where they stayed when they came to visit Bulgaria.

The disputed legal relationship is matrimonial and related to award of maintenance and division of property acquired during the marriage. The international element is stemming from the different citizenship and habitual residence of the spouses, as well as the location of the real estate in Bulgaria. The claims are for divorce, division of property and maintenance of the wife (Bulgarian national) against the husband (national of UAE).

Here, first, the Bulgarian court (if seized on the matter) should rule on the validity of the polygamous marriage concluded by the Bulgarian national in a country that accepts this marriage as valid. Since the validity and the recognition of the marriage are issues outside the scope of application of the EU law instruments in the field[19], the court has to apply its national understanding of public policy to rule on the recognition of such polygamous marriage. The provision of Art. 45(1) PILC, provides that a provision of foreign law determined as applicable by PILC shall not apply only if the result of its application is clearly incompatible with the Bulgarian public order. This relates to such manifest contradiction of foreign law with Bulgarian law, which may lead to rejection of the application of foreign law provisions. The public policy reservation applies only with respect to the final foreign substantive law solution and not to the conflict -of-law rules of the foreign private international law. Legal theory also understands public policy as an element of the mechanism for the application of the conflict rule[20]. To the extent this reservation leads in fact to deviation from the normal applicability of the conflict rule, it should therefore be used rarely and as an exception.

Certain legal consequences related to polygamy which was admitted in another country, shall be recognized and certain rights arising out of this legal situation shall receive legal

[19] As mentioned expressly in Article 1(2)(b) of Regulation 1259/2010 and Article 1(2)(b) of Regulation 2016/1103.

[20] V. Koutikov, *Private International Law of the Republic of Bulgaria. General Part* (New edition by T. Todorov, Sofia, Sibi, 1993) 321-323 (in Bulgarian)

protection in Bulgaria, for example the right to claim maintenance, the equal legal status of children born out of a second marriage under the conditions of polygamy, etc. This phenomenon is known in legal doctrine as the "mitigated effect" of public policy[21]. Under the circumstances of the hypothetical case study discussed here, it is expected that Bulgarian court should recognize certain legal consequences related to the polygamous marriage entered in UAE and to the extent this marriage is considered valid under the applicable law of UAE as *lex loci celebrationis*[22].

Under the circumstances of the hypothetical case study, the Bulgarian court shall have jurisdiction to hear the divorce claim under the sixth proposition of Article 3(a) of Regulation 2201/2003 or in case the claimant' habitual residence lasted in Bulgaria for a period shorter than 6 months, the Bulgarian court shall be competent on the ground of Article 7 PILC due to the Bulgarian citizenship of the claimant. To the extent the jurisdictional ground for the divorce claim is based on the citizenship of the claimant and there is no information that the spouses have reached an agreement on the jurisdiction of the Bulgarian court (under the terms of Article 5(2) of Regulation 2016/1103), the Bulgarian court shall be competent to hear the claim concerning the division of the property as a consequence of the divorce under the conditions of the subsidiary jurisdiction under Art. 10 of Regulation 2016/1103 and only in respect of the real estate situated in Bulgaria.

Since the marriage was entered in 2016, domestic conflict of law rules shall determine the applicable law to the matrimonial property regime. The issues related to the jurisdiction of the Bulgarian court to hear the maintenance claim and the applicable law to the maintenance obligation shall be determined pursuant to the rules of Regulation 4/2009 and the 2007 Hague Protocol on Maintenance.

V. CONCLUSION

The review of the court practice of the Bulgarian courts (in sections II and III) and the hypothetical case studies examined in section IV of the pater, demonstrates that the cross-border cases which involve matters of matrimonial property regimes reveal the necessity for consideration of several family and/or inheritance law relations. This suggests the existence of possible difficulty for the classification of the dispute as matrimonial, inheritance or even *in rem* rights issue. In addition, the fact that matters of matrimonial property regimes normally co-exist with other aspects of family, inheritance or property law, leads to the application of plurality of legal instruments of different nature – EU law, international law, and domestic law, which needs to be used for the resolution of the dispute. Despite of the universal scope of the jurisdictional and conflict of law rules of Regulation 2016/1103, its uniform application is presently challenged by certain temporal considerations (which result in the application of domestic conflict of law rules) and the exitance of international law instruments in family law matters between Bulgaria and some third countries.

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[21] Yordanka Zidarova, Public Policy and Private International Law, Nauka I izkustvo, Sofia, 1975.

[22] Pursuant to Bulgarian law, the substantive requirements (prerequisites) for entry into marriage (Article 76(1) PILC) and respectively, marriage annulment (Article 78(1) PILC) are governed by the national law of each of the (future) spouses at the time of celebration of the marriage. In case of different nationality, the provision requires cumulative application of national laws.

THE APPLICATION OF EU REGULATIONS 1103/2016 AND 1104/2016 IN CYPRUS: A GRADUAL PROCESS

Nicolas Kyriakides / Nicholas Mouttotos[1]

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Summary: I. Introduction. II. Historical overview. III. Family law in Cyprus. IV. Private international law in Cyprus. V. Case law involving Regulations 1103/2016 and 1104/2016.VI. Conclusions.

Abstract: The legal system of Cyprus, a "unique" mixed system, is increasingly influenced by European derivative law particularly in the area of private international law, where the Brussels regime, after initial reluctance, is often referenced before courts when it comes to jurisdictional issues. Nevertheless, as with other areas of the law, this influence is gradual and slow due to lack of familiarity and limited reference by the litigants of the case. This is similarly seen when it comes to the application of EU Regulations 1103/2016 and 1104/2016 whereby only one court decision exists, which does not go into detail as far as the rules found within the Regulation itself. This contribution examines the challenges that the Regulations present to Cypriot private international law and family law.

I. INTRODUCTION

Cyprus' legal system has a number of peculiarities that render it an interesting case study in many aspects. The mixed nature of the legal system provides a 'juridical unicorn' in mixed jurisdiction theory since the elements that make up Cypriot law (i.e. common law and civil law) are reversely allocated compared to other mixed jurisdictions.[2] Procedural law follows common law as in most other mixed jurisdictions.[3] However, in the case of Cyprus it is vital to think in common law terms in order to understand Cyprus law.[4] Procedural law has acted as a vehicle for the introduction of common law notions into areas of substantive law that are

[1] Nicolas Kyriakides, Adjunct Faculty, School of Law, University of Nicosia, e-mail: kyriakides.n@unic.ac.cy; Nicholas Mouttotos, Postdoctoral researcher, Institute for Commercial Law, Fachbereich Rechtswissenschaft, Universität Bremen, e-mail: nic_mou@uni-bremen.de; ORCID ID: https://orcid.org/0000-0003-4015-5309.

[2] V.V. Palmer (ed.) *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edition, Cambridge: Cambridge University Press, 2012).

[3] S. Glodstein 'The Odd Couple: Common Law Procedure and Civilian Substantive Law', *Tulane Law Review 78*, 291, (2003-2004): indicating that, with the exception of Scotland, the prevailing procedural law in mixed jurisdictions is common law.

[4] N.E. Hatzimihail, 'On Law, Legal Elites and the Legal Profession in a (Biggish) Small State: Cyprus', in P. Butler, C. Morris (eds.) *Small States in a Legal World* (Springer Cham, 2017), 217.

oriented towards the continental legal tradition, and for ensuring the persistence of a common law mentality.[5] Substantive family law is primarily based on Greek family law. In general, most of the legislation has been imported or transplanted from abroad.[6]

Despite the tendency to codify law in a legislative instrument,[7] private international law in Cyprus was not subject to such comprehensive domestic legislation.[8] Private international law is oriented towards English conflict of laws, with the courts making usual recourse to the doctrine of *forum non conveniens*.[9] The delay in delivering justice[10] makes the evaluation of the case law of Regulations 1103/2016 and 1104/2016 difficult, since only one case exists which does not go into detail with regard to the rules found within the Regulation itself.[11] Generally, the Regulations present a challenge for Cypriot law, since the ability of the parties to choose the applicable law was not allowed in matrimonial property disputes.

II. HISTORICAL OVERVIEW

The Republic of Cyprus acceded to the European Union in 2004. Its troubled history is reflected in its legal system. The various conquerors that exercised control and influence over the island led to the creation of a melting pot of languages, cultures as well as diverse laws.[12] The present day's pluralist nature of Cyprus' legal system has been shaped by the Byzantines, Turks and British.[13] Common law has a stronghold in Cypriot law today, however, pockets of resistance to such common law influence have been created witnessing certain "patterns of reception"[14] such as the transplantation of Greek family law.[15] After the Ottoman rule which lasted four centuries, leaving its mark on the island, the United Kingdom ceded Cyprus in 1878 as a 'place d'armes',[16] a product of bargain

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5 *Ibid,* 228.

6 Hatzimihail 2017, above n 4, 217.

7 See also the recent legislation consolidating consumer law, Law 112(I)/2021.

8 N.E. Hatzimihail, 'Cyprus' in P. Beaumont, M. Danov, K. Trimmings, B. Yüksel, *Cross-Border Litigation in Europe* (Oxford: Hart Publishing, 2017), 274.

9 *Ibid*.

10 N. Kyriakides 'Civil procedure reform in Cyprus: looking to England and beyond' 2 *Oxford University Commonwealth Law Journal* 16, 262-291, (2016). N. Mouttotos, 'Reform of civil procedure in Cyprus: Delivering justice in a more efficient and timely way' 2:49 *Common Law World Review,* 99-130, (2020).

11 See Section V.

12 See also, N. Mouttotos, *The Impact of Europeanization in Cyprus Contract Law and the Spill-Over to Matters of Civil Procedure: More Piece on the Mosaic?* (Maastricht Law Series, Eleven International Publishing 2021).

13 See also, S.P. Donlan 'The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture', *European Journal of Comparative Law and Governance* 1-35, (2013): on the various traditions that represent the extraordinary legal and normative hybridity of the Mediterranean region as a result of conquest, colonisation and social and legal diffusion across shifting and porous political boundaries.

14 J. du Plessis 'Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems', *Tulane Law Review* 78, 219-256, 219, (2003-2004).

15 Hatzimihail 2017, above n. 4, 217.

16 W. Mallinson, *Cyprus: A Modern History*, (London: I.B. Tauris, 2005) 10. The island had a role of a reserve *place d'armes* lying on the periphery of an area of vital concern to Britain. Historical evidence suggests that Cyprus would only acquire importance if the British evacuated Egypt. Therefore, the island was not considered definitely useless but it was also not disposable. See, G. S. Georghallides, *A Political and Administrative History of Cyprus 1918-1926*, (Nicosia: Cyprus Research Centre, 1979), 14.

with the weakened Ottoman Empire in return for protection against the expansionist aims of Russia.[17]

During British rule and despite the gradual introduction of the common law in Cyprus, certain laws that were introduced by the Tanzimat movement and initiated by the Ottomans still remained in force, such as the communal administration of the justice system.[18] The 1878 Supplementary Agreement to the Cyprus Convention stripped the Sultan of all his substantive powers over the island, investing the Queen of England with "full powers for making Laws and Conventions for the Government of the Island of Cyprus in her Majesty's name, and for the regulation of its Commercial and Consular relations and affairs free from the Porte's control".[19] Britain introduced a series of reforms but it was only in 1935 that common law entirely replaced Ottoman law.[20] In 1925, Cyprus formally became a British colony and English substantive law began its conquest of the land. A policy of 'structured mixité'[21] was employed, whereby common law was gradually imposed as a result of the rule of international law that provided that the laws of a conquered country continue to be in force, until they are altered by the conqueror.[22] Palmer suggests that neither British nor US decision-makers based their policies on this rule; rather they exercised discretion taking into

[17] See Georghallides 1979, n. 16, 4 *et seq.* On 4 June 1878, Sir Austen Layard and Safvet Pasha, the Ottoman Foreign Minister signed an Anglo-Turkish Convention of Defensive Alliance which stipulated that Britain would go to Turkey's assistance in the event of the renewal of Russian attacks in Asiatic Turkey and the occupation and administration of Cyprus to be given to Britain in order to be able to carry out its military obligations to Turkey. See also, A. Neocleous, D. Bevir, 'Legal History', in D. Campbell (ed.) *Introduction to Cyprus Law*, (A. Neocleous & Co., Yorkhill Law Publishing, 2000), 6.

[18] N.E. Hatzimihail, 'Cyprus as a Mixed Legal System' 1:6 *Journal of Civil Law Studies,* 37-96, 40, (2013).

[19] Correspondence respecting the Island of Cyprus, C. 2229, London (1879). See also Georghallides 1979, n. 16, 11.

[20] Georghallides 1979, above n 16, 11. Until this replacement took place, the residual law was implemented making recourse to English law to avoid manifest injustice and fill gaps in the law. See *Hassan Erikzade* v *Georghi Arghiro* [1890] (V1) 1 C. L. R. 84. Section 1202 of the Mejelle (Civil Code of the Ottoman Empire): "It is considered as a great nuisance that a place used by women such as the kitchen, the mouth of the well and the yard of a house should be seen." The Court noted that: "Now it is to be observed that, *prima facie*, a man is entitled to use his property in any way he pleases; and he is further entitled to the free access of light and air to his property unless his rights are restricted by any law, or unless the owner of adjoining property had acquired some easement recognised by the law, which interferes with the free exercise of these rights. Such a restriction on the natural right of a man to make use of his property in any way he pleases, is contained in the section of the Mejelle last above referred to, and we consider that *in construing a law which is restrictive of the natural rights of individuals, a strict construction must be place upon it, that is to say, we must construe it in such a way that the enjoyment of his property by the defendant shall be interfered with as little as possible.*[emphasis added] What then is the effect of Section 1202 of the Mejelle? In our opinion it is that the overlooking of the places described in that section, and places of similar nature, is prohibited".

Therefore, Section 1202 of the Mejelle was interpreted in line with English law to avoid manifest injustice. See also, Pikis 2017, 73. G. M. Pikis, *An Analysis of the English Common Law, Principles of Equity and their Application in a Former British Colony*, Cyprus (Brill Nijhoff, 2017), 73.

[21] P. Glenn 'Quebec: Mixité and Monism', in E. Örücü, E. Atwool, S. Coyle (eds.) *Studies in Legal Systems: Mixed and Mixing* (Netherlands: Kluwer Law International, 1996), 3-8.

[22] *Campbell v Hall* [1774] 1 Cowp. All ER Rep 252 1045, para. 1047, as per Lord Mansfield: "The laws of a conquered country continue in force, until they are altered by the conqueror".

Under the common law doctrine of reception, the laws of a conquered or ceded territory remained in force unless and until are altered by the conquering nation. See Secher 2005. See *Mabo* v *Queensland* (No 2) ("*Mabo Case*") [1992] HCA 23; [1992] 175 CLR 1.at 35.

account demographic, political and social factors such as introducing foreign language to an uncomprehending population.[23] This may be shown in the judgment of Chief Justice Hallinan in *Universal Advertising and Publishing Agency v Panayiota A. Vouros*[24] where it was stressed that the principles of the English common law did not fit Cyprus in their totality.[25]

After an armed rebellion against the British which began in 1955 and lasted until 1959, Cyprus gained the status of an independent state.[26] The Zurich-London Accords of 1960, despite different aspirations, imposed independence on the people of Cyprus.[27] The Constitution divided the citizens of the Republic into a Greek and a Turkish Community and provided for a binary/bi-communal government with presidential characteristics in a consociational system.[28] The Constitution has been characterised as one of the most peculiar in the constitutional world.[29] It is a rather lengthy instrument with a number of provisions having the character of fundamental, basic articles, not capable of any revision or amendment.[30] Nonetheless, the bi-communal administration was unfortunately short-lived, as three years after independence the Republic was faced with a major political and constitutional crisis after the departure of the Turkish Cypriots from their posts in the executive and legislative functions.[31] In order for the state to function properly, the doctrine of necessity was employed.[32] After the Turkish invasion of 1974, Cyprus is divided ethnically

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[23] Palmer 2012, above n. 2, 28.

[24] [1955] 19 CLR 87.

[25] See also, G. M. Pikis, *An Analysis of the English Common Law, Principles of Equity and their Application in a Former British Colony*, *Cyprus* (Brill Nijhoff, 2017), 75. Pikis, above n 20, 75.

[26] Cyprus Act 1960, Chapter 52, 'An Act to make provision for, and in connection with, the establishment of an independent republic in Cyprus', 29th July 1960, 8&9 Eliz. 2.

[27] Hatzimihail 2013, n. 18, 48. According to Polyviou the thesis about "an imposed settlement" was advanced in numerous Legal Opinions, letters and notes prepared and issued by the then Attorney General of the Republic of Cyprus Mr Criton Tornaritis from 1961 onwards. See note 8 page 8 in P. Polyviou, *CYPRUS: A Study in the Theory, Structure and Method of the Legal System of the Republic of Cyprus* (Nicosia: Chryssafinis & Polyviou, 2015).

[28] See, *inter alia*, Articles 1, 72(1), 112(1), 115(1) of the Constitution of Cyprus providing for a "Turkish" second in command to the "Greek" public office holder.

[29] P. Neophytou Kourtellos, 'Constitutional Law', Campbell, n. 17, 16. Jan Smits measures complexity in law by looking at the different factors of density, technicality, institutional differentiation and indeterminacy and finds that the Constitution of Cyprus is highly difficult to understand while in general the legal system scores high on complexity. J.M. Smits 'Do Small Jurisdictions Have a More Complex Law? A Numerical Experiment in Constitutional and Private Law', *Maastricht European Private Law Institute Working Paper,* 2015/05 (2015).

[30] According to Tornaritis (Attorney General from 1960 to 1984) "Such provisions are contrary to the accepted principles of public law and the current constitutional practice" in C. Tornaritis, *Cyprus and its Constitutional and other Legal Problems* (Nicosia: 1977) 55.

[31] The Turkish Cypriot judges remained in their posts for a few more years, while the Turkish Cypriot High Court Judge Mehmet Zekia became the united Supreme Court's first President and first Cypriot judge at the European Court of Human Rights. See Hatzimihail 2013, above n. 18, 67.

[32] This doctrine provides that when compliance with constitutional provisions is rendered impossible due to the exceptional and unforeseen circumstances, which the framers of the Constitution never contemplated (*e.g.* the non-participation of Turkish Cypriots in the institutions of the Republic), the relevant constitutional provisions are deemed to be amended so that the state can avoid a complete paralysis. See *Nicolaou (Νικολάου)* v *Nicolaou (Νικολάου)* 1 CLR 1338. See also, C. Lykourgos, 'Cyprus Public Law as affected by accession to the European Union', in C. Kombos (ed.) *Studies in European Public Law: Thematic, National and Post-National Perspectives* (Athens: Sakkoulas Publications, 2010), 103.

and geographically, since Turkey's military holds 36% of the territory, while the bi-communal structure of the Republic of Cyprus functions according to the doctrine of necessity, and the Turkish Cypriot community is expected to return and reclaim their seats, once it is set free from Turkey.[33]

EU membership was seen as an opportunity both in terms of reunification of the territorially divided island but also in terms of facilitating the reform of the basic institutions.[34] The accession process as well as accession itself were expected to contribute to a fair settlement of the Cyprus problem. This is one of the reasons that, along with international legality, European integration constitutes a fundamental pillar of the political and legal discourse. The aim was to resolve the Cyprus problem in an integrationalist manner in accordance with the European *acquis*.[35] Furthermore, Cypriots have strongly identified with Europe and have been "quite happy to partake in European law",[36] although the change steered by European integration is only gradually being realised. Therefore, the decision was made to adopt a 'Europe provision' in the model of Ireland that gives prevalence to EU law in its entirety over all of domestic law.[37]

III. FAMILY LAW IN CYPRUS

During British rule of the island, Ottoman law was partly preserved by recognising the jurisdiction of the Muslim Religious Courts to adjudicate matters of personal status of the Muslim inhabitants of the island,[38] while Byzantine law was preserved through the recognition of the jurisdiction of the Episcopal Courts and the law-making authority of the Orthodox church for matters of personal status of the Greek Orthodox inhabitants.[39] The essential characteristics of the *millet* system were thus maintained and the British administrator

[33] Hatzimihail 2013, n 18, 51. Turkish Cypriot property in the area controlled by the Republic is held in trust by the government, pending resolution of the Cyprus problem. Turkish Cypriot Properties (Management and Other Topics) Law L. 139/91.

[34] According to Symeonides: "[…] there is little excuse for the fact that, so many years after independence, no serious effort has been undertaken for a comprehensive streamlining and modernisation of the law of Cyprus." He then notes that accession to the EU is a chance for modernisation and harmonisation to be combined in one project. S. Symeonides, 'The Mixed Legal System of the Republic of Cyprus'. *Tulane Law Review 78* (2003), 441-454, 454.

[35] See also A.Theophanous 'Cyprus: From an economic miracle to a systemic collapse and its aftermath' in L. Briguglio (ed.) *Small States and the European Union: Economic Perspectives* (London: Routledge, 2016), 28-49.

[36] Hatzimihail 2017, above n. 4, 214.

[37] Fifth Amendment of the Constitution of Cyprus, Law 127(I)/2006.

[38] Article I of the Annex to the 1878 Convention obliged Britain to ensure that Moslem Sheri Law would be administered by special courts in religious and family matters affecting the members of the Turkish community. The Cyprus Convention, Convention of Defensive Alliance Between Great Britain and Turkey with Respect of the Asiatic Provinces of Turkey, Signed at Constantinople 4th June 1878, Article I of the Annex reads:

"That a Mussulman religious Tribunal (Mehkeme-I Sheri) shall continue to exist in the island which will take exclusive cognizance of religious matters, and of no others, concerning the Mussulman population of the island."

Georghallides points out that, unlike the religious courts of the Greek Orthodox Church, the Moslem courts continued to have all their expenses defrayed by the Cyprus budget. See, n. 16, 358, Georghallides 1979.

[39] A similar approach was followed in India. See G. Cuniberti, *Grands systèmes de droit contemporains* (2nd edn. Lextenso, 2011), 398. The composition of Supreme Court was a subject of contention in 1925 since it consisted of two British judges and the Greek elected members of the Legislative Council argued that such a

modernised the faith groups as ethnic communities, transforming at the same time the "quasi-medieval community elites into ethno-communal elites".[40] The Ottoman Empire allowed each metropole to retain the personal statutes of the indigenous people they encountered.[41] Community ecclesiastical courts could be used for personal and community affairs, along with unhindered access to the Islamic *kadi* courts.

These elements were partly preserved by the Constitution as well, since Article 111 provides that any matter relating to betrothal, marriage, divorce, nullity of marriage, judicial separation or restitution of conjugal rights or to family relations shall be governed by the law of the Greek Orthodox Church or of the Church of such religious group as the case may be.[42] An amendment in 1989 granted jurisdiction on Family Courts for such matters of personal status.[43] The establishment of these Family Courts led to their gradual acquisition of jurisdiction over most types of family-law cases. This has led to a novelty for the Cypriot judicial system, which is seen as being traditionally unitary, whereby Family Courts have special jurisdiction at the trial level.[44] Appellate review is undertaken by a panel of rotating Supreme Court justices.

Family law in Cyprus is influenced by Greek family law to a great extent, as a result of the transplantation of Greek family law. This creates an interesting paradox whereby substantive family law is based on continental law, while conflict rules are entirely oriented towards English conflict of laws.[45] Article 22 of the Constitution establishes the right to marry and found a family according to the law relating to marriage. In doing so, it does not provide a definition of the term marriage nor family, the latter being considered an indefinite legal concept.[46] However, Section 2 of the matrimonial property of spouses law provides a definition of the term "spouse" as being a relationship between a man and a woman as a result of a marriage recognised by the State.[47] Section 3 (1) of the Law on Marriage, gives a definition of the institution of marriage as an agreement to unite in marriage by a man and a woman under the presence of the Registrar or the priests according to the rites of the Greek

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composition was deprived of detailed knowledge of local habits, customs and laws such as of Muslim religious and Greek canon law. See Georghallides 1979, above n. 16, 358.

40 N. Trimikliniotis 'Nationality and citizenship in Cyprus since 1945: Communal citizenship, gendered nationality and the adventures of a post-colonial subject in a divided country' in R. Bauböck, B. Perchinig, W. Sievers (eds.) *Citizenship Policies in the New Europe*, (Amsterdam University Press 2009), 391. The *millet* was a form of indirect rule according to religious difference adopted by the Ottomans. The autonomy of the main communities forming part of the Ottoman Empire at the time was non-territorial, providing the members of each *millet* a sense of community coherence, self-rule and choice. See for more K. Barkley, G. Gavrilis 'The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy', 24-42, 26-27, 15 *Ethnopolitics* (2016). The era of the British rule was characterised as post-millet since all religious communities had the right to administer their religious and family affairs without any State intervention. Canon law of the Orthodox Church was also recognised and confirmed by the Administration of Justice Law 39/1935. See A. Plevri 'Cyprus' in L. Ruggeri, I. Kunda, S. Winkler (eds) *Family Property and Succession in EU Member States: National Reports on the Collected Data*, Sveučilište u Rijeci, Pravni fakultet/University of Rijeka, (Faculty of Law 2019), 97.

41 V.V. Palmer 'Mixed Legal Systems and Pure Laws' 4 *Louisiana Law Review* 67, 1205-1218, 1215, (2007).

42 Article 111 (1) of the Constitution of the Republic of Cyprus, prior to Amendments.

43 Law 95/1989.

44 Hatzimihail, above n. 8, 280.

45 *Ibid*, 274.

46 Plevri, n 40, 99.

47 Law 232/1991.

Orthodox Church or the doctrines of the three religious groups that are recognised by the Constitution.[48] The promulgation of other laws gave also the option of civil marriage.[49] Nevertheless, the Church membership of the population remains an integral part of family law in Cyprus, despite the fact that jurisdiction in terms of matters of personal status have been granted to (State) Family Courts.[50]

Law 184(I)/2015 established the possibility of civil union between heterosexual or same-sex couples which was not available prior to the Law's adoption. The Law gives a civil union the same legal validity and consequences as a marriage, however, parties in civil union do not have a right of adoption.[51] Other forms of free unions or cohabitations are not regulated by law in Cyprus; however, it is generally accepted that the law of equity concerning constructive trusts may apply to such cases of cohabitation.[52]

IV. PRIVATE INTERNATIONAL LAW IN CYPRUS

As mentioned above, private international law in Cyprus is entirely oriented towards the English conflict-of-laws rules. Cyprus participates in sixteen instruments of the Hague Conference on Private International Law and has been particularly active in the Conference's activities on family law.[53] Nevertheless, due to the preference for domicile and habitual residence as a connecting factor, instead of nationality, the litigation on family issues in Cyprus has systematically given a preference to the *lex fori*.[54] Domicile under Cypriot law is a legal rather than a factual notion and is distinct from residence in that domicile consists of the permanent home of a person instead of the place of permanent residence.[55] Habitual residence under Cypriot private international law has been interpreted as actual physical presence in contrast to temporary sojourn.[56] EU law has gradually limited the significance of domicile as a connecting factor, and a lack of awareness of the conflict-of-laws rules contained in Regulations 1103/2016 and 1104/2016 is bound to create problems for their application, since the Regulations authorise the parties to choose the law applicable to the property consequences of their registered partnership/marriage. This is a novelty for Cypriot private international law, since the application of foreign law is not possible and party autonomy is not allowed.[57]

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48 Law 104(I)/2003.

49 See Laws 21/1990, 104(I)/2003.

50 Plevri, n. 40, 98-99.

51 *Ibid*, 100.

52 Ibid, 101.

53 Hatzimihail, above n. 8, 280. See HCCH website on the status of Cyprus accession to Hague Conventions HCCH | Cyprus (last accessed 26/04/2022).

54 Hatzimihail, above n. 8, 280.

55 See Cap. 195, see also Plevri, above n. 40, 107.

56 Plevri, n. 39, 105. See also *Rawlings* [2021] ECLI:CY:EDLAR:2021:A216 referring to the Supreme Court decision in *Hani El Sayegh* [1991] CLR 773. The latter judgment referred to Radin's Law Dictionary (296) where the definition of the verb reside is provided as follows: "To live permanently in a fixed abode. It generally means actual physical presence in a particular place, as distinguished from domicile, which ordinary deals, with a place considered by a person as his home whether he is there or not. Temporary sojourn or casual presence in transit - even if for a substantial time - is usually not called residence. Story, Conflict of Laws, ad hoc."

57 Plevri, above n 40, 106.

Contrary to other areas of law, private international law was not consolidated in a legislative document. EU private international law currently is the most important source of Cypriot private international law.[58] Due to the supremacy of EU law as enshrined in article 1A of the Constitution, this takes a higher status compared to domestic legislation on private international law. However, as indicated by Plevri, Cypriot courts are reluctant to apply EU Regulations such as 1103/2016 and 1104/2016 both due to lack of familiarity with the field, but also as a result of limited reference by the litigants of the case.[59] As Hatzimihail, indeed, points out the recent innovations in international civil litigation are only gradually making their way in Cyprus' commercial practice.[60] This trepidation was seen with regard to the application of the Brussels regime but was eventually superseded by a willingness to explore jurisdictional issues by making reference to these Regulations.[61]

Family Courts in Cyprus have jurisdiction over 'family relations' which includes all civil disputes that fall under the scope of family law as well as property disputes for which they exercise exclusive jurisdiction.[62] Family Courts exercise jurisdiction in cases of matrimonial property when both or one of the litigants resides in Cyprus for a period of more than three months.[63] They may also exercise jurisdiction even if neither of the parties resides in Cyprus as long as there is property, be it movable or immovable, that was acquired before the marriage in anticipation of a marriage, or at any point after the conclusion of a marriage.[64] This grants unlimited international jurisdiction to Cypriot courts over any matrimonial dispute, whereas Section 14 of Law 23/1990 provides that Family Courts should apply Cypriot domestic law when they have jurisdiction.[65]

V. CASE LAW INVOLVING REGULATIONS 1103/2016 AND 1104/2016

Given the delay in the adjudication of cases, judgments involving the application of Regulations 1103/2016 and 1104/2016 are rare. Marital property litigation takes between two and six years to be adjudicated.[66] Only one case exists and it involves an application for delivery of documents for destruction.[67] In the context of the applicant's initial application to

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58 Plevri, above n 40, 107.

59 Plevri, above n 40, 104. Cyprus follows the adversarial system whereby the judge is an arbiter of the contest between lawyers presenting arguments of fact and of law who is called on to decide according to the material brought forward by the litigating parties. See also N. Mouttotos, N. Kyriakides Comment on Supreme Court of Cyprus judgment, 4 *Lex & Forum* (2022) [in Greek]. In *Christodoulou* v *Sofroniou* [1987] 1 CLR 441. it was explained that under the adversarial system of administration of justice, the issues in dispute are defined by the pleadings of the parties, the statement of claim and the defense.

60 Hatzimihail, above n 8, 273.

61 *Ibid*, 279.

62 *Dadakarides (Δαδακαρίδης)* v *Dadakaridou (Δαδακαρίδου)* [1990] 1 CLR 566; *Logginou (Λογγίνου)* v *Logginou (Λογγίνου)* [2000] 1 CLR 1347. See Law 25(I)/98 that transferred the jurisdiction of the District Courts on matters of matrimonial property to the Family Courts.

63 Section 11, Law 23/1990.

64 Section 11(2), Law 23/1990 read in conjunction with Section 2, Law 232/1991.

65 Plevri, above n. 40, 109. However, Section 14 of Law 23/1990 provides the caveat that where there is *lex specialis* on the particular topic then the latter takes precedence.

66 Hatzimihail, n 8, 282.

67 *Christoforou* v *Christoforou (Χριστοφόρου) et al.* [2021] ECLI:CY:EDLEM:2021:A115.

the Cypriot courts, an order for the recognition and execution of the English order was issued. According to the text of the English order, a duty of confidentiality upon the parties (applicant and defendant in the proceedings before the District Court) was established, from which both the documents and the information disclosed in the procedure before the English court were protected. The English order provided for the prohibition of the use of privileged documents and information without permission, and that the breach of the duty of confidentiality or any actions by parties who are not members in the court proceedings would be considered as a contempt of Court. In the proceedings before the District Court of Limassol, an allegation of breach of the duty of confidentiality by defendant was raised and the Family Court in the initial proceedings prohibited defendant 1 from providing any documents and/or information of proceedings in England to any person who is not a party to the marital proceedings. A number of defendants in the application before the District Court of Limassol gained access to information that was restricted by the English order through defendant 1. Thus, a number of privileged documents and information have illegally escaped the jurisdiction of the English courts through defendant 1 and his lawyers, in order for a number of other parties to use them as a basis of applications and/or affidavits in the action before the District Court of Limassol.

The English order was recognised by the Family Court under Regulation 1103/2016; in an *ex parte* decision without providing reasoning.[68] As the Supreme Court noted in *Kountouri* v *Ministry of Justice and Public Order*,[69] the purpose of recognition and enforcement of foreign judgments is to give the force of precedence to the decision or order sought for recognition, enforcement, or both. The court that deals with the application for recognition or enforcement does not examine the order or decision in terms of its substance.[70] According to the Supreme Court, in case a party wanted to challenge the jurisdiction of the foreign Court or the correctness of the issued decision or order, that party has to appear before that Court and present his or her arguments.[71] In the proceedings before the District Court of Limassol, the main question relating to the application of Regulation 1103/2016 concerned the lack of jurisdiction by the trial court to issue the orders requested by the applicant, since the Family Court was the competent court to decide on whether the orders issued by it (which recognised the English order and granted it the force of an order issued by national courts)[72] were violated. Indeed, the District Court decided that it lacked jurisdiction to rule on the matter and that the procedure should be referred back to the Family Court. Therefore, there was no actual deliberation by the District Court on whether the English order should have been recognised under Regulation 1103/2016. The Court did mention, though, that the substantive review of a decision issued in another Member State is prohibited under the Regulation.

An element which has been seen in other cases, and was mentioned by the counsels of the applicant in the above-mentioned case, relates to the tendency towards procedural formalism in cases of recognition and enforcement of decisions. Namely, the applicant argued that the prescribed procedure under Law 121(I)/2000 was not followed in the request for

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68 Family Court, Application 7/19.

69 Κουντούρη v Υπουργείο Δικαιοσύνης και Δημόσιας Τάξης [1997] 1 CLR 1677.

70 *In Re Nicolaedi* (Νικολαϊδη) [1994] 1 CLR 804

71 *Ibid*.

72 On the effect of recognition see *Kountouri (Κουντούρη)* v *Minister of Justice (Υπουργού Δικαιοσύνης και Δημόσιας Τάξης)* [1997] 1(Γ) CLR 1677.

recognition of the English order.[73] Law 121(I)/2000 sets the procedural framework for an application for recognition and enforcement of foreign judgments or orders.[74] The District Court did not deliberate on the issue as it referred back to the Family Court as the competent court. Nevertheless, other cases involving the enforcement of EU Member States' judgments declined to exercise jurisdiction and enforce the judgment due to the failure to comply with the procedure prescribed by Law 121(I)/2000.[75] Procedural formalism has become an integral part of the mentality of the Cypriot judiciary, however, some cases have shown some leniency towards objections on the enforcement of a judgment which was given in absentia by a Lithuanian court, with the defendant claiming not having been duly served.[76]

VI. CONCLUSIONS

Both Regulations present challenges to the private international law regime in Cyprus, since choice of law in matrimonial property is a novelty. Furthermore, problems may arise as to the definition of the legal notion "marriage".[77] Since it is left upon national laws of the Member States to define the term, there might be a need to adapt the notion in the case of Cyprus since substantive family law interprets it as an agreement between a man and a woman.[78] If such adaptation does not take place, then with regards to certain arrangements recognised by other Member States as falling within the notion of marriage and not adhering to the interpretation given by Cypriot substantive law, Cypriot courts may decline jurisdiction under Regulation 1103/2016.

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[73] Law on the Recognition and Enforcement of Foreign Judgments, 121(I)/2000, Article 5.

[74] The Supreme Court has indicated that Law 121(I)/2000 does not add to substantive law but is rather exhausted in the procedure to be followed in cases of application for recognition or enforcement of foreign decision or order. See *Barbara Doris Bauer via the responsible German Authority* v *Karapataki (Καραπατάκη)* [2007] 1(A) CLR 503.

[75] See *In Re Tomaszewski* [2013] ECLI:CY:ODLEM:2013:1. See also Hatzimihail, above n. 8, 282.

[76] See also Hatzimihail, above n. 8, 282. See *In Re Fylaktou (Φυλακτου)* [2014] ECLI:CY:ODPAF:2014:2; and the appeal which upheld the first-instance decision that enforced the judgment by the Lithuanian court, *In Re Fylaktou (Φυλακτού)* [2018] ECLI:CY:DOD:2018:3.

[77] See also Plevri, above n. 40, 105.

[78] See *ibid*.

APPLICATION OF THE MATRIMONIAL PROPERTY REGIMES REGULATION: CROATIAN PERSPECTIVE

Danijela Vrbljanac[1]

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Summary: I. Introduction. II. International element. III. Jurisdictional rule of Article 6(c). IV. Temporal scope of application. V. Hypothetical case on temporal scope of application. VI. Conclusion

Abstract: Regulation 2016/1103 has been in force in EU Member States participating in enhanced cooperation for more than 2 years. The paper looks into Croatian case-law on the application of Regulation 2016/1103 and scrutinizes issues with which Croatian courts were confronted in applying this recent piece of EU private international law source. These issues include the temporal scope of application of Regulation 2016/1103, the notion of international element, the existence of which is the prerequisite for applying Regulation 2016/1103 as well as the question whether jurisdictional rule referred to in Article 6(c) of Regulation 2016/1103 may be applied when the defendant is not the spouse.

I. INTRODUCTION

The puzzle of EU private international law sources in the area of family and succession law was recently complemented by two pieces of legislation governing private international law aspects of cross-border couples' property regimes. These are Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter: Regulation 2016/1103)[2] and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (hereinafter: Regulation 2016/1104)[3], often referred to as the Twin Regulations.

The more than a decade long path to the adoption of these sources was marked with difficulties which resulted in the enactment of these instruments in the framework of the

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[1] Danijela Vrbljanac, PhD is an Assistant Professor at the Chair of International and European Private Law, University of Rijeka, Faculty of Law, Croatia

[2] Regulation 2016/1103, OJ L 183, 8 July 2016, 1–29.

[3] Regulation 2016/1104, OJ L 183, 8 July 2016, 30–56.

enhanced cooperation mechanism[4]. Still, they represent a remarkable step forward in bringing more clarity and certainty to cross-border couples faced with the breakdown of their relationship and the need to divide their assets[5].

Since the Twin Regulations have been in force for more than two years, the purpose of the paper is to analyse case law of Croatian courts on these instruments. In total, four judgments on the application of Regulation 2016/1103 were found. Based on the issues the Croatian courts were confronted with in proceedings resulting in the said judgments, the paper is divided into three parts: international element, jurisdictional rule of Article 6(c) and temporal scope of application. Since the question on the temporal ambit raised in the judgments is a rather straightforward one, the author tried to anticipate a connected, more complex issue which may arise in a hypothetical case in the final part of the paper.

At this time, no judgments were found on Regulation 2016/1104. However, due to the fact that provisions of Regulation 2016/1103 which are subject to scrutiny have their equivalent in Regulations 2016/1104, the outlined analysis may also serve for the purposes of the latter Regulation.

II. INTERNATIONAL ELEMENT

In a case before the Commercial Court in Rijeka, the plaintiff with an address in Italy, N.D., instituted proceedings against her husband M.M. with an address in Croatia. She sought from the court to establish that she, together with the defendant, was the owner of the share in the company M.M. d.o.o. registered in Croatia to N.D.'s name. The Commercial Court in Rijeka dismissed the plaintiff's claim by the judgment rendered on 16 May 2019. Upon the plaintiff's appeal, the High Commercial Court of the Republic of Croatia, abolished the first-instance decision and returned the case for retrial with instructions to determine the content of Italian substantive law, in particular as to whether the regime of separate property, opted for by the parties, encompassed solely the property located in Italy[6]. In the retrial, the Commercial Court in Rijeka[7] established that N.D. and M.M., when concluding marriage in Italy, opted for the matrimonial regime of separate property[8] pursuant to Article 215 of Italian Civil Code. The Court correctly dismissed the plaintiff's claims asserting that the regime of separate property included only the property located in Italy. Furthermore, the Court was correct in its conclusion that Regulation 2016/1103 was not applicable since the proceedings were instituted prior to 29 January 2019. Instead, it founded its jurisdiction on Article 46 of the 1982 Croatian PIL Act (*Zakon o rješavanju sukoba zakona s propisima drugih zemalja*

[4] On the adoption of the Twin Regulations, see E. Kavoliunite Ragauskeine, 'The Twin Regulations, Development and Adoption', in L. Ruggeri, A. Limantė, N. Pogorelčnik Vogrinc eds., *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 25-37.

[5] See European Commission, 'Commission goes ahead with 17 Member States to clarify the rules applicable to property regimes for Europe's international couples', 2 March 2016, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_449 (last visited 29 April 2022).

[6] Decision of the High Commercial Court of the Republic of Croatia Pž-4707/2019-2 of 1 December 2020.

[7] Judgment and decision of the Commercial Court in Rijeka 5 P-97/2021-44 of 26 November 2021.

[8] For more on family property regimes, see R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin, M. V. Maccari 'Italy', in L. Ruggeri, I. Kunda, S. Winkler eds., *Family Property and Succession in EU Member States, National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), 356-390.

u određenim odnosima) which is a general jurisdiction rule[9]. It established that Italian law was applicable based on Article 36(1) of the 1982 Croatian PIL Act[10] since the spouses were Italian citizens.

Even though the Commercial Court in Rijeka reached a correct conclusion on the existence of the cross-border element and, as well as international jurisdiction and applicable law, in one of the sentences it was briefly mentioned that Regulation 2016/1103 could not be applied since the parties were not an 'international couple'. This formulation might demonstrate difficulties with which the courts and other authorities are sometimes confronted in determining whether a particular case has an international or cross-border element and whether Regulation 2016/1103, along with other private international law sources, should be activated. This fact is corroborated by the research conducted on the implementation of the Succession Regulation in the Republic of Croatia and Slovenia from which it stems that the consensus on whether particular succession proceedings have an international element does not always exist among Croatian and Slovenian practitioners[11].

Regulation 2016/1103, as well as Regulation 2016/1104, states in Recitals 1 and 14 that it applies in cases having cross-border implications without giving explanation of the term cross-border. The Twin Regulations thus follow the example of the majority of EU family and succession private international sources which do not elaborate on the matter[12]. In the Rome III Regulation proposal, the European Commission provided a general and vague explanation that conflict of laws means situations in which there are aspects of the case which take it outside the domestic social life of one country and which may involve several legal systems[13]. In doctrine, it is indicated that a cross-border nature of couple's property relations derives from an intrinsic element, i.e. personal, objective and territorial[14]. Examples of a cross-

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[9] Article 46(1) of the 1982 Croatian PIL Act, NN 53/91, 88/01:

The court of the Republic of Croatia has jurisdiction if the defendant is domiciled or has its seat in the Republic of Croatia.

For the translation of the former Croatian 1982 PIL Act, see Ž. Matić, 'The Yugoslav Act Concerning Private International Law with Introduction' 30 *Netherlands International Law Review* 2, 220-239 (1983).

[10] Article 36(1) of the 1982 Croatian PIL Act:

The law governing the personal relations and statutory matrimonial property regime of spouses is the law of the state of which they are citizens.

[11] S. Aras Kramar, M. Turk, K. Vučko, 'Završno izvješće o provedenom istraživanju o primjeni Uredbe o nasljeđivanju u Hrvatskoj i Sloveniji', 2019, available at https://www.hjk.hr/Portals/0/ForumUpload/dokumenti/Zavrsno%20izvjesce_hrv.pdf (last visited 22 April 2022), 11-16.

[12] This is also for true for sources not regulating private international law issues in the field of family and succession, such as the Brussels I bis Regulation (OJ L 351, 20 December 2012, 1–32), Rome I (OJ L 177, 4 July 2008, 6–16) and Rome II (OJ L 199, 31 July 2007, 40–49) Regulations. Only two sources define a cross border element. These are European Order for Payment Regulation (OJ L 399, 30 December 2006, 1–32) and European Small Claims Procedure Regulation (OJ L 199, 31 July 2007, 1–22) which state in Article 3 that a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. These definitions, due to the particularities of the proceedings they refer to, are of little relevance for understanding cross-border element for the purpose of the Twin Regulations.

[13] Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final, Brussels, 24 March 2010, COM(2010) 105 final, 2010/0067 (CNS), 6.

[14] A. Rodriguez Benot, 'Article 1, Scope', in I. Viarengo, P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples, A Commentary* (Cheltenham: Edward Elgar, 2020), 20.

border element include couples with different nationalities, domicile or habitual residence, property located in another country,[15] marriage which was concluded in another country[16] or a case might concern a couple residing in a country other than that of their nationality[17]. Even when all other elements are connected to a single country, a cross-border element might appear due to the fact that creditors or debtors, third parties, are in a different country or countries[18]. However, there are more problematic scenarios in which the existence of an international element might be questionable. For instance, if the couple holds shares in a company incorporated abroad or formerly had an international element in their relationship while they worked abroad, but no longer do so[19].

Even when a case involves an international element, it will not necessarily be relevant enough to integrate a private international law dimension into a particular legal relationship[20]. In *E.E.*, the CJEU had a chance to discuss the existence of an international element in a succession case[21]. It clarified that the case involving a deceased, national of one Member State, residing in another Member State at the date of his or her death but who had not cut ties with the first of those Member States, in which the assets making up his or her estate were located, while his or her successors had their residence in both of those Member States, fell within the scope of the concept of 'succession with cross-border implications'.

A more elaborate interpretation of international element by the CJEU was given in *Hypoteční banka,* a case concerning Brussels I bis Regulation. It involved a company governed by Czech law and established in Prague which brought an action before the Czech court and sought payment from Mr Lindner, a German national, based on the mortgage loan granted to Mr Lindner. The contract between the parties conferred jurisdiction to 'the local court of the bank'. At the time of the conclusion of the contract, Lindner was domiciled in the Czech Republic. However, when the proceedings were instituted, his domicile became unknown[22]. The CJEU highlighted the need to differentiate between the jurisdictional criteria in Brussels I bis Regulation from the elements which bring a cross-border element into a relationship. Even when Brussels I bis Regulation does not recognise a certain element as relevant for establishing international jurisdiction, that element could still be a decisive criterion making the dispute an international one. Referring to Mr. Lindner's foreign nationality, the CJEU explained that nationality is not one of the jurisdictional criteria prescribed by Brussels I bis

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15 Ibid. 20.

16 H. Peroz, E. Fongaro, *Droit international prive patrimonial de la famille* (Paris: Lexis Nexis, 2017), 1.

17 M. J. Cazorla González, M. Soto Moya, 'Main Concepts and Scope of Application of the Twin Regulations', in L. Ruggeri, A. Limantė, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 50. See Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final, Brussels, 24 March 2010, COM(2010) 105 final, 2010/0067 (CNS), 6. See F. G. Viterbo, 'Article 1, Scope', in L. Ruggeri, R. Garetto eds., *European Family Property Relations, Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Edizioni Scientifiche Italiane, 2021), 9-10.

18 A. M. Sanchez-Moraleda, 'The Questions of the Primary Matrimonial Regime and the Application of Regulation 2016/1103', 12 *Cuadernos de Derecho Transnacional* 1, 260 (2020).

19 J. Gray, *Party Autonomy in EU Private International Law, Choice of Court and Choice of Law in Family Matters and Succession* (Cambridge: Intersentia, 2021), 72.

20 H. Peroz, E. Fongaro, n 15 above, 1.

21 Judgment of 20 July 2020, *E.E.*, C-80/19, EU:C:2020:569.

22 Judgment of 17 November 2011, *Hypoteční banka*, C-327/10, EU:C:2011:745.

Regulation, but could, nonetheless be a circumstance making the dispute international in its nature. If one applied argument *a maiori ad minus*, they might reach a conclusion on the minimum threshold of international element relevance which would trigger application of private international law sources. The minimum threshold conclusion would require that, although it is not necessary that the assessment of the cross-border element is based only on jurisdictional criteria prescribed in the Regulation, it is required that the elements underlying the jurisdictional criteria are considered while deciding if the dispute is an international one.

It is an unrewarding task to try to establish in advance the degree of relevance a foreign element must have so that the court or other authority has to resort to provisions of private international law. If the minimum threshold conclusion extracted from the *Hypoteční banka* is translated to the area of property relations of international couples, that would mean that whenever a cross-border element in a case is present through a fact underlying one of the jurisdictional criteria or connecting factors, such as habitual residence and nationality of the spouses or partners or the place of the conclusion of the marriage or registration of partnership[23], one of the Twin Regulations should be applied. If the European legislator deemed these elements were important enough for a particular legal relationship to indicate the state with which the relationship is closely connected to, then it would perhaps be safe to say that they have the power to transform a domestic relationship into an international one.

Some scholars are of the opinion that an international element might derive from an external element, i.e. when the parties involved agree to submit their dispute to a foreign court or legal system under Articles 7 and 22 in a purely domestic situation[24]. If the external element appears in the form of prorogation of jurisdiction, the dispute will have an international character. If the parties to a purely domestic case decide to submit their dispute to a foreign court, once it is seised, the foreign court will have to reach for its rules on international jurisdiction to determine whether it has competence or not, since it will be confronted with the claim between parties from abroad. Therefore, that statement holds true for an external element in view of the choice of court. On the other hand, if parties decide to choose the applicable law of a foreign country and all other elements of their relationship are connected to one country, the existence of an international element is disputable. Traditionally, party autonomy, in contractual situations involving an international element must be distinguished from party autonomy in purely domestic situations. If there is an international element present, and parties are allowed to choose the applicable law, they can choose the entire legal system of a particular country to govern their legal relationship, including the mandatory rules of the chosen law[25]. On the other hand, if no international element exists, parties may only derogate from dispositive provisions of the law which the relationship is connected to[26].

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[23] These are jurisdictional criteria and connecting factors Arts. 6, 7 and 22 of the Twin Regulations.

[24] A. Rodriguez Benot, n 13 above, 20.

[25] Y. Nishitani, 'Party Autonomy in Contemporary Private International Law — The Hague Principles on Choice of Law and East Asia' 59 *Japanese Yearbook of International Law*, 300 (2016).

[26] H. L. E. Verhage, 'The Tension between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd v Eaton Leonard Technologies Inc', 51 *The International and Comparative Law Quarterly*, 1, 135 (2002). See also P. Mankowski, 'Article 3, Freedom of Choice', in U. Magnus, P. Mankowski eds, *Rome I Regulation*, (Cologne: Otto Schmidt, 2017), 228-233; F. Ragno, 'Article 3 Freedom of Choice', in F. Ferrari ed,, *Concise Commentary on the Rome I Regulation* (Cambridge: Cambridge University Press, 2nd ed, 2020), 60.

From this distinction, it follows that the choice of foreign law cannot constitute, *per se*, an international element.

III. JURISDICTIONAL RULE OF ARTICLE 6(C)

In the case before the Municipal Court in Pazin, permanent service in Buje[27], M.L.K., the plaintiff with an address in Piran, Slovenia, instituted the proceedings seeking the declaration that the contract for the maintenance until death (*ugovor o dosmrtnom uzdržavanju*)[28] was null and void and that she was the co-owner of one half of the real estates located in Istria, Croatia. The defendant was S.G., with an address in Piran, Slovenia, with whom M.L.K.'s former, late husband I.K., with an address in Momjan, Croatia concluded a maintenance until death contract. Along with S.G., who is not related to any of the parties, the defendants were also M.L.K.'s and I.K.'s daughters, L.K. with an address in Kopar, Slovenia and A.M. with an address in Ljubljana, Slovenia, as universal successors of late I.K. M.L.K. claimed that real estates located in Istria, Croatia, that were transferred to S.G., were part of the community of spouses' assets (*bračna stečevina*) as the default matrimonial property regime and sought one half of her co-ownership of real estates to be recorded in land registry. The plaintiff also sought that paintings and other works of art she created, which were transferred to S.G. based on the maintenance until death contract, be handed to M.L.K. since they formed personal assets (*vlastita imovina*) based on Article 39(3) of the Croatian Family Act (*Obiteljski zakon*)[29], which rather than part of the community of spouses' assets[30].

The Municipal Court in Pazin, permanent service in Buje, characterised the proceedings as a matter of matrimonial property regime by referring to definition of matrimonial property regime in Article 3(1)(a) of Regulation 2016/1103. The Court explained that defendant S.G. was a third party and a maintenance creditor to whom late I.K. allegedly transferred a part of matrimonial property. The Municipal Court in Pazin, permanent service in Buje declared it had jurisdiction based on Article 6(c) of Regulation 2016/1103 since S.G. was the respondent and her habitual residence was in Momjan, Istria[31].

The Court correctly concluded that the proceedings at issue were covered by the material ambit of Regulation 2016/1103 considering its main purpose was to establish whether property with regards to which a late husband made *inter vivos* dispositions was

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[27] Judgment and decision of the Municipal Court in Pazin, permanent service in Buje P-1262/2019-53 of 24 August 2020.

[28] Under Article 586(1) of the Croatian Civil Obligations Act *(Zakon o obveznim odnosima*, NN 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021), the contract for the maintenance until death obliges one party (maintenance debtor) to support the other party or a third party (maintenance creditor) until his death, and the other party undertakes to transfer all or part of his property to him during his life.

[29] Croatian Family Act, NN 103/15, 98/19.

[30] For more on family property regimes in Croatia, see M. Bukovac Puvača, I. Kunda, S. Winkler, D. Vrbljanac, 'Croatia', in L. Ruggeri, I. Kunda, S. Winkler eds, *Family Property and Succession in EU Member States, National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), 68-92.

[31] Additionally, the Court cited Article 10 of Regulation 2016/1103 as the basis for jurisdiction. As for applicable law, the Court briefly mentioned Article 26(3)(b) without much consideration. The Court established in the judgment that the contents of the Croatian and Slovenian law on matrimonial property regime were virtually the same.

part of community of spouses' assets and therefore belonged, in one half, to his former wife. Furthermore, in cases of matrimonial property regimes, not all proceedings will be conducted between spouses, including future or former spouses. Third parties will also appear as parties to the proceedings[32]. The definition of 'matrimonial property regimes' referred to in Article 3(1)(a) of Regulation 2016/1103 supports this by explaining that the concept encompasses a set of rules concerning the property relationships between the spouses and their relations with third parties. However, the issue is whether the jurisdiction of the court may be based on the habitual residence of the defendant who is not one of the spouses pursuant to Article 6(c) of Regulation 2016/1103. The only place in both Twin Regulations in which the term 'respondent' is used is point (c) of Article 6, which contains jurisdictional rules applicable in cases in which concentration of jurisdiction rules from Articles 4 and 5 cannot be applied and spouses did not choose the competent court. All other jurisdictional criteria in Article 6 refer to either both spouses or one of the spouses.

An analogous rule conferring jurisdiction to the Member State in which the 'respondent' has habitual residence may be found in Article 3(1)(a), third indent of Brussels II bis Regulation[33], whereas fifth and sixth indents mention the 'applicant'. In *Mikolajczyk*,[34] the action for annulment of marriage was brought by the third party relying on jurisdictional rule from Article 3(1)(a), fifth indent of Brussels II bis Regulation. The CJEU ruled that the fifth and sixth indents of Article 3(1)(a) must be interpreted as meaning that a person, other than one of the spouses who brings an action for annulment of marriage, may not rely on the grounds of jurisdiction set out in those provisions. The reasoning behind is the objective of the jurisdictional rules at issue, which is to protect the interests of spouses and to establish a flexible rule dealing with the mobility of spouses, particularly in situations in which one spouse leaves the country of common habitual residence, while at the same time ensuring there is a genuine link between the party concerned and the Member State exercising jurisdiction[35]. Such decision was somewhat criticised in doctrine[36]. If the same approach of taking into account the objective of the provision is accepted, the *ratio* of Article 6 and its jurisdictional rules has to be traced back to the legislative proceedings of enacting Regulation 2016/1103. The Explanatory Memorandum in the Proposal of the Regulation 2016/1103 states that jurisdictional criteria in Article 6 include the habitual residence of the spouses, their last habitual residence if one of them still resides there or the habitual residence of the respondent and that these widely used criteria frequently coincide with the location of the

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[32] L. Ruggeri, 'Article 17, Lis pendens', in L. Ruggeri, R. Garetto eds, *European Family Property Relations, Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Edizioni Scientifiche Italiane, 2021), 172.

[33] Brussels II bis Regulation, OJ L 338, 23.12.2003, 1–29.

[34] Judgment of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772.

[35] Judgment of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772, paragraphs 49-50.

For more on *ratio* of the fifth and sixth indent of Article 3(1)(a) of Brussels II is Regulation, see V. Tomljenović, I. Kunda, 'Uredba Rim III: treba li Hrvatskoj?', in I. Kunda ed, *Obitelj i djeca: europska očekivanja i hrvatska stvarnost/Family and children: European expectations and national reality* (Rijeka: Faculty of Law in Rijeka/ Croatian Comparative Law Association, 2014), 225.

[36] A. Borras, 'Article 3', in U. Magnus, P. Mankowski, *Brussels IIbis Regulation* (Cologne: Otto Schmidt, 2017), 95.

spouses' property[37]. There is no mention of jurisdictional criteria referring to anyone else but the spouses. Furthermore, Recital 35 indicates that jurisdictional rules are set in view of the increasing mobility of citizens and in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised. In line with the need for a genuine link between the competent court and spouses, the doctrine has supported that interpretation of Article 6(c) as to refer to other defendants, not just spouses, would not be satisfactory from the perspective of proximity and predictability[38]. However, there are contrary views according to which, since the Regulation's scope encompasses proceedings instituted by third parties or directed against third parties, Article 6(c) does not only encompass spouses[39]. Perhaps the most convincing argument towards limiting interpretation of Article 6(c) to spouses would be that otherwise, jurisdiction might be conferred to court which is not closely connected to spouses and their property regime. In the case at hand before the Municipal Court in Pazin, permanent service in Buje, interpreting Article 6(c) to apply beyond defendants who are spouses, did not have negative results from the perspective of achieving a sufficient connection between the court and the dispute. However, understanding Article 6(c) in such an extensive manner might not lead to appropriate results in all situations.

IV. TEMPORAL SCOPE OF APPLICATION

Out of four available decisions of Croatian courts on Regulation 2016/1103, two of them concern the temporal ambit of Regulation 2016/1103. This should not come as a surprise, since the Regulation entered into force relatively recently.

One of the judgments was rendered in proceedings instituted by plaintiff Z.K. against defendant A.K. for determining matrimonial property before the Municipal Court in Slavonski Brod. The Municipal Court in Slavonski Brod declared it had no jurisdiction and dismissed the claim. It relied on Article 54(1) of the 1982 Croatian PIL Act according to which the Croatian court has jurisdiction for property claims if the property of the defendant or the object for which the proceedings are instituted is situated on the territory of the Republic of Croatia. The Municipal Court indicated that funds which were the object of the instituted proceedings were located in bank accounts in Austria. The plaintiff appealed against the decision on all the grounds of appeal prescribed by the provision of Article 353(1) points 1-3 of the Civil Procedure Act (*Zakon o parničnom postupku*)[40]. The County Court in Zagreb upheld the appeal and referred the case to the first instance court for a retrial[41]. The County Court in Zagreb explained that the Municipal Court did not establish the facts necessary for determining whether a Croatian court could be competent based on the 1982 Croatian

[37] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 2 March 2016, COM(2016) 106 final,2016/0059 (CNS), 8.

[38] A. Bonomi, 'Article 6', in A. Bonomi, P. Wautelet eds, *Le droit europeen des relations patrimoniales de couple: commentaire des Reglements (UE) nos 2016/1103 et 2016/1104* (Bruxelles: Bruylant, 2021), 426.

[39] M. Makowsky, 'Artikel 6, Züstandigkeit in anderen Fällen', in R. Hüßtege, H.-P. Mansel eds, *BGB*, Vol. 6, *Rom-Verordnungen - EuErbVO – HUP* (Baden-Baden: Nomos, 3rd ed, 2019), 898.

[40] Croatian Civil Procedure Act, NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 123/08, 57/11, 148/11, 25/13, 28/13, 89/14, 70/19.

[41] Decision of the County Court in Zagreb Gž Ob 1137/2019-2 of 8 July 2020.

PIL Act, Articles 46,[42] 59[43] and 50[44]. The plaintiff indicated in the appeal that the Croatian court should declare itself competent based on provisions of Regulation 2016/1103. The County Court correctly held that the case did not fall into the temporal scope of application of Regulation 2016/1103, since the proceedings were instituted on 8 March 2017.

In the other judgment on temporal ambit, the Municipal Court in Pazin declared it had no competence in the proceedings instituted by plaintiff I.P. against defendant P.P. for establishing matrimonial property. The Court invoked Article 6 of Regulation 2016/1103 and indicated that the parties were Slovenian nationals residing in the Republic of Slovenia. Plaintiff I.P. lodged an appeal against the decision of the Municipal Court in Pazin objecting to the application of the Regulation on the grounds that the assets were acquired before the entry into force of the Regulation and that the application of the Regulation was excluded, given the subject matter of the dispute. The County Court in Zagreb dismissed the plaintiff's appeal as unfounded. It stated that the conclusion of the first instance court was correct. The County Court in Zagreb pointed out that, as to the question of the temporal application of the Regulation, the decisive factor was the date of the initiation of the court proceedings, in accordance with Article 69(1) of Regulation 2016/1103, and the issue of the time of acquisition of property was not decisive. As far as the subject matter of Regulation 2016/1103 is concerned, the issue cannot be decided by a court which has no jurisdiction[45].

The temporal scope of application of Regulation 2016/1103 is determined by the date of 29 January 2019. According to Article 69(1), the rules of jurisdiction apply to instituted proceedings, authentic instruments formally drawn up or registered and court settlements

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[42] Article 46 of the 1982 Croatian PIL Act:

The court of the Republic of Croatia has jurisdiction if the defendant is domiciled or has its seat in Croatia.

If the defendant is not domiciled in the Republic of Croatia or in any other state, the jurisdiction of the court of the Republic of Croatia exists if the defendant is resident in the Republic of Croatia.

If the parties are citizens of the Republic of Croatia, the jurisdiction of the court of the Republic of Croatia also exists when the defendant has residence in the Republic of Croatia.

If there is more than one "material" defendant, the court of the Republic of Croatia has jurisdiction if one of them is domiciled or has its seat in the Republic of Croatia.

When a dispute is resolved in a non-litigious procedure, the jurisdiction of the court of the Republic of Croatia exists if the person against whom the claim is brought is domiciled or has its seat in Croatia and when only one person takes part in the proceedings if that person is domiciled or has its seat in the Republic of Croatia, unless otherwise provided by this Act.

[43] Article 59 of the 1982 Croatian PIL Act:

As regards proceedings concerning the matrimonial property regime between spouses in respect of property situated in the Republic of Croatia, the jurisdiction of the court of the Republic Croatia also exists when the defendant is not domiciled in the Republic of Croatia, and the plaintiff is domiciled or resides in the Republic of Croatia at the time of filing the lawsuit.

If the greater part of the property is located in the Republic of Croatia, and the other part is located abroad, the court of the Republic of Croatia may decide on the property which is located abroad in the proceedings in which judgment is also given on the property in the Republic of Croatia, and only if the defendant agrees that the court of the Republic of Croatia renders the judgment.

[44] Article 50 of the 1982 Croatian PIL Act:

When the jurisdiction of the court of the Republic of Croatia depends on the defendant's consent, the defendant is considered to have given his consent by entering a plea or objecting to a payment order without contesting the jurisdiction.

[45] Decision of the County Court in Zagreb, 40 Gž Ob-123/2021-2 of 1 July 2021.

approved or concluded on or after 29 January 2019[46]. However, for the purposes of Chapter III containing rules on applicable law, the temporal scope of application is defined differently. Chapter III applies only to matrimonial property regimes of spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019[47]. Such a rule may be explained by the legitimate expectations of the parties, so that they may know in advance which law will be applicable to their matrimonial property regime[48].

There are four possible scenarios with respect to the issue whether Regulation 2016/1103 will be applied for determining applicable law. The most straightforward situations are if the marriage was concluded before 29 January 2019 and the applicable law for matrimonial property regime was either not wither or was chosen prior to this date, and the situation in which marriage was concluded on or after 29 January 2019 and the applicable law for matrimonial property was either chosen after that date or was not chosen at all. In the former situation, Chapter III will not apply. Instead, national private international law rules will apply. In the latter, Chapter III will be applicable. A slightly more complex situation occurs if marriage was concluded prior to 29 January 2019, but the applicable law for matrimonial property regime was specified after this date. The validity of the agreement will be subject to Regulation 2019/1103. The term 'specify' should be understood as the initial choice, as well as a subsequent amendment to that choice.[49] Since spouses may choose the applicable law before conclusion of the marriage[50], it may happen that spouses specified the applicable law for their matrimonial property regime before 29 January 2019, whereas the marriage was concluded after that date. In this case, the validity of the choice of law should be assessed in accordance with Regulation 2016/1103[51].

As far as rules on recognition and enforcement are concerned, pursuant to Article 69(1), if the proceedings in which the decision on the merits was rendered were instituted on or after 29 January 2019, provisions of Regulation 2016/1103 will be applied to recognition and enforcement of that judgment in another Member State participating in enhanced cooperation. However, Article 69(3) provides for an exception according to which, if the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date are to be recognised and enforced in accordance with Regulation 2016/1103 as long as the rules of jurisdiction applied comply with those set out in Chapter II. This exception is analogous to the one in Brussels I Regulation[52]. The *ratio* is to subject the

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46 Article 69(1) of the Regulation 2016/1103.

47 Article 69(3) of the Regulation 2016/1103.

48 G. Biagioni, 'Article 69, Transitional Provisions', in I. Viarengo, P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples, A Commentary* (Cheltenham: Edward Elgar Publishing, 2020), 487.

49 Ibid, 488.

50 Article 22 of the Regulation 2016/1103 allows this possibility for future spouses. For more see N. Pogorelčnik Vogrinc, 'Applicable Law in the Twin Regulations', in L. Ruggeri, A. Limantė, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 118-125

51 See by analogy F. Dougan, J. Kramberger Škerl, 'Chapter 2, Model Clauses for Registered Partnerships under Regulation (EU) 2016/1104' in M. J. Cazorla González, L. Ruggeri eds, *Guidelines for Practitioners in Cross-Border Family Property and Succession Law, (A collection of model acts accompanied by comments and guidelines for their drafting)* (Madrid: Dykinson, 2020), 38. See also M. J. Cazorla González, M. Soto Moya, above n 16, 65

52 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 12, 16 January 2001, 1–23. See Article 66.

judgments in which the jurisdiction was based on the rules compliant to jurisdictional rules in the Regulation to milder recognition and enforcement regime[53].

The time of acquiring the assets bears no relevance for temporal scope of application of any category of rules contained in Regulation 2016/1103, i.e. those on international jurisdiction, applicable law or recognition and enforcement. The issue whether particular assets form part of the matrimonial property regime is to be determined in accordance with the substantive provisions of the applicable law.

V. HYPOTHETICAL CASE ON TEMPORAL SCOPE OF APPLICATION

An issue which may arise with respect to the application of Regulation 2016/1103 is the interrelation of rules on the choice of court agreement and the choice of law agreement due to their different temporal scope of application. Consider the following facts:

Ana, a Croatian national and Philipp, a German national met in 2014 in one of Austrian ski-resorts. For the first two years, they maintained a long-distance relationship. Ana was living in Croatia, and Phillipp was living in Germany. In 2016, Ana moved to Hamburg and they started living together. In May 2017, they married during holidays in Greece. After a short marital bliss, their relationship started to deteriorate. By February 2018, Ana moved out of their house in Hamburg and returned to Croatia. In March 2018 they divorced before the Austrian court. In February 2019, they decided to divide their assets which included a house in Hamburg, two apartments in Croatia and money on a joint bank account in a bank in Hamburg. During one of the meetings with their attorneys, they discussed the possibility of choosing the Croatian court as competent for discussing the division of their property.

According to Article 7 of Regulation 2016/1103, parties may choose the competent court. The choice of court party autonomy is limited to the courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1)(a) or (b), or the courts of the Member State where the marriage was concluded. Article 7 is a jurisdictional rule but links almost all of the potential jurisdictional bases which parties may choose to the applicable law. The issue which may arise is whether different temporal ambit of rules on jurisdiction and applicable law of Regulation 2019/1103 may affect negatively the party autonomy in choosing the competent court. In other words, are spouses who married before 29 January 2019 and did not specify the law applicable to their matrimonial regime or specified it before that date, provided that the proceedings were instituted on or after 29 January 2019, allowed to choose the competent court in the Member State whose law is applicable in accordance with Article 22 or Article 26(1)(a) or (b)? In the hypothetical case at hand, Ana and Philipp wish to choose the Croatian court as competent. In accordance with Article 22(1)(a), Croatian law may be chosen as applicable (if Chapter III were applicable *ratione temporis*) and therefore, pursuant to Article 7 parties may agree on the jurisdiction of the Croatian court. From the perspective of jurisdictional rules, these proceedings would fall into the temporal ambit of

[53] J. Kramberger Škerl, 'The application 'ratione temporis' of the Brussels I regulation (recast)' in D. Duić, T. Petrašević eds, *EU and Comparative Law Issues and Challenges: Procedural Aspects of EU Law* (Osijek: Faculty of Law Osijek, 2017), available at www.pravos.unios.hr/download/eu-and-comparative-law-issuesand-challenges.pdf (last visited 18 April 2022), 352.

Regulation 2019/1103 whereas the Regulation rules on applicable law would be inapplicable. For that category of disputes, there are two potential solutions. The first one allows the parties to agree on jurisdiction of courts in accordance with Article 7, as if Chapter III were applicable. Applicable law would be determined in accordance with the national conflict-of-laws provisions. The second possibility gives parties only the option of prorogating the jurisdiction of the court located in the Member State where the marriage was concluded, since this is the only jurisdictional base prescribed in Article 7 not linked to applicable law[54]. The first option seems to be a preferred one. First of all, by allowing spouses to agree on any of the competent courts in accordance with Article 7 does not undermine legal certainty. The different temporal scope of rules on jurisdiction and applicable law, reflect their different nature and operation. It is widely accepted to determine the temporal scope of application of the rules on applicable law considering the date of establishment of a legal relationship with the aim of protecting legitimate expectations of the parties.[55] As for the rules on jurisdiction, predictability is ensured by linking the temporal ambit to the date of commencement of proceedings. Second, even though Regulation 2016/1103 seeks to align the jurisdiction and applicable law, this is not ensured in all cases. Under Article 7 parties have a range of courts to choose from, which means that the European legislator's intention was not limiting the spouses' options solely to the courts of the Member State the law of which is applicable. Therefore, choosing the competent court of a Member State the law of which could potentially be applicable (as if Chapter III of Regulation 2016/1103 were applicable *ratione temporis*) and determining the law of potentially another state based on national conflict-of-laws provisions should not present a problem.

VI. CONCLUSION

Regulation 2016/1103, along with its Twin Regulation 2016/1104, completes the legal landscape of EU private international law sources in the area of family and succession law. At this point, Croatian case law in applying these instruments may not be plentiful. Nevertheless, Croatian courts were confronted with the application of Regulation 2016/1103 on several occasions and had a chance of discussing the different issues arising in connection with private international law aspects of matrimonial property regimes. Considering that the Twin Regulations are still novel instruments, generally the Croatian case law has demonstrated the correct application of the instruments. It will be interesting to follow further judicial developments concerning these and other issues and see how they will be resolved.

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[54] See D. Vrbljanac, 'The matrimonial property regime regulation: selected issues concerning applicable law. Working paper', in J. Kramberger Škerl, L. Ruggeri, F. G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper* (Camerino: Università degli Studi di Camerino, 2019), 194-195.

[55] G. Biagioni, n 47 above, 487.

REGULATION (EU) 2016/1103 IN THE CZECH APPLICATION PRACTICE: LITTLE EXPERIENCE BUT HIGH EXPECTATIONS

Tereza Kyselovská / Martin Kornel[1]

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Summary: I. Czech family private international law. II. Czech conflict-of-laws rules for matrimonial property regimes. 1. 49 Czech PILA in general. 2. 49 (3) Czech PILA. 3. 49 (4) Czech PILA. III. Comments on the national court rulings with legal bases in Regulation (EU) 2016/1103 in the matter of matrimonial property regimes. IV. Theoretical and practical questions connected to private international law and matrimonial property regimes. 1. Theoretical questions. 2. Practical questions. V. Conclusion.

Abstract: In our paper, we will first provide a general outline of Czech family private international law with particular regard to the matrimonial property regimes. Then we will comment on Czech court rulings with legal bases in Council Regulation (EU) 2016/1103 in the matter of matrimonial property regimes. Our findings in this respect are limited by the fact that not all Czech court's rulings are published. Only the Czech Constitutional Court and Supreme Court publish all their rulings. Lower courts' rulings are currently published only exceptionally. Thus, we are commenting on only two court rulings explicitly referring to Regulation (EU) 2016/1103. Then we point out theoretical and practical questions connected to matrimonial property regimes that arose in connection with Regulation (EU) 2016/1103.

The Czech Republic did not declare its wish to participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships established by Council Regulation (EU) 2016/1104. Therefore, we are not providing any information in this respect.

I. CZECH FAMILY PRIVATE INTERNATIONAL LAW

Czech private international law has, in recent years, undergone substantial changes. On 1 January 2014, the new Act No 91/2012 Coll., on Private International Law (hereinafter referred to as "the Czech PILA") came into effect. The Czech PILA replaced Act No 97/1963 Coll., on Private International Law and the Rules of Procedures relating thereto (hereinafter referred to as "the 1963 PILA Act").

[1] Both authors are Assistant Professors at Masaryk University in the Czech Republic, respectively in the Department of International and European Law and in the Department of Civil Law.

The Czech PILA is a part of the recodification of the Czech private law represented by Act No 89/2012 Coll., Civil Code. Like its predecessors,[2] it continues the Czechoslovak, later the Czech tradition of a separate legislative act for choice of law rules, jurisdictional rules and rules on recognition and enforcement of foreign judgments (i.e., a separate private international law act). Specific procedural issues are enacted in Act No 99/1963 Coll., Civil Procedural Code, in Act No 120/2001 Coll., Enforcement Procedure Act and Act No 292/2013 Coll., Special Judicial Proceedings Act.

Fundamental principles of Czech law are provided for in Act No 1/1993 Coll., Constitution of the Czech Republic and in Act No 2/1993 Coll., Charter of the Fundamental Rights and Freedoms. These fundamental principles, such as equality of gender, race, religion, politics, and other beliefs, are applicable in the context of public order (§ 4 Czech PILA) and imperative rules (§ 3 Czech PILA).

The Czech PILA reflects the latest trends in modern private international law, esp. regarding the EU private international law. To a certain extent, Czech private international law rules have been replaced by EU law and/or international conventions. Compatibility with EU law and international conventions is expressly provided in § 2 Czech PILA; the legislation in the Czech PILA is applicable within the limits of the directly applicable EU law (EU regulations) and international conventions legally binding to the Czech Republic. The preferential application of international conventions and treaties stems from Article 10 of the Constitution. If an international convention or treaty provides something different from a statute, the application of the treaty prevails.

The Czech Republic participates in several international treaties and conventions, both multilateral and bilateral. However, in family law, the Czech Republic is not a contractual State to either the 1905 Effects of Marriage Convention[3] or the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes. Thus, only selected bilateral treaties on judicial cooperation, which contain conflict-of-laws rules for matrimonial property regimes, are applicable in Czech courts. These bilateral treaties have rules on judicial cooperation in civil, family and/or criminal matters and were concluded between the Czech Republic and Belarus, Bosnia and Herzegovina, Bulgaria, Montenegro, Georgia, Croatia, Democratic People's Republic of Korea, Kosovo, Cuba, Kyrgyzstan, Hungary, Macedonia, Republic of Moldova, Mongolia, Poland, Romania, Russia, Slovenia, Serbia, Uzbekistan, and Vietnam.[4]

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[2] The predecessors of the Czech PILA were Act No 41/1948 Coll., on Private International and Interregional Law and the Legal Status of Aliens in the Sphere of Private Law (hereinafter referred to as "the 1948 PILA Act") and the 1963 PILA Act. The 1948 PILA Act and the 1963 PILA Act were progressive and modern legislation on private international law for their time. M. Pauknerová, 'Czech Republic' *Encyclopaedia of Private International Law* (Edward Elgar Publishing, 2017), 2011. The 1963 PILA Act is still in force in the Slovak Republic.

[3] Convention du 17 Juillet 1905 concernant les Conflits de Lois Relatifs aux Effets du Mariage sur les Droits et les Devoirs des Époux dans Leurs Rapports Personnels et sur les Biens des Époux. Hague Conference on Private International Law.

[4] L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 28. For the full list of the relevant bilateral treaties see L. Zavadilová, *Distribution of matrimonial property regimes upon the dissolution of marriage by divorce – conflict-of-law aspects, Annex No. 1.* Advanced Master's Thesis (Brno: Masarykova univerzita, 2018), 169-170.

II. CZECH CONFLICT-OF-LAWS RULES FOR MATRIMONIAL PROPERTY REGIMES

The Czech PILA applies to spouses who married or who specified the law applicable to the matrimonial property regime before 29 January 2019, unless a bilateral treaty on judicial cooperation in civil and family matters is applicable.

The Czech PILA is divided into eight chapters. Chapters 1 to 3 contain provisions on the general part of private international law, which were previously dealt with only by the theory of private international law or relevant case law.[5] The Czech PILA provides for new provisions regarding overriding mandatory rules (§§ 3 and 25), evasion of law (§ 5), characterisation (§ 20) or incidental questions (§ 22), which are relevant for matrimonial property regimes.

Chapter 4 contains provisions on international jurisdiction, conflict-of-laws rules and provisions regarding the recognition and enforcement of foreign judgments concerning specific legal relations, such as legal capacity, agency, family matters, registered partnerships, rights *in rem*, succession, securities, and obligations). Chapter 5 contains provisions on legal assistance and cooperation. Chapters 6 and 7 provide for insolvency and international arbitration, respectively. Chapter 9 regulates transitional and final provisions.

1. § 49 Czech PILA in general

Law applicable to matrimonial property regimes with an international element is governed by § 49 (3) and (4) of the Czech PILA.[6] § 49 (3) contains a general conflict-of-laws rule for matrimonial property regimes; § 49 (4) includes a special conflict-of-laws rule for agreements on matrimonial property regimes. Thus, § 49 (4) is *lex specialis* to § 49 (3), which remains *lex generalis*.

Three types of matrimonial regimes regulated in § 708 Czech Civil Code fall within the scope of the "matrimonial property regime", i.e. statutory regime, a regime established by a court decision and a "modified" regime established by an agreement between the fiancés or spouses.

2. § 49 (3) Czech PILA

The provision in § 49 (3) of the Czech PILA contains a "cascade" or a "hierarchy" of connecting factors.[7] Under § 49 (3) of the Czech PILA, matrimonial property regimes shall

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[5] The 1963 PILA Act contained, regarding general principles of private international law, express provisions only on *renvoi* (§ 35) and public policy reservations (§ 36).

[6] The 1963 PILA Act contained conflict-of-laws rules on matrimonial property regimes in § 21 (1) and § 21 (2)*: (1) "The personal and property regimes between spouses are governed by the law of their nationality. If the spouses are nationals of different states, these relations are governed by Czech law. (2) The agreement on matrimonial property regime shall be governed by the law applicable to matrimonial property regime at the time of the conclusion of the agreement."*

[7] Z. Fišerová, § 49, in P. Bříza et al., *Zákon o mezinárodním právu soukromém. Komentář* (Praha: C.H.Beck, 2014), 256-262.

be governed by the law of the State in which both spouses are habitually resident (common habitual residence). If it is not possible to determine the law applicable based on this connecting factor, the relationship is governed by the law of the State of which both spouses are citizens (common *lex patriae)*; otherwise by Czech law *(lex fori)*. The conflict-of-laws rule in § 49 (3) of the Czech PILA applies to movable and immovable property.

The primary objective connecting factor,[8] "common habitual residence" of both spouses, represents the real, social, familial, or economic connection between the persons and territory of a particular State.[9] Both spouses shall have their habitual residence in the same territory at the relevant time. However, they don't need to have their habitual residence at the exact location or live in a shared household.[10]

The "common habitual residence" of both spouses and the common citizenship are not stabilised to any specific moment (e.g. the first common habitual residence of the spouses, the date of marriage, or the last common habitual residence). Therefore, it is necessary to assess the connecting factor at the relevant time when the legally significant act or conduct has occurred. Any changes associated with a change in the applicable law shall not affect third parties' rights and legitimate expectations.[11]

3. § 49 (4) of the Czech PILA

The provision in § 43 (4) of the Czech PILA provides for a choice of law for an agreement on the matrimonial property regime. However, this choice of law is limited by an exhaustive list of connecting factors. An agreement on a matrimonial property regime shall be governed by the law applicable to the property regimes of spouses at the time of the conclusion of the agreement. The spouses may choose as the law applicable either the law of the State of which one of the spouses is a citizen, or in which one of the spouses is habitually resident, or in which immovable property is located, should the matter concern the immovable property, or Czech law (§ 716 et seq. of the Czech Civil Code).

This provision applies to both agreements concluded before the marriage (pre-nuptial agreements) and agreements concluded during the marriage.[12]

The provision in § 49 (4) of the Czech PILA does not expressly stipulate any moment from which the law chosen by the parties applies. According to commentaries, the chosen law applies to legal relationships that arose only after the choice, not retroactively.[13] It is important

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[8] L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 24.

[9] M. Zavadilová, § 49, in M. Pauknerová, N. Rozehnalová, M. Zavadilová et al. *Zákon o mezinárodním právu soukromém. Komentář* (Praha: Wolters Kluwer, 2013), 338.

[10] M. Zavadilová, § 49, in M. Pauknerová, N. Rozehnalová, M. Zavadilová et al. *Zákon o mezinárodním právu soukromém. Komentář* (Praha: Wolters Kluwer, 2013), 338.

[11] Z. Fišerová, § 49, in P. Bříza et al., *Zákon o mezinárodním právu soukromém. Komentář* (Praha: C.H.Beck, 2014), 256-262.

[12] M. Zavadilová, § 49, in M. Pauknerová, N. Rozehnalová, M. Zavadilová et al. *Zákon o mezinárodním právu soukromém. Komentář* (Praha: Wolters Kluwer, 2013), 339.

[13] Z. Fišerová, § 49, in P. Bříza et al., *Zákon o mezinárodním právu soukromém. Komentář* (Praha: C.H. Beck, 2014), 256-262.

to stress that the choice of law shall not affect third parties' rights and legitimate expectations when the third party could not have known about the choice of law.[14]

If the agreement on the matrimonial property regime is concluded abroad, it shall be recorded in the form of a notarial deed or in a similar form permitted by the foreign law of the State where the agreement is concluded [§ 716 (2) of the Czech Civil Code].[15] This formalisation should prevent any reckless actions of one of the spouses, who would not have considered all the consequences that the choice of applicable law may have.

III. COMMENTS ON THE NATIONAL COURT RULINGS WITH LEGAL BASES IN REGULATION (EU) 2016/1103 IN THE MATTER OF MATRIMONIAL PROPERTY REGIMES

The Czech legal system does not consider case law as a source of law. However, the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic case law has been widely respected. In addition, in their decisions, Czech courts increasingly refer to judgments of the Court of Justice of the European Union and the European Court of Human Rights.[16]

Private law disputes containing international (cross-border) element are not adjudicated by specialised authorities. Such cases may be decided by courts, in some areas are relevant decisions of public notaries (e.g. succession), non-judicial authorities or registration offices (e.g. births, marriages, or deaths agenda).[17]

The Regulation (EU) 2016/1103 is applicable from 29 January 2019 (except for specific provisions). Due to the temporal scope, Czech courts have not yet created an extensive body of decisions related to its application.[18] As to the date of publication of this report, Regulation (EU) 2016/1103 was "indirectly" applied only in one published judgment by a Czech court. In this decision, the court applied § 49 (3) of the Czech PILA and determined the application of Czech law to a matrimonial property regime dispute with an international element. Regulation (EU) 2016/1103 was used by the court to confirm the conflict of laws results stating, *"also under Article 26 [of Regulation (EU) 2016/1103] Czech law is applicable because the spouses had their first and last habitual residence in the Czech Republic"*.[19]

Czech courts have also applied Article 69 of Regulation (EU) 2016/1103, confirming that the Regulation is not applicable if legal proceedings were instituted before 29 January 2019.[20]

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[14] Ibid.

[15] P. Dobiáš et al. § 49. *Zákon o mezinárodním právu soukromém. Komentář* (Praha: Leges, 2014), online.

[16] M. Pauknerová, 'Czech Republic' *Encyclopaedia of Private International Law* (Edward Elgar Publishing, 2017), 2010.

[17] M. Pauknerová, 'Czech Republic' *Encyclopaedia of Private International Law* (Edward Elgar Publishing, 2017), 2011.

[18] The authors would like to thank Mr Radek Tesař for his help in researching the relevant case law of Czech courts.

[19] Rozsudek Obvodního soudu pro Prahu 8 č. j. 25 C 51/2020-177, 5 March 2021 (2021). https://rozhodnuti.justice.cz/rozhodnuti/201327

[20] Rozsudek Městského soudu v Praze č. j. 18 Co 63/2020, 27 May 2020 (2020). http://kraken.slv.cz/MSPHAAB18Co63/2020

Notwithstanding, it is possible to introduce several judgments on interpreting Czech private international law rules relevant to conflict-of-laws rules for matrimonial property regimes.

The Czech Constitutional Court and the Czech Supreme Court have adjudicated on the principles of determination and application of foreign law in Czech courts (§ 23 of the Czech PILA). The judicial authority should determine the content of foreign law in any available and reliable way, i.e. directly from the sources available to it, if they are sufficiently reliable, especially regarding the possibility of changes that may occur in foreign law at any time. It may request the cooperation of participants - foreigners who have their lawyers, or if the participants are represented by lawyers who can obtain relevant sources, literature or statements and opinions about foreign law, as well as submission of a certificate of foreign law issued by a competent authority in a foreign state or obtain the opinion of a qualified expert on foreign law.[21]

According to the Czech case law, the foreign law applicable to matrimonial property regimes in Czech courts shall not be considered a statement of fact because, in evidence proceedings, only the facts alleged by the participants or otherwise disclosed in the proceedings are proved. In other words, foreign law is a "law" that does not have to be proven by the parties. The court applies foreign law as law, not as facts (principle of *iura novit curia*).[2223]

Czech courts also adjudicated on the scope of the "matrimonial property issues" in Czech conflict-of-laws rules. Both movable and immovable property fall within the relevant conflict-of-laws rule in the Czech PILA.[24]

Czech courts also confirmed that the proceedings concerning the dissolution of matrimonial property after divorce are of adversarial nature. The initiative in gathering and presenting evidence to substantiate their claims rests primarily on the participants. The parties carry the burden of proof and the burden of proof assertion.[25]

Czech courts also repeatedly adjudicated that the matrimonial property regimes fall outside the scope of Council Regulation (EC) 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, repealing Regulation (EC) No 1347/2000 (Brussels IIbis Regulation)[26] and the scope of Council Regulation (EC) No 44/2001 of 22 December 2000

[21] Usnesení Ústavního soudu ČR sp. zn. Pl. ÚS 2/11 2 April 2012 (2012); Usnesení Nejvyššího soudu ČR sp. zn. 25 Cdo 1143/2006, 26 September 2007 (2007); Usnesení Nejvyššího soudu ČR sp. zn. 29 Cdo 1115/2014, 31 March 2016 (2016).

[22] Usnesení Ústavního soudu ČR sp. zn. Pl. ÚS 2/11, 2 April 2012 (2012); Usnesení Nejvyššího soudu ČR sp. zn. 33 Cdo 3117/2010, 26 June 2012 (2012); Usnesení Nejvyššího soudu ČR sp. zn. 33 Cdo 3529/2010, 26 June 2012 (2012).

[23] The Czech court is not obliged to know the contents of any foreign law, but has to find out its content. P. Bříza, Z. Fišerová, § 23 *Zákon o mezinárodním právu soukromém. Komentář* (Praha: C.H. Beck, 2014), 144-151.

[24] Usnesení Nejvyššího soudu ČR sp. zn. 22 Cdo 723/2015, 28 March 2017 (2017); Usnesení Nejvyššího soudu ČR sp. zn. 30 Cdo 4883/2016, 5 April 2017 (2017).

[25] Rozsudek Nejvyššího soudu ČR sp. zn. 22 Cdo 3441/2009, 22 November 2010 (2010); Usnesení Nejvyššího soudu ČR sp. zn. 29 Cdo 1115/2014, 31 March 2016 (2016).

[26] Usnesení Ústavního soudu ČR sp. zn. III. ÚS 902/16, 5 April 2016 (2016); Usnesení Nejvyššího soudu ČR sp. zn. 33 Nd 146/2013, 29 August 2013 (2013).

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).[27]

The Supreme Court of the Czech Republic also decided on the multiplicity of nationalities in the context of the jurisdiction in matrimonial property regimes. The Supreme Court stated that in cases where a party to the proceedings has dual citizenship (Czech and "foreign"), the decisive factor in assessing the question of jurisdiction of Czech courts is the Czech nationality. It follows that in the case of dual citizenship of a Czech citizen, "foreign" citizenship is not considered, and the jurisdiction of Czech courts is established.[28]

Other judgments of Czech courts concern the interpretation of the Czech *ordre public*, its scope and forms of its application, especially as a ground to refuse recognition and enforcement of foreign judgments.[29]

IV. THEORETICAL AND PRACTICAL QUESTIONS CONNECTED TO PRIVATE INTERNATIONAL LAW AND MATRIMONIAL PROPERTY REGIMES

Due to its temporal scope (marriages concluded or law chosen for matrimonial property regimes before 29 January 2019), the Czech PILA is not a *"subsidiary"* source of law for private international law rules in matters of matrimonial property regimes, but it is an *"equal and parallel legal act"* to Regulation (EU) 2016/1103.[30]

Several private international law issues are connected to the determination and application of foreign law governing the matrimonial property regimes. These issues can be distinguished into theoretical (doctrinal) issues and practical issues stemming from legal (esp. notarial) practice.

1. Theoretical questions

In the context of finding law applicable to matrimonial property regimes, it is necessary to determine, *inter alia*, the following issues: the characterisation of "marriage" (*lex fori* or autonomous qualification); the type of national proceedings concerning matrimonial property regimes (adversarial or inquisitorial); the existence of a relevant international (cross-border) element; the method of application of conflict-of-laws rules (*ex officio* or at the request of the parties); the process of finding out the content of foreign law to be applied based on the conflict-of-laws rule (*ex officio* or at the request of the parties); and implications of *ordre public*.[31]

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[27] Usnesení Nejvyššího soudu ČR sp. zn. 22 Cdo 2419/2015, 1 December 2015 (2015); Usnesení Nejvyššího soudu ČR sp. zn. 22 Cdo 723/2015, 28 March 2017 (2017).

[28] Usnesení Nejvyššího soudu ČR sp. zn. 22 Cdo 2909/2012, 31 July 2013 (2013).

[29] Rozsudek Městského soudu v Praze č. j. 5 A 185/2012-58, 4 April 2016 (2016); Rozsudek Městského soudu v Praze č. j. 5 A 186/2012-61, 4 April 2016 (2016); Nález Ústavního soudu sp. zn. Pl. ÚS 6/20, 15 December 2020 (2020); Nález Ústavního soudu sp. zn. I. ÚS 3226/16, 29 June 2017 (2017).

[30] L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 191.

[31] For more detailed analysis see L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 169-190.

Regulation (EU) 2016/1103 applies to "matrimonial" property regimes. However, it does not define "marriage"; it merely refers to the national laws of the Member States (Article 17 Preamble). Under § 20 (1) of the Czech PILA, the term "marriage" shall be, in Czech courts, qualified according to Czech law. Under § 655 of the Czech Civil Code, *"marriage is a permanent union of a man and a woman established in the manner provided by this Act. The main purpose of marriage is the establishment of a family, the proper upbringing of children and mutual support and assistance"*. However, the national legal orders of the Member States may differ in this definition and consider a "marriage" union of same-sex persons or other types of relationships.[32]

The principle of *forum regit processum* governs civil proceedings with an international (cross-border) element.[33] Under § 8 (1) of the Czech PILA, Czech courts apply in civil proceedings Czech procedural rules *(lex fori)*. However, the national procedural rules and principles regarding the role of the parties and the judge may differ among the Member States. According to the traditional approach to civil procedural law, as confirmed in the above-mentioned case law, the civil proceedings concerning matrimonial property regimes in Czech law is primarily adversarial. The burden of proof lies with the parties; the parties must present evidence to substantiate their claims; the judge, traditionally, has a more passive role. However, under the "modified" approach to the adversarial process recognised in the commentaries to the Czech Civil Procedural Code, "*the judge is an active actor involved in establishing the facts. The material conduct of the proceedings represents the court's cooperation in the collection of evidence, the purpose of which is to ensure that the court's decision is based on fully clarified and as close to the facts as possible background. In this sense, the material management of the proceedings complements and implements the duty of truth, which is imposed on the parties to the proceedings*".[34]

The active or passive role of the judge and the procedural parties influences the course of the proceedings and their outcome. It may have significant consequences for considerations, *inter alia*, on the existence of a relevant international element. Let's use an example from the cited literature of a married couple (both spouses are Czech nationals) who filed for divorce proceedings and subsequently for the dissolution of their matrimonial property in Czech courts. During their marriage, the couple worked and lived for several years in Germany and owned movable and immovable property located in the Czech Republic (rental flat), Germany (house and bank accounts), and Spain (holiday villa). The spouses did not conclude an agreement on matrimonial property, nor did they argue the existence of a cross-border element or that foreign law was applicable.[35]

The question is whether the court is obliged, even though this issue is not argued by the parties, to consider the private international law aspects of the proceedings. Regulation (EU) 2016/1103 applies to the property regimes of "international" couples (Article 11,

[32] T. Kyselovská, Rodinné právo in N. Rozehnalová et al. Úvod do mezinárodního práva soukromého (Praha: Wolters Kluwer, 2017), 249.

[33] T. Břicháček, § 8 in P. Bříza et al. *Zákon o mezinárodním právu soukromém. Komentář* (Praha: C.H. Beck, 2014), 66.

[34] P. Lavický, § 5 in P. Lavický et al. *Občanský soudní řád: Praktický komentář* (Praha: Wolters Kluwer, 2016), online.

[35] L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 171.

Preamble). Thus, the existence of a relevant international element is essential for its application. Regulation (EU) 2016/1103 does not expressly address the issue of identifying the international element. On the other hand, according to the Czech private international law doctrine, the considerations regarding the existence or non-existence of the relevant international element form *"an integral part of the qualification and the presumption of the application of the conflict-of-laws rules*".[36] Additionally, under §§ 5 and 118 Czech Civil Procedural Code, the court informs the parties of their procedural rights and obligations. Therefore, it is argued that the *"courts have an obligation to inform parties (the spouses) about the existence of an international element, application of private international rules and the possibility of applying a foreign law to the substance of the dispute*".[37]

Regulation (EU) 2016/1103 is silent on the application of its conflict-of-laws rules, that is, if the court is obliged to apply its rules *ex officio* or based on the parties' express motion. As stated by commentators, *"the unification of conflict-of-laws rules does not in itself imply their mandatory application in the Member States which are bound by that regulation*".[38] Under the general principle of Czech private international law, choice of law rules are binding for courts. The court shall apply conflict-of-laws rules contained in the applicable EU regulations, international conventions, or the Czech PILA, *ex officio*.[39]

The issue of (mandatory) application of conflict-of-laws rules is closely connected to the issue of the application of foreign law as such. The Regulation (EU) 2016/1103 does not expressly regulate how the law applicable to matrimonial property regimes should be applied and what measures are the national judicial authorities obliged to use to determine its content. Under the Czech private international law doctrine and the above-mentioned case law, a Czech judge is obliged to apply foreign law if a choice of law rule determines foreign law as the law applicable.[40]

A special rule covers the treatment of foreign law in § 23 of the Czech PILA. Unless otherwise stipulated by the Czech PILA, the foreign law which is to be applied under the provisions of this Act shall be applied *ex officio,* and in a way, it is applied in the territory to which it applies. Foreign law shall be applied in the same manner it would be applied in the territory to which it applies, regardless of its systematic classification or its public nature, provided its application is not contrary to the overriding mandatory provision of Czech law [(§ 23 (1)]. Unless further stipulated otherwise by the Czech PILA, the content of the foreign law which is to be applied under the Czech PILA shall be determined *ex officio.* The court or public authority shall undertake all necessary measures to determine the applicable law content [§ 23 (2)]. Should the content of foreign law remain unknown to the court or

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[36] N. Rozehnalová, *Instituty českého mezinárodního práva soukromého* (Praha: Wolters Kluwer, 2016), 204 as cited in L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 175.

[37] L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 171.

[38] L. Zavadilová, *Majetkové poměry manželů. Unifikace kolizního práva v rámci Evropské unie* (Brno: Masarykova univerzita, 2021), 180.

[39] N. Rozehnalová, Obecná část kolizního práva – zacházení s kolizní normou in N. Rozehnalová et al. Úvod do mezinárodního práva soukromého (Praha: Wolters Kluwer, 2017), 85.

[40] P. Bříza, Z. Fišerová, § 23 *Zákon o mezinárodním právu soukromém. Komentář* (Praha: C.H. Beck, 2014), 144-151.

public authority deciding upon matters covered by the Czech PILA, it may request for its determination an opinion from the Ministry of Justice [§ 23 (3)]. If the foreign law is not determined within a reasonable time or if such determination is impossible, the Czech law shall apply [§ 23 Section (5)].

2. Practical questions

Czech doctrine points out that Article 2(g) of Regulation (EU) 2016/1103, providing that the law applicable to the matrimonial property regime according to the Regulation shall govern *the material validity of a matrimonial property agreement,* might bring uncertainty to the parties in the situation of no choice-of-law.[41] In Article 26 of Regulation (EU) 2016/1103, the connecting factor referring to the spouses' first common habitual residence after the conclusion of the marriage might lead to doubts about the law governing the material validity of the matrimonial property agreement. E.g., if spouses had their first common habitual residence in one state, then moved to another state, and after spending significant time living there, they concluded the matrimonial property agreement. In such a situation, the law of the state of the original habitual residence would still govern the material validity of the matrimonial property agreement. Only exceptionally, when conditions of Article 63(3) of Regulation (EU) 2016/1103 are met, the judicial authority may decide that the law of the state in which the spouses were living at the moment when they entered into the agreement is applicable.

Within the Czech context, it might be particularly problematic that according to Article 23 of Regulation (EU) 2016/1103 the law of the state in which both spouses have their habitual residence at the time the matrimonial property agreement is concluded is applicable in respect of its formal requirements for agreements. A matrimonial property agreement must be concluded in the form of a public instrument (a notarial deed) according to § 715 (2) of the Czech Civil Code. According to § 70a Act No 358/1992 Coll. on Notaries and their Activities (Notarial Code), notary public must confirm that the matrimonial property agreement is in accordance with legal regulations (material requirements included) in the deed. If the material validity of the matrimonial property agreement is governed by other than Czech law, the notary would, in most cases, decline the declaration of such conformity because of insufficient knowledge of applicable foreign law. That would force the spouses to include the choice of Czech law clause into their agreement or entirely refrain from entering into such agreement.

If one of the spouses dies, different connecting factors provided by Regulation (EU) 2016/1103 and Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession might lead to different applicable laws governing the distribution or liquidation of marital property on the one hand and succession on the other hand.[42] In some states, the rules on the distribution of marital property and rules on succession are very deeply interconnected. For example, the German principle of equalisation of accrued gains is reflected by the share of the inheritance

[41] M. Pfeiffer, Kolizní nástrahy smluveného majetkového režimu manželů. *Ad Notam,* 1, 20 (2019),

[42] Problémy s jejich koordinací. Bulletin Advokacie. Available at https://www.bulletin-advokacie.cz/rozhodne-pravo-pro-vyporadani-majetkovych-pomeru-manzelu-a-pro-dedictvi-a-problemy-s-jejich-koordinaci

on intestacy of the surviving spouse being increased by one-quarter of the inheritance (§ 1371 BGB). The Czech Civil Code rules on succession and division of matrimonial property are relatively separated – normally, division of the matrimonial property shall be dealt with at first during succession proceedings and only after that the decedent's estate is disposed of. Yet, splitting the applicable law in such way brings risks of unfair outcomes in the case when Czech substantive law would be applicable only in one area and another state law in other areas.

V. CONCLUSION

In the context of the Czech Republic, practical experiences with Council Regulation (EU) 2016/1103 are minimal. There are almost no published court rulings applying the Regulation, and only a minimal number of academic articles are dedicated to the topic. Yet, academicians and practitioners have identified some practical issues with the application of the Regulation in situations when no choice of law has been made. Mainly, as we have explained above, it might be impossible to conclude a matrimonial property agreement without a choice of law clause in the context of the Czech Republic.

However, there are several theoretical questions, that might potentially have a significant influence on the law applicable to the matrimonial regime, such as the characterisation of "marriage", the type of national proceedings concerning matrimonial property regimes, the existence of a relevant international element; the method of application of conflict of law rules, the process of finding out the content of foreign law to be applied based on the conflict of law rule, and implications of *ordre public*. These theoretical questions are dealt with in the Czech doctrine, however, due to the above-mentioned lack of court rulings we must wait to have them answered.

FINNISH PIL PERSPECTIVE, MATRIMONIAL PROPERTY RELATIONS AND APPLICABLE LAW

Tuulikki Mikkola[1]

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Summary: I. Introduction to origins of Finnish PIL. II. Structure of the article. III. Process of distribution of matrimonial property in Finland. IV. Building blocks adopted in the Marriage Act: connecting factors and the freedom of contract of spouses. V. Provisions of the Marriage Act: applicable law to property relations of spouses. VI. Observations of Finnish case law and PIL. VII. Case study and some comparative conclusions.

Abstract: During the recent years the most important factor in the development of private international law (PIL) rules applicable in Finland has been the intense development of EU PIL. However, our history is part of the explanation why private international law is not even today generally embraced in the work of attorneys and why a change of attitude as well as education is needed. The fact that private international law – in general – is not very familiar in Finland has probably led to its inapplicability in familial relations. In addition to the lack of knowledge, the lack of court cases may be due to the fact that in practice most distributions are carried out by the agreement of the spouses. If the parties cannot agree on the distribution of the matrimonial assets by themselves, it can be made officially, by a court-appointed distributor. Both of these are private processes and the end-results are not published or confirmed in a court process (in case nobody contests the distribution in court.)

Since, in my opinion, understanding of the Finnish process concerning the distribution of matrimonial property is important, I will describe it shortly in the beginning of the chapter. Following this, I will move on to Finnish domestic PIL provisions on applicable law to the matrimonial property regime. I will also go through some of my observations concerning practical application of PIL in Finland that may be of interest to a reader. I will conclude the chapter with a hypothetical case with which I will demonstrate how the EU Matrimonial Property Regulation and domestic PIL provisions of the Marriage Act determine the applicable law differently and what positive changes the regulation has brought along and in what ways I consider it having confusing features. The subject of my article is the choice of applicable law and the spouses´ possibility to agree on the choice.

[1] Professor of Private International Law and Family Law at University of Turku.

I. INTRODUCTION TO ORIGINS OF FINNISH PIL

During the recent years, the most important factor in the development of private international law (PIL) rules applicable in Finland has been the intense development of EU PIL. However, our history is part of the explanation why private international law is not even today generally embraced in the work of attorneys and why a change of attitude as well as education is strongly needed.

The beginnings of Finnish private international law were jurisprudential. There were no provisions concerning cross-border cases in the code of the year 1734. An exception was a provision that forbade the application of foreign law but it is not clear whether the provision referred to cross-border cases or purely domestic cases. Professor of private law R.A.Montgomery was influenced by the learnings of F.C. von Savigny and in the 1890s he laid down an opinion that it was possible to apply foreign law in cases with foreign connections, stressing sitz (Savigny´s doctrine of proper law) of the case. The first Finnish author who had a clear and strong interest in private international law issues was F.W.Ekström (1871-1920) who also taught the subject at the faculty of law in Helsinki. His essays on the subject were published as a collection (written in Swedish) in 1920. Also in these essays one can see features of the German doctrines. Ekström has been called the founder of Finnish private international law.[2]

After Finland gained independency, the legislative development concerning private international law progressed as Finland participated in Nordic legislative cooperation and later took part in the work of the Hague Conference on Private International Law.[3] Various acts based on the Nordic cooperation were passed already in the 1920s, including the Act on Certain Family Relationships of an International Nature 1929 (379/1929).

Today, Finnish private international law is still quite fragmented. The discipline includes a lot of different sources of law and a multitude of rules that originate from different sources. For instance, there might exist national statutes, EU-legislation and international treaties. These can further be divided into general and field-specific instruments. Finland is bound by certain conventions prepared and adopted in the Hague Conference on Private International Law, and Nordic co-operation has led to important conventions in order to settle various PIL issues.[4] Bilateral conventions are few in number.

Finding the applicable source of law and the provisions that should be applied in a matter at hand, can be quite a challenge in each case; especially when combined with the fact that private international law has developed quite slowly in Finland compared to other European jurisdictions. Earlier even the homeward trend was a well-known phenomenon in the courts and PIL was for a long time downright neglected, also by legal scholars. It was not considered an important area of law until its development was not only necessary but also obligatory

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[2] For history of private international law in Finland, see H. Tapani Klami, *Private International Law in Finland*, (Turku 1986), 4-8. On the influence of continental law and especially German legal thinking in Nordic countries, see Heikki E.S. Mattila, *Comparative Legal Linguistics*, (Taylor & Francis Group 2013), 228-229.

[3] In Finland international conventions are not directly applicable. Instead, in order to gain applicability, an international convention/treaty has to be implemented into the Finnish legal system through domestic measures.

[4] See Severin Blomstrand, Nordic Co-operation on Legislation in the Field of Private Law. In: Scandinavian Studies in Law 39/2000, pp. 59-77.

because of the steady increase of inter-connectedness between Finland and various other legal systems. Fortunately, the role of private international law has changed considerably in Finland over the past two decades. The discipline has gained more practical significance and the number of legislative activities has also grown on the national level. The Marriage Act (234/1929), originating from the year 1929 did not include provisions on applicable law. These entered into force in 2002, in the context of a reform adding comprehensive PIL provisions to the Marriage Act[5] and the Inheritance Code (40/1965). Also legislation introducing registered partnerships (950/2001) – that came into force in 2002 – took into account the internationalization of relationships.[6]

II. STRUCTURE OF THE ARTICLE

The fact that private international law is not very familiar in Finland has probably led to its inapplicability in familial relations. This can be the most important reason for us lacking cross-border case law in the area of matrimonial property relations. I have not been able to find even one PIL case (before or after the 29 January 2019) relating to the division of marital property of spouses. I made an inquiry to the district court of Helsinki and my observation was confirmed. In addition to the lack of knowledge, the lack of court cases may be due to the fact that in practice most distributions are carried out by the agreement of the spouses. If the parties cannot agree on the distribution of the matrimonial assets by themselves, it can be made officially, by a court-appointed distributor. Thus, the distributor is in all cases obliged to strive for an amicable end-result and an agreement between the parties involved. Both of these are private processes and the end-results are not published or confirmed in a court process (in case nobody contests the distribution in court.)

Since, in my opinion, understanding of the Finnish process concerning the distribution of matrimonial property is important, I will describe it shortly in the beginning of the chapter. Following this, I will move on to Finnish domestic PIL provisions on applicable law to the matrimonial property regime. I will also go through some of my observations concerning practical application of PIL in Finland that may be of interest to a reader. As determining habitual residence is (will be) one of the most difficult tasks for the courts in matrimonial property issues, I refer to an inheritance case from Helsinki court of appeal which holds an important position as an example of a well-argued decision; it shows a line of argumentation in the determination of a person´s habitual residence. I will conclude the chapter with a hypothetical case with which I will demonstrate how the EU Matrimonial Property Regulation (2016/1103) and domestic PIL provisions of the Marriage Act determine the applicable law and what changes the Regulation has brought along.

The subject of my article is the choice of applicable law and the spouses´ possibility to agree on the choice. I will leave the issues of international jurisdiction and cross-border

[5] The Marriage Act can be found in English at: https://www.finlex.fi/fi/laki/kaannokset/1929/en19290234_20011226.pdf.

[6] See Markku Helin, The Impact of Hague Conventions on the Development of Finnish Private International Family Law. International Family Law 2012 pp. 15-19.

recognition out of the chapter´s scope.[7] As the chapter is dedicated to matrimonial property, also registered partnerships are outside its scope. However, it should be noted that Finland opened up marriage to the same-sex partners and as of 1 March 2017, couples that are living in a registered partnership have been able to convert their registered partnership into marriage by filing a joint notification. The notification of the conversion must be submitted to the Digital and Population Data Services Agency (DVV). The conversion is not obligatory and if a couple chooses not to convert their partnership into a marriage, they continue to live in a registered partnership. However, new partnerships cannot be registered anymore.[8] As regards PIL rules concerning same-sex marriages, there is a lack of any distinct treatment and the rules adopted for "classic" marriages already in force govern also the same-sex marriages. In respect to registered partnerships that are not converted to marriages, the law on registered partnerships provides the same rights and obligations as conclusion of marriage, with certain exceptions (the Act on Registered Partnerships, section 8). This refers also to the rules of private international law in case there are not special PIL provisions in the Act on Registered Partnerships.[9] As regards to property relations, EU rules on the property regimes of international couples (2016/1104) are applicable in Finland.

III. PROCESS OF DISTRIBUTION OF MATRIMONIAL PROPERTY IN FINLAND

According to the Marriage Act, when divorce proceedings are pending, either party may demand the distribution or separation of the matrimonial assets. The distribution is not mandatory (inter partes) and spouses may even decide not to go through with it, but one should bear in mind that the right to demand the distribution is not time-barred. The distribution may be demanded even when the ex-spouse has remarried, or died.

In practice most distributions are carried out by an agreement of the spouses. The agreement does not have to be validated in a court/authority. If the parties cannot agree on the distribution of the matrimonial assets by themselves, it can be made officially, by a court-appointed distributor. Normally, the distributor establishes an inventory in order to list the assets covered by the marital right and the assets separated from it. The inventory of the assets and debts of the spouses is the foundation of the distribution. The distributor is not free in his/her discretion as the Marriage Act gives quite specific guidance according to which the distribution has to be made. The distributor is also bound by agreements concluded by the

[7] Nordic Conventions are not included in this chapter. I just make a note here that Nordic countries have a long history of cooperation in various legislative fields. Provisions on matrimonial property regimes are included in the Nordic Convention of 1931 (Nordic Convention on Marriage, Treaty Series 20/1931). These provisions are applicable if there is a double connection, that is if spouses are both Nordic citizens and have established their domicile in a contracting state.

[8] Only a partnership registered in Finland may be converted into marriage. Regarding the recognition of partnerships registered abroad, the Act on Registered Partnerships (section 12) states that the registered partnership of two persons of the same sex that has been registered in a foreign state is valid in Finland if it is valid in the state where it was registered. The Act is available in English at: https://www.finlex.fi/fi/laki/kaannokset/2001/en20010950_20011229.pdf.

[9] As the Act on Registered Partnerships does not include special PIL provisions pertaining i.e to personal obligations of the institution, the section 128 of the Marriage Act applies. Nordic Convention on Marriage is not, thus, applied to registered partnerships (see the Act on Registered Partnerships, section 15).

spouses either before the commencement of the distribution or after it. In fact, the distributor is in all cases obliged to strive for an amicable end-result and an agreement between the parties involved. [10]

The distributor's powers and duties are quite extensive as he/she ascertains the validity of the agreements made between the parties during marriage—including a marriage settlement, a marital agreement and a choice of law agreement. The distributor is also entitled (and obliged) to decide contentious property issues between spouses.[11]

If the spouses agree themselves on how to distribute the matrimonial property, they should make a signed deed of distribution. Two witnesses are required in order to affirm that the signatures of the spouses are authentic. When the distributor has been appointed, he/she signs the deed of distribution even if the deed is based partially or fully on the agreement of the spouses. No witnesses are required. If a spouse is not happy with a distribution made by an estate distributor, he/she can contest it by bringing an action against the other spouse in a district court within six months of the date of the distribution. However, it is not common to contest the distributions/separations of assets in a court.

IV. BUILDING BLOCKS ADOPTED IN THE MARRIAGE ACT: CONNECTING FACTORS AND THE FREEDOM OF CONTRACT OF SPOUSES

Historically the most important connecting factor in Finnish PIL – especially for cases of personal law[12] – was nationality. This led to apply the law as determined by person´s citizenship. Even though there have also been exceptions to this rule (i.e Inter-Nordic PIL conventions for family matters established in the 1930´s were based on the domiciliary principle), in general, though, the nationality principle has been traditionally followed. The supporters of the nationality principle were of the opinion that the concept was clear in most cases and its application was easy, especially compared to domiciliary principle. On the other hand, it was admitted that challenges could arise if a person had the nationality of more than one state or he/she was considered to be stateless.[13]

Recently, Finnish legislator has opted for establishment of one´s home/residence as the appropriate affiliation in order to determine the law applicable to status and individuals,

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[10] See Tuulikki Mikkola, *Family and Succession Law in Finland*, (Kluwer Law International B.V. 2018), 76-77.

[11] After the calculation and valuation of the net assets of each spouse, the spouse that owns more has to give his/her property (in the ambit of marital right) or a corresponding amount of money to the other spouse, so that the shares are equal. The spouse who is obliged to hand over property to the other spouse, may decide what to give in order to equalise the final shares. An estate distributor is not able to intervene if the property the owner has decided to hand over has value in recipient's hand. In case there is no marital right because of a marriage settlement, the property is separated and each spouse keeps what he/she owns. If spouses cannot agree on the separation of assets, a distributor can be nominated to decide contentious matters. See Pertti Välimäki, *Pesänjakaja,* (Alma Talent 2022), 423-438.

[12] The scope of the "personal law" is usually understood to cover the status of a person, the capacity, marriage, the relationship between a parent and a child, and inheritance. See in detail Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: R. Haavisto (ed.): Oikeusjärjestys III. Rovaniemi 2000 pp. 299-390, especially pp. 299-309.

[13] For the discussion see Aatos Alanen, *Yleinen oikeustiede ja kansainvälinen yksityisoikeus*, (Porvoo 1965), 217.

covering also familial relations and inheritance. There have been various reasons behind this legislative change; i.e. general globalisation, the rise in immigration and emigration, protection of parties´ justified expectations, legal certainty, practicality and the international development of PIL. Even though nationality has given way to domicile/habitual residence as the main connecting factor, nationality has not been totally buried and there are still instances in which nationality holds a place as a relevant connection in purposes of PIL application. In addition, in considering whether or not foreign law should be rejected according to the *ordre public* principle, the decision might depend on the intensity of the connection between the dispute and the forum, and nationality may have relevance in this respect.[14]

The PIL provisions of the Marriage Act (which came into force in 2002) have also been built on the domicile principle. Domicile and habitual residence - as concepts of Finnish private international law - have not been generally defined in the legislation. They are both concepts of a flexible nature and in practice it has turned out that defining a person´s domicile and habitual residence can be particularly challenging. There is, however, consensus among legal scholars what elements are significant in establishing one´s domicile and habitual residence according to the Finnish PIL. They are both construed by virtue of the center of a life of a person, referring to a place where a person lives permanently, where he/she works, where he/she has hobbies and social life, where his/her children go to school etc. In order to gain domicile or habitual residence, residence has to last for some time. A definition cannot be based only on time spent in a jurisdiction since one must also take into account the habitual quality of the residence.

The most obvious difference between the concepts of habitual residence and domicile is that the former changes easier than domicile as it leans purely on facts (past and present) and not the future intentions of the individual. It has been pointed out that in order to acquire a domicile in a foreign country, there should also be willingness and effort to integrate and to settle down to that country. Even though the subjective element is in some respects decisive in determining the domicile, this element may also cause some problems for the court if the opinion of the individual is expressed in order to choose an applicable law. Therefore, it is suggested by legal scholars that if the asserted intention of the individual does not match that of an average person facing the same situation, it can be disregarded.

It is possible to generalise that a new habitual residence can be established in a shorter period of time than domicile and without any intentions of staying in a country on a permanent basis also in a future. As a result, a court may find habitual residence even without voluntariness of a person residing in a country (solely on physical presence) – even if a person is compelled to live in a jurisdiction against his/her will.[15] However, also in defining the habitual residence, it must be shown that the individual holds certain degree of stability in respect to the jurisdiction. There must be stable physical presence, an identifiable link between the individual and the jurisdiction.

Family relations are part of the factors that are important in determining the domicile/habitual residence. It is of interest, though, that the domicile and habitual residence of a child

[14] Tuulikki Mikkola, Vieraan valtion oikeuden soveltamisen torjuminen ja ordre public. Edilex 2016/12.

[15] H. Salmenkylä, 'Finland' in J.Stewart (ed.): *Family Law – Jurisdictional Comparisons 2013*, (Thomson Reuters 2013), 183-200, 184.

is determined independently from that of his/her parents.[16] Individuality of the concepts is also demonstrated in a fact that spouses´ domicile and habitual residence are not automatically identical and one does not necessarily follow the other.

Another important principle that the PIL provisions of the Marriage Act demonstrate is the freedom of contract of the spouses (inter and ultra partes). According to the Marriage Act, section 33, spouses are free to conclude agreements and enter into mutual transactions. They have contractual freedom inter partes, as well as ultra partes in respect to property. In addition, spouses may conclude agreements through which they alter their statutory legal rights and relations in respect of matrimonial property (marriage settlement, marital agreement).[17] The freedom of contract has a reflection in the PIL and spouses are able to agree – with no time constraints – on the law that is applicable to the marital property regime. Choice is limited to options determined in the Marriage Act and requires quite substantial connection between the parties and the chosen legal system.

V. PROVISIONS OF THE MARRIAGE ACT: APPLICABLE LAW TO PROPERTY RELATIONS OF SPOUSES

The Marriage Act sets as the main rule that matrimonial property rights of the spouses are governed by the law of the country in which they both acquired domicile right after the conclusion of the marriage (MA, section 129). It is, thus, possible that the applicable law changes if the spouses have later moved together to another country. The additional requirement for the change is that the spouses have lived there for at least five years. There are misinterpretations of this in practice as the provision has been interpreted to mean that the domicile changes after residing in a country for at least five years. Instead, these are two separate requirements for changing the applicable law. Domicile is not time bound concept of PIL.

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[16] For case law regarding the habitual residence of a child, see e.g. KKO 2019:37 (ECLI:FI:KKO:2019:37).The judgment concerned the return of a child under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Hague Convention) and Brussels II Regulation. See the summary of the precedent at: https://korkeinoikeus.fi/en/index/ennakkopaatokset/shortsummariesofselectedprecedentsinenglish/2019/kko201937.html. The Supreme Court referred to the jurisprudence of the Court of the European Union according to which, factors affecting the determination of a child's habitual residence are whether the child's actual place of residence is in any way temporary or intermittent, and whether the residence of the child reflects some degree of integration of the child in a social and family environment. "For this purpose, particular consideration shall be paid, in respect of the family's move to and stay on the territory of a member state, to the duration, regularity, conditions and reasons for this move and sojourn, the child's nationality, the place and conditions of attendance at school, whether or not the child can speak the language of the state in question, and the family and social relationships of the child in that state. It is for the national court to establish the place of the child's habitual residence in the light of the criteria referred to and the overall assessment (judgment 2 April 2009, A, C-523/07, EU:C:2009:225, paragraphs 38-42)."

[17] Tuulikki Mikkola, The Risks and Opportunities of Foreign Connections in Marriages: the Proprietary Rights of Spouses. In: B. Atkin (ed.), The International Survey of Family Law 2008, Jordan Publishing 2008, pp. 77-106, pp. 81-82. The contractual freedom of the spouses is not limitless, though. The Marriage Act protects i.e. the family home and the contractual freedom of the owner to transfer the property to a third party without the permission the other spouse is restricted in sections 38-39 of the Marriage Act. See Mikkola n 10 above, 70-71.

The law of a new home country may even be applied immediately upon the spouses becoming domiciled there if they have earlier during the marriage been domiciled there or if both are citizens of that country (the MA, section 129). Rarely, failing to have common domicile, the law that governs spouses´ matrimonial property rights is the law of the country to which the spouses have the closest connection under the circumstances. The objective of the provisions is to ensure legal certainty and to guarantee that a regime on asset division is not imposed from a country with which a couple is no longer connected when their marriage ends.

The Marriage Act permits parties´ choice of law. Spouses, or even future spouses, may agree on the law applicable to their matrimonial property relations.[18] The freedom to choose the law is not limitless, though. The acceptable alternatives to choose from are listed in the section 130 of the Marriage Act; the law of the country where one spouse or both spouses are domiciled or whose citizen a spouse is at the time of the agreement, may be designated as the law applicable to matrimonial property regime. If the domicile of one or both spouses has moved to another state during the marriage, also the law of their last domicile may be chosen as the applicable law.

The agreement on the applicable law has to be written in order to gain validity. Witnesses are not required. Also, if the spouses want to alter or cancel the agreement it needs to be executed in writing. It is, however, possible to presume the existence of an implied choice of law contract and therefore it does not have to be explicitly indicated in, for instance, a marriage settlement or a marital contract if a certain legal system has apparently been leaned on when the marital settlement or marital contract was drawn up.

According to the Marriage Act, in addition to marriage settlement, spouses may make a marital agreement governing in detail what happens in the event of a divorce and thus decide how the matrimonial property (or part of it) is distributed. The agreement is free in form and may contain any terms whatsoever regarding the distribution of property in case of divorce. It can even cover terms that are personal by nature such as spousal support. In this regard the marital agreement differs from a marriage settlement, whose form and content are regulated in detail by the provisions of the Marriage Act. Moreover, a marital agreement is not affected by time limits and it can be effectively made before concluding a marriage and during it. It is not required that the breakdown of the marriage has to be foreseeable at the time the marital agreement is concluded. Since there are no time constraints, a marital agreement can be made even when divorce proceedings are pending. There are no provisions concerning a marital agreement in the Marriage Act, its justification lies on the spouses' freedom of contract (the Marriage Act, section 33).[19]

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[18] With regard to future spouses, it is worth mentioning here that all legal consequences that an engagement once had according to the Marriage Act have been abolished. This does not mean, thus, that future spouses are in a legal vacuum. If, for instance, the engagement is broken off, it is possible that the gifts can be claimed back if they were transferred in anticipation of a future commitment and the engagement is terminated by the donee without a proper cause. This follows from the rules of contract and property law. There are no statutory conflict rules concerning the legal effects of an engagement, and no case law, either. Therefore, in respect to contractual and property relations between future spouses, conflict rules stem from the contract and property law. In each case the court has to characterize the issue at hand and form an appropriate conflict rule.

[19] Mikkola, n 10 above, 73-74.

The issues that are resolved by reference to the law applicable to matrimonial property regime are listed – in a non-exhaustive manner - in the Marriage Act (section 131). The law covers issues pertaining to the distribution of matrimonial property after the dissolution of the marriage or during the marriage. Other issues listed in the law are those pertaining to transactions entered into by the spouses, the right of a spouse to administer property and the liability of a spouse for the debts of the spouses. In other words, these issues include basically all aspects of matrimonial property regimes, both the management of the matrimonial property during marriage and the division of property upon its dissolution as a result of the couple's divorce or the death of one of the spouses. In general, a change of the law applicable to matrimonial property regime does not affect the validity of a transaction concluded before the change (the MA, section 131). However, the validity of provisions in a marriage settlement or an agreement on the future distribution of property, is assessed in accordance with the law applicable to matrimonial property matters at the time when the issue becomes relevant.

The provisions of the Marriage Act follow both the universality principle and the unity of applicable law. A division of matrimonial property upon dissolution of marriage is deemed to cover all assets of the spouses, irrespective of their situs; accordingly, assets situated abroad are included in the scope of the division.[20]

The public policy clause (ordre public) is applicable and a provision of the foreign law may be disregarded, if its application would have an outcome contrary to Finnish public policy (the Marriage Act, section 139). Furthermore, the provisions of the Marriage Act i.e on the adjustment of the distribution of matrimonial property, restrictions of property administration and the provisions of the Code of Inheritance on the right of the surviving spouse to keep a lifetime possession of the last common home of the spouses, are deemed as internationally mandatory provisions. In addition, the Marriage Act protects also interests of third parties and there might be some restrictions of applicable law, for instance in order to protect rights of creditors (see the Marriage Act, section 135).

VI. OBSERVATIONS OF FINNISH CASE LAW AND PIL

As mentioned earlier, we are lacking court cases concerning the choice of applicable law in matrimonial property issues. I dare to say that one reason for this is the fact that attorneys are not familiar with PIL provisions and therefore cross-border connections are not recognised and their legal implications are not understood. Unfortunately, even the Finnish Supreme Court stepped over PIL provisions in the case KKO 2017:13, in which spouses had strong and non-disputed connections to Spain. Spouses had their common home there and they had lived there on a permanent basis for over a decade. This fact was totally neglected as there is no published argumentation concerning the international jurisdiction or applicable law. The case concerned the petition on the end of cohabitation (section 24 of the Marriage Act).

[20] As it is possible that the division is not recognised abroad, the Marriage Act, section 137 stipulates the following: "When determining the property that is to devolve on one spouse, the provisions of the law applicable to matrimonial property matters may be derogated from, if necessary, in order to secure a lawful share of the property to the spouse." This may lead to an end-result where possible property ownership transfers are made only in relation to assets located in Finland so that both spouses can effectively get their lawful shares as a result of a division. See Markku Helin, *Suomen kansainvälinen perhe- ja jäämistöoikeus*, (Helsinki 2013), 299-300.

The Supreme Court did not seem to know section 119 of the Marriage Act, which states that the request for ending cohabitation may be ruled admissible in Finland if the spouses make their common home there. If well-justified, the precedent could have been valuable in many ways, especially on educational grounds. It would have sent an important message about the application of PIL and the importance of noticing relevant cross-border connections in spousal relations.

When one expands the perspective to inheritance matters, the phenomenon that is observable is the very same as in other jurisdictions – that is the difficulty of determining the habitual residence of a person. It has been noted in court practice that it is not possible to give exact shape to habitual residence and accordingly, this calls for a case-by-case interpretation against individual circumstances and, at least to some respect, the nature of the legal matter in question. For instance, the determination of residence can be challenging if a person has moved abroad fairly recently, he/she has not yet integrated to a new country or if she/he still retained strong ties to the country of origin before she/he died.[21] There are certain misconceptions in Finnish practice concerning the determination of habitual residence in PIL. I have encountered cases where one understands that habitual residence for the purposes of PIL is the same as municipality of residence according to the domestic Municipality of Residence Act (201/1994). Following this, habitual residence has been defined by which population information system the individual is registered on.

At least some of these unfortunate misconceptions were corrected in the well-reasoned Helsinki court of appeal case HelHO 2019:2, regarding the application of an estate administrator. The deceased had connections to both Finland and Italy. He died in the latter in January 2017. The district court of Helsinki found that it had international jurisdiction based on the domestic rules of the Code of Inheritance.

The next step was to determine the habitual residence of the deceased. The court of appeal noted the preamble, Recitals 23-24 of the Succession Regulation and stated that in order to determine the habitual residence, the court had to make an overall assessment of the circumstances of life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements. The court stated that as the deceased had not travelled from one state to another without settling permanently in any of them, the location of his assets was not taken into account in the overall assessment of all the factual circumstances. In addition, it was not considered relevant in which country the deceased paid his income taxes. The deceased´s connections to Italy were considered to be closer than to Finland and therefore – as the last habitual residence was in Italy – Finnish courts lacked jurisdiction to deal with the estate. An estate administrator could not be nominated in Finland.

It is also notable that if a person was married at the time of his/her death, the marital regime has to be dissolved in order to define the distributable estate. In Finland, the widow´s legal position is a combination of the matrimonial law and the inheritance law. [22] I assume that since the application of the Matrimonial Property Regulation and the Succession Regulation may lead to different laws (lex causae) and the end-result may either over- or undercompensate the widow, we will face more challenges of qualification. In practice it is

[21] Markku Helin, *Suomen kansainvälinen perhe- ja jäämistöoikeus*, (Helsinki 2013), 478.

[22] For the legal position of the surviving spouse in Finland, see Mikkola, note 10 above, 90-93.

of great importance for the parties that matrimonial property issues are separated out from inheritance issues.

VII. CASE STUDY AND SOME COMPARATIVE CONCLUSIONS

The Matrimonial Property Regulation has changed Finnish law considerably, regarding the applicable law in matrimonial property relations. The changes can be demonstrated through an example:

A and B got married in Finland where they live and which is their first common place of residence/domicile. The spouses have Finnish nationality. After two years they move to another state X where A has a new work opportunity. Family plans to move there on permanent basis. Before moving, A and B have consulted a lawyer and as a result a precontract concerning the distribution of assets in divorce (so-called marital agreement) have been concluded. It does not include a specific choice-of-law clause but the wording of the contract clearly demonstrates that it is based on Finnish law and provisions of the Marriage Act.

Domestic PIL rules, included in the Marriage Act, sections 129-130, give spouses a right to agree on the applicable law concerning matrimonial property relations. The alternatives are the law of the state where one spouse or both spouses are domiciled or whose citizen a spouse is at the time of the agreement. In addition, if the domicile of one or both spouses has moved to another state during the marriage, also the law of the state where both spouses last were domiciled may be designated as the applicable law. It is possible to change the choice, for instance, after moving to another state and establishing a domicile there. The choice-of law agreement has to be made in writing but witnesses are not required. It is also possible to construe an implicit choice of law. In case marital agreement is made in writing, the choice of law is formally valid. Marital agreement does not require registration in order to enter into force inter partes.

The applicable law governs all assets of both spouses, irrespective of the situs (location of the assets). In addition, in case the choice (or a its change) is valid, it has retrospective effect as the applicable law covers all property regardless of when the property has been acquired. The only exception to this rule may be the result of the application of internationally mandatory rules. Therefore, a patchwork of different laws applying to matrimonial property relations cannot exist under domestic PIL provisions.

The Matrimonial Property Regulation, Article 22, also allows the spouses to choose expressly - or implicitly - the applicable law. They are able to choose from the law of the state of which at least one of the spouses has nationality or the law of their habitual residence at the time of the choice. The main changes that the regulation has brought along are connected to the form and coverage of the choice of law clause. Formal requirements are stricter since if the spouses have a residence in Finland, the provisions of the Marriage Act on the form of a prenuptial agreement must be followed. By the latter I refer to the fact that the choice of law applicable to the matrimonial property regime during the marriage will only have effect for the future, unless otherwise agreed by the spouses and without prejudice to the rights of third parties. Coverage of the choice is different and has to be taken into account in the preparation of the agreement and it has to be clearly explained to the spouses.

In the absence of a choice of law agreement, the Marriage Act regulates that the law of the country which became the domicile of both spouses after marriage is applied to the spouses' property relations. If the domicile has been transferred later to another state, the law of that state is applied, if the spouses have lived there for at least five years. In certain cases, as explained earlier, applicable law changes immediately. In other words, if the main connecting factor – domicile – changes, the applicable law changes. This is regulated in detail in the PIL provisions of the Marriage Act in order to ensure legal certainty.

Here again, the main rule is that there is one applicable law that covers all assets irrespective of time of the acquisition or property or its location.

Article 26 of the Matrimonial Property Regulation sets out the hierarchy of connecting factors to determine the applicable law. The law is the law of the state of the spouses' first common habitual residence after the conclusion of the marriage or, if there is no such state, the law of state of the spouses' common nationality at the time of the conclusion of their marriage or, failing that, with which the spouses jointly have the closest connection at the time of the conclusion of the marriage - taking into account all the circumstances.

According to the Regulation, the applicable law does not change later on in case no choice of law agreement is made. However, exceptionally and upon application by either spouse, the court having jurisdiction to rule on matters of the matrimonial property regime may make a decision that the law of a state (other than the state whose law is applicable) governs the matrimonial property regime. There are two requirements for this: firstly the applicant has to show that the spouses had their last common habitual residence in that other state for a significantly longer period of time and that both spouses had relied on the law of that other state in arranging their property relations (Article 26(3)).[23] The law of that other state applies as from the conclusion of the marriage, but not if spouses disagree on this. In the case of disagreement, the law of that other state has effect as from the establishment of the last common habitual residence.

This rule about the change of the applicable law is not utilised thus when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other state. The preventive effect arises irrespective of what terms are included in the matrimonial property agreement in case the agreement is valid.

Compared to the provisions of the Marriage Act, the provisions of the Regulation seem a bit complicated as Finnish rules are more straightforward and based on unity of the applicable law. Spouses and their attorneys have to learn to agree on retrospective effects of the choice of law agreements, especially since they cannot agree on a state´s law being applicable conditional upon later becoming habitually resident in that state.

From a Finnish point of view Article 26(3) is confusing. It can create uncertainty which is inconsistent with the objectives of the Regulation. These objectives include "greater predictability and legal certainty" (Recital 72). If the applicable law is to be locked to connections existing in the beginning of the marriage for the sake of legal certainty, it is difficult to understand why it is possible to change the applicable law later without specifying

[23] Helin, n 21 above, 315.

more in detail the requirements for the change. For these reasons, one can say that the Regulation is not clear in its objectives.[24]

Although I have stated above that there are certain challenges in the Matrimonial Property Regulation and in its provisions concerning applicable law, I do not mean that it is lacking positive features. One good feature is the fact that it ensures cross-border effects of a choice of law agreement and accordingly EU rules on property regimes bring legal certainty in relation to states that apply the regulation. Earlier choice of law agreement based on the Marriage Act has produced a desired end-result only if Finnish courts have had international jurisdiction or if another forum-state has accepted it on the basis of its own domestic PIL provisions.

In addition, one very positive feature of the Regulation is that it rules the applicable law to material validity of a choice of law agreement (Article 24(1)). According to the Regulation the existence and validity of an agreement on choice of law or of any term thereof shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid. There is no provision on applicable law in the Marriage Act concerning the contractual validity of choice-of-law clauses. In legal literature there has been strong support to a conclusion that it is determined by *lex fori*.

[24] Helin, n 21 above, 316.

FIRST APPLICATIONS OF EUROPEAN REGULATIONS NO 2016/1103 AND NO 2016/1104 OF 24 JUNE 2016 IN FRENCH LAW

Severine Cabrillac[1]

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Summary: I. Brief presentation of the French case law that may shed light on the application of Regulations 2016/1103 and 1104. 1. The field of application of Regulations 2016/1103 and 1104: mechanical application of the spatial and material criteria. 2. A strict concept of the express designation of the choice of applicable law, made under the Hague Convention and applicable to Regulations 2016/1103 and 1104. II. Case studies. 1. Case 1: Determining the applicable law in the absence of a choice. 2. Case 2: Exercise of the power of designation to remove the uncertainty arising from the criteria for designation under prior French international law.

Abstract: The first two decisions referring to Regulations 2016/1103 and 1104 are simple illustrations of the application of the spatial criterion and the material criterion for the delimitation of this area. The Paris Court of Appeal applied the common law rules, excluding international conventions, to the application for enforcement of financial orders issued by English courts in the liquidation of the property interests of former spouses following their divorce (Paris Court of Appeal, Pole 1, chamber 1, 18 February 2020 - No 18/10520). This decision is only the inevitable consequence of the UK's failure to participate in the process of drafting EU Regulation. The First Civil Chamber of the Court of Cassation on 14 October 2020 (19-11.585) exposes the material scope of the regulations in a pedagogical manner: the property liquidation of spouses' interests falls exclusively within the scope of Regulation No 2016/1103 pursuant to Article 1 of that text, which delimits its scope by reference to "matrimonial property regimes".

I. BRIEF PRESENTATION OF THE FRENCH CASE LAW THAT MAY SHED LIGHT ON THE APPLICATION OF REGULATIONS 2016/1103 AND 1104

The two decisions referring to Regulations 2016/1103 and 1104 deal with their areas of application and are simple illustrations of the application of the spatial criterion and the material criterion for the delimitation of this area (A). More instructive is a decision rendered on the basis of the prior law concerning the modalities of designation of the applicable law and which seems to have to be applied under the realm of Regulations 2016/1103 and 1104 (B).

[1] Professor, Private Law and Criminal Sciences at the University of Montpellier.

1. The field of application of Regulations 2016/1103 and 1104: mechanical application of the spatial and material criteria

a) Spatial criterion application: exclusion of the application of Regulations 2016/1103 and 1104 for the exequatur of decisions delivered by English courts

Recalling that European Regulation 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial matters is not applicable in the United Kingdom, the Paris Court of Appeal applied the common law rules, excluding international conventions, to the application for enforcement of financial orders issued by English courts in the liquidation of the property interests of former spouses following their divorce (Paris Court of Appeal, Pole 1, chamber 1, 18 February 2020 – No 18/10520). This decision is only the inevitable consequence of the UK's failure to participate in the process of drafting EU Regulation No 2016/1103. Also, an identical solution would be reached in relation to decisions of English court ruling on the liquidation of property interests arising from a registered partnership under Regulation 2016/1104.

b) Application of the material criterion: application of regulations 2016/1103 and 1104 for the exequatur of decisions liquidating the property interests arising from formalised couple relationships

Observing that the dispute between the spouses concerned the liquidation of their property interests arising from their matrimonial regime (property acquired in joint ownership during a regime of separation of property), the Court of Appeal ruled out, with regards to the property nature of the dispute, the application of Council Regulation (EC) No 2201/2003 of 27 November 2003, concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. This decision handed down by the First Civil Chamber of the Court of Cassation on 14 October 2020 (19-11.585)[2] is interesting because of its reference to Regulation 2016/1103, the application of which it excludes on the grounds that the decision under discussion predates its entry into force: "that [Regulation 2016/1103] is applicable only to proceedings initiated after 29 January 2019". This specification implies that the exclusion is based solely on the implementation of the temporal criterion and that, in the absence of this criterion, Regulation 2016/1103 would have been applicable. Hence, this *objection* makes it possible to contrast the material scope of the two regulations in a pedagogical manner: the property liquidation of spouses' interests falls exclusively within the scope of Regulation No 2016/1103 pursuant to Article 1(1) of that text, which delimits its scope by reference to "matrimonial property regimes". This reasoning is transferable to the determination of the material scope of Regulation 2016/1104 defined by its Article 1 as governing "the property effects of organised partnerships" which includes the liquidation of assets acquired during the partnership.

[2] Cass. 1st civ., 14 October 2020, no 19-11.585 JurisData no 2020-016557; family Dr. 2020, comm. 173, A. Devers, Family law no 4, April 2021, chron. 1, obs. V. Egea.

2. A strict concept of the express designation of the choice of applicable law, made under the Hague Convention and applicable to Regulations 2016/1103 and 1104

a) The content of the ruling given under the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes

The Court of Cassation has had to rule on the case of spouses married abroad before the coming into effect of the Hague Convention on the law applicable to matrimonial property regimes. After living abroad for more than ten years, the couple settled in France for professional reasons. They passed two authentic acts before a French notary: a deed of acquisition of real estate and a donation between spouses. These documents were received by the notary after the coming into effect in France of the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes. In these documents, the spouses were mentioned "as declaring themselves married under the regime of the legal community, according to French law". After the spouses divorced and disputes arose over the liquidation of their property interests, one of them argued that the reference to the French legal regime expressed the spouses' wish to designate French law during the union, as authorised by the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes.

Referring to Articles 6, 11 and 21 of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, the Court of Cassation rejected this argument, considering that "this declaration, mentioned in notarial deeds with another purpose, did not express the unequivocal will of the spouses to submit their matrimonial property regime to a domestic law other than the one that had governed it up to that point, and could not constitute an express stipulation designating the applicable law"[3].

The Court of Cassation has therefore interpreted rigorously the requirement of an "express specification" of the applicable law provided for in Article 11 of the Convention. The reference to an applicable law contained in a deed with another purpose therefore does not fulfil the designation requirements. This stance is demanding because, while one of the deeds (acquisition of real estate) was concluded with third parties, which can interfere with the existence of an unequivocal will to choose the law applicable to the matrimonial regime, the second deed concerned only the spouses, related to their property interests and, more precisely, to a question of partial distribution, since it was a donation. As a result, the Court of Cassation seems to allow designation only within an autonomous act dealing exclusively with the applicable law or the applicable regime.

b) The extension of this solution to Regulations 2016/1103 and 1104

The formulation of the articles relating to the designation of the applicable law in Regulations 2016/1103 and 1104 does not contain the clarification of "express stipulation"

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[3] Cass.1st civ., 13 Dec. 2017, no. 16-27.216: JurisData no. 2017-025514; JCP N 2017, act. 1053, obs. D. Boulanger; JCP N 2018, 73, note G. Wiederkehr. – M. Revillard: Defrénois 1 March 2018, 9, 20, 132. Z4; JDI 2018, comm. 7, 563; H. Péroz and P. Callé , 'Article 6 of the Hague Convention and the will of the spouses to submit their matrimonial regime to another internal law', *Defrénois,* 133 r0, 29 (22 February 2018); M. Revillard, 'Formal requirements for the express stipulation designating a new law applicable to the matrimonial property regime', *Defrénois*, 132z4, 20 (1st March 2018); obs C. Nourissat, *Defrénois* , 137b7, 45 (21 June 2018).

contained in Article 11 of the Hague Convention of 14 March 1978. Nonetheless, French doctrine[4] (followed by French practitioners[5]) is unanimous in considering that the demanding solution given by the Court of Cassation should be applied to the application of the two European instruments.

There are three reasons for this:

- the Regulations' use of the terms "the convention on the choice of applicable law".[6] However, these terms suggest that the choice of law must be the subject of a specific act.
- the use of the term "expressly stipulated" in Recitals for changes of law during the life of the couple.
- the Court of Cassation's reference in its decision to the requirement of an unequivocal will, a requirement which derives more from the attention paid to the will of the spouses than from the need for an express stipulation (since in the acts concerned there was an explicit reference to a law, which the Court considered insufficient).

Also, since the coming into effect of Regulations 2016/1103 and 1104, French practitioners recommend that couples should only express their choice through a document dedicated exclusively to the question of the matrimonial property regime and entitled: "Designation of the law applicable to the matrimonial property regime".

II. CASE STUDIES

1. Case 1: Determining the applicable law in the absence of a choice

Statement.

Mr and Mrs Bakrane were married in Constantine, Algeria in 2020 without having drawn up a marriage contract or designated applicable law and have one child. He works in Montpellier Hospital (France) as an emergency doctor, with the status of a foreign doctor because of his Algerian nationality. She comes from an old Algerian family, very attached to her country of origin, and she never wanted to live in France. He needs to obtain a financing

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[4] For example :

- D. Boulanger, Commentary on the decision under reviewJCP N 2018, 73 « La future mise en application du règlement (UE) 2016/1103 du Conseil du 24 juin 2016 (..) ne modifiera pas cette interprétation » : *Translation: The future implementation of Council Regulation (EU) 2016/1103 of 24 June 2016 (..) will not change this interpretation* ;

- M. Revillard,Fasc. 320 Régimes matrimoniaux, Règlements UE 2016/1103 et 2016/1104, Jurisclasseur Notarial, 2019 : "Cette solution prononcée dans le cadre de l'application de la convention de La Haye conserve toute sa portée dans le cadre du règlement du 24 juin 2016." *Translation: This solution pronounced in the context of the application of the Hague Convention retains its full scope in the context of the Regulation of 24 June 2016.*

[5] For example, R. Blondelle, Pratique notariale du règlement européen « régimes matrimoniaux » du 24 juin 2016 », Etude et formule rédigée, JCPN 2019, 1164. This article, written by a notary, offers model contracts. For spouses subject to Regulation 2016/1103, this notary advises a contract exclusively devoted to the designation of the applicable law. Thus, that notary considers that the solution rendered must also apply to Regulation 2016/1103.

[6] In particular in their Article 23.

for the purchase of the 2-bedroom apartment in which he lives and asks you to draw up the notarised deed necessary to record the legal mortgage of the lender. Can you draw up this act?

Same question if the wife joined her husband in France one year after the marriage.

Resolution

The spouses married after the coming into effect of Regulation 2016/1103 and this should be subject to the rules for determining the law applicable to their matrimonial property regime established by this text. If the spouses have not chosen the applicable law and if they do not have their habitual residence in the same State, Article 26(1)(b) designates the common national law at the time of the celebration of the marriage as the applicable law. As a result, Algerian law is applicable to the matrimonial regime of Mr and Mrs Bakrane. Algerian law treats spouses, in terms of property, as single persons, so there is no rule against the man buying a property alone and taking part in the authentic act to give rise to the legal mortgage of the moneylender on the property thus purchased.

Everything else being equal, if the wife joins her husband in France one year after the marriage, Article 26(1)(a) designates the law of the State of this first residence as applicable.

As a result, Mr and Mrs Bakrane are subject to French law and, in the absence of a marriage contract, to the legal community of reduced acquests (Article 1400 of the Civil Code). This system establishes concurrent powers for the benefit of the spouses which allow the husband to present himself alone to validly acquire a property.

In contrast, Article 1415 of the Civil Code provides that each spouse may only pledge his or her own property and income through a loan, unless authorised by the spouse. Therefore, if the husband can borrow alone, the Court of Cassation considers that Article 1415 of the Civil Code prevents the legal mortgage from arising on a common property (however, the apartment acquired here is common in application of the basic rule of Article 1401 of the Civil Code which attributes the qualification of common property to property acquired during the marriage): Cass. 1re civ., 5 May 2021, No 19-15.072. Hence, in the second case, if the banker intends to be provided guarantee by the legal mortgage of the lender of funds, the notary must obtain the authorisation of the wife to borrow (without her having to be a co-borrower).

2. Case 2: Exercise of the power of designation to remove the uncertainty arising from the criteria for designation under prior French international law.

Statement.

The Karam couple, he being Lebanese, she being French, were married in Italy on 4 January 1975. After their marriage, the couple lived for three years in the United States, one year in Mexico, one year in Libya, ... and so on, with the husband's work (as a specialist in the development of new plant bacteria) taking him all over the world. On 29 March 2022, after retiring, he concluded a reciprocal commitment to purchase a beautiful house in Montpellier (France) for his and his wife's retirement. Prior to concluding the final deed, he comes to consult you to find out what will happen to the property with regard to his matrimonial regime.

Resolution

The spouses, who married before the coming into effect in France of the Hague Convention of 14 March 1978 on the law applicable to the matrimonial property regime, are subject to the French pre-trial rules on the designation of the law applicable to the situation of spouses with foreign elements.

If the spouses have not chosen the applicable law, the Court of Cassation looks for the tacit will of the spouses and presumes that this tacit will is revealed by the place of the first matrimonial place of residence (Cass. 1st civ., 30 December 1959). Here we are talking about place of residence in the sense of French law, i.e. Article 102 of the Civil Code, which requires the cumulative meeting of two criteria: an intentional criterion, the will to settle in one place, and a material criterion, the meeting of the centre of interests.

The spouses' existence dictated by the professional imperatives of the spouse does not reveal their desire to settle in one place. As a result, it is impossible to establish with certainty a place of residence within the meaning of Article 102 of the Civil Code. In this case, the court has recourse to the technique of the bundle of clues by taking into account the common nationality of the spouses, their place of marriage. However, the spouses do not have a common nationality and there is no other evidence to support the place of their marriage.

There is therefore considerable uncertainty as to how the court, if seised, would designate the law applicable to the matrimonial regime of this couple.

The practitioner should therefore recommend (especially as the statement suggests that the spouses agree) that they remove this uncertainty by using the possibilities of designation of applicable law offered by Regulation 2016/1103 applicable by virtue of its Article 69(3) to all designations of applicable law after 29 January 2019, regardless of the date of the marriage.

The choice imposed by Article 22 should therefore be explained to them: law of the habitual residence (French law since they have decided to buy and reside in France), national law of one of the spouses (French law or Lebanese law). In view of their situation: lack of property in Lebanon, non-unified character of the Lebanese property law which varies according to the religion of the individuals (which makes it complex to establish its content), purchase in France and will to reside there, the practitioner will recommend the choice of French law.

Care should be taken by the practitioner to receive, prior to the acquisition and in a separate document complying with the formal requirements of the marriage contract, the document designating the applicable law.

According to Article 25(1) of Regulation 2016/1103, this agreement must be in writing, dated and signed by both spouses. By virtue of § 2 and 3 of the same Article, compliance with the conditions of the form of the marriage contract under French law is imposed. These requirements are laid down in Article 1394 of the Civil Code, which requires the contract to be executed before a notary and the simultaneous consent of the parties (which does not preclude the use of power of attorney, provided that it is also given by notarial deed).

THE PROPERTY REGIMES OF CROSS-BORDER COUPLES: THE ITALIAN PERSPECTIVE

Lucia Ruggeri[1]

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Summary: I. Statistical relevance of cross-border couples in Italy and numerical irrelevance of decisions. II. The Italian discipline of private international law on property relations. Comparison with the European discipline. III. The principle of unity in the Italian case law in matters of succession relationships: its impact on the property relationships of couples. IV. The qualification of juridical institutions: case law indications. V. Unions registered in the realm of Italian law.

Abstract: The paper offers an updated overview on the Italian case-law regarding property regimes of cross-border couples, analyzing several cases resolved by the Italian Courts. A special focus is dedicated to the Italian discipline of private international law on property relations with a specific regard to the issues offered by the iuridical qualification in private international relationships following the case law indications.

I. STATISTICAL RELEVANCE OF CROSS-BORDER COUPLES IN ITALY AND NUMERICAL IRRELEVANCE OF DECISIONS

The transnational dimension of family property relationships is very significant in a country like Italy, which is traditionally characterised by both incoming and outgoing migratory flows. As revealed by the latest data made available by ISTAT in 2020, 18,832 weddings were celebrated with at least one foreign spouse, a decrease of 44.9% compared to the previous year, a decrease also determined by the spread of the pandemic. However, the share of total marriages remained practically unchanged: 19.4% compared to 18.6% in 2019. Mixed marriages (in which one spouse is Italian and the other a foreigner) amount to over 14,000 (about 10,000 fewer than the previous year) and continue to represent the largest part of marriages with at least one foreign spouse: approximately eight in ten marriages with at least one foreigner are made up of mixed couples. In the areas where foreign communities are more frequent (northern and central Italy), one in four marriages is mixed, while in southern Italy this type of marriages reaches 11.3%. At the regional level, the following regions are at the top of the ranking: Umbria (25.8%), Lombardy (25.2%), Emilia-Romagna (25.1%) and Marche (24.8%).

[1] Lucia Ruggeri is full Professor of Private Law, University of Camerino.

The statistical framework outlined above demonstrates the importance of investigations in the legal context[2] on the problems posed by cross-border couples. Following Italy's participation in the international cooperation procedure that led to the adoption of European Regulations 1103 and 1104 of 2016,[3] an important study profile is the management of disputes concerning the property relationships of spouses or of those who are linked by registered partnerships. In this context, there are the powers delegated to the government[4] to modify the procedures aimed at obtaining a declaration of enforceability of a foreign law and those aimed at obtaining primarily a verification of the existence of the preconditions for the recognition of a foreign decision on the basis of Regulations 1103 and 1104 of 2016.

The statistical significance of cross-border couples is not, however, accompanied by the equally numerical significance of judgments that have as their object disputes between transnational couples. The reasons for this are mainly attributable to the wide use by these couples of negotiating tools for resolving disputes, and of the absorption of disputes in procedures such as separation and divorce. In other words, conflict in cross-border couples is managed by resorting to alternative instruments to the legal procedure for reasons of convenience, or the conflict explodes at different times such as at the moment of cessation of cohabitation determined by separation or divorce. In this sense, it seems highly negative that the European regulations have relegated to the recitals[5] reference to non-procedural instruments for settling the dispute, not dedicating a specific discipline to these important institutes. Article 47 of the Charter of Fundamental Rights provides for the effective protection of rights through appropriate tools:[6] the legal professionals involved in the implementation of Regulations 1103 and 1104, in this perspective, have a huge role in suggesting wise use of private autonomy to achieve increasing levels of effective and accessible justice for cross-border couples.

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2 M. Pinardi, 'I Regolamenti europei del 24 giugno 2016 nn 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Europa e diritto privato*, 733-751 (2018).

3 O. Feraci, 'Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate' *Rivista di diritto internazionale*, 529-537 (2016); V. Colonna 'I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate' *Famiglia e diritto*, 839-851 (2019).

4 Law 26 November 2021, no 206, Art 1, paragraph 14 a).

5 Recital 39 provides that 'This Regulation should not prevent the parties from settling the matrimonial property regime case amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the matrimonial property regime is not the law of that Member State'. For an interesting proposal of guidelines on mediation relating to cross-border couples, see C. Maugelli, 'GoInEU Plus Practical Guidelines on Cultural Mediation in Family and Succession Law'; S. Landini ed, *EU Regulations 650/2012, 1103 and 1104/2016: Cross-border Families, International Successions, Mediation Issues and New Financial Assets. GoInEU Plus Project Final Volume* (Napoli: Edizioni Scientifiche Italiane, 2020), 537-545.

6 V.J.I. Signes de Mesa, 'Introduction', in M. J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri, S. Winkler eds, *Property Relations of Cross-Border Couples in the European Union* (Napoli: Edizioni Scientifiche Italiane, 2020), 10, 6-13.

II. THE ITALIAN DISCIPLINE OF PRIVATE INTERNATIONAL LAW ON PROPERTY RELATIONS. COMPARISON WITH THE EUROPEAN DISCIPLINE

The financial relationships of cross-border couples in Italy are considered in Article 30 of L 218 of 1995 which establishes that property relations between spouses are regulated by the law identified to govern their personal relationships.[7] The renvoi made by Article 30 to Article 29, which governs the personal relationships between spouses, determines the application, in the first instance, of the common national law and, in its absence, the application of the law of the State in which married life predominantly takes place.

The formulation of the connecting criteria is the result of the adaptation of the Italian system of private international law to constitutional principles: before the 1995 reform, the connecting factor in the absence of a common law was the application of the law of the country of the husband. This rule, by virtue of the *tempus regit actum* principle, continued to be used contrary to the principles of equality contained in the Constitution and in the international conventions to which Italy adhered. The intervention of the Constitutional Court was necessary to eliminate this inequality of treatment between men and women in matters of property relations characterised by internationality: in 2006,[8] the provision contained in Article 19(1), of the provisions on the general law was hence declared unconstitutional, which, although repealed by L 218/1995, had continued to be invoked for marriages contracted before the reform of private international law.

This decision is part of a phase marked by the great commitment of the constitutional judge to adapt the legislation dedicated to transnational couples to the principles of equality: it is preceded by other judgments which declared as unconstitutional the connecting factor based on the national law of the husband applied by the provision of the general law on the subject of personal relations between spouses[9] and on the subject of parental relations.[10]

Adaptive reading is still a necessity today as the current Italian regulatory system of private international law does not meet the constitutional requirements expressed by Article

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[7] On the subject with some critical points about the non-application of the criterion of the closest connection in property matters, see I. Viarengo, 'Problemi di individuazione della legge applicabile ai rapporti patrimoniali e ruolo della volontà delle parti' *Rivista del Notariato*, 5, 1127-1154 (2000).

[8] Constitutional Court 4 July 2006 no 254, *Rassegna di diritto civile*, 2, 514 (2008). The question of constitutional legitimacy was proposed by the Supreme Court, with the order of 16 July 2005, no 15092. On the consequences of the ruling of constitutional illegitimacy, see C. Di Stasio, 'Rapporti personali tra coniugi', in M. Sesta ed, *Le fonti del diritto italiano. Codice della famiglia*, (Milano: Giuffrè, 2007), 4888.

[9] Constitutional Court 5 March 1987 no 71, *Rivista di diritto internazionale*, 1987, I, 1365; in *Giurisprudenza Italiana*, 1987, I, 1153, with a note by A. De Cupis, 'Eguaglianza coniugale e conflitto di leggi?'; *Foro italiano*, 1987, I, 2316, with a note by Poletti Di Teodoro, 'Una svolta storica nel diritto internazionale privato italiano: il primo intervento «abrogativo» della Corte costituzionale'.

[10] Constitutional Court 10 December 1987 no 477, in *Rivista di diritto internazionale*, 1988, I, 314; in *Foro italiano*, 1988, I, 2830, with a note by Pagano, 'La legge regolatrice dei rapporti personali tra coniugi e dei rapporti tra genitori e figli dopo la declaratoria di incostituzionalità degli art. 18 and 20 Preleggi'. The decision made by the Constitutional Court is important because it denies the 'neutral' nature traditionally attributed to the norms of private international law and considers them capable of conflicting with constitutional principles. On the subject, see U. Villani, in Ugo Villani - Marcello Di Fabio Francesco Sbordone, *Nozioni di diritto internazionale privato, Parte generale e obbligazioni* (Napoli, Edizioni Scientifiche Italiane, 2013), 24.

117 of the Constitution, as amended in 2001. The constitutional charter imposes a functional limitation of sovereignty on compliance with Euro-unitary and international principles, with the consequent need to abandon the vision of international rules of private law based on the logic of conflict between legal systems and the adoption of a logic for identifying the regulation that can more satisfactorily realize the interests of foreign people and cross-border families.

The intensification of the mobility of couples has raised a question: is the reference made by Article 30 to Article 29 static or dynamic in nature?

The issue was addressed by the Court of Appeal of Catania[11] in a case involving a real estate purchase by an Italian married to a Kenyan in the State of Virginia in the USA. Based on Article 51 of L 218/1995 when the attribution of a real right derives from family relationships, the connecting factor is established by Art 30.[12] In the present case, at first, the couple established their residence in the State of Virginia. Shortly before leaving Virginia for Mozambique, the husband bought a property in the State of Virginia, a state that does not know the institute of community of property. The couple, after a further transfer to Kenya, entered into a crisis and the wife asked for the property purchased in Virginia to be re-entered into community, invoking the application of the law of Mozambique or Kenya, both states that consider community of property. The Italian judge denied that the change in the applicable law determined by the change of the State of residence may produce retroactive effects because in the present case the principle *tempus regit actum* was applicable, serving the purpose of ascertaining legal relationships.

According to the Sicilian judge, both third parties and cross-border couples rely on the static application of the connecting factor in organising their property relationships and a change would amount to unfairness. The solution proposed by the Court of Appeal has matured through interpretation and in the absence of legislative indications. The regulatory framework offered by Regulation 1103 is quite different, which in Article 26 makes it possible to concretely evaluate the country that the spouses have taken as a reference for the planning and organisation of their property relationships, with possible consideration also of the time spent in a particular state. Undoubtedly, therefore, the European Regulations will go beyond static readings, and possibly also the logic of the *tempus regit actum* which, in the present case, has led to the automatic exclusion of the possibility that an act signed in a state a few days before departure could be regulated only by the law of the country in which the deed was made.

Dynamic readings of the connecting factors have already been proposed by the Italian case law with regard to the identification of the law applicable to marital separation. As established by the Supreme Court in 2011,[13] the location where married life takes place can be identified

[11] The question refers to the Court of Appeal, 24 September 2018, at Ilfamiliarista.it, 13 November 2018.

[12] Art 51 makes a distinction between the title on which the property is based or other real right and the content and method of exercise. The conflict-of-law rules are in this case based on the *lex rei sitae* for the acquisition and loss of possession, while they are governed by the rules on succession or by those on family or contractual matters when the right *in rem* is part of a succession, in a family property relationship, or it is the result of a contract. On the subject, see F.P. Lops 'I rapporti patrimoniali tra coniugi', in M. Ieva ed, *La condizione di reciprocità – La riforma del sistema italiano di diritto internazionale privato – Aspetti di interesse notarile* (Milano: Giuffrè, 2001), 170.

[13] This refers to the Supreme Court 4 April 2011 no 7599, Civil Law Abstracts 4, 536 (2011).

having regard to the main centre of the couple's interests and affections, which does not always coincide with the place of residence.

The distinction in Italian law between the primary and the secondary property regime[14] has led to a restrictive reading of Article 30 which is considered to be applicable exclusively to the secondary regime (legal and conventional property regime),[15] while contribution obligations, assistance obligations and family solidarity are governed by Article 29.[16]

This determines the first difference between Italian private international law and European legislation: the 2016 Regulations, in fact, are also applicable to the so-called primary family regime. In the Italian legislation, for personal relationships there is no opportunity to choose the applicable law, while the European Regulations give ample space for the possibility of choice. As most of the matters that are now regulated by the Regulations have been subtracted in an interpretative way from the core of Article 30, it is rare in Italian practice to resort to instruments of choice of the applicable law that the Italian legislator provides exclusively for property relations. Unlike Article 29, Article 30 allows for an agreement on the applicable law: the choice may fall on that of a State of which at least one of the spouses is a citizen or in which at least one of them resides. The *professio iuris* contemplated by the European regulations in Article 22 adds as a possible choice the law of the country in which the spouses have common residence and, with a specific provision contained in Article 69(3), also allows those who had married before the entry into force of the Regulations to carry out a *professio iuris* subsequently, expanding the scope of application of Regulation 1103/2016. Similar provisions are envisaged for couples linked by registered partnerships with the addition of the possibility for such couples to choose the law of the State in which the registered partnership was established.

Similarities with the discipline contained in the Twin Regulations can also be found in relation to the protection of third parties. Article 30 of L 218/1995 establishes that if the regime of property relations between spouses is governed by a foreign law, this can be considered

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[14] For a description of the family property relationships in the various Member States of the European Union, see L. Ruggeri, I. Kunda, S. Winkler (eds), *Family Property and Succession in EU Member States: National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), 1-709. For a comparison between Italian and Croatian property relations, see L. Ruggeri and S. Winkler, 'Neka pitanja o imovinskim odnosima bračnih drugova u hrvatskom i talijanskom obiteljskom pravu' *Zbornik Pravnog fakulteta u Rijeci* 40, 1, 167-197 (2019).

[15] See 'Article 30', in *Codice della famiglia e dei minori commentato*, available online at One Legale, (Alphen aan den Rijn: Wolters Kluwer, 2022), 2 according to which the Italian secondary property regime includes the ownership and administration of assets, the prohibition or any limitations on sales between spouses, the property fund, the powers of representation, the modification of property relationships following separation, the prenuptial agreements admitted in some legal systems, aimed at identifying the future applicable national law and at regulating the property relations between spouses, as well as at regulating a possible marriage crisis. During a divorce procedure, prenuptial agreements signed by two Italian citizens residing abroad were considered valid on the basis that according to Art 30 of L 218 of 1995, it was possible to subject property relations to foreign law when both citizens had their residence abroad. See the Supreme Court 28 May 2004 no 10378, Rivista Diritto Internazionale Privato e Processuale, 2005.

[16] See R. Clerici, 'Articolo 29', in F. Pocar, T. Treves, S. Carbone, A. Giardina, R. Luzzatto, F. Mosconi and R. Clerici (eds), *Commentario del nuovo diritto internazionale privato* (Padova: Cedam, 1996), 155; L. Garofalo *I rapporti patrimoniali tra coniugi nel diritto internazionale privato* 2 (Torino: Giappichelli, 1997), 145; G. Carella 'Rapporti di famiglia (diritto internazionale privato)' Enciclopedia del diritto. Update (Milano: Giuffrè, 2001), V, 908.

against third parties only if they have knowledge of it or have ignored it through their own fault and with regard to real rights over immovable property. In the European Regulations, there is a specific regulation of the protection of third parties with recourse to a series of presumptions contained in Article 28 of both regulations. Based on Article 30, however, the opposition to the third party 'is limited to cases in which the forms of disclosure prescribed by the law of the State in which the assets are located have been respected'. This determines a series of problems that linger even in the case of the application of the Regulations given that, even in these, one of the criteria of the presumption of knowledge concerns precisely the fulfilment of the obligations of disclosure or registration of the matrimonial property regime or of the property effects of the registered partnership.[17] Only thanks to the creation of a consolidated case law orientation in respect of foreigners residing in Italy who have entered into marriage abroad is it allowed to enter a notation into the register of marriages for the purposes of enforceability against third parties.[18] These notations were rejected by the officials of the registry offices on the basis of the provisions contained in a circular[19] interpreting Article 19 of Presidential Decree 396/2000, which considered the transcription of such acts as a mere reproduction of foreign acts and as such was unsuitable for producing effects and justifying additional notations.

This interpretation, thanks to an opinion given by the Council of State,[20] led to the adoption of an interpretative circular[21] which allowed foreigners residing in Italy to proceed with the notation. Foreigners who are not resident in Italy and who have entered into a marriage or registered partnership abroad are still precluded today from noting their union in the registers of the civil state with the consequent impossibility of fulfilling the disclosure obligations for potential property regimes chosen by them. The impediment derives from Article 19 of Presidential Decree 396/2000.[22]

To overcome this inconvenience, the practice of resorting to real estate registers by recording property regimes has been developed:[23] a ploy adopted to overcome the prohibition on notation which strongly discriminates between resident and non-resident foreigners in Italy. As evidenced by the doctrine, recourse to the recording pursuant to Article 2643 of the Civil Code makes the single legal situation determined by the application of the foreign

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17 M. Giobbi and L. Ruggeri, 'Property Regimes and Land Registers for Cross-Borders Couples', in L. Ruggeri, A. Limante, N. Pogorelcnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 266-291.

18 Thus Court of Saluzzo, Decree, 11 August 2010, Rivista di Diritto Internazionale Privato e Processuale, 2011; Court of Massa, 22 July 2010, Rivista del notariato, 2011, 2, 403; Court of Monza, 31 March 2007, Rivista del notariato, 1171, with a note by R. Zisa 'Scelta della legge regolatrice dei rapporti patrimoniali da parte di coniugi cittadini stranieri e annotazione a margine dell'atto di matrimonio' and Court of Venice, decree 470, 15 September 2006, Guida al diritto - Il Sole 24-Ore, no 1, November 2006, 82.

19 This is the MIACEL Circular no 2/2001 (Direzione Centrale delle Autonomie Servizio Enti Locali Divisione Servizi Locali d'Interesse Statale) no 00102161-15100 / 397 - 26.3.2001 of 26 March 2001, Guida al diritto - Il Sole 24-Ore, November 2006, no 1, 82.

20 Reference is made to the Council of State, opinion of 8 June 2011 no 1732.

21 Circular of 3 August 2011, no 10307.

22 Presidential Decree of 3 November 2000, n 396 - Regulation for the revision and simplification of the civil status system.

23 See D. Damascelli, 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato Italiano ed europeo', *Rivista di diritto internazionale*, 1114 (2017).

law the reason for opposing, rather than the foreign law itself, which could not be concretely known by third parties.[24]

III. THE PRINCIPLE OF UNITY IN THE ITALIAN CASE LAW IN MATTERS OF SUCCESSION RELATIONSHIPS: ITS IMPACT ON THE PROPERTY RELATIONSHIPS OF COUPLES

In this scenario, in order to understand the interpretation and application of the rules of private international law on the property regimes of transnational couples, it may be useful to examine a recent ruling issued by the Italian Supreme Court in matters of succession.

This ruling was adopted in Joint Sections on 5 February 2021, no 2867,[25] which set the principles of law concerning a key feature of private international family law such as the principle of unity. On the basis of the principle of unity, the law applicable to the property regimes of couples is applicable to all assets regardless of where they are located. The principle is applicable both when the law has been identified following an agreement on the basis of Art 22 of both regulations and when it is the result of the application of the rules contained in Art 26, which identifies the applicable law in the absence of a choice made by the couple. The principle of unity is opposed to the principle of scission which instead leads to the application of different laws depending on the nature of the assets;[26] this principle is also adopted by Regulation 650 of 2012 in matters of succession, and characterises Italian private international law.[27]

With this decision, based on the rules of Italian private international law, the Joint Sections consider the principle of unity as a principle that is not always applicable, allowing the entry into Italy of rules based on the principle of scission. The decision is interesting for those who study international family property law as it emerges that the principle of unity is not always absolute and that consequently criteria for applying the law based on different logics such as the *lex rei sitae* can find their place.

The solution proposed by the Joint Sections differs from that offered by other European judges.

In 1985 the High Court, Chancery Division,[28] found itself deciding on the will of Christopher William Adams, domiciled in England, who had left all his real estate assets to

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[24] Thus Vecchi, 'La scelta della legge regolatrice il regime patrimoniale dei coniugi', in *Familia*, 2003, 67. The recording contributes to generating in third parties an innocent trust regarding the legal situation: on the subject, see Art 30, 20.

[25] The decision can be consulted in Giurisprudenza italiana, 2022, 598, with a note by R. Grimaldi, 'Tramonto (a colpi di rinvio) dell'universalita`/unita` della successione?' For an examination of this decision, in Foro it., see below, Section II.

[26] V.D. Martiny, sub Art 21, in I. Viarengo, P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham Glos: Edward Elgar Publishing, 2020), 192.

[27] It was already present in Art 23 of the Provisions on the general law and was confirmed by the 1995 reform of private international law (see Art 46).

[28] This is the Sentence of the High Court of Justice Chancery Division 31 July 1985 in Re Estate of Christopher William Adams deceased. See L. Fumagalli, 'Rinvio e unità della successione nel nuovo diritto internazionale privato italiano', *Riv. dir. int. priv. proc*., 829, 837 (1997).

his wife. The real estate that was the subject of the will was in Spain, a state which, unlike England, protects the position of the relatives of the deceased. For this reason, the son of the deceased asked for the application of Spanish law invoking the renvoi of the English law to the *lex rei sitae*. The decision made by the English court was to deny the application of the renvoi as the unity of the succession was a fundamental principle of Spanish law that prevented the application of Spanish law to assets located in Spain, but belonging to a foreign owner.[29]

The decision made by the English court was to deny the application of renvoi as the unity of succession was a fundamental principle of Spanish law which prevented the application of English law to the real estate located in Spain.

This principle was considered equally insuperable by the Spanish Supreme Court[30] in a case of the challenge of a will by the pretermitted son of an Englishman domiciled in Spain. The deceased had in fact appointed his wife as sole heir, the movable assets consisting of an art collection were located in Spain, and the son invoked the application of Spanish law on the basis of the renvoi made by the rules of English private international law to Spanish law. In this case, the scission applicable on the basis of English law would allow the pretermitted child to benefit from the safeguards offered to his position by Spanish law as the law of domicile is applicable to movable property. The movable assets consisting of an art collection were located in Spain and the son invoked the application of Spanish law on the basis of the renvoi made by the Spanish private international law rules to English law. In this case, the scission applicable on the basis of English law would allow the pretermitted child to benefit from the safeguards offered to his position by Spanish law. However, even in this case, the judge considered the principle of unity to prevail, considering that the renvoi could not always be the result of automatism, but that it could rather be applied flexibly taking into account the concrete situation. This led to the result that Spanish law was deemed inapplicable and English law was deemed the only law applicable to the succession.

This decision confirms an orientation expressed in a previous case by the Spanish Supreme Court in 1996,[31] confirming the need to adequately balance the legal solution and bearing in mind the importance of the principle of unity. It is understood that the choice made by the European legislator in Regulations 1103 and 1104 not only feeds on the legal solutions adopted by Regulation 650/2012,[32] but is also affected by the case law formed on the subject of renvoi determined by the application of domestic rules of private international law. In this complex scenario, the case law that will be formed in the matter of property relations between spouses will necessarily be affected by the strong choice made by the Twin Regulations, which on the one hand exclude recourse to renvoi and on the other adopt as a basic criterion for

[29] The case is analysed in a fact sheet written by C. Olivier, dedicated to developing practical cases which can be consulted at the following site: https://elibrary.fondazionenotariato.it/ Articolo.asp?art=28/2811&mn=3#note.

[30] *Denney v Denney (Royde Smith) Spanish Supreme Court 21 May 1999 Appeal no 3086/1995.* See E. Castellanos Ruiz, 'Sucesión hereditaria', in A.-L. Calvo Caravaca - J. Carrascosa González (eds), *Derecho Internacional Privado*, *8, II*, Granada, 2007, 283, 291.

[31] Reference is made to Tribunal supremo 15 November 1996, Lowenthal. See, in this regard, M. Virgós Soriano and E. Rodríguez Pineau, 'Succession Law and Renvoi: The Spanish Solution', *Festschrift für Erik Jayme* (München, 2004) vol I, 977.

[32] For the link between the Twin Regulations and Regulation 650/2012 see, among others, V. Lagarde, 'Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partnerships enregistrés', *Riv. dir. int. priv. proc.*, 677 (2016).

identifying the applicable law the principle of unity,[33] without providing for attenuations or mitigations that can be found in Regulation 650/2012.

Indeed, in Regulations 1103 and 1104, the rigid application of the principle of unity is accompanied by greater flexibility in matters of jurisdiction. Article 10 introduces a subsidiary jurisdiction to the Court of the State in which a specific immovable property is located; the dispute relating to such property may in this case be dealt with by the judge of that State. The exception to the principle of unity is based on considerations of expediency for the case to be dealt with by the judge of the *locus rei sitae*;[34] likewise, the decision of the court seised to exclude from the decision assets located in States that do not participate in the enhanced cooperation procedure may also be based on the evaluations of expediency when the dispute concerning the assets of a couple is connected with a succession dispute. Based on Article 13 of the two Regulations, the judge, at the request of a party, could exclude from the ruling certain goods that are located in third States if, on the basis of the rules of international law of these States, they consider that their decision could not be recognised or enforced.[35]

On closer inspection, the entry of the scission system applied by the Supreme Court is based on the presence of the renvoi in the Italian rules of private international law. The Twin Regulations, however, unlike the Italian private international law system, expressly exclude the renvoi: in Article 32 it is clearly excluded that the applicable rules may include the rules of private international law. The exclusion of renvoi is frequent in private international law of European derivation: it is applicable in numerous provisions such as those relating to contractual and non-contractual obligations, separation and divorce, and maintenance obligations. It appears to be rigidly inspired by the doctrine of immutability,[36] deviating moreover from the choices made in matters of succession where Article 34 of the Succession Regulation allows partial renvoi to the law of a Member State or a third State.

Consequently, it seems possible to affirm that the application of the foreign law based on the scission criteria cannot be implemented when it is a question of family property relationships governed by the Twin Regulations, while it can find its application for as long as the Italian rules of private international law are applied. There is still a long way to go in respect of this application since, based on Article 69(3) of the Regulations, the entire chapter III, including Article 32, applies exclusively to married couples starting from 29 January 2019.

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[33] For an examination of the renvoi in connection with the application of the principle of unity, see A. Davì, 'Le renvoi en droit international privé contemporain', *Recueil des cours*, vol 352, 471, (2010).

[34] Thus P. Franzina, 'sub Art. 10', in I. Viarengo, P. Franzina (eds), *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Edward Elgar Publishing, 2020) 114.

[35] V.F. Marongiu Bonaiuti, 'Article 13', in Alfonso-Luis Calvo Caracava, Angelo Davì and Heinz-Peter Mansel (eds), *The EU Succession Regulation* (CUP 2016), 216.

[36] V. M. Gebauer, 'Art 32', in I. Viarengo, P. Franzina (eds), *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Edward Elgar Publishing, 2020), 314.

IV. THE QUALIFICATION OF JURIDICAL INSTITUTIONS: CASE LAW INDICATIONS

The decision made by the Joint Sections 2867/2021 is also interesting because it addresses the issue of the qualification of institutes in Italian private international law.[37] Based on Article 15 of L 218 of 1995 'the foreign law is applied according to its own criteria of interpretation and application over time'. Consequently, the foreign law, operating in the Italian legal system by virtue of the rules of private international law, must be applied by the Italian judge making use of all the interpretative tools posed by the foreign legal system.

According to the Joint Sections, however, Article 15 'does not give an answer as to the profile of the qualification and therefore of the nature of the law of another State, which has to be dealt with, therefore, according to the lex fori'. The judge must determine the meaning of the juridical expressions 'that connote the categories of the case in point' according to the canons of qualification pertaining to the Italian legal system (*lex fori*) rather than on the basis of the *lex causae*.

In the present case, the revocation of the will that English law includes in family property law would fall under succession law precisely because the qualification would then be removed from the interpretative rules of the foreign law and the court seised would have the prerogative to apply the *lex fori*.

It should be noted that the position taken by the Joint Sections of the Supreme Court is in line with a concept traditionally applied for the rules of private international law that separates interpretation from qualification. This interpretation of Article 15 of L 218 of 1995 serves the purpose of ensuring uniformity in the national territory of the reading of foreign laws, but leaves open the problem of consistency with opinions now present in other fields of legal science that advocate interpretation for the purpose of application. In this different perspective, qualification is the natural landing place of interpretation and, in turn, interpretation is nourished by qualification in a circular type of procedure. In this scenario, the scission between the qualification phase, always attributed to the *lex fori*, and the phase of the interpretation that can be carried out on the basis of the *lex causae*, does not appear entirely convincing.[38] In a systematic reading of the legal system, the rules of private international law serve to identify the law applicable to the case characterised by international profiles, assuming legality because they respond to a fundamental function: they ensure adequate regulation of all facts without excluding some due to the circumstance that they are characterised by elements of internationality.[39]

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[37] For an analysis of the operative modalities of the qualification in private international law see, U. Villani, n 10 above. On the subject, see in various ways, P. Fedozzi, 'Il diritto internazionale privato. Teorie generali e diritto civile', in P. Fedozzi and Santi Romano eds, *Trattato di diritto internazionale*, IV (Padova: Cedam, 1935), 181-185; G. Pacchioni, 'Diritto internazionale privato' (Padova: Cedam, 1935), 171; E. Betti 'Problematica del diritto internazionale' (Milano: Giuffrè,1956), 188-190; E. Vitta, 'Diritto internazionale privato', 1 (Torino: UTET, 1972), 311-313.

[38] See G. Barile, 'Qualificazione (dir. intern. Privato)' *Enciclopedia del diritto* (Milano: Giuffré, 1987), XXXVIII, 10, 1-22. G. Barile points out that 'the legal operator finds the solution to a problem of private international law through much more complicated ways than those of formal logic'.

[39] For some time, studies have been developed, especially in the United States, aimed at finding the best solution for the case that presents elements of internationality. On the topic, see E. Vitta 'Diritto internazionale privato (voce)', *Digesto*, (Alphen aan den Rijn: Wolters Kluwer, 1990), 54.

In this perspective, the legal nature of foreign regulations is not the result of their reference by the *lex fori*, but it seems to be inherent in their function of regulating cases characterised by transnationality.[40] It is therefore easy to understand how even the institutes unknown to the domestic legal system, but present in a particular foreign legal system, can produce effects in the territory of a particular State without being qualified on the basis of internal categories.

It should be noted that the scission between interpretation and qualification is not envisaged for the rules of private international law present in international Conventions: for these, in fact, on the basis of Article 2(2), of Article 15 of L 218 of 1995, interpretation is done for application purposes aiming at guaranteeing uniformity in an international context. The interpretative indications contained in the Vienna Convention on the Law of Treaties also operate in this sense.[41]

The elaboration of an autonomous qualification connotes private international law of a Euro-unitary matrix: in this context, in fact, the Court of Justice guarantees uniform interpretation of the rules in the context of the European Union, avoiding the impact of fragmentation caused by readings based on the *lex fori*.

In Regulations 1103 and 1104 of 2016, the issue of qualification and recognition of institutes present in one State and absent in another is extremely delicate, having regard to profiles such as family and property. With regard to the notion of marriage or registered union, therefore, providing an autonomous notion of a European type by classifying this problem as a preliminary question that can be resolved by the judge on the basis of domestic law (Recital 21) is to be avoided, while the solution adopted for the qualification of rights *in rem* is different.

Article 29 of the Regulations establishes, in fact, that when a right *in rem* envisaged by the applicable law is not recognised as a right *in rem* by the law of the State in which the application is invoked, that right is 'adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it'. Adaptation is also a solution present in Regulation 2012/650: it is a demonstration of how the judge must adopt an interpretation that is attentive to factual, actual profiles and not rigidly anchored to the legislative dictate.[42]

As can be seen, the theme of interpretation and qualification holds a central place in private international law whose interpretation cannot be monolithic, but can vary according to the techniques used to achieve the objective of attributing a discipline to cases characterised by transnationality.

In the Italian context characterised by the application of Article 15 of L 218/1995, understanding which foreign law is applicable serves the purpose of identifying the meaning

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[40] The consideration of foreign regulations as facts to which relevance is to be attributed is the subject of wide debate.

[41] F. Mosconi 'Sulla qualificazione delle norme di diritto internazionale privato di origine convenzionale', in *Scintillae iuris: Studi in memoria di Gino Gorla*, (Milano: Giuffrè, 1994), II, 1459.

[42] See also P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milano: Giuffrè, 2019), 220-221 and L. Ruggeri, 'I regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border, in EU Regulations 650/2012, 1103 and 1104/2016' in S. Landini ed, *Cross-border Families, International Successions, Mediation Issues and New Financial Assets* (Napoli, 2020), 122-123.

of the expressions used by the conflict-of-law rules to indicate the abstract categories, and at the same time of verifying the existence in the specific case of the characters of the abstract case contemplated by the conflict-of-law rule for the purpose of the subsumability of the former in the latter.[43] By virtue of internal coherence,[44] a double qualification is envisaged: in a first phase, the qualification is carried out to identify the competent rules of private international law, while in a second phase the rules thus identified would allow the cases to be qualified. Many objections have emerged against this approach which, with various perspectives, have led to a profound rethinking of the qualification operated by the rules of private international law and, more generally, regarding the subject matter of private international law.

It is therefore necessary to ask whether the formulation adopted by Article 15 of Article 218 of 1995 can still be useful today, founded as it is on a rigid split between qualification and interpretation, in an era such as the current one characterised by the use of interpretative techniques based on the balancing of values and on readings that adapt to constitutional, European and international principles. In this context, the subsumption of the specific case into a specific abstract case could lose relevance: the classification of a fact within a provision[45] is not an adequate tool for identifying the applicable discipline which, in order to be specified, requires an assessment of the structure of interest and a comparison with the assessment of value expressed not by a single provision, but by the entire system. In Italian private international law, this new dimension of interpretation understood as a unitary and circular procedure between the legal text and the context is still not fully explored, even if there is no lack of openings towards a non-literal reading of the conflict-of-law rules that leads to a broader and more flexible reading[46] of the terms used in them, not always coinciding with the interpretation given to a certain term by a rule of domestic law applicable to cases without the elements of internationality.[47] Article 15 is therefore read and applied as if it were only a matter of choosing between a provision inserted in an Italian law and a provision inserted in a foreign law (so-called conflicts justice) without the possibility of evaluations of material justice: once the qualification on the basis of the *lex fori* is applied, the application of the foreign law ensues automatically without the qualification being influenced by the content of the applied law.[48]

The European legislator is well aware of all this and in respect of the traditions and cultures expressed by the various countries in matters of family in Recital 21 of Regulations 1103 and 1104, it excludes the fact that these can be applied for preliminary issues such as existence, validity or recognition of marriages or registered partnerships. A complete renvoi to the law of the forum including the rules of private international law is therefore applicable to the preliminary questions. Consequently, if this law contains the renvoi, the qualification of the institutes may also take place through the renvoi to another law.

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43 V.D. Damascelli 'La Cassazione si esprime su qualificazione e rinvio in materia successoria: un'occasione persa per la messa a fuoco di due questioni generali del diritto internazionale privato' *Famiglia e Diritto*, 12,1134 (2021).

44 G. Morelli, G. Morelli, *Elementi di diritto internazionale privato* (Napoli: Jovene, 1982), 34.

45 For a critique of the use of legal reasoning based on formal logic alone, see G. Barile, n 38 above, 8.

46 G. Barile, n 37 above, 12.

47 E. Vitta, n 37 above, 24.

48 E. Vitta, n 37 above, 13.

There is a need for a new interpretation of the internal private international law system so as to be able to apply also in this area the techniques and methodologies that reflect the changed relationship between legal systems established at the constitutional level by the modification of Art 117 of the Constitution.

In the current Italian scenario, the rules of private international law in which internal rules inspired by completely different logics from those expressed by the European Union coexist, it seems necessary to rethink the application mechanisms traditionally adopted, a rethinking based on the dialogue between doctrine, case law and legislator, from which an organic revision of the system of private international law is expected.

V. UNIONS REGISTERED IN THE REALM OF ITALIAN LAW

The Italian legal system is characterised by the recent relevance of registered unions, by the absence of any form of recognition for same-sex marriages and by a body of legislation dedicated to private international law that is not adequate for the numerous innovations made in this area by European Union law.[49] Only in 2016, in fact, were registered unions regulated.[50]

However, Italy reserved exclusively these for same-sex couples: there is, therefore, a regulation that declines the family taxonomy on the basis of sex, with an evident need to apply the legal solutions prepared on the basis of the homogeneity or diversity of the sex of the members of the couple. In this, the Italian legislation appears extremely misaligned with the European regulation which, on the other hand, is applied on the basis of a dichotomy between the institute of marriage and that of the registered union, but which is not at all based on the sex of the persons forming the couple. This peculiar regulatory context makes the absence of case law dedicated to the property issues of cross-border homosexual couples understandable since this taxonomy is so recent that it has not yet resulted in many cases.[51] The regulatory framework of private international law dates back to 1995 and, before 2016, there were no specific rules for the property relations of registered unions: only in 2017, with the adoption of Legislative Decree 19 January 2017, no 7, were provisions introduced relating to marriage contracted abroad by Italian citizens of the same sex and to the civil union between adults of the same sex, with Articles 32-bis to 32-quinquies. The introduction of this new legislation is destined to produce results in terms of case studies only in the future and those who want to analyse the case law approach to the problems posed by the property relationships of cross-border couples are left to investigate those few cases subjected to judges on the basis of the

[49] The regulatory framework of the European Union on family matters is now truly composite and complex. For an interesting analysis of the interpretation problems posed by the different contents and meanings of the 'internal' definitions in relation to the normative definitions present in the European Regulations dedicated to family and food law, see. F.G. Viterbo, 'Claim for Maintenance after Divorce: Legal Uncertainty Regarding the Determination of the Applicable Law', in J. Kramberger Škerl, L. Ruggeri, F. Giacomo Viterbo eds, *Case studies and Best Practices Analysis to Enhance EU Family and Succession Law: Working Paper* (Camerino: University of Camerino, 2019), 176, 171-184.

[50] Law 76 of 20 May 2016 in fact introduced the institute of civil unions specifically dedicated to unions between persons of the same sex.

[51] On the role of legislative policies and case law decisions in the matter of family taxonomy, see the interesting considerations of J.M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' *The Equal Rights Review*, Vol. 10, 83, 83-96 (2013).

rules contained in L 218/1995 not yet amended or affected by coexistence with the European Regulations 1103 and 1104 of 2016.[52]

A first question posed by the peculiar Italian legal framework stems from the so-called downgrading carried out by Article 32-bis of L 218/95 as amended in 2017. Marriage between persons of the same sex is not in fact provided for by Italian law which, in the event that two Italians enter into marriage abroad, has to apply a sort of novation *ex lege* of the relationship regulating it as a civil union, the only institute that can be used for this type of couple. The provision contained in Article 32-bis gave rise to a wide debate:[53] if, in fact, a distinction is made between the marriage-act and marriage-relationship, it is necessary to ask whether the transformation of the marriage entered into abroad concerns the act and the relationship or is limited only to the relationship. Among the rules of private international law, there are also so-called rules for the recognition of situations[54] which allow for the harmonisation of the attribution of effects to cases not provided for in one legal system, but present in another legal system, thus avoiding 'lame' situations,[55] applicable in a single legal context. Article 32-bis could, in this perspective, not be considered a conflict-of-law rule, but a rule that leaves to foreign law the identification of the features necessary to have a marriage act and that reserves the task of attributing to the foreign act those effects that in Italy are attributable to the union of two people of the same sex.[56] The distinction proposed between the act and the relationship is, however, not very convincing if compared with the European regulation which delegates any preliminary question to the law of the judge, attributing to this law the coverage of the matters of existence, validity and recognition of marriages or registered unions. In this perspective, the provision contained in Article 32-bis could be considered a rule that adapts by attributing the effectiveness of a civil union to homosexual marriage entered into abroad: an acceptance of the union entered into abroad in a legal form that is not a marriage.[57] The consequence of the recognition made by Article 32-bis is the subjecting of same-sex marriage entered into abroad to the Italian law dedicated to civil unions, with the consequence that the

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[52] For a concrete application of Regulation 1104/2016, see F. Dougan and J. Kramberger Škerl, 'Model Clauses for Registered Partnerships under Regulation (EU) 2016/1104', in M.J. Cazorla González and L. Ruggeri eds, *Guidelines for Practitioners in Cross-border Family Property and Succession Law* (Madrid: Dykinson, 2020), 37-42.

[53] See, for all, V. Biagioni 'Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017' *Rivista di diritto internazionale*, 498 (2018); C. Campiglio 'La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso' *Rivista di diritto internazionale* 41 (2017); S. Tonolo 'Articlolo 1 comma 64 — Profili problematici di diritto internazionale privato nella nuova disciplina italiana delle unioni civili e degli accordi di convivenza', in P. Rescigno and V. Cuffaro eds, *Unioni civili e convivenze di fatto: la legge*, (Torino: UTET Giurisprudenza italiana, 2016), 293.

[54] On the importance of forms of recognition in the international private context, with particular regard to the law of persons, see R. Baratta, 'La reconnaissance internationale des situations juridiques personnelles et familiales', *Recueil des cours*, vol 348, 253 (2011); S. Pfeiff, 'La portabilité du statut personnel dans l'espace européen', Bruxelles, 2017.

[55] On the subject, see Picone, 'La teoria generale del diritto internazionale privato nella legge italiana di riforma della materia', *Rivista*, 289, 297 (1996).

[56] Thus, D. Damascelli 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato Italiano ed europeo' *Rivista di diritto internazionale*, 1114 (2017).

[57] As highlighted by D. Damascelli, ibid 47, 1115, the absence of same-sex marriage in the Italian law in the absence of Article 32-bis would lead to an inexorable nullity of the marriage entered into abroad.

property regime of the couple is subject to the regime of legal communion of assets,[58] unless the parties opt for other regimes.

Nothing is provided for couples made up of an Italian and a foreigner or foreign citizens who have entered into a registered partnership abroad: the silence of the Italian legislation does not prevent, however, extensive interpretations of Article 32-bis which is also considered applicable to so-called mixed couples or to an analogical application of Article 32-ter, paragraph 4, to heterosexual couples who have entered into a registered partnership abroad.[59] As can be understood, the comparison between domestic taxonomies and foreign taxonomies is not resolved with rigid mechanisms but through an elastic reading of the rules of private international law. This method allows the courts to elaborate solutions that substantially make adjustments whenever they see a concrete situation and a structure of interests worthy of applying in the internal legal system, even if not expressly contemplated by it (think, in this regard, of trust[60] or the kafala[61]).

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[58] On the basis of Art 1, paragraph 13, of L 76/2016.

[59] On the topic, V. D. Damascelli, n 43 above, 1130, which highlights that on the basis of Art 32-ter, paragraph 1, civil unions entered into abroad by Italians or foreigners whose law does not know the institute of civil union for heterosexual couples risk not producing effects in Italy. The failure to provide for the institute of civil union for heterosexual couples was considered discriminatory by both the British Supreme Court and the Austrian Constitutional Court. For an examination of these decisions made in 2018 and 2017 respectively, see L. Ruggeri, 'I regolamenti europei sui regimi patrimoniali', ibid 34, 13, spec. notes 42 and 45. The issue was also addressed by the ECHR which, with a decision made on 26 October 2017 in the case of *Ratzenböck and Seydl v Austria*, which had considered the choice of the Austrian legislator to preclude heterosexual couples from having recourse to registered partnerships compatible with the European Convention. See P. Bruno, 'Coppie omosessuali e unione registrata: la Corte di Strasburgo evita la reverse discrimination', in www.ilfamiliarista.it; R. Garetto, 'Opposite-sex Registered Partnerships and Recognition Issues', in J. Jerca Kramberger Škerl, L. Ruggeri, F. G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law*, 2019, 89; J.M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' *The Equal Rights Review*, vol 10, 83-96 (2013).

[60] The trust has been a classic example of an evaluation gap in Italy. See in this regard, G. Barile, n 38 above, 14.

[61] The recognition of the kafala gave rise to an important ruling by the Court of Justice which established that 'it is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned. In the event that it is established, following that assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State'. This is Case C-129/18, SM v *Entry Clearance Officer,* judgment of Grand Chamber, 26 March 2019 *UK Visa Section*, available at www.eur-lex.europa.eu. For a comment on this sentence, see C. Peraro, 'L'istituto della Kafala quale presupposto per il ricongiungimento familiare con il cittadino Europeo: la sentenza della corte di giustizia nel caso S.M. C. Entry Clearance Officer', *Rivista di diritto internazionale privato e processuale*, 319-348 e (2019).

P. Hammje, 'Reconnaissance d'une kafala au titre d'une vie familiale effective avec un citoyen européen aux fins d'octroi d'un droit de séjour dérivé' *Revue critique de droit international privé*, 3, 769-785 (2019). In Italy, among other rulings, see Decree of the Tribunal for Minors Emilia Romagna, 14 March 2019, Diritto di famiglia e delle persone, 3, 1198-1209 (2019), with a note by M. Poli, 'Abbandonare la strada vecchia per quella nuova: l'efficacia dei provvedimenti di kafalah a seguito dell'entrata in vigore della Convenzione dell'Aja del 1996'.

CASE STUDY CONCERNING INTERNATIONAL LAW REGULATING MATRIMONIAL PROPERTY REGIMES. MANAGEMENT OF A PROPERTY FUND AND THE DISPOSAL OF PLEDGED ASSETS

Giovanna Di Benedetto[1]

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Summary: I.Introduction. II. The case. III. Regulation (EU) 2016/1103 concerning matters of matrimonial property regimes: scope. IV. Jurisdiction. V. Law applicable to matrimonial property relations: Italian law. VI. Disposal in violation of the rules concerning the management of the fund: action for annulment.

Abstract: The paper offers a discussion of a case study, analyzing issues that Italian courts may resolve in the future in applying EU private international law sources on property regimes of cross-border couples.

I. INTRODUCTION

The property fund,[2] introduced by the Law on the Reform of Family Law of 19 May 1975, no 151, and governed by Article 167 and the following articles of the Civil Code, constitutes property aimed to be strictly linked to the 'needs of the family'.

It is appropriate to specify that the establishment of a property fund cannot be traced back to the fulfilment of the obligation of the contribution of each spouse, as laid out in Article 143 of the Civil Code.

This is a kind of separation of property which establishes a constraint of unavailability[3] imposed on specific assets of the fund and the fruits thereof, not only *inter partes* but also *erga omnes*.

The assets set up in a property fund and the fruits thereof, pursuant to Article 170 of the Civil Code, may not be subjected to forced execution, except in the case of the assumed obligations concerning the fulfilment of the needs of the family.

Therefore, the assets set up in a property fund are not subject to the general principle, enshrined in Article 2740 of the Civil Code, for which the debtor is liable to fulfil his obligations with all his present and future assets.

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[1] Giovanna Di Benedetto is Phd Researcher, University of Camerino.

[2] A. Auciello, *La volontaria giurisdizione e il regime patrimoniale della famiglia* (Milano: Giuffrè, 2000), 333; L. Genghini, *La volontaria giurisdizione e il regime patrimoniale della famiglia* (Milano: Cedam, 2020), 445.

[3] G. Gabrielli, *Il regime patrimoniale dei coniugi* (Milano: Giuffrè. 1998), 8.

This means that not all the creditors of the spouses, but only some of them, will be entitled to forced execution on the pledged assets. Specifically, only the creditors of the fund may act on the property fund without the assistance of others. In other words, only the creditors whose obligations have arisen as a function of the interest that the law deems to protect, which is to fulfil the needs of the family, will be entitled to act.

This limited liability is justified by the function of solidarity aimed at the protection of the family, which is also recognised at constitutional level. This is certainly a laudable aim which constitutes a concrete manifestation of the spirit of solidarity that permeates the Italian juridical system.

Unless expressly provided for in the deed of constitution, pursuant to Article 169 of the Civil Code, the separated assets may not be disposed of, pledged or encumbered in any way, except with the consent of both spouses and, if there are minors, with the authorisation of the court, to be granted only in the case of necessity or obvious usefulness to the family.

It is clear that the rationale of this rule is to place limitations on the free commercialisation of the assets that are part of the fund, in order to ensure that these remain as a guarantee aimed at fulfilling the needs of the family.

II. THE CASE

After ten years of engagement, John, an entrepreneur and American citizen, and Francesca, a teacher and Italian citizen, marry in the States in 2009 and establish the family's habitual residence there.

In July 2019, John alone buys a building in the Assisi Municipality, where the couple resides for brief periods during their stays in Italy.

Simultaneously with the purchase of the property in Italy, both spouses, through a family property agreement concluded at the Municipality of Assisi, agree to the application of Italian law to their matrimonial property regime, pursuant to and for the purpose of Council Regulation (EU) 2016/1103.

For a long period, the couple have a wonderful life, with a standard of living exceeding their family's financial possibilities while contracting a large number of debts for the renovation of the building in Assisi.

In August 2019, the spouses, concerned about their family's plunging financial situation following some unfortunate investments of their savings, decide to set up a property fund, to which John pledges the property in Assisi, so that it can be solely intended to meet the needs of the family, while retaining ownership of the property for himself.

In December 2020, within a few days and without consulting his wife, John decides to sell the building in Assisi to finance a sudden entrepreneurial operation in the States, significantly depleting the property fund and putting the family's creditors at serious risk.

In May 2021, after losing her job and having been prompted several times by the family's creditors to fulfil the obligations assumed by the spouses, Francesca is surprised to discover

the seriousness of the family's financial situation and the operation concerning the immovable property into which John embarked without her knowledge.

Determined to save her marriage and restore the financial prospects of the family, Francesca repeatedly asks her husband to replenish the fund by paying an amount equal to the price of the sale of the property in Assisi, but she is always met by his steadfast refusal.

Therefore, Francesca decides to contact the renowned Mockingbird Law Firm in New York, with offices all over the world, and sue her husband before the court in Perugia, thus forcing him to return the sold property to the family assets and to the fund bound to satisfy the needs of the family.

III. COUNCIL REGULATION (EU) 2016/1103 CONCERNING MATTERS OF MATRIMONIAL PROPERTY REGIMES: SCOPE

In the case at hand, John and Francesca are respectively citizens of the United States and Italy, with habitual residence in the USA and financial interests geared to the needs of the family, which have been established in Italy.

First of all, it must be verified which law governs the specific case that entails cross-border implications.

Council Regulation (EU) 2016/1103 of 24 June implements enhanced cooperation in the area of jurisdiction, applicable law, and recognition and enforcement of decisions in matters of matrimonial property regimes of cross-border families.

The Regulation aims at facilitating the property arrangement of families founded on marriage in order to allow full judicial cooperation between the adhering States and free movement of people, capital and goods within EU territory.

Ratione materiae, the Regulation applies, pursuant to Recital 14 therein, 'in the context of matrimonial property regimes having cross-border implications'.

In the present case, the dispute concerns the determination of the competent judicial authority before which the best action can be brought to protect Francesca's interests and identify the law to be applied to the property relationship of the two spouses.

In these terms, since the dispute concerns a matter of matrimonial property regimes, and, in particular, the administration of assets pledged to a property fund to fulfil the needs of the family, it appears that the applicability of European legislation is evident given the object of the dispute concerning the matter of matrimonial property regimes referred to in Regulation 2016/1103.

Ratione personae, the Regulation in question is applicable so as to guarantee, as laid out in Recital 1 therein, judicial cooperation in civil matters with the aim of preserving and developing an area of freedom, security and justice which provides for the free circulation within the European territory of couples having cross-border implications and family property interests. These are couples extraneous to the legal system where the matrimonial property relationships and related disputes are initiated.

In addition, the rules of the Regulation are applicable not only to nationals of the states subject to the Regulation itself, but also to the nationals of non-European States.

In this sense, Regulation 1103 must be deemed applicable, even though the couple consists of Francesca, who is national of a Member State, and John, who is a national of a non-European State.

Therefore, this concerns a couple with cross-border implications, which is a condition to apply the Regulation, and John's non-European nationality results as being irrelevant.

Ratione temporis, pursuant to Article 70(2) of the Regulation,[4] the same applies, starting from 29 January 2019, to Member States participating in enhanced cooperation in the area of jurisdiction of courts, applicable law, and the circulation of decisions concerning matrimonial property regimes. Therefore, the Regulation is applicable to all matrimonial property relationships established on or after 29 January 2019.

John and Francesca joined in marriage in 2009. However, they made a choice regarding the law to apply to their family property regime starting only from July 2019, ie, at a later date than the one set out in the Regulation regarding its application.

Since nothing provides for *ratione temporis* more than the applicability of the above-mentioned EU Regulation to property regimes starting from 29 January 2019, it must be considered that it is also applicable to all property regimes regardless of the date of establishment of the marriage union.

Indeed, the Regulation does not include any provision which would exclude its applicability to all marriage unions established on a date preceding 29 January 2019.

On the contrary, the Regulation is functional, in the meaning of Recital 72 therein, in guaranteeing the free movement of persons in the Union, to allow spouses to organise their property relationships between them and with third parties during their married life, and to increase legal certainty and predictability. To this end, the maximum possible applicability of the Regulation is desirable, without prejudice to the foreseen explicit exclusions of applicability.

Any possible unjustified discrimination of couples formed on a date prior to the one provided for in the Regulation concerning its application would constitute an obstacle to the full achievement of the objectives set out in the Regulation itself.

It can also be added that the matrimonial property relations which are the matter of the dispute, as well as the dispute itself, were initiated after the date chosen by the law applicable to John and Francesca's matrimonial property regime, which was put into effect pursuant to Regulation 1103.

Finally, with the aim of the applicability of the Regulation in question, the principle of supremacy of European Union law over national law should be considered in the meaning of Declaration 17 attached to the Consolidated European Treaties of 13 December 2007. Therefore, as of 29 January 2016, the area of jurisdiction, the criteria for identifying the applicable law, and the rules for the effectiveness of foreign judgments and acts are no longer

[4] K. Zabrotina, 'Article 70: Entry into Force', in L. Ruggeri ed, *European Family Property Relations: Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Esi, 2020), 598.

to be governed by the Italian national law referred to in Law no 281 of 31 May 1995 on the Reform of the Italian System of International Private Law. In fact, starting from 29 January 2019, the above-mentioned judicial relations in the matter of matrimonial property regimes have been governed by Regulation (EU) 2016/1103.

IV. JURISDICTION

The New York law firm, with a mandate to protect Francesca's legal interests, proposes legal action to be brought in Italy before the Court of Perugia.

In order to verify jurisdiction, it should be emphasised that, in exercising their negotiating autonomy, the spouses did not express any preference concerning the court seised in relation to any disputes concerning their matrimonial property regime in the meaning of Article 7 of Regulation 1103.[5]

In such a case, it is necessary to verify the existence of appropriate rules governing the establishment of the competent court within the European legislation in question.

Given the absence of an *optio fori* and considering that the object of the dispute does not appear to be related to the death of one of the spouses, to their divorce, to personal separation or the annulment of the marriage, Articles 4, 5 and 7 of the Regulation must be deemed not applicable.

It also seems necessary to exclude the applicability of Article 6 of the Regulation since it does not seem to regulate issues inherent to the matrimonial property regime between John and Francesca, the jurisdiction of the territory where the spouses are habitually resident, or the territory in which the last habitual residence of only one of the spouses is located or, alternatively, the place where the habitual residence of the defendant is located, or the territory of the common nationality of the spouses.

In fact, it must be considered that the habitual residence of the spouses is in the United States which is a non-European country and, therefore, not an EU Member State. It must also be considered that the spouses do not have a common nationality, and that John's habitual residence is in the US.

Therefore, for the purpose of properly verifying the jurisdiction of the authority before which the dispute is to be brought, it appears necessary to consider the provision of Article 8 of the Regulation.[6]

Indeed, in the meaning of the mentioned Article, a court of a Member State whose law is applicable pursuant to Article 22 of the Regulation, and before which a defendant enters his or her appearance, will have jurisdiction.

Therefore, it is considered that John, as the defendant, will appear before the judicial authority in Perugia.

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[5] F. Pascucci, 'Article 7: Choice of Court', in L. Ruggeri ed, *European Family Property Relations: Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Esi, 2020), 95

[6] M.P. Nico, 'Article 8: Jurisdiction Based on the Appearance of the Defendant', in L. Ruggeri ed, *European Family Property Relations: Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Esi, 2020), 100.

Since, in July 2019, the spouses chose an *optio legis* in favour of Italian law, the action brought before the court in Perugia, and the dispute attached to the Italian judicial authority, appears correct.

However, in the meaning of Article 8(2) of the Regulation, before assuming its jurisdiction and before gaining knowledge of the dispute, the Italian court must inform the defendant, John, at the first useful hearing, of his right to contest the jurisdiction, and in the absence of such an objection, the Italian court will be required to inform him of the consequences deriving from the procedure.

V. LAW APPLICABLE TO MATRIMONIAL PROPERTY RELATIONS: ITALIAN LAW

John, a US national, and Francesca, an Italian national, were married in 2009 in the US where they established the family's habitual residence.

With the aim of avoiding uncertainty, the spouses, John and Francesca, decided to apply Italian law to their matrimonial property regime.

In fact, at the same time as they purchased the house in Italy, in exercising their negotiating autonomy, the spouses decided to apply Italian law to their matrimonial property regime by *optio legis*, pursuant to Article 22.1. b) of Regulation 1103[7] since Italian law was the law of the State of nationality of either spouse at the time the agreement was concluded.

Indeed, Francesca is an Italian national and has preserved her nationality even after the marriage. Therefore, she was an Italian national at the time of the conclusion of the agreement of the matrimonial property regime. Consequently, in the meaning of Regulation 1103, Italian law is applicable to their matrimonial property regime also in relation to her husband, John, who is a US national.

In fact, for the purpose of predictability and full legal certainty, the objective of Regulation 1103 is to allow the spouses to be aware in advance of the law that is applicable to their matrimonial property regime, so as to prevent them from becoming subject to different regimes concerning the competent court or applicable law.

In the case at hand, the property agreement between the spouses where they had chosen, pursuant to Regulation 1103, to apply Italian law to their matrimonial property regime was duly noted in the margin of the marriage certificate, pursuant to Article 162 of the Civil Code together with the date of signature of the certificate, the attesting notary and the details of the contracting parties.

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[7] E. Bazzo, 'Article 22: Choice of the Applicable Law', in L. Ruggeri ed, *European Family Property Relations: Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Esi, 2020), 100.

VI. DISPOSAL IN VIOLATION OF THE RULES CONCERNING THE MANAGEMENT OF THE FUND: ACTION FOR ANNULMENT

Pursuant to Article 168(3) of the Civil Code, the management of the assets established in the fund is governed by the rules regulating the legal communion between the spouses referred to in Article 180 and subsequent articles of the Civil Code.

In particular, pursuant to the combined provisions of Articles 168(3) and 180 of the Civil Code, the management of the fund is the separate responsibility of both spouses for ordinary management, and jointly for acts of extraordinary management.

It should also be noted that all acts of alienation of the assets established within the fund may not be carried out in the absence of an express derogation in the deed of constitution, without the consent of both spouses.

Such a provision must be retained with a view to overcoming the hierarchical and authoritative aspect of the family which had long been a feature of Italian families, and to preserve the fundamental initial national values, such as the moral and judicial equality of the spouses pursuant to Article 3 of the Constitution, or such as the authentic communion of family life with the prospect of full matrimonial solidarity in the meaning of Article 2 of the Constitution. This provision must also be considered, within the broad framework of European family law, to be closely linked to the fundamental rights of persons that require respect for family life, as set out in Article 8 ECHR and in Article 6 TEU.

In the case at hand, John proceeds to the transfer, rendered against payment, by sale, of the right to the real estate property in Assisi, purchased by him alone and subsequently pledged to a property fund.

In this case, John disposes against payment of the personal asset pledged in the property fund to use the proceeds for an entrepreneurial investment that is not intended to satisfy the needs of the family.

Therefore, it must be concluded that even though John had bought the property as an exclusive asset, this property, afterwards pledged to a matrimonial property fund, should be considered subject to the rules applied to the management of the fund and bound to the fulfilment of the needs of the family.

Consequently, in order to alienate the asset pledged to the fund, since this is an act of extraordinary administration, the consent of both spouses is required.

It must also be concluded that, even when the consent of both spouses exists to dispose of an asset pledged to a matrimonial property fund, the related negotiating activity must be aimed at fulfilling the needs of the family, and the assets may not be disposed of for purposes alien to the fulfilment of the needs of the family.

In the case at hand, John disposes of the assets assigned to the fund for the purpose of an entrepreneurial activity carried out by him, which is not aimed at the fulfilment of the needs of the family.

In the meaning of the combined provisions of Articles 168(3) and 184(1), acts of alienation of pledged real estate carried out by one of the spouses, without the necessary consent or

without successive validation of the other spouse, are voidable if their object is immovable property or movable property entered in public registries.

Pursuant to Article 184(2), action for the annulment of the act of alienation of the asset pledged to the fund can be legitimately brought by the spouse who has not given consent, provided this is within a year from the date when he or she has become aware of the act of disposal or, alternatively, within a year[8] from the date when this is entered into the real property register if it concerns real estate property.

Therefore, Francesca was right to bring this action against her husband to hear a declaration of annulment of the act by which the asset pledged to the matrimonial property fund was alienated without her consent.

[8] The term of one-year in derogation of the five-year limitation period provided for in Article 1442 Civil Code.

THE ITALIAN PERSPECTIVE ON THE IMPLEMENTATION OF THE PRIVATE INTERNATIONAL LAW OF SUCCESSIONS

Ilaria Riva[1]

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Summary: I. Introduction. II. International successions from the Italian perspective: from nationality to the last habitual residence of the deceased. III. The principle of unity of succession and the rule of renvoi. IV. Notes on the ability to make a will, formal validity of the will and succession of the State. V. The rights of forced heirs in the perspective of international public policy. VI. The scope of application of the Succession Regulation between included and excluded issues.

Abstract: The paper offers an updated overview on the Italian case-law regarding successions of cross-border couples. It analyzes Italian rulings that have resolved disputes regarding international successions, applying the private international law discipline prior to the entry into force of Regulation 650 /2012. The paper then examines, from the perspective of Italian law, the rulings of the EU Court of Justice on EU Regulation 650/12.

I. INTRODUCTION

The death of a married person causes the dissolution of the matrimonial property regime and has significant effects on the assets of the surviving spouse, who sometimes acquires rights both as an heir and on the basis of marriage. From an international-private perspective, the two acquisition methods must be kept distinct, as they can be regulated by different laws.

From the point of view of the judge competent to settle disputes, the Twin Regulations on the property regimes of married couples and registered partnerships have introduced a special jurisdiction rule, under which if a court of a Member State is seised in a matter relating to the succession of a married person/registered partner, the courts of that Member State are also competent for all matters relating to the property regime and the succession (Art. 4 of EU Regulations 1103 and 1004/2015).[2] This form of court competence resulting from related

[1] Ilaria Riva is Associate Professor of Private Law at University of Torino.

[2] A. Bonomi, 'Article 4 Jurisdiction in the Event of the Death of One of the Spouses [partners]', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples, A Commentary* (Cheltenham: Edward Elgar Publishing, 2020) 50; V. Egéa, S. Corneloup, E. Gallant and F. Jaul Seseke eds, *Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104* (Paris: Société de législation comparée, 2018); R. Garetto, 'Art. 4, in L. Ruggeri and R. Garetto eds., *European Family Property Relations. Article-by-Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Edizioni

cases favours the concentration of proceedings and avoids conflicts of jurisdiction, but the harmonisation does not extend to the applicable law: in many cases, the court seised will not apply the same law for matters relating to succession by cause of death and for those relating to the property regime.

As for the former, the matter is now regulated by EU Regulation no 650 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter: the Succession Regulation),[3] the contents of which have led to a significant change in the rules applicable to cross-border successions in Italy.

II. INTERNATIONAL SUCCESSIONS FROM THE ITALIAN PERSPECTIVE: FROM NATIONALITY TO THE LAST HABITUAL RESIDENCE OF THE DECEASED

In Italy, the internal discipline of private international law is contained in Law no 218 of 1995, which, with regard to succession matters, envisages the nationality of the deceased at the time of death as the connecting criterion for identifying the applicable law and the competent judge.[4]

This is also without prejudice to the possibility of the deceased to subject, with a statement expressed in the form of a will, the entire succession to the law of the state of residence, provided that the declarant is resident in that state, even at the time of death.

This discipline, contained in Art. 46 of Law no 218 of 1995, although it was not expressly repealed by the Italian legislator, it is now understood to be implicitly superseded by the European Succession Regulation, and therefore is no longer applicable.

Indeed, one of the most significant changes in the Regulation is the choice of the habitual residence of the deceased at the time of death as the main connecting factor in order to

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Scientifiche italiane, 2021) 76; P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate: commento ai regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019) 73.

[3] Among the first commentaries on the Regulations, see A. Bonomi and P. Wautelet, *Le droit européen des successions. Commentaire du Règlement n. 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2013); U. Bergquist, R. Frimston, F. Odersky, D. Damascelli, P. Lagarde and B. Reinhartz, *Commentaire du règlement européen sur les successions* (Paris: Dalloz, 2015); H. Hüsstege and N. Mansel eds., *NomosKommentar-BGB*, VI (Baden-Baden: Nomos Verlag, 2nd edn., 2015); A.-L. Calvo Caravaca, A. Davì and H.-P. Mansel eds., *The EU Succession Regulation: A Commentary* (Cambridge: Cambridge University Press, 2016); A. Davì and A. Zanobetti, 'Il nuovo diritto internazionale privato delle successioni nell'Unione europea', 5 *Cuadernos de Derecho Transnacional*, 5-139 (2013); P. Franzina and A. Leandro, *Il diritto internazionale privato europeo delle successioni* mortis causa (Milan: Giuffrè, 2013); D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2012).

[4] Previously, Art. 23 of the preliminary provisions of the civil code was applicable, by virtue of which the succession for cause of death was regulated, irrespective of where the property was, by the law of the State to which the person whose inheritance concerned belonged at the time of death. On this point, therefore, the entry into force of the 1995 law did not change the discipline.

determine the applicable law.[5] In accordance with the widespread trend, the Succession Regulation is also without prejudice to the different will of the deceased (*professio iuris*).

As of 17 August 2015, all persons habitually resident in Italy, regardless of their nationality and as regards the law applicable to their succession, are thus subject to Italian law, unless they express (or have previously expressed) a different will pursuant to Art. 22 of the Regulation.[6]

Likewise, all Italian citizens habitually resident abroad are subject to the *lex successionis* of the State of residence, be it a Member State or a third State.[7] It is interesting to observe how the entry into force of the Regulation entailed a radical change in the succession discipline for many Italians abroad or foreigners residing in Italy, probably completely without their knowledge.

III. THE PRINCIPLE OF UNITY OF SUCCESSION AND THE RULE OF RENVOI

In certain respects, the Italian regulatory framework does not differ from the existing European legislation. In Italy, in fact, even before the entry into force of the Succession Regulation, the criterion of the universality of the applicable law was valid, by virtue of which the law identified by the conflict-of-law rule applied to the entire succession, without distinguishing between movables and immovables.

Therefore, even the Italian legislation took into account, within certain limits, the 'renvoi'. The problem of renvoi consists of contemplating whether the reference made by the conflict-of-law rule of the forum to a foreign legal system refers only to the substantive rules of that system or whether, instead, it also includes the conflict-of-law rule of the same, with the consequence that identifying the substantive law that is actually applicable could

[5] The increasingly frequent use of the habitual residence criterion as a connecting factor, to the detriment of the criteria of nationality and domicile, represents one of the most prominent features of the instruments developed by the European Union legislator in the context of European private international law in matters of family and personal status. Despite its fluid and unstable nature, such as to require intense interpretative efforts for its identification, habitual residence has long been the preferred connecting factor for its suitability to strengthen the bond of a person with the State in which they reside, thus promoting its integration. At the same time, it is a suitable criterion for countries with high immigration influxes, as it avoids the difficulties of having to apply succession regimes from third countries. It is therefore an appropriate connecting factor for 21st century (European) private international law. For further information, see J. Carrascosa González, 'Reglamento sucesorio europeo y residencia habitual del causante', 8 *Cuaderno de derecho transnacional*, 47-75 (2016); A. Zanobetti, 'La residenza abituale nel diritto internazionale privato: Spunti di riflessione', in *Liber Amicorum Angelo Davì*, *La vita giuridica internazionale nell'età della globalizzazione*, II (Napoli: Editoriale Scientifica, 2019) 1361; O. Feraci, 'The Last Habitual Residence of the Deceased: Potentials and Challenges', in S. Landini eds, *Insights and Proposals Related to the Application of the European Succession Regulation 650/2012*, Fondazione italiana del Notariato (Milano: Giuffrè Francis Lefebvre, 2019) 273; J. Re, 'Where Did They Live? Habitual Residence in the Succession Regulation', *Rivista di diritto internazionale privato e processuale*, 978 (2018); P. Rogerson, 'Habitual Residence: The New Domicile?' *International Comparative Law Quarterly*, 86. (2000); I. Martone, "Sul concetto di residenza abituale. Casi e questioni", *Diritto delle successioni e della famiglia*, 103 (2021).

[6] The succession regulation allows the deceased a choice of law which, pursuant to Art. 22 paragraph 1, however, can only be made in favour of the law of the State where the deceased had citizenship at the time of choice or at the time of death.

[7] However, it should be pointed out that in the latter case, the lack of harmonisation of the rules of private international law could give rise to positive or negative conflicts of law (and jurisdiction).

require numerous steps. The Italian legal system of private international law provides that the renvoi, carried out by the private international law of a foreign legal system referred to by the Italian conflict-of-law rules, must be taken into account only if: a) the law of the State of renvoi accepts the renvoi and therefore applies its own substantive law; or b) it is a renvoi to Italian law (Art. 13 L. 218/1995).[8]

However, the renvoi is excluded in cases where the provisions of the reform law make foreign law applicable on the basis of the choice made by the parties with regard to the provisions on the form of the documents and again with regard to non-contractual obligations.

Likewise, pursuant to Art. 34, para 1, Reg. 650/12, in the event that the uniform conflict-of-law rules refer to the law of a third State, the reference that the private international law of that State makes to the law of another State must be taken into account, only if such rules refer to: a) the law of a Member State; or b) the law of another third State which would apply its own law.[9] For the sake of completeness, it is recalled that the renvoi does not operate as regards the form of documents, when the applicable law is such by virtue of a choice of the parties and again when the law of the State with which the subject had the closest connections is exceptionally applicable, notwithstanding the habitual residence criterion (see Art. 34 Reg. EU 650/2012).

On the basis of the premise that a third State must be understood as any State not adhering to the Regulation, these rules will govern matters relating to cross-border successions connected, for example, to the United Kingdom, Ireland and Denmark, as well as to all non-EU countries.

Of particular interest, also for the statistical significance of the events, is an examination of English private international law, which adopts the criterion of the division of inheritance, applying to movable property the law of the domicile of the deceased at the time of death, and to immovable property the law of the place of establishment of such property.

A comparison with these so-called dualistic or scission legal systems reveals that the rule of renvoi can help move away from the principle of unity or universality of succession.[10]

In this regard, it may be interesting to return to a recent decision of the Joint Sections of the Italian Supreme Court, already analysed in the previous section, and relating to a succession case opened in 1999, but nevertheless also useful in the perspective of the Succession Regulation.[11]

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[8] The discipline prior to the 1995 law, contained in Art. 30 of the preliminary provisions of the civil code, and applicable to judgments introduced up to 1 September 1995, as well as to situations completed before that date (see Art. 70 L. 218/95) was different, by virtue of which when a foreign law must be applied, the provisions of the law itself are applied without taking into account the renvoi made by it to another law.

[9] R. Hausmann, 'Le questioni generali nel diritto internazionale privato europeo', *Rivista di diritto internazionale privato e processuale*, 516 (2015).

[10] L. Fumagalli, 'Rinvio e unità della successione nel nuovo diritto internazionale privato', *Rivista di diritto internazionale privato e processuale*, 840 (1997); V. Pirari, 'Successioni transfrontaliere nel diritto internazionalprivato: la regola del rinvio ex art. 13 della legge n. 218 del 1995 e il superamento del principio dell'unità e della universalità della successione in favore della globalizzazione del diritto'. *Aspetti problematici e soluzioni*, *Judicium.it* (28 July 2021).

[11] Joint Sections of the Supreme Court, 5 February 2021 no 2867, available at *www.dejure.it*.

In this case, an English citizen had entered into marriage with an Italian citizen and then died in Milan, leaving a will, drawn up in London before the marriage, through which he attributed a sum of money to his future wife, and designated the heirs of the remaining assets (consisting of real estate located in Italy and movable property) among his children. The widow seised the Court of Milan requesting that the revocation of the will due to marriage be ascertained, in accordance with English law (Will Act 1837) applicable to the case in question, and therefore for the legitimate succession to be declared open. In doing so, the attribution of all personal movable property of the deceased, as well as a third of the immovable property, would be in her favour, as applied by Art. 581 of the Civil Code, which operates as a 'remission' required by English law.

The question is whether or not the English rule of the substantive nature of the renvoi of the will by subsequent marriage (which under English law is a rule relating to the property regime of the family and not to the succession) applies to the present case, and, if so, with regard to the entire succession, or only to the movable property for which the *lex domicilii* applies. More generally, it is a question of understanding the exact scope of the renvoi rule, that is, what extension the reference to the *lex rei sitae* has.

The Supreme Court first addressed a preliminary question, namely whether the categories of Italian law or English law were valid in order to qualify the case of revocation of a will due to marriage as a matter of inheritance law or family property law. The conclusion was in the first direction: the judges held that foreign law -as set forth in Article 15 of the Italian Private International Law Act, Law 218/1995- must be applied according to its own criteria of interpretation and application over time, but, before that, in order to determine which conflict rule to apply, the court must use the qualifying canons of the *lex fori*. The revocation of the will is a matter of succession under Italian law, and the judge will consequently apply the conflict-of-law rule governing succession due to death.

The ruling raises delicate questions regarding the relationship between the interpretation and the qualification of the case, issues to which reference is made in the first section of this chapter.

In any case, these issues are now partially overcome with the entry into force of EU Regulation no 650/12, and even more so following Regulations nos. 1103 and 1104/15. In fact, the qualification must now be conducted on the basis of autonomous supranational categories, which do not necessarily correspond to the schemes and models of domestic law. The Succession Regulation, in particular, would seem unequivocal when considering within its scope the revocation of the will, regardless of the cause of the revocation. By virtue of Art. 24, paras 1 and 3, such revocation is governed by the law which, by virtue of the regulation, would have been applicable to the succession of the person who made the disposition if the person had died on the day the disposition was made.

Returning to the examination of the ruling, once the revocation in question was qualified as a 'succession' matter, the judges derived from it the application of the relevant conflict-of-law rule, which led to the application of English law (nationality of the deceased). At this point, the rule of separation between the law governing movable property and the law regulating real estate property intervened and the doubt was whether this fragmentation was compatible with the Italian legal system, which was based instead on the principle of universality.

The issue is also relevant from the perspective of the Succession Regulation, which, as mentioned, is in favour of the unity of the regulating law, but which at the same time allows for 'remission'. Therefore, assuming that the testator in question was habitually resident in England, the law of English private international law would then be applicable, and hence, for immovable property only, the substantive legislation of the State of the situation.

The ruling in question explicitly confirms that this separation of the applicable regulations based on the nature and location of the assets is not incompatible with the Italian legal system, because this is what the application of the renvoi rule enshrined in Art. 13 L. 218/95 leads to. Therefore, obstacles of international public policy may in no way be invoked. And the same conclusion must be reached today, under the force of the Succession Regulation, which opts for a non-scissionist criterion, but not to the point of refusing the renvoi.

The judges concluded on the point that the law governing the succession inherent to the real estate was Italian law, or that of the State in which the assets were located (*lex rei sitae*), while the law governing the succession inherent to the movable property was English law, the law of the domicile of the deceased. In concrete terms, this means that two distinct inheritances are formed, each governed by a different law, in terms of handover, the hereditary transmission of assets and division, as well as in terms of any rights pertaining to forced heirs.

In its last paragraph, the ruling specifies a profile that was not correctly understood by the judges who ruled on the merits: the mechanism of remission ensures that the real estate is entirely governed by the *lex rei sitae*, also in terms of inheritance handover. In this case it is not taken for granted that for this law the subsequent marriage constitutes a cause for revocation of the will, since it is a matter of English substantive law that is applicable only to movable assets.

IV. NOTES ON THE ABILITY TO MAKE A WILL, FORMAL VALIDITY OF THE WILL AND SUCCESSION OF THE STATE

Returning to the Italian provisions of private international law applicable to succession due to death, the aforementioned law 218 of 1995 still provides the following.

Art. 47 states that 'the ability to dispose of property by a will, to modify or to revoke the will is governed by the national law of the heir at the time of the will, modification or revocation'. Even this provision must now be considered implicitly superseded by the combined provisions of Articles 24 and 26 of the Succession Regulation, which show that the ability to make a will is governed by the law which, according to the Regulation itself, would have been applicable to the succession of the person who made the disposition if the person had died on the day he made the will.

Art. 48 confirms the validity of the will, as regards the form, if it 'is considered such by the law of the State in which the testator has made disposition, or by the law of the State of which the testator, at the time of the will or death, was a citizen or by the law of the State in which he had his domicile or residence'. Even this provision must now be considered implicitly superseded by the provisions of Art. 27 of the Succession Regulation, which, inspired by the criterion of *favor testamenti*, affirms the formal validity of the will as long as it is such by

virtue of alternatively one of the different laws listed.[12] However, it should be pointed out that the Succession Regulation does not apply to a will in oral form, and does not deal with the question of the validity of this form of will (Art. 1, para 2, f).

In this regard, we can cite a sentence of the Court of Belluno in 1997, which faced, under the force of L. 218/95, the question of the validity of an oral will of a woman with Italian and Austrian citizenship by marriage, residing in Austria, which was made in accordance with Austrian law. The court not only confirmed the validity of the oral will because it was made in compliance with the Austrian law which admits, albeit under certain conditions, this testamentary form, but also its recognition in Italy because it is not contrary to the fundamental principles of Italian succession law or to public policy, all the more so when the will has already been voluntarily executed.[13]

The question could arise again under the validity of the Succession Regulation, as there are several countries that admit, under certain conditions, an oral will (in addition to Austria, for example Germany, Slovenia, and Croatia). In the absence of a supranational provision that regulates the case in question and its validity, the Italian judge should today continue to apply Art. 48 of L. 218 of 1995, for which the will must be considered to be valid, as regards the form, if it is considered as such by the law of the State in which the testator has disposed, or by the law of the State of which the testator, at the time of the will or of death, was a citizen, or by the law of the State in which he had his domicile or residence.

As for the limit of public policy, there seem to be no arguments for denying entry to the verbally drafted will. As proof of this, it is enough to cite the Italian case law in favour of confirming the oral will,[14] which reveals that the lack of writing does not contravene a fundamental principle of the Italian legal system.

Finally, Art. 49 specifies that 'when the law applicable to the succession, in the absence of beneficiaries, does not attribute the succession to the State, the inheritance estate existing in Italy is devolved to the Italian State'. The disposition partially retains its validity by virtue of the provision contained in Art. 33 of the Succession Regulation, however having to be

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[12] Art. 27 Reg. 650/2012: 'A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:

a) of the State in which the disposition was made or the agreement as to succession concluded; or

b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; or

c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death; or

d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or

e) in so far as immovable property is concerned, of the State in which that property is located.

[13] Court of Belluno, 22 December 1997, *Famiglia e diritto*, 1100 (2000).

[14] Court of Naples, 30 June 2009, *Giurisprudenza di merito,* 3001 (2010), with a note from Di Marzio; Supreme Court 11 July 1996 no 6313, *Notariato*, 509 (1996), with a note by Celeste. Art. 590 of the Civil Code provides that the nullity of the will, for whatever cause, cannot be asserted by the person who, knowing the cause of the nullity, after the death of the testator, has confirmed the disposition or provided voluntary execution.

integrated with what is provided therein. In fact, Article 33 provides that when, according to the law applicable to the succession pursuant to the regulation, there are no provisions due to death that would establish heirs or legatees, nor natural persons who have the right to inherit by law, the application of the law thus determined does not preclude the right of a Member State or of an institution designated by the law of that State to appropriate, under its law, the succession property located in its territory, 'provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole'.

In turn, this legislation must be integrated with the provisions of Article 586, para 2, of the Italian Civil Code, which limits the liability of the State towards hereditary creditors to the value of the assets appropriated, as this limitation does not appear to be incompatible with the regulatory provisions.

V. THE RIGHTS OF FORCED HEIRS IN THE PERSPECTIVE OF INTERNATIONAL PUBLIC POLICY

Italian legislation reserves a share of inheritance in favour of the closest relatives (spouse, children, and in the absence of the latter, ascendants) of the deceased, to be calculated from a succession estate composed of fictitiously bringing together the relict property and the donations made in life from the deceased. To obtain what is due to him, the forced heir whose rights have been violated will have to take legal action, requesting the reduction of testamentary dispositions and, if this is not sufficient, of donations starting from the most recent. Rights to a reserved share are inalienable before the death of the deceased.

In the event of a cross-border succession to which a foreign law is applicable, doubt arises as to whether the Italian legal system can accept the effects of state legislation that does not recognise any right to the rightful heirs. In fact, legal systems (for example common law) without the institution of the reserved share are not rare, even if usually at least support is provided in case of need (e.g. the Inheritance (Provision for family and dependants) Act 1975).

Before the entry into force of the Succession Regulation, the Italian legislation of private international law provided that in the case of the succession of an Italian citizen who had chosen the law of the State of residence as the law applicable to his succession, the choice could not prejudice the rights that the Italian law attributed to the forced heirs residing in Italy at the time of the death of the person whose succession was concerned (Art. 46 L. 218/95). This provision must now be considered implicitly repealed.

Under the hypothesis, then, for example, of an English citizen habitually resident in Italy who has chosen English law as the law applicable to his succession (in this way, being an *optio iuris*, remission is excluded), the problem remains of the protection of any excluded forced heirs residing in Italy. Not applying Italian law, the only way would be to qualify the institution of a reserved share as an expression of a primary value ascribable to international public policy, but this is an unconvincing interpretation that is denied both by the prevailing doctrine and by more recent case law.

In 1996, the Supreme Court[15] ruled on a matter where the partner of the deceased on the one hand, and his wife and children on the other, were the opposing parties. The deceased, a Canadian citizen, had left all his assets to his partner as per a will. His succession was governed by the law of the State of Québec, which does not provide for the succession 'of a reserved share' in its legal system. The daughter, an Italian citizen, turned to the Italian judge to claim her right to a reserved share, arguing that Canadian law is contrary to public policy. The case took place before the entry into force of Law 218/95, and therefore the judges applied the discipline then in force, namely Art. 31 of the preliminary provisions of the civil code (now repealed), according to which 'in no case may the laws and acts of a foreign state, the regulations and acts of any institution or body, or private provisions and conventions have effect in the territory of the State, when they are contrary to public policy or morality'.

The Court of Appeal adhered to the daughter's approach, stating that the provisions on succession expressed the principles of public policy as these rules, which had long belonged to the legal tradition of the country, found their moral and social foundation in the safeguarding of those principles of solidarity pertaining to the institute of family, as recognised and protected by the Italian Constitution; and therefore represented a limit to the effectiveness in the Italian territory of provisions belonging to other legal systems; ultimately, according to the Court of Appeal, in not providing for any reserved share in favour of the right-holders, Art. 831 of the Canadian Civil Code was in irremediable conflict with the internal public policy and had therefore to be disapplied, while the Italian legislation on the matter was to be applied.

These conclusions were rejected by the Supreme Court, which, based primarily on the fact that a reserved share was not provided for by the Constitution (and therefore represented a limit to the autonomy of the testator, which the ordinary legislator could modify and even suppress), excluded it from being a concept pertaining to public policy, to be understood as a set of general principles which were the expression of a need so fundamental as to express the conditions necessary for the very existence of society, according to the historical moment in which they were invoked.[16]

More recently, the Court of First Instance of Siena has expressed itself along the same lines, with reference to the will of an Australian citizen who designated her companion as her sole universal heir, skipping thus the children. Considering Australian law to be applicable (as a case subject to the previous legislation, and therefore to the criterion of nationality), which does not contemplate the institute of a reserved share, the Court excluded children from having rights, concluding in the sense that the reserved share was not a regulation pertaining to public policy.[17]

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[15] The Supreme Court 24 June 1996 no 5832, available at *www.dejure.it*.

[16] Along the same lines, cf also the Supreme Court 30 June 2014, no 14811, available at *www.dejure.it:* 'With specific reference to Art. 29 of the Constitution, it must be noted that this rule protects the interest of the subject in the intangibility of the sphere of affections and mutual solidarity in the context of the particular social formation made by the family, and does not extend to the institution of the necessary succession, which does not have constitutional coverage'. And also Court of Chiavari 25 February 1974, *Rep. Foro it.*, Item *Diritto internazionale privato*, no 21 (1977).

[17] Court of Siena, 8 May 2015, available at *www.dejure.it*.

In accordance with the opinion of the prevailing doctrine,[18] the non-international public policy nature of the concept of a reserved share must be reiterated today also in the light of the Succession Regulation, whose Art. 35, as is well known, states that '[t]he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum'.

On the other hand, foreign legislation could be considered contrary to public policy, which not only excludes the rights of forced heirs, but also denies any economic support to the closest relatives in need, as it is in contrast with the protection of the person and their dignity.

VI. THE SCOPE OF APPLICATION OF THE SUCCESSION REGULATION BETWEEN INCLUDED AND EXCLUDED ISSUES

As regards the scope of application of the Regulation, it is very broad, applying both to succession by law and to succession by will. It then concerns all the phases of the succession, up to the sharing out of the estate.

It also includes the agreement as to succession in its scope, starting from an approach favourable to succession by contract.[19] It is defined by Art. 3 b) as 'the agreement as to succession (including an agreement resulting from mutual wills), which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement'.

In light of the express prohibition of agreement as to succession in force in Italy (Art. 458 of the Civil Code), one wonders whether an inheritance contract entered into for example by an Italian citizen habitually resident in a State that admits contractual handover, such as Germany, is valid and effective in Italy. In compliance with Art. 25 of the Regulation, the answer must be positive, even if hypothetically the last habitual residence of the deceased was Italy: what matters is that he was habitually resident in Germany at the time of the stipulation of the agreement. The correctness of this statement must however be assessed in the light of the general limit of public policy, reaffirmed by Art. 35 of the Regulation, asking whether the prohibition of an agreement as to succession represents a principle of public policy. Interpreters tend to give a negative answer to the question,[20] both because it is a prohibition

[18] See V. Barba, 'I nuovi confini del diritto delle successioni' *Diritto delle successioni e della famiglia*, 336 (2015); Id., *I patti successori e il divieto di disposizione della delazione* (Napoli: Edizioni scientifiche italiane, 2015) 207; E. Calò, 'L'etica dell'ordine pubblico internazionale e lo spirito della successione necessaria', *Nuove leggi civ.*, I, 167 (1997); G. Perlingieri, 'Il discorso preliminare di Portalis tra presente e futuro del diritto delle successioni e della famiglia', *Diritto delle successioni e della famiglia*, 671 (2015); G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni scientifiche italiane, 2019) 187.

[19] In Recital no 49, the aim of the Regulation is to facilitate the acceptance in the Member States of inheritance rights acquired as a result of an agreement as to succession.

[20] V. Barba, *I patti successori e il divieto di disposizione della delazione* (Napoli: Edizioni scientifiche italiane, 2015) 211; G. Bonilini, 'Attualità del divieto di patti successori?' *Diritto delle successioni e della famiglia*, 348 (2015); R. Calvo, 'I patti successori', in G. Perlingieri and R. Calvo eds., *Diritto delle successioni e donazioni*, I (Napoli: Edizioni scientifiche italiane, 2008) 14, nota 7; D. Damascelli, 'Successioni (diritto internazionale privato e processuale europeo)', Enciclopedia del diritto, Annali IV (Milano: Giuffré, 2013), 964; M.B. Deli, "Art. 46 ", in S. Bariatti eds., *La legge 31 maggio 1995, n. 218*, *Riforma del sistema italiano di diritto internazionale privato*, *Nuove*

not provided for by the Constitution, and because in the Italian system there are various legal cases that derogate from the prohibition (for example, the statutory clauses that limit the transmission due to death of shares or company shares, admitted by the 2003 company reform).[21] In conclusion, there is no impediment to the admissibility of an agreement as to succession, even if relating to assets located in Italy, provided that they were admissible on the basis of the law applicable to the succession of their author on the date of stipulation.

Coming now to excluded matters, other and different ways of transferring wealth, which are also linked to the inheritance phenomenon, such as donations, trusts and *inter vivos* purchases through life insurance policies in favour of third parties, fall outside the scope of the Regulation.

Starting from donations, it is necessary to reflect on the applicability of the Succession Regulations to donations in which the transferral effect is deferred to the moment of the donor's death. The Court of Justice of the European Union recently ruled on the issue, with the judgment of 9 September 2021 in Case C-277/20. The story concerned an agreement between a father on the one hand, and the son and daughter-in-law on the other, through which the former transferred to the latter, fifty percent each, the ownership of land located in Austria, including all that would be built there at the time of his death. The transfer was deferred until the death of the donor, and was subject to a double condition: firstly, the father had to build a semi-detached house on the land in question; second, the donees had still to be married at the time of the donor's death. This last condition not being met, the transfer was to be to the benefit of the son only. The stipulator died on 13 May 2018 in Cologne (Germany), and both conditions not having been met, the son claimed to be the sole beneficiary of the attribution.

It should also be noted that at the time of the conclusion of that contract all the parties had their habitual residence in Germany, but had designated Austrian law as applicable. In compliance with Austrian law, the son claimed to have the compulsory right to register his property right in the land register on the basis of the said deed of donation and the deed of death of the donor.

Since it was a question of understanding which law was applicable, and whether the *professio iuris* connected to the deed of donation was valid, the Austrian judge referred the question to the Court of Justice to see whether an act such as the one in question fell within the scope of application of the Succession Regulation.

The Court's response appeared to be inspired by the criterion of cost-effectiveness of judgments and simplicity of solutions: in a pragmatic way, the Court affirmed that a contract, by virtue of which a person provided for the future transfer, upon his death, of the ownership of his real estate, and which therefore conferred rights on its future inheritance to other parties to the said contract, represented 'an agreement as to succession', subject as such to the Succession Regulation. The temporal element, that is, the deferral of the transfer until death, seemed inevitably to lead to qualification as an agreement as to succession. In the perspective

leggi civili commentate, 1294 (1996); A. Migliazza, "Successione. VII) Diritto internazionale privato e processuale", Enciclopedia giuridica (Roma: Treccani, 1993), XXX, 1-6; P. Rescigno, 'Trasmissione della ricchezza e divieto di patti successori', *Vita notarile*, 1281 (1993); V. Roppo, "Per una riforma del divieto di patti successori", *Rivista di diritto privato*, 8 (1997).

[21] See art. 2355 bis and 2469 of the Civil Code.

of the Italian legal system, in which the prohibition of institutional agreements as to succession is in force, this solution could create some inconsistency, to the extent that the mere deferral of the transfer until the death of the donor is not in itself sufficient to qualify a donation as an agreement as to succession. It is widely accepted, in fact, that it is necessary to distinguish between donations due to death (or *mortis causa*), void due to violation of the prohibition of the agreement as to succession, and donations in which the donor's death is a mere initial term of the attributive effect, but in which the function of the contract, its causal justification, is not to provide for one's future succession. In the latter case, these are normal initial-term donations, in which the donated goods are not considered by the parties as hereditary estate, and the beneficiary immediately acquires, from the moment of the contract, a legally protected expectation.

The distinction between the two cases is of great importance for a State like Italy which declares an agreement as to succession null and void, including *mortis causa* donations.

But a causal investigation does not seem to be required by the EU Court of Justice. If this were the case, a donation with *post mortem* effects could be considered as an agreement as to succession in the perspective of the Regulation, entailing its subjection to the law of the State in which the donor had his habitual residence at the time of stipulation: if this State is Italy, for the principle of autonomy of the respective legal categories, the deed will be treated as a donation.

The issues relating to the establishment, operation and dissolution of trusts are also excluded from the scope of application of Regulation no 650/2012. There are uniform stances on this aspect with respect to internal legislation, as demonstrated by a recent decision of the Italian Supreme Court, pronounced in the case of determining court jurisdiction.[22] The case involved a trust having as its object controlling company shares, subject to New Zealand law, and in which the same settlor and, in the event of his death, the two daughters were designated as beneficiaries in equal shares.[23] They were then appointed universal heirs of the settlor with a separate will.

Having to determine which judge was competent to resolve the dispute between the two beneficiaries following the settlor's death, the Supreme Court concluded that the trust in question, even if it provided for the transfer of the assets to the beneficiaries only upon the death of the settlor (*trust post mortem*), it had no succession nature. In fact, the assets immediately cease to be the settlor's property, and become the property of the trustee. The daughters will acquire property directly by virtue of the *inter vivos* deed from the trustee, invested with the fiduciary task of managing the shareholdings in the company in the interest of the beneficiaries and transferring the assets to them at the end of the trust. Furthermore, according to the Court, this case would integrate an indirect donation since the enrichment of the beneficiaries is achieved through an indirect mechanism that provides for the creation of a trust, where the second segment of the operation or the transfer from the trustee to the beneficiaries involves legal spheres other than those of the original settlor: with respect to this

[22] Civil Division of the Joint Sections of the Supreme Court 12 July 2019, no 18831, available at *www.dejure.it.*

[23] Although it is an institution unrelated to national legislation, the validity of the so-called testamentary trust has long been admitted in Italy, provided that it is governed by a foreign law that admits it, even if the succession of the settlor is governed by Italian law: cf the Court of Lucca 23 September 1977, *Rivista di diritto internazionale privato e processuale*, 818 (1998).

transfer, the death of the settlor identifies the mere moment of execution of the attribution and has no causal relevance.

Finally, as regards the life insurance policies stipulated in favour of a third beneficiary, the Succession Regulation excludes them from its scope. The explicit exclusion is appropriate, in consideration of the controversial nature of these negotiating tools, in many jurisdictions that are essentially traced back to Will Substitutes as inheritance planning tools.[24] Debate is currently underway on the *mortis causa* or *inter vivos nature* of these contracts also in Italy,[25] where the Supreme Court has however recently intervened in joint sections, and with regard to the hypothesis of life insurance stipulated 'in favour of forced heirs', has approved its *inter vivos* nature, even though the precise identification of the beneficiaries is possible only at the time of the death of the insured. From this qualification the judges drew some interesting corollaries: 1) the generic identification of beneficiaries of the 'forced and/or testamentary heirs' entails their subjective identification as those who, at the time of the death of the stipulator hold this quality by virtue of the abstract inheritance handover chosen by the stipulator, independently of the renunciation or acceptance; 2) the *inter vivos* nature of the claim assigned by contract to the 'heirs' who are designated as beneficiaries of the benefits of the insurance excludes its application to the rules on the community of heirs, valid for the claims of the deceased, as well as the automatic distribution of compensation between the co-heirs on the basis of their respective shares of the estate: each of the beneficiaries is entitled to an equal share; 3) the attribution of the right *iure proprio* to the beneficiary as a result of the designation also justifies the applicability of life insurance due to death referred to in Art. 1412, para 2, of the Italian Civil Code, according to which 'the service must be performed in favour of the heirs of a third party if the latter dies before the stipulator, provided that the benefit has not been revoked or the stipulator has not provided otherwise', with consequent transmission to the heirs of the third predeceased of the insurance benefits. In this case, the acquisition of the right to the insurance benefit in favour of the heirs of the predeceased beneficiary with respect to the stipulator operates, however, *iure hereditatis*, and not *iure proprio*, and therefore in proportion to the respective inheritance shares, since it is a matter of succession of the contractual right to the compensation that became part of the assets of the designee before his death, to the same extent as would have been due to the predeceased beneficiary, according to the logic of derivative acquisitions; 4) since it is a *iure proprio* acquisition due to the effect of the designation, a predeceased 'heir' cannot benefit from it with respect to the very designation, since at the time of the birth of the right he was no longer alive: the right could not have become part of his assets and consequently could not be transferred to his heirs.

Lastly, an important decision of the EU Court of Justice of 1 March 2018 (the *Mahnkopf* case) deserves to be considered, from which the principle of autonomy of categories according to European law emerges quite clearly.[26] The Court of Justice was called on to

[24] A. Braun and A. Roethel eds, *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Oxford: Hart Publishing, 2016); J. T. Bosch, 'Will-Substitutes in the US and in Spain' 103 *Iowa Law Review*, 2293 (2018); C. Pernice, 'Life Insurance, Mortis Causa Contract and Application of the Regulation EU 650/2012', in S. Landini eds, *Insights and Proposals Related to the Application of the European Succession Regulation 650/2012*, Fondazione italiana del Notariato (Milano: Giuffrè Francis Lefebvre, 2019), 253.

[25] See, in particular, C. Pernice, n above.

[26] See R. Hausmann, 'Le questioni generali nel diritto internazionale privato europeo' *Rivista di diritto internazionale privato e processuale*, 513 (2015).

qualify as an *inter vivos* or *mortis causa* acquisition of the property allocation in favour of the surviving spouse provided for by the legal marital regime in force in Germany, the *Zugewinngemainschaft*. According to this property regime, the spouses are during the marriage in a regime of separation of property but at the time of its dissolution there is a reciprocal right to an adjustment, in an amount equal to the capital gains achieved by both spouses during the marriage. Paragraph 1371 *BGB* dictates a very particular rule in the event that the regime is dissolved due to the death of one of the spouses: it is in fact envisaged that in this case the adjustment will be made by increasing on a lump-sum basis the legal inheritance share of the surviving spouse by one quarter and to this end it is irrelevant whether or not the spouses have achieved accrued gains in the individual case. For example, if the deceased predeceases his spouse and child, half of the estate is recognised to the surviving spouse, one quarter under the succession regime and one quarter under Article 1371 *BGB*. It is therefore a lump-sum adjustment of accrued gains, aimed at avoiding complicated calculations and disputes between the heirs following the death. This is a simplifying solution not devoid of elements of irrationality, as the German doctrine itself points out. The Court of Justice is required to rule on the inheritance or otherwise of this 'lump-sum increase', in order to determine whether it can be accounted for in the European Certificate of Succession.

The question had already arisen, for other purposes, in Germany where the thesis of non-hereditary nature seemed to prevail. Although it consists of an inheritance share, it is in reality an acquisition pertaining to the property regime, taking effect from the death of one of the spouses. Death is here the term of effectiveness of a transferral that depends on the chosen property regime.

These considerations are not shared by the Court of Justice, which, without making particular distinctions relating to the cause of the attribution, concludes that 'a national provision, such as that at issue in the main proceedings, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of that regulation'. The fact that it is a share of inheritance is sufficient to qualify the acquisition as inherited, and the consideration that '(the) achievement of the objectives of the European Certificate of Succession would be impeded considerably in a situation such as that at issue in the main proceedings if it did not include full information relating to the surviving spouse's rights regarding the estate'.

The ruling leads to reflect on other acquisition phenomena connected to the property regime of the spouses and which occur at the time of the dissolution of the regime, due to the death of one of the spouses. As for Italy, the institute of 'de residuo' communion is referred to: under the communion of property regime, the proceeds from separate activities of each spouse, the assets intended for the exercise of the business of one of the spouses established after the marriage, and increases in the company established even previously are considered the object of the communion only if they exist at the time of its dissolution. Upon the death of a spouse, these assets belong to the surviving spouse by virtue of the property regime and regardless of the succession event (as well as the inheritance call and acceptance of the same). Despite the *Mahnkopf* decision, it seems difficult to argue that these attributions are hereditary in nature, even from a European perspective, since it is not really the attribution of an inheritance share.

PRIVATE INTERNATIONAL SUCCESSION LAW CASE STUDY. AGREEMENTS AS TO SUCCESSION, PUBLIC POLICY AND PROTECTION OF FORCED HEIRS UNDER EU REGULATION NO 650/2012

Maria Cristina Gruppuso[1]

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Summary: I. Foreword. II. Case. III. Applicable law. IV. Concept of agreement as to succession. V. Public policy. VI. Protection of forced heirs.

Abstract: The work examines a cross-border succession case concerning agreements as to succession, showing the impact that EU Regulation 650/2012, which offers a definition of agreement as to succession (Article 3 (1) b) and indicates the criteria for identifying the law applicable to it (Article 25), has on States, such as Italy, that prohibit its stipulation. Once the case has been presented, it is necessary to take the perspective of the Italian judge called upon to settle the dispute. In this context, the main legal issues that may arise in the matter of agreements as to succession are discussed and resolved. After having determined the criteria for identifying the applicable law and after having clarified the concept of agreements as to succession, the Italian judge must deal with two extremely important questions: the eventual incompatibility with public policy and the value of the rules intended to protect forced heirs when it comes to the application of a foreign law admitting and regulating agreements as to succession.

I. FOREWORD

EU Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, with the aim of promoting succession by contract, offers a definition of agreement as to succession (Article 3 (1) b) and indicates the criteria for identifying the law applicable to it (Article 25).

This scope takes on particular importance in view of the different attitudes that national legal systems assume with regard to the agreements as to succession and produces a certain impact on the States that prohibit its stipulation.

Among such States is Italy. Pursuant to Article 458 of the Civil Code, entitled 'Prohibition of agreements as to succession', 'every agreement by which someone disposes of his succession'

[1] Maria Cristina Gruppuso is PhD Student, University of Torino.

and 'every act by which someone is entitled to a right to a succession not yet open or by someone who renounces them' is null. The rule, read in conjunction with Article 457 of the Civil Code, shows that there are only two forms of succession admitted in the Italian legal system: intestate succession and testamentary succession, and it is consequently excluded that a contract can be a source of handover of the inheritance.

Even in the uniqueness of the prohibition, and from the literal content of the norm, we can derive the existence of three distinct types of agreements as to succession: so-called *istitutivi*, *dispositivi*, *rinunciativi*. These agreements present a common element of having as their object a succession not yet open, which means that the rights which are the subject of the legal transactions put in place are considered rights of a future succession.

Faced with a very complex reality, in which it is not always easy to discern between valid cases and cases falling within the legal prohibition – and, therefore, deemed null – the Italian case law states that in order for an agreement as to succession to be recognised as prohibited, it is necessary: a) that an agreement has been concluded before the opening of succession; b) that the subject matter of the agreement must be included in a future succession or is considered in the stipulation as part of a future succession; c) that the promisor has wished to provide for his own succession; d) that the acquirer of rights to succession has contracted or stipulated having the right to that succession; e) that the object of the agreement must transfer to the promisee *mortis causa*, that is, as an inheritance or legacy.[2]

In Germany, on the other hand, the conclusion of agreements as to succession is allowed and very widespread. § 1941, paragraph 1, BGB states that the person whose succession is concerned (*Erblasser*) in the agreement (*Ervbertrag*), by way of a *mortis causa* legal transaction, may establish one or more heirs (*Erbeinsetzung*), arrange legacies (*Vermächtnisse*) or impose charges (*Auflagen*). Paragraph 2, then, specifies that it is permitted to designate as heir or forced heir a counterparty or a third party. The agreement is binding and can only be terminated by mutual agreement by the parties who stipulated it (§ 2290 BGB).[3]

Not only this, but the German legal system allows the early renunciation of inheritance rights. §§ 2346 - 2352 BGB (*Erbverzicht*) recognise the possibility for relatives and the spouse to waive these rights by contract with the person whose succession is in question; in this way, the waiving party is excluded from the succession as though he were no longer alive at the time of the opening of the succession.

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[2] These are the criteria evoked by C. Giannattasio, *Delle successioni. Disposizioni generali-Successioni legittime* (Torino: Utet, 1959), 21 (which recalls the Supreme Court of 13 October 1958 no 3240, *Giustizia civile. Massimario,* 1157 (1958)) and frequently employed by the case law in the resolution of disputes: Supreme Court of 22 July 1971 no 2404, available at *www.foroplus.it*; Supreme Court of 9 July 1976 no 2619, *Repertorio Foro it*., II, item *Successione ereditaria*, 2909 (1976); Supreme Court, 16 February 1995 no 1683, *Giustizia civile*., 1501 (1995); Court of Naples 30 June 2009, *Giurisprudenza di merito*, III, 3001 (2010); Supreme Court 15 July 2016 no 14566, *Rivista Notarile*, II, 974 (2016); Supreme Court 24 May 2021 no 14110, available at *www.dejure.it*; Court of Rome 1 July 2021 no 11383, available at *www.dejure.it*.

[3] A. Fusaro, 'Profili comparatistici dei contratti ereditari' *Rivista del Notariato*, 659 (2021); P. Kindler, 'Le successioni a causa di morte nel diritto tedesco: profili generali e successione nei beni produttivi' *Rivista di Diritto Civile*, 359, 364 (2015).

Pursuant to §§ 2276 and 2348 BGB, for the purposes of formal validity, the stipulation of the inheritance contract and waiving must take place by public deed, before a notary.[4]

With these mentioned differences between the two systems on the subject, we can then grasp the relevance of Regulation (EU) 650/2012. According to the regulatory provisions, in fact, an agreement as to succession is admissible if considered as such by the law of the State in which the deceased had his habitual residence at the time agreement was concluded or, where *optio legis* has been applied, by the law of his State of nationality – regardless of the admissibility of agreements as to succession under the law applicable to the entire succession.

Given this, it is still necessary to question the role played by public policy, bearing in mind that for this purpose it is necessary to place oneself in the perspective of so-called 'international' public policy (see paragraph V). In fact, the application of the law of another State that admits and regulates agreements as to succession must be measured against the public policy of the forum in which these are prohibited, in terms of compatibility or manifest incompatibilities. This requires a concrete evaluation, as will be seen, not only with reference to the contract-instrument, but also with regard to the content of the agreement that, sometimes, can result in the exclusion of forced heirs from succession.

The latter hypothesis requires us to extend the reflection to the value of the rules in place for the protection of forced heirs and, with particular reference to Italy, it seems appropriate to ask the following question: is the protection of forced heirs, as it is regulated, a fundamental and indispensable principle of the legal system?

II. CASE

Peter, a German citizen, a widower, with three children Albert, Markus and Karl, lives in Berlin.

In 2018, he met Laura, an Italian citizen, also a widow, with whom he began a relationship. Together they chose to move to Rome, the city where Laura lived. His children, on the other hand, remained in Berlin where, by then independent, they worked and lived.

In Rome, Peter bought an apartment to live in with Laura and started a small business activity.

In 2020, Peter, Laura and his sons Karl and Albert went to a notary in Rome. The parties, by mutual agreement, recalling the institutes of German law, declared that they wanted to enter into an agreement relating to the succession of Peter. Thus, in the agreement, where there are exact references to the provisions of the BGB, we read that Peter left the apartment to Laura, his business to Karl, and Albert waived his rights as forced heir.

A year later, Peter died in Rome. The succession opened and both Albert and Markus, believing to have rights as forced heirs, instituted a proceeding before the Italian judge.

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[4] R. Zimmermann, 'Compulsory Portion in Germany', in K.G.C. Reid, M. J De Waal and R. Zimmermann eds, *Mandatory Family Protection* (Oxford: Oxford University Press, 2020), 311-312; D. Achille, *Il divieto dei patti successori. Contributo allo studio dell'autonomia private nella successione futura* (Naples: Jovene Editore, 2012), 169; S. Delle Monache, 'Scenari attuali in materia di tutela dei legittimari' *Nuova Giurisprudenza Civile Commentata*, 59, 61 (2008).

In particular, the two children affirmed that the stipulated agreement as to succession was not admissible under Italian law — applicable to the agreement as the law of the State in which the deceased had his habitual residence on the day the agreement was concluded.

Again, even if the agreement was admissible under German law, the waiver of the rights of forced heir does not fall under the notion of agreement as to succession in Article 3(1) b), so the eligibility of the waiver should be evaluated in the light of the law applicable to the entire succession, namely Italian law.

In any case, in the perspective of the brothers as plaintiffs, the pact is in violation of public policy and the rules for the protection of forced heirs.

III. APPLICABLE LAW

The first question that the Italian judge must address in a logical-legal order, after having positively verified the jurisdiction, concerns the applicable law.[5] It is necessary to determine whether the law governing the agreement as to succession is the Italian law pursuant to Article 25(1) or the German law chosen pursuant to Article 25(3).

Art 21(1) of EU Regulation 650/2012, in accordance with the principle of proximity, states that the law applicable to the entire succession is that of the State in which the deceased had his habitual residence at time of death.

The Regulation does not provide a definition of habitual residence, but merely dictates some indications – Recitals 23 and 24 – about the evaluations to be made for its determination. Given that the habitual residence has an autonomous meaning with respect to the person's premises known in national law, it is stated that it must be identified as the place where the interests, affairs and social and affective relationships of the person are stable. More precisely, the habituality of residence can be derived from two elements: the first, objective element, relating to the length of time of a person's stay in the territory of the State; the second, subjective element, concerning the person's intention to establish permanently in that State the centre of his life and business interests. [6] In essence, the evaluations made with respect to this criterion must necessarily take into account the concrete case and the particularities of the story.

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[5] One of the guidelines by which the European legislator has pursued simplification in the management of international successions is the coincidence between *forum* and *ius*, as the habitual residence of the deceased at the time of death is the qualification for general jurisdiction and an objective link criterion. This coincidence may fail in the case of *professio iuris*, even if interested parties can remedy it *ex post* through the mechanisms provided for by the Regulation. For an introduction to EU Regulation 650/2012, see: I. Kunda, S. Winkler and T. Pertot, 'Jurisdiction and Applicable Law in Succession Matters', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property Relations of Cross Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 99-131.

[6] I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), 75; I. Riva, 'Il quadro normativo introdotto dal Regolamento UE n 650/2012 sulle successioni transfrontaliere', in Ead ed, *Famiglie trasfrontaliere: regimi patrimoniali e successori* (Turin: University of Turin, 2021), 127-128; D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 50-51.

In accordance with the autonomy of will, Article 22, through the so-called *professio iuris*, whether expressed or tacit, allows for a derogation from the connection criterion, attributing to a subject the right to choose as the law regulating the succession that of the State of which he is a citizen at the time of choice or death.

Now, the case in question is an agreement as to succession for which the Regulation, under the applicable law, provides an *ad hoc* provision, namely Article 25. The said Article identifies the applicable law with regard to the admissibility, the substantive validity, and the binding effects between the parties, including the conditions for dissolution, of the agreement as to succession having as a subject the succession of a single person (Article 25(1)) or of several persons (Article 25(2)).

In particular, pursuant to Article 25(1), the law applicable to the covenant (*lex pacti*) is the law that would have been applicable to the succession if the deceased had died on the day of the conclusion of the covenant: therefore, the law of the State in which he, at that time, had his habitual residence (compare Article 21(1)).

Article 25(3) allows the parties, in both cases referred to in paragraphs 1 and 2, for all aspects, to exercise the *optio legis* in favour of the law that the person – or one of the persons whose inheritance is in question – could have chosen pursuant to Article 22 of the Regulation.

In the present case, the agreement entered into is aimed at regulating Peter's succession. Thus, the brothers as plaintiffs argued that the admissibility of the covenant had to be assessed according to the law of the State in which the deceased had his habitual residence at the time of the conclusion of the agreement.

In fact, Peter, at the time of signing the agreement, was residing in Rome, Italy. There he had established his business and that was the place of his interests: work and family life.

The central point, however, is the following: the agreement results in a choice in favour of German law, Peter's citizenship law. The parties expressed to the notary the will to agree according to the institutes of German law; in the agreement, in fact, there are precise references to the provisions of the BGB.

As anticipated in the introduction, §§ 1941 and 2274 BGB govern the inheritance contract (*Erbvertrag*), by which the stipulator can establish heirs, dispose of legacies and impose burdens. It was also said that unlike Italian law, in Germany it is permitted to waive – before the opening of the succession – the rights that may exist with a future succession. In this sense, §§ 2346 - 2352 BGB allow the spouse and relatives to enter into a contract with the one whose succession is in question in order to waive their rights or the reserved share. The waiver by one or more descendants, in fact, represents one of the succession planning tools generally used to allow the generational transfer of the company into the hands of the descendant that the entrepreneur considers capable and suitable for the continuation of the activity.[7]

The judge must take this into account, since the choice of law, pursuant to Article 22(2) of the Regulation, 'shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition', and Recital 39 clarifies that 'A choice of law could be regarded as demonstrated by a disposition

[7] R. Zimmermann, 'Compulsory Portion in Germany', in K.G.C. Reid, M. J De Waal and R. Zimmermann eds, *Mandatory Family Protection* (Oxford: Oxford University Press, 2020), 311-312.

of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law'.

Moreover, as it emerges, the parties exercise an *optio legis* by mutual agreement, just as the prevailing opinion considers that it should happen when the choice of applicable law concerns the agreement as to succession.[8]

IV. CONCEPT OF AGREEMENT AS TO SUCCESSION

The second legal question concerns the breadth of the notion of an agreement as to succession. One of the plaintiffs, Albert, who had renounced his rights as a forced heir, stated that in reality the renunciation did not fall within the notion of an agreement as to succession referred to in Article 3(1)(b) of the Regulation. Following this approach, it would derive that the *lex pacti ex* Article 25(3) should not be applied to it, but Italian law which – pursuant to Articles 21(1) and 23(2)(e) – regulates the succession as a whole and, therefore, also 'the conditions and effects (...) of renouncing the inheritance or legacy. Now, given that the Italian legal system does not allow early renunciation, the conclusion should be in the sense that Albert's renunciation of his rights as a forced heir is void.

The cited Article 3(1)(b) states that for the purposes of the Regulation, agreement as to succession means: 'an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement'.

The notion in question is very broad and attracts different institutes governed by the laws of the Member States. For the Italian judge, as regards the present case, there is an interpretative question concerning the breadth of this definition with respect to the wording of Article 458 of the Civil Code, entitled 'Prohibition of agreements as to succession'. Precisely, the provision of the Code identifies three types of pacts: so-called *istitutivi*, that is, the agreements through which a subject establishes an heir or has a legacy in favour of the counterparty or a third party; so-called *dispositivi*, *inter vivos* acts, by means of which a subject has the rights which he expects to acquire under the succession of another person; so-called *rinunciativi,* through which a person renounces a future inheritance.

Now, about the definition in Article 3(1) (b), there are two opposing reconstructions. According to the restrictive orientation, only the agreements as to succession so-called

[8] D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 98; J. Re, *Pianificazione successoria e diritto internazionale privato* (Milan-Padova: Wolters Kluwer-Cedam, 2020), 248; A Bonomi, 'Patto successorio (Art 25)', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni: commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 347; 347; J. Rodríguez Rodrigo, 'Article 25: Agreements as to Succession', in A.L. Calvo Caravaca, A. Davì et al eds, *The EU Succession Regulation. A Commentary* (Cambridge: Cambridge University Press, 2016), 388; B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 128-129, which provides arguments starting from Article 83(4) on the subject of transitional provisions.

istitutivi [9] fall under the notion of the Regulation by virtue of the literal fact of the forecast. According to an extensive orientation, however, as the only matter relevant is the existence of an agreement on a future succession as a common denominator for the cases referred to in Article 3(1)(b), the so-called *dispositivi* and *rinunciativi* agreements must also be brought under the notion under consideration.[10] This second interpretation was the subject of clarification: according to the prevailing approach in the doctrine, in fact, the central point of the regulatory notion of an agreement as to succession consists of the necessity that the person whose succession is concerned participates in the agreement.[11]

Now, in the present case, the judge will take into account the fact that Albert's waiver fits into the multilateral transaction in which Peter, the one whose succession is concerned, participated. Thus, unlike Albert's view, the renunciation is governed by the *lex pacti*, namely by German law, pursuant to Article 25(3): it is therefore valid.

V. PUBLIC POLICY

A further legal question, in the light of the provisions of Article 35 of the Regulation, concerns the compatibility with the public policy of the forum of a law that admits agreements as to succession.

Public policy, as a general clause, has content whose determination cannot ignore the application to a concrete case and whose results vary in relation to the different systems and the historical periods of reference. Precisely, the expression 'international public policy' indicates a set of fundamental principles expressing the identification values of the legal order of a State. Thus, the judge, evaluating according to reasonableness, must verify if there are one

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[9] D. Damascelli, n 6 above, 92. Thus, the author specifies, the definition includes the *contract to make a will* used in *common law* systems or *l'institution contractuelle* of French law.

[10] Cf A. Bonomi and P. Wautelet, 'Definizioni (Art 3)', in A. Bonomi and Fr. Wautelet, *Il regolamento europeo sulle successioni: commentario al Reg UE 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 93-94; M. Weller, 'Article 3: Definitions', in A.L. Calvo Caravaca, A. Davì et al. eds, *The EU Succession Regulation: A Commentary* (Cambridge: Cambridge University Press, 2016), 117; I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), 32, which gives two sets of reasons: *in primis*, 'it would not be easy to describe in another way, with a single summary formula', the variety of cases integrating agreements as to succession; secondly, with a view to promoting succession planning tools alternative to the will, the disposing and waiving agreements have a certain importance, especially if we consider that 'the various figures often intertwine and connect for the creation of a final result in accordance with the interests of the parties'.

[11] It follows that only disposing and waiving legal transactions in which the person whose succession is concerned does not intervene are excluded from the notion in question. Cf B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 113-114; J. Rodríguez Rodrigo, 'Article 25: Agreements as to Succession', in A.L. Calvo Caravaca, A. Davì et al eds, *The EU Succession Regulation. A Commentary* (Cambridge: Cambridge University Press, 2016), 381-382; P. Kindler, 'La legge applicabile ai patti successori nel Regolamento (UE) n 650/2012' *Rivista di diritto internazionale privato e processuale*, 12, 15-16 (2017); E. Calò, 'Dalla legge italiana al regolamento europeo', in E. Calò, M.T. Battista and D. Muritano, *Le successioni nel diritto internazionale privato dell'Unione Europea. Regolamento (UE) n 650/2012 del 4 luglio 2012. Lineamenti e casi pratici* (Naples: Edizione Scientifiche Italiane, 2019), 110; J. *Re, Pianificazione successoria e diritto internazionale privato* (Milan-Padua: Wolters Kluwer-Cedam, 2020), 214-216.

or more principles considered essential and absolutely mandatory for a legal order and that hinder the application of the law of another State.[12]

In the proposed case, the Italian judge is asked to assess whether the application of German law, which provides for and governs agreements as to succession, can be considered 'manifestly'[13] incompatible with the fundamental principles which express the identifying values of the Italian legal system. The evaluation, in reality, must take into account two profiles: public policy as a limit with respect to the instrument, that is to say, the agreement as to succession; public policy as a limit with respect to the content of such agreement (see paragraph V).[14]

On this point, the dominant opinion is that the prohibition *ex* Article 458 of the Civil Code on regulating succession by means of a contract can be considered a rule of internal public policy, but not an 'international' public policy rule (in the sense specified above).[15]

This statement stems from different assumptions: first, the *favor* granted to the agreement as to succession by the Regulation must be highlighted which, in Recital (49), explicitly states the objective of facilitating the acceptance in the Member States of the inheritance rights acquired as a result of an agreement as to succession; secondly, Article 35 would end up being exploited for the purpose of preventing the application of Article 25;[16] thirdly, the reasons laid at the foundation of the Civil Code prohibition are very doubtful[17]

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[12] G. Perlingeri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), *passim*. The work metaphorically refers to public policy as a 'drawbridge' placed at the entrance of an 'ideal castle' represented by the legal system of the State in which enforcement is sought. Moreover, the principles, rules and obligations of international and supranational origin cannot fail to be taken into account. On this point, see: I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), , 34; V. Putortì, 'Successione *ex contractu* e ordine pubblico del foro *ex* art 35 Regolamento UE 650/2012' *Le Corti Fiorentine. Rivista di diritto e procedura civile, 3, 11 (2016);* S. Deplano, 'Applicable Law to Succession and European Public Policy', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper* (Camerino: University of Camerino, 2019), 51.

[13] According to V. Barba, *I patti successori e il divieto di disposizione della delazione* (Naples: Edizioni Scientifiche Italiane, 2015), 217, the adverb must be understood as 'perceptible *ictu oculi*'; the clause, therefore, must be interpreted restrictively according to D. Mauritano, 'Casi pratici in tema di successioni internazionali', in E. Calò, M.T. Battista and D. Muritano, *Le successioni nel diritto internazionale privato dell'Unione Europea. Regolamento (UE) n 650/2012 del 4 luglio 2012. Lineamenti e casi pratici* (Naples: Edizioni Scientifiche Italiane, 2019). On this point, reference is also made to the considerations made in M.C. Gruppuso, 'Article 37: Grounds of Non-recognition', in L. Ruggeri and R. Garetto eds, *European Family Property Relations Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Naples: Edizioni Scientifiche Italiane, 2021), 341-342.

[14] Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), , 35.

[15] B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. *Leandro eds, Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 137, G. Perlingeri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), 187-199; A. Fusaro, 'Profili comparatistici dei contratti ereditari' *Rivista del Notariato*, 659 (2021), , 670.

[16] A. Fusaro, n 3 above, 670; A. Barel, n 8 above, 136.

[17] The justifying reasons for the establishing agreement are traditionally traced in the need to protect the testator's freedom to dispose and in the essential revocability of the provisions *mortis causa* (Cf C. Giannattasio, *Delle successioni. Disposizioni generali-Successioni legittime* (Torino: Utet, 1959), 20; G. Grosso and A. Burdese, 'Le successioni. Parte generale', in F. Vassalli ed, *Trattato Diritto Civile* (Turin: Utet, 1977),12, I, 93; B. Toti,

so much so that, for some time now, there have been more and more pressing demands for reform.[18]

Therefore, the plaintiffs' claim must be rejected, as in the present case there is no manifest incompatibility with the public policy of the forum.

VI. PROTECTION OF FORCED HEIRS

As anticipated, Article 25 of EU Regulation 650/2012 identifies the law governing the agreement as to succession in terms of admissibility, substantial validity and binding effects between the parties.

Pursuant to the combined provisions of Article 21(1) and Article 23(2) h), the law of the State in which the deceased had his habitual residence at the time of death regulates, on the other hand, the entire succession and, precisely, also 'the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs'. With this in mind, the Italian Civil Code, in Article 536, identifies the persons in favour of whom the law reserves a share of inheritance or other rights in the succession: the spouse (or the person in the registered union), the children, and, in the absence of the latter, the ascendants.

It is necessary to understand whether the two children as plaintiffs have the right to obtain the protection that the Italian legal system offers to forced heirs. To this end, a separate reasoning must be followed for each of the two.

Albert had given up his rights as a forced heir. As seen, the waiver is governed by the *lex pacti*, namely by German law, for different profiles, including that of 'binding effects between the parties'.

'La nullità del testamento esecutivo del patto successorio' *Rivista del Notariato*, 9, 17 (1985); M.V. De Giorgi, *I patti sulle successioni future* (Naples: Jovene, 1976), 2, 60; A. Palazzo, 'Le successioni. Introduzione al diritto successorio. Istituti comuni alle categorie successorie. Successione legale', in G. Iudica and P. Zatti eds, *Trattato di diritto Privato* (Milan: Giuffrè, 2nd ed., 2000), I, 212; M. Calogero, 'Disposizioni generali sulle successioni. Art 456-461', in P. Schlesinger and D. Busnelli, *Il Codice Civile: Commentary* (Milan): Giuffrè, 2006), 110; F.P. Traisci, *Il divieto dei patti successori nella prospettiva di un diritto europeo delle successioni* (Naples-Rome: Edizioni Scientifiche Italiane, 2014), 54; C.M. Bianca, *Le successioni* (Milan: Giuffrè, 5a ed, 2015), 31). For the disposing and waiving of agreements, the reasons vary from the desire to avert the so-called *votum captandae mortis* (C. Gangi, *La successione testamentaria*, (Milan: Giuffrè, 2nd ed, 1952), 40), to the desire to preserve 'prodigal and inexperienced' subjects in order to prevent them from squandering the substances they could receive as an inheritance or legacy (A. Palazzo, 'Le successioni. Introduzione al diritto successorio. Istituti comuni alle categorie successorie. Successione legale', in G. Iudica and P. Zatti eds, *Trattato di diritto Privato* (Milan: Giuffrè, 2nd ed, 2000), I, 213; L. Ferri, 'Successioni in generale. Art. 456-511', in A. Scialoja and G. Branca eds, *Commentario del Codice civile* (Bologna-Rome: Zanichelli - Soc ed del Foro italiano, 1964), 86), and finally to the protection of forced heirs (M. Ieva, 'Appunti per un'ipotesi di revisione del divieto dei patti successori' Rivista del Notariato, 1, 2 (2018); Id, 'Art. 458 – Divieto di patti successori', in V. Cuffaro and F. Delfini eds, Delle Successioni, in E. Gabrielli ed, *Commentario del Codice civile* (Turin: Utet, 2009), 32; C. Cicero, 'Il divieto del patto successorio' *Rivista del Notariato,* 699, 705 (2018); S. Lo Iacono, *Ambulatoria est voluntas defuncti? Ricerche sui 'Patti successori' istitutivi* (Milan: Giuffrè, 2019), 28, 105).

[18] On the progressive weakening of the prohibition for all, see 'Il quadro normativo introdotto dal Regolamento UE n 650/2012 sulle successioni transfrontaliere', in *Ead ed, Famiglie trasfrontaliere: regimi patrimoniali e successori* (Turin: University of Turin, 2021), 134.

Now, if the forced heir were allowed to free himself from the agreement and invoke Italian law, as it is more favourable, there would be two consequences: the first, that of depriving Article 25 of usefulness;[19] the second, disregard of the objective of certainty and stability of succession planning that through Recital 7 the Regulation tends to pursue (in fact, it reads: 'In the European area of justice, citizens must be able to organise their succession in advance').

In addition, it should be taken into account that the protection is lost due to a choice of renunciation consciously manifested by the forced heir before the notary.

Even if, then, doubt arises as to the violation of public policy in terms of the content of the agreement, the extremes for the application of Article 35 cannot be seen, since the protection of forced heirs, as regulated in our legal system, and having regard to today's socio-economic context, cannot be considered a principle of international public policy.[20]

For these reasons, Albert will not be able to claim the reserved share that the Italian legal system reserves for the children of the deceased.[21]

On the other hand, the position of Markus, who did not participate in the agreement, is different. He cannot be subject to the *lex pacti*. Therefore, he will find protection under the law governing succession, in the application of Articles 21(1) and 23(2) (h).

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[19] The Proposal for a Regulation, in Article 18 (4) - now Article 25 - was without prejudice to the rights of the forced heirs who remained unrelated to the agreement. According to the doctrine, this specification, later removed, became superfluous in the final text, in which one goes so far as to state that the *lex pacti* regulates the binding effects 'between the parties'.

[20] For further information, see I Riva, Certificato successorio europeo. Tutele e vicende acquisitive (Naples: Edizioni Scientifiche Italiane, 2017), 45 and A. Bonomi and P. Wautelet, 'Definizioni (Art 3)', in A. Bonomi and Fr. Wautelet, Il regolamento europeo sulle successioni: commentario al Reg UE 650/2012 in vigore dal 17 agosto 2015 (Milan: Giuffrè, 2015), 470-478. On the applicability of foreign law that admits the validity of an agreement as to succession and excludes the protection of forced heirs or provides for one that does not correspond to that of domestic law, see V. Barba, I patti successori e il divieto di disposizione della delazione (Naples: Edizioni Scientiche Italiane, 2015), , 207, which recalls the Supreme Court of 24 June 1996 no 5832. For case law, see the Supreme Court 30 June 2014 no 14811, available at https://pa.leggiditalia.it.

Not even in the present case can there be discrimination, as the *lex pacti* does not provide for a discriminatory order of succession on the basis of sex, religion or grounds of affiliation, nor does it assign rights differentiated according to these criteria. On the point, see I. Riva, *Certificato*, n 6 above, 52.

[21] This is the prevailing opinion: A. Bonomi, 'Patto successorio (Art 25)', in A. Bonomi and P. Wautelet eds, Il regolamento europeo sulle successioni: commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015 (Milan: Giuffrè, 2015), 338-340; B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. Leandro eds, Il diritto internazionale privato europeo delle successioni mortis causa (Milan: Giuffrè, 2013), 133; E. Calò, 'Dalla legge italiana al regolamento europeo', in E. Calò, M.T. Battista and D. Muritano, Le succesisoni nel diritto internazionle privato dell'Unione Europea. Regolamento (UE) n 650/2012 del 4 luglio 2012. Lineamenti e casi pratici (Naples: Edizione Scientifiche Italiane, 2019), 111; indirectly also P. Kindler, 'La legge applicabile ai patti successori nel Regolamento (UE) n 650/2012' Rivista di diritto internazionale privato e processuale, 12, 15-16 (2017), 20. For the sake of completeness, account must also be taken of the contrary opinion of D. Damascelli, Diritto internazionale privato delle successioni a causa di morte (Milan: Giuffrè, 2013), , 96-97: leveraging Recital (50) and regardless of participation in the agreement as to succession, according to the author, forced heirs cannot be deprived of the rights recognised by the *lex successionis*, also in consideration of the restrictive interpretation of Article 3(1)(b) which, always in the author's opinion, does not include agreements with which the rights that may lie in a succession that is not yet open are renounced.

JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL PROPERTY REGIMES IN LUXEMBOURG

Alba Paños Pérez[1]

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Summary: I. Introduction. II. Assumption of fact. III. Decision. IV. Concluding remarks.

Abstract: Regulation (EU) 2016/1103 aims to enable spouses to know, in advance, which law will apply to their matrimonial property regime and to avoid being subject to different regimes depending on the competent court or the applicable law. The decision selected for this commentary is the only one to date implementing Council Regulation (EU), 2016/1103 of 24 June 2016 on enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of judgments in matrimonial matters. The case in question concerns an application for divorce with several foreign elements (the former spouses are of different nationalities and have their habitual residence in Luxembourg) and where the application for divorce is based on Article 232 of the Luxembourg Civil Code. The procedure addresses jurisdiction, applicable law and formal admissibility.

I. INTRODUCTION

Luxembourg has no specific family law; the source of family law is Luxembourg civil law. Thus, family-related litigation is mainly governed by the Code of Civil Procedure, which sets out the actions to be taken in the case of divorce or child custody[2].

International sources complement national sources for the few issues that involve specific questions. Although the jurisprudence is not very rich, it is sometimes quite relevant (especially since the Constitutional Court declared some provisions contrary to the Constitution).

It should be noted at the outset that the decision selected for this commentary is the only one to date implementing Council Regulation (EU), 2016/1103 of 24 June 2016 on enhanced

[1] Full professor of Civil Law at University of Almeria. Paper carried out within the framework of the SEJ-235 research group, attached to the CEIA3 and CIDES centres.

[2] A. Paños Pérez, F. Pérez Ferrer, M.J. Cazorla González, D. Hiez, R. Herrera de las Heras, 'Luxembourg' in L. Ruggeri, I. Kunda, S. Winkler (Eds.), *Family Property and Succession in EU Member States: National Reports on the Collected Data,* University of Rijeka, (2019), 429.

cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of judgments in matrimonial matters[3].

Regulation (EU) 2016/1103 aims to enable spouses to know, in advance, which law will apply to their matrimonial property regime and to avoid being subject to different regimes depending on the competent court or the applicable law[4]. It is, therefore, a provision for harmonised conflict-of-laws rules to avoid contradictory results[5].

The case in question concerns an application for divorce with several foreign elements (the former spouses are of different nationalities and have their habitual residence in Luxembourg) and the application for divorce is based on Article 232 of the Luxembourg Civil Code. In cases of divorce or separation, as the case may be, the jurisdiction shall lie with the court having jurisdiction to settle the matrimonial dispute[6].

In other cases, however, it is necessary to differentiate whether or not there is an agreement, depending on:

a) Forum of tacit or express submission: It is deemed to be 'express' when the spouses agree on the jurisdiction corresponding to a Member State of applicable law (Article 6) or of the place where the marriage was celebrated (Article 7). However, such an agreement must be in writing, dated and signed by the parties. It is deemed 'tacit' when both the application and the defence are lodged with the same court without opposition (Article 4 or Article 5(1) (Article 8).

b) In the absence of an agreement, the application shall be brought before the court of the Member State in which the application is lodged for the settlement of any question relating to the matrimonial property regime, except in the event of the death of one of the spouses or of a matrimonial dispute, in the following order[7]:

   - If the spouses habitually reside in Luxembourg at the time the court is seised, their nationality or where the marriage was celebrated is considered unimportant; what matters is the common habitual residence at the time of contracting marriage.
   - When the spouses or partner does not reside in the Member State because one of them lives in another country. In this situation, the court seised will be where both parties have established their common habitual residence, provided that one of them still resides there.
   - Where the spouses are each resident in different States, there are two situations, the first prevailing over the second and is based on cases where they have not been ha-

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3 Available at:
https://justice.public.lu/fr/jurisprudence/jurisprudence-judoc.html?q=règlement+%28UE%29+2016%2F1103

4 M.I. Espiñera Soto, 'Regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas con repercusiones transfronterizas', *El Notario del Siglo XXI*, (2020).

5 Recital 43

6 L. Ruggeri and M.J. Cazorla González, *Directrices para profesionales sobre los efectos patrimoniales familiares y sucesorios transfronterizos*, Dykinson, (2020), 23. Available at:
https://docs.google.com/document/d/15sJroZkCxbEnDNj_gZpjjy8XgWslqbFc/edit

7 Case C-281/02, *Owusu*, para. 25-6 and 41-3: This instrument applies even when both parties are domiciled in the same MS; the court of the MS in question cannot decline jurisdiction in favour of the court of a third country, even when all other elements of the case relate only to that country.

bitually resident together for a long time. In the first instance, in the country where the defendant is habitually resident. In the second, in the country where the plaintiff habitually resides, provided they had resided in that country for at least one year before the application was lodged.

- When the spouses agree jointly. Suppose they consider applying for termination of the registered partnership by mutual consent. In that case, they can choose a country where either of them is habitually resident; it is understood that the agreement has the force of law and that if relations subsequently become complicated, there will be no possibility of modifying the agreement.
- Where the applicant has resided for at least six months in the country where the individual is a national. In this case, an application may be made in the country where they are nationals.
- If both spouses are nationals of the same State, they may apply to settle the matrimonial property regime without any residence requirement in their country.

When determining the body competent to deal with matrimonial property regime issues, a distinction must be made between proceedings initiated before 29 January 2019 and those initiated after that date, as this is the date on which Regulation 2016/1103 entered into force[8]. Thus, in proceedings such as this one, initiated after 29 January 2019, as far as matrimonial property regimes are concerned, jurisdiction is determined by the rules contained in Regulation 2016/1103. They provide that the competent authorities are as follows:

a) Where the legal relationship is extinguished by the death of one of the parties, jurisdiction lies with the court having jurisdiction for matters arising by connection with the succession (Article 4).

b) In the event of divorce, legal separation or marriage annulment, and in accordance and by connection with Regulation (EC) No 2201/2003, jurisdiction shall lie with the court having jurisdiction to settle the matrimonial dispute (Article 5).

In the present case, therefore, the date on which the procedure was initiated allows the Regulation to be applied, stating that "In accordance with Article 5(1) of Council Regulation (EU) 2016/1103 of 24 June 2016 on enhanced cooperation in the fields of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regime matters, applicable to proceedings instituted after 29 January 2019, the family court of the Tribunal d'Arrondissement of Luxembourg has jurisdiction to rule on matrimonial property regime matters concerning proceedings instituted after 29 January 2019".

On the other hand, jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the agreement of the spouses when the court seised of an application for divorce, legal separation or marriage annulment:

a) is the court of a Member State in which the applicant is habitually resident and has resided for at least one year immediately prior to the filing of the application (Article 3(1a) of Regulation (EC) Nº 2201/2003);

[8] A. Paños Pérez and M.J. Cazorla González, 'Matrimonial property regimes in the absence of choice by the spouses under regulation (EU) 2016/1103', in M.J. Cazorla González, D. Gobbi, J. Kramberger Skerl, L. Ruggeri, S. Winkler, *Property relations of cross border couples in the European Union*, Edizioni Scientifiche Italiane, (2020), 61.

b) is the court of a Member State of which the claimant is a national and in which they are habitually resident and have resided for at least six months immediately preceding the lodging of the application (Article 3(1)(a) of Regulation (EC) No 2201/2003);

c) in cases of conversion of legal separation into divorce (Article 5 of Regulation (EC) No 2201/2003;

d) in cases of residual competition (Article 7 of Regulation (EC) No 2201/2003);

e) in other cases, it is necessary to distinguish whether or not there is an agreement.

It should be noted that where the spouses agree on the jurisdiction of a Member State whose law is applicable or where the marriage has taken place, the agreement must be in writing, dated and signed by the parties.

Finally, it should be noted that the principle of concentration would also operate concerning the connection between the financial consequences of registered partnerships and disputes arising from the dissolution or cancellation of the registered partnership[9]. Any dissolution or cancellation inevitably leads to evaluating the assets resulting from the interruption of the personal relationship between the parties. With a disciplinary approach inspired by favouring the unity of jurisdiction in these related matters, Article 5 of the Regulation states that the property profiles of the registered partnership be examined by the same judicial authority that is called upon to decide on the dissolution or annulment of the partnership[10]. The court seised can only deal with questions relating to the property consequences of a registered partnership if it operates in a State that has participated in the enhanced cooperation procedure and therefore accepts Rule 1104. Unlike in matters of succession, the concentration, in this case, is not the result of an automatic legislative procedure but is subject to the agreement of the partners. Here, therefore, another important space for private autonomy in property matters arises, an *electio fori* resulting from an agreed assessment of the desirability of cases dealt with by the same national court being chosen based on conflict rules different from those of Regulation 1104. It is left to the free disposal of the parties who, even in this often delicate and conflictual phase, are called upon to decide by common agreement and, for reasons of economy and not only of procedure, to opt for the forum they consider most convenient.

II. ASSUMPTION OF FACT

The present case deals with an application for divorce, and the divorce action is based on Article 232 of the Civil Code. The procedure addresses jurisdiction, applicable law and formal admissibility and has several foreign elements.

Since the parties are habitually resident in Luxembourg, the local court has jurisdiction over their divorce proceedings under Article 3(1)(a) of Council Regulation (EC) No

[9] R. Garetto, M. Giobbi, F. Giacomo Viterbo, L. Ruggeri, 'Registered partnerships and property consequence', in M.J. Cazorla González, D. Gobbi, J. Kramberger Skerl, L. Ruggeri, S. Winkler, *Property relations of cross border couples in the European Union*, Edizioni Scientifiche Italiane, (2020), 61.

[10] S. Bariatti and I. Viarengo, 'I rapporti patrimoniali tra coniugi nel diritto internazionale privato Comunitario', *Rivista diritto internazionale privato e processuale*, 605-610, (2007).

2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Luxembourg law, the law of the State of the habitual residence of the spouses at the time of the court proceedings, applies to the divorce of the parties by virtue of Article 8(a) of Council Regulation (EU) No 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation.

The decision states that the plaintiff's primary action for divorce has been duly filed based on the provisions of Articles 232 of the Civil Code and 1007-24 of the New Luxembourg Code of Civil Procedure and is admissible in its pure form. The aforementioned Article 232 of the Civil Code provides that "divorce on the grounds of irretrievable breakdown of marital relations may be requested by one of the spouses or, where there is agreement on the principle of divorce, by both spouses jointly" and Article 233 provides that "irretrievable breakdown is established by the agreement of both spouses on the principle of divorce (...)".

The judgment states that, at the hearing of 14 June 2019, the respondent accepted the principle of divorce and that, in these conditions, the irremediable breakdown of the marriage bond is established so that the plaintiff's claim for divorce must be declared well-founded. Therefore, it is determined that the matrimonial property regime must be liquidated, and the community property be distributed.

As already mentioned, the resolution states that, given the date on which the procedure was initiated, it is possible to apply the Regulation, stating that "In accordance with Article 5(1) of Council Regulation (EU) 2016/1103 of 24 June 2016 on enhanced cooperation in the fields of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regime matters, applicable to proceedings instituted after 29 January 2019", the family court of the Tribunal d'Arrondissement of Luxembourg has jurisdiction to rule on matrimonial property regime matters in proceedings instituted after 29 January 2019".

On the other hand, Article 237 of the Civil Code states that "the divorce decree establishes the irretrievable breakdown of marital relations, pronounces the divorce, orders the liquidation and division of the matrimonial property regime and regulates the consequences." In this respect, the law of the matrimonial property regime shall determine according to which rule the liquidation of the matrimonial property regime shall be carried out. It is this law that will define the mutual rights of the spouses; and will be competent for the proof of recovery and division of property[11].

The liquidation of the matrimonial property regime is governed by the law applicable to the matrimonial property regime[12]; in this case, the law determined by the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes. It follows that the law applicable to the liquidation of the matrimonial property regime after divorce must be determined. Thus, the ruling determines that: "The judges of the Court of First Instance must investigate whether the stipulations of the marriage certificate do not imply the adoption of a particular matrimonial property regime by the spouses (Cass. fr. 1re civ., 7 April 1998, Rev. crit. DPI 1998, p. 644)".

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[11] *Dalloz*, Répertoire de droit international, v° Régimes matrimoniaux, N° 180.

[12] See, in this respect, *Dalloz*, Répertoire de droit international, v° Divorce and legal separation, N° 234.

III. DECISION

The decision discussed in this paper points out that some foreign codes may include several legal regimes or provide that, at the time of the conclusion of the marriage, the spouses may express their will in favour of a particular regime. This choice of a matrimonial property regime at the time of the celebration of the marriage, expressed by the spouses before a foreign civil registrar, represents a valid choice of law and regime, provided that it is made following the provisions of the domestic law applicable in the place of celebration of the marriage.

The option in question must be assessed in light of the limited choice of law provided under Article 3 of the Hague Convention. If valid, the regime chosen by the spouses should be applied in the same way as a marriage contract. Senegalese law (nationality of the respondent) provides, for example, at the time of the conclusion of the marriage, a choice between three regimes: separation of property, the dowry regime and the shared earnings regime of participation in movable goods and acquired property. The option is exercised, in this case, in the form of a declaration made by the civil registrar and recorded in the marriage certificate under Article 65 of the Family Code (Article 370(1))[13].

In the present case, the parties' marriage certificate contained an option, in accordance with Article 3 of the Hague Convention of 14 March 1978, for community regime of property under Senegalese law, the country, as previously noted, the respondent was a national. Thus, the decision states that Senegalese law applies both to the matrimonial property regime of the parties and, correlatively, to its liquidation.

Therefore, the judge's decision in this judgment was that: "it is necessary to proceed with the liquidation and division of the community property that existed between the parties and appoint Maître (...), a notary resident in Luxembourg, for these purposes".

IV. CONCLUDING REMARKS

We know that autonomous free will is essential in marital agreements, even more so in those with transnational elements, because if the parties cannot choose the applicable law of the contract, they run the risk that the agreement will be null and void or unenforceable under the law that finally becomes applicable[14].

Based on the principle of the autonomous free will of the parties, we consider that the great novelty of Regulation (EU) 2016/1103 has been to offer married couples the possibility of regulating their property relations by applying a law other than that of their nationality, thus allowing future spouses or married couple to choose which law shall govern their property regime when their case involves foreign elements. Indeed, Article 22 of Regulation (EU) 2016/1103 allows the matrimonial property regime to be governed by the law chosen by the spouses. This choice of law can be based on the common habitual residence of the spouses (or that of one of them at the time of choice) or the national law of which one of the spouses

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[13] *See* M. Devisme, 'La place de la volonté dans l'établissement des conventions matrimoniales', *JCP*, 25, 1268, (2012).

[14] Hence, C.I. Nagy, 'El derecho aplicable a los aspectos patrimoniales del matrimonio: la ley rectora del matrimonio empieza donde el amor acaba', *Anuario Español de Derecho Internacional Privado*, T. X, 524, (2010).

is a national. Thus, the will of the spouses is expressed, allowing them to choose between the different secondary legal regimes provided for in a system or to design an *ad hoc* regime, provided it is not prohibited by the mandatory rules of the primary legal regime; and, at the international level, to determine the competence of authorities and/or the applicable legal system for the property effects of the marriage[15].

It must be said that, in our opinion, the guidelines regarding the choice of law go further and would be equally applicable to marriage contracts, the validity of which would depend on the observance of the formal and material requirements for them[16]. Thus, the determination of the law applicable to the matrimonial property regime in the event of an agreement is subject to the same conflict of law rules as in the absence of such an agreement, i.e., the spouses may choose the law applicable to the matrimonial property regime agreed in accordance with the provisions of Article 22. Otherwise, the law applicable to such an agreed regime will be determined by Article 26 of the Regulation[17].

In short, we conclude by pointing out that relations between spouses are torn between the traditional paternalism that has inspired our legislator in matters of family law, characterised by a greater limitation of autonomous free will through a list of mandatory rules under the protection of public family order, and an evolution of the notion of the family that calls for a relaxation of regulatory rigidity in favour of personal autonomy. With a more ephemeral concept of marriage, these new family models are based on a global social reality that requires a legal system adapted to changes in circumstances that may affect their property relations.

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[15] A. Rodríguez Benot, 'Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión Europea', *Cuadernos de Derecho Transnacional*, V. 11, 1, 27-28, (2019).

[16] *See*. A. Paños Pérez, 'Hacia una mayor autonomía privada en capitulaciones matrimoniales con marco transfronterizo', *Cuadernos de Derecho Transnacional*, V. 13, 470-471, (2021).

[17] B. Añoveros Terradas, 'El régimen conflictual de las capitulaciones en los nuevos Reglamentos de la Unión Europea en materia de regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas', *Anuario Español de Derecho Internacional Privado*, T. XVII, 833, (2017).

DISSOLUTION OF SAME- SEX MARRIAGE: INTERNATIONAL JURISDICTION AND POSSIBLE EXERCISE OF PARTY AUTONOMY

Roberto Garetto[1]

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Summary: I. Regulatory framework. II. The case. III. Legal issues. 1. Which legal source shall the Maltese court use to determine whether it has international jurisdiction in hearing a cause of personal separation and instituting subsequent divorce proceedings? 2. May the Maltese courts also decide on spouses' matrimonial property regime? 3. The courts of which Member States shall have international jurisdiction to decide on the spouses' matrimonial property regime? 4. In the event that the parties do not reach an agreement aimed at concentrating in the separation proceedings also the questions relating to the property regime, can the Italian seised court decide on the entire matrimonial property of the spouses (or shall it limit the jurisdiction to the assets located in the Member State to which it belongs)? 5. In order to avoid the fragmentation of proceedings that occurred during the separation phase, could the spouses have entered into a choice of court agreement earlier? The courts of which Member State could they have chosen? 6. In the event that the parties do not agree to concentrate the matters relating to the property regime in the separation proceedings in Malta, having regard to the jurisdiction of the Italian seised court, would that court have to apply Regulation 2016/1103 or 2016/1104 instead? IV. Conclusions

Abstract: The hypothetical case examined concerns a same-sex couple getting married in Malta. The couple has a cross-border element, since one of the parties is Maltese and the other is Italian. The marriage is celebrated in Malta, where the couple resides for a certain period, before moving to Italy. When the couple comes to a crisis, the Maltese spouse returns to his own country and subsequently initiates in Malta contentious legal separation proceedings, which in Maltese legislation must precede divorce. Shortly afterwards, the Italian spouse applies to an Italian court to obtain the judicial division of property. In the analysis of the legal issues arising from the case, particular attention will be paid to the question of the jurisdiction of the Maltese court in matters of separation (and subsequent divorce) and measures concerning the property regime, pursuant to EU Regulation 2016/1103. Consideration will finally be given to the hypothesis that, also following a possible agreement of the parties, it is the Italian court that will have to decide on property matters, bearing in mind possible problematic issues with regard to the application of the Twin Regulations to the case at hand.

[1] University of Camerino.

I. REGULATORY FRAMEWORK

European Convention on Human Rights

- Article 8. Right to respect for private and family life
- Article 12. Right to marry

Charter of Fundamental Rights of the European Union

- Article 7. Respect for private and family life.
- Article 9. Right to marry and right to found a family.

EU Regulations

- Council 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.
- Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.
- Council Regulation (EC) 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, repealing Regulation (EC) no 1347/2000.
- Council 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.

National Legislation: Malta

- 1975 Marriage Act (Chapter 255 of the Laws of Malta).
- Marriage Act and other Laws (Amendment) Act, 2017.
- Act no XIV of 2011.
- Act no XXV of 2021.
- Article 1320 of the Civil Code (Community of Property)

National Legislation: Italy

- Law no 76 of 20 May 2016, 'Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.'
- Legislative Decree no 7 of 19 January 2017, Article 1, that amends Law no 218 of 31 May 1995 (Article 32 *bis*).

European case law

European Court of Human Rights

- *Oliari and Others v. Italy*, no 18766/11 and 36030/11, ECHR 2015.

- *Orlandi and others v.Italy*, nos. 26431/12; 26742/12; 44057/12 and 60088/12, ECHR 2017.

Court of Justice of the European Union

- *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept* v *Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, case C-673/16, of 5 June 2018.

National Case law: Italy

- Cass. civ., sez. I, no 11696 of 14 May 2018.

II. THE CASE

Anard is a Maltese national living in Valletta, where he manages a restaurant together with his brother.

He met Sebastiano, an Italian national from Catania, in 2015, because of a summer vacation that had led Sebastiano to Malta. After intense summer dating, the two men started a long-distance relationship. Given the proximity between Catania, Sicily, and Malta, they had the opportunity to meet each other often. A very few years after the beginning of their relationship, they started to consider the possibility of formalising their union.

Although Malta has allowed same-sex couples to enter into registered partnerships (*unjoni ċivili*) since 2014, the two men only opted to formalise their union when Malta, following the promulgation of the Marriage Act on 1 August 2017, permitted same-sex couples to contract marriage.

Work and family needs of both did not allow them anyway to immediately implement their intention to get married. They had to wait more than a year, but finally in early 2019 they could contract marriage in the presence of family and friends of both.

The wedding was celebrated in Valletta in February 2019. With regard to the property regime, as the spouses did not elect otherwise, the marriage results regulated by the community of property (*Il-Komunjoni tal-Akkwisti*), as provided for in Article 1320 of the Civil Code.

For two years, immediately after getting married, the spouses lived in Valletta, as Sebastiano, a software engineer, had no difficulties to relocate, by starting a collaboration with an Italian IT company that allowed him to work remotely.

In Malta the spouses bought together an inexpensive small shell apartment located in Xlendi, which they summarily furnished and into which they moved.

Two years later, Sebastiano received a lucrative job offer from a multinational IT company based in Milan. After evaluating the proposal with his spouse, he finally decided to accept. For his part, Anard, in order to follow Sebastiano to Milan, ceded to his brother his share of the restaurant they managed together.

In order to better settle in Milan, the couple bought a two-room apartment in the Baggio district. Anard, who had used the amount of the restaurant's sold share to help buy the apartment, had to find employment as a manager in a restaurant on the Navigli in Milan.

They moved to Milan in February 2021. A few months after moving to Milan, in May 2021, Sebastiano requested the transcription in Italy of the marriage celebrated in Malta. The marriage was transcribed in the register of civil unions.

Soon after the spouses relocated to Milan, serious misunderstandings arose that put the relationship in crisis. Anard in particular, gradually realised that he did not feel comfortable in a big city like Milan and that he missed the quiet life he used to live in Malta. Nine months after (November 2021) he returned to Valletta, establishing his domicile there.

The outcome of this crisis was the decision to divorce. In March 2022, Anard initiated contentious legal separation proceedings in Valletta, at the Civil Court, Family Section. The following month Sebastiano instituted the proceedings for division of property before an Italian court (the Court of Milan). In the analysis of the legal issues arising from the case, particular attention will be paid to the question of the jurisdiction of the Maltese court in matters of separation (and subsequent divorce) and property regime, pursuant to EU Regulation 2016/1103. Consideration will finally be given to the hypothesis that, also following a possible agreement of the parties, it is the Italian court that will have to decide on property matters, bearing in mind the issues relating to the application of the Twin Regulations to the case at hand.

III. LEGAL ISSUES

The case illustrated above offers some insights concerning the application of the Twin Regulations[2] to the cross-border couple who got married in Malta and subsequently separated after having previously moved to Italy. A key aspect is the concentration of proceedings, with related ancillary jurisdiction,[3] since two proceedings are initiated: the first in Malta for legal separation, prodromal to divorce, and the second in Italy, for matters relating to the matrimonial property regime.

For clarity of exposition, the legal insights are divided into six distinct points.

1. Which legal source shall the Maltese court use to determine whether it has international jurisdiction in hearing a cause of personal separation and instituting subsequent divorce proceedings?

As an EU Member State, in Malta the international jurisdiction to decide on legal separation proceedings and divorce proceedings is determined in accordance with the Council

[2] 'Twin Regulations' is the term normally used in a concise manner to refer to (EU) Regulations 1103 and 1104 of 24 June 2016. See G. Zarra, 'Introduction', in L. Ruggeri and R. Garetto eds, *European Family Property Relations Article-by-Article Commentary on EU Regulations 1103 and 1104/2016* (Naples: Edizioni Scientifiche Italiane, 2021), 2.

[3] On the issue of ancillary jurisdiction, see R. Garetto, 'Article 5', in L. Ruggeri and R. Garetto eds n 1 above, 85: ancillary jurisdiction is aimed at avoiding 'the rooting of related cases in different Member States, operating a concentration of jurisdiction by connection which ends up attracting the majority of hypotheses.'

Regulation (EC) no 2201/2003 (Brussels II *bis*). In August 2022 Council Regulation (EU) no 2019/1111 (Brussels II *ter*) will begin to apply and will replace Regulation Brussels II *bis*.[4]

As the commencement of separation procedures took place in Malta some months earlier than that date (that is: November 2021), it is possible that any divorce proceedings, which in this specific case are supposed to be necessarily preceded by separation, may be commenced after that date. The international jurisdiction in all divorce proceedings initiated after 1 August 2022 will be thus determined in line with this new Regulation. However, no major changes were implemented regarding international jurisdiction in divorce proceedings.[5]

Article 3 of the Regulation Brussels II *bis* stipulates that in matters relating to legal separation and divorce, jurisdiction shall lie with the courts of the Member State in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;
- of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.[6]

In the opposite circumstance, if an Italian court had jurisdiction, it should be however highlighted that 1975 Marriage Act (Chapter 255 of the Laws of Malta) states that a decision or other official act of a foreign court or competent authority on the status of a married person, including divorce, shall be recognised in Malta if the decision is handed down by a court or competent authority of the country in which either of the parties to the proceedings is domiciled, or of which either of the parties is a citizen. This decision must, however, be a decision of a judicial nature, as non-judicial divorce decrees will not be recognised (on this specific point there are differences between Brussels II *bis* and Brussels II *ter*, which will be highlighted below).

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[4] The Brussels II *ter* Regulation was adopted on 25 June 2019, but it will not be applied until 1 August 2022 (cf Article 100(1) Brussels II *ter* Regulation).

[5] See I. Viarengo et al, 'Defining Marriage and Other Unions of Persons in European Family Law', in T. Pfeiffer et al eds, *Facilitating Cross-Border Family Life – Towards a Common European Understanding EUFams II and Beyond* (Heidelberg: Heidelberg University Publishing, 2021), 177-178: 'the recent adoption of the Brussels II *ter* Regulation (...) has not introduced any substantial changes to the existing regime governing matrimonial matters.'

[6] See for in-depth analysis R. Garetto n 2 above, 85-86.

In accordance with Brussels Il *bis* Regulation, Malta subject to the exceptions of Articles 22 and 23 (where the recognition of a particular divorce decree would be manifestly contrary to public policy,[7] or irreconcilable with an earlier judgment recognised under Maltese law with respect to the same parties), the Maltese authorities must recognise and enforce divorce decrees handed down by another Member State. However, the question may come up in some circumstances whether Brussels II *bis* (or the Brussels II *ter*, which will become applicable in August 2022) will be applied given that in some Member States same-sex marriage is not permitted and thus also not recognised as such. This is concretely the case in Italy, for example, where the marriage between same-sex couple is recognised as a registered partnership (see below, § 3.6.). From this follows that Brussels II *bis* – and Brussels II *ter* –, could not apply to the dissolution of the marriage between Anard and Sebastiano.[8]

In the present case, we can determine that the international jurisdiction will lie with the Maltese Family Court pursuant to Article 3(1)(a) sixth indent.

The legal separation proceedings are initiated by Anard, who is covered by the provisions of the Brussels Il *bis* Regulation.

In the case under consideration, the separation proceedings in Malta are necessary prior to the pronouncement of divorce.

By means of Act XXV of 2021 amendments to divorce proceedings within Malta were recently approved by Parliament. The main aim of this legislative reform was to enable divorce proceedings to be carried out in a more appropriate and fair manner and in the best interest of the involved parties.

In effect, as a result of this new regulatory provision, it shall not be required that, prior to divorce, the spouses are separated from each other by means of a personal separation agreement[9] or of a judgment.

However, one of the following conditions must be met.

When an application is made jointly by both spouses, it is required that on the date of commencement of the divorce proceedings, the spouses will have lived apart for a period of (or periods that amount to) at least six months out of the preceding year.

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[7] See K. Boele- Woelki, 'To Be, Or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union', *Victoria University of Wellington Law Review*,779, 784-785 (2009). For an in-depth analysis concerning public policy as it relates to the Twin Regulations, see G. Zarra, 'Law and morals in the application of the public policy exception under the Twin Regulations 1103 and 1104 of 2016' *Actualidad Jurídica Iberoamericana*, 324, 331-335.

[8] See L. Ruggeri, 'Article 10', in Id and R. Garetto eds n 1 above, 113-114: 'The adoption of the Brussels II *bis* Regulation (recast) does not provide for any new application: even when the new Regulation comes into force, which will change the previous Regulation 2201/2003, property issues will be dealt with by the judge with jurisdiction in matters of separation, divorce, or annulment of marriage (...). Consequently, the new Brussels II *bis* Regulation (recast), if literally understood, will be effective only for heterosexual couples and not for homosexual couples to whom a national law, such as the Italian one, denies recourse to marriage'. For further reading, see also: G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships', in D. Gallo et al eds *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Heidelberg 2014), 359–380.

[9] In Malta a consensual agreement of personal separation needs to be approved by the Family Court. On pronouncement of the decree, the personal separation agreement is then signed by the parties before the notary who will ensure such agreement is published and registered at the Public Registry.

When the demand is made by one of the spouses against the other spouse, it is necessary that on the date of commencement of the divorce proceedings, the spouses will have lived apart for a period of (or periods that amount to) at least one year out of the preceding two years. Moreover, where the spouses are not separated by means of a contract or a court judgment, the spouses must attend mediation before proceedings with the divorce.

However, it should be stressed that in the present case, it is only Anard's intention to dissolve the marriage bond and Sebastiano does not manifest any willingness to cooperate in this respect. For this reason Anard must initiate the separation procedure.

After the spouses are legally separated, then they (both or individually) may opt to file for divorce, provided that there is no prospect of reconciliation, adequate maintenance for spouses is provided, and the parties have been living apart for a period, in case of sole application, of one year out of the conclusion of separation proceedings.[10]

In that case the Malta's Family Court shall have jurisdiction to hear and determine a demand for divorce. However, it will be necessary that one of the following requirements is satisfied:

- at least one of the spouses was domiciled in Malta on the date of the filing of the demand for divorce;
- at least one of the spouses was ordinarily resident in Malta for a period of one year immediately preceding the filing of the demand for divorce.

It is reasonable to assume that, given the permanence of the separation, Anard will continue to reside in Malta, and the required conditions will therefore be met.

It is lastly to be pointed out that, although a separation agreement between the parties is possible under the Maltese legal system, there is no provision, under Act XXV of 2021, for a divorce by mutual consent in writing.

[10] In the 1975 Marriage Act no provision was made for divorce, except for the recognition of divorces granted by foreign courts. Legislation introducing divorce came into effect in October 2011, following the result of a referendum held earlier in the same year. On this occasion it was provided for no-fault divorce. The option for no-fault divorce is a current trend even in common law systems that previously adopted fault divorce for a long period of time. This is the case in England and Wales, where the Supreme Court, in the case *Owens* v *Owens* [2018] UKSC 41, revealed the inadequacy of the previous divorce model, paving the way for the no-fault divorce, then enacted through the Dissolution and Separation Act 2020, which received royal assent in June 2020 and came into force on 6 April 2022. In Malta a recent amendment in the Civil Code (Act no XXV of 2021) dated to 28 May 2021 has repealed a much longer period of separation previously required for spouses to be able to file for divorce (four years, as provided for by Act no XIV of 2011). This recent amendment now stipulates that, provided that a) the parties are legally separated, b) there is no prospect of reconciliation, and c) the spouses (and, in case, their children) are receiving adequate maintenance, the spouses may now file a joint application for divorce if they have lived apart for at least six months. If, however, a sole application for divorce is filed by one of the spouses, then it is required that they have lived apart for at least one year.

This possibility has recently been adopted in some Member States, e.g. France,[11] and Italy.[12] It appears to be covered by Council Regulation (EU) No 2019/1111 (Brussels II *ter*), that will enter into force in August 2022. In divorce matters, this Regulation recognises a new type of instrument: the 'agreement' which, without being an authentic instrument, has been concluded 'by the parties' in the matters covered by the Regulation and 'registered by a public authority' (Article 2(2)(3)).

Even if Anard and Sebastian were to agree to proceed with the divorce and at the same time wished to avoid proceedings before a court to obtain a divorce, they would not be allowed to do so in Malta. They might be able to avoid court proceedings opting for extrajudicial divorce in Italy, which allows the parties access to assisted negotiation by an attorney or procedure before the civil registrar.

It should be noted, however, that in this case the divorce decree in Italy would not refer to the dissolution of the matrimonial bond, but to the extinction of the registered partnership (see below, § 3.6.).

2. May the Maltese courts also decide on spouses' matrimonial property regime?

The applicant to these separation proceedings – as pointed out – falls under provisions of Brussels II *bis* Regulation. Arnad indeed established his habitual residence in Valletta, when he returned to his country in November 2021 and lived in Malta for six months before initiating the contentious legal separation proceedings. On the other hand he is a Maltese national.

Regulation 2016/1103 is intended to achieve the concentration of international jurisdiction in connected proceedings. Thus, Article 5 of the Regulation stipulates that where a court of a Member State is seised to rule, as in the present case, on an application for legal separation pursuant to Regulation Brussels II *bis*, the courts of that state shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

In this sense the Regulation aims to obtain that both the separation proceedings (or eventually the divorce proceedings) and the proceedings on the matrimonial property regime will be conducted in the same Member State, implementing a scheme of ancillary jurisdiction.[13]

However, it is important to note that under Regulation 2016/1103 this does not necessarily mean that the decision on both issues will be made in the same proceedings or even before the same court. Regulation 2016/1103 only determines international jurisdiction; the type

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[11] See in France Decree no 2016-1907 of 28 December 2016 on the divorce provided for in Article 229-1 of the Civil Code and on various provisions relating to succession. It contains provisions relating to divorce by mutual consent by private deed countersigned by attorneys (Articles 229-1 et seq. of the Civil Code and Articles 1144 et seq. of the Code of Civil Procedure).

[12] In Italy, extrajudicial divorce (by means of assisted negotiation and proceedings before the Registrar of Civil Status) was introduced by Decree-Law 132/2014 converted by Law 162/2014 (and referred to by Law 76/2016).

[13] See R. Garetto n 2 above, 84-85.

of proceedings (i.e. contentions or non contentions) as well as the local jurisdiction will be determined in accordance with national procedural law.[14]

In this present case, the concentration may relate to separation proceedings and not divorce proceedings. It should be borne in mind indeed that when a divorce judgment is issued in Malta, the main consequence is that the marriage is dissolved, so the parties are granted the possibility to re-marry. All other issues such as access arrangements, maintenance orders, the termination of the default matrimonial regime, and liquidation of the marital assets are dealt with in legal separation.

Article 5 of Regulation 2016/1103 also states that separation proceedings (as well as divorce proceedings) need to be connected to the matters of the matrimonial property regime. In the present case such connection exists since the need for the division of the spouses' property is caused by the separation proceedings.

At first glance we can thus establish that:

- we have two proceedings (separation and matrimonial property matter), which are connected
- the jurisdiction for the divorce proceedings lies with Maltese courts.

However, special attention needs to be given to the second paragraph of Article 5, which sets out criteria that are sometimes referred to as 'weak.'[15] In some cases the concentration of proceedings is only possible if the parties agree to it.

Whether we need the agreement of the parties for the concentration or not depends on the connecting factor on which the international jurisdiction in the separation proceedings was established.

Agreement is thus needed, whether the court that is seised to rule on the application for legal separation:

- is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003
- is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;

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[14] Ibid, 86-87: 'the provision refers only to the Member State whose courts have related jurisdiction. It does not, however, regulate which of those courts may hear the related case on matrimonial property regimes, the choice being left to the internal rules of the Member State identified. It follows that the court hearing the main action on divorce, separation or marriage annulment will not necessarily be called upon to rule also on the related property matter.'

[15] On the question of 'weak' criteria, see R. Garetto n 2 above, 87; M.P. Gasperini, 'Jurisdiction and Efficiency in Protection of Matrimonial Property Rights' *Zbornik Znanstvenih Razprav*, 23, 32 (2019); and I. Viarengo, 'Article 5', in Id and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 73.

- is seised pursuant to Article 5 of Regulation (EC) no 2201/2003 in cases of conversion of legal separation into divorce; or
- is seised pursuant to Article 7 of Regulation (EC) no 2201/2003 in cases of residual jurisdiction.

Consequently, in the present case the exercise of party autonomy becomes a determining factor: an agreement between Anard and Sebastiano is indeed necessary. In other words, Sebastiano will have to accept that the Malta's Family Court has international jurisdiction to decide on the matrimonial property regime of the spouses.[16] If such an agreement is reached, it needs to comply with formal requirements for the choice of court agreements, as provided for in Article 7(2) of Regulation 2016/1103. On the other hand, if the agreement is not reached, the Maltese courts may not decide on the matrimonial property regime of the spouses.

The rationale for such restrictions is clear, given that Regulation 2201/2003 offers the applicant a wide range of choices when deciding which court is competent.[17] The manifest purpose is to discourage the temptation to misuse this opportunity to the detriment of the other party.[18]

3. The courts of which Member States shall have international jurisdiction to decide on the spouses' matrimonial property regime?

In case Sebastiano does not agree with the concentration of jurisdiction in Malta (as pointed out above), the international jurisdiction will be determined in accordance with Article 6 of Regulation 2016/1103. It is important to note that Article 6 will only be applied if jurisdiction cannot be established in accordance with Article 5 of the same Regulation.[19] Under Article 6 the international jurisdiction lies with the courts of the Member State:

- in whose territory the spouses are habitually resident at the time the court is seised; or failing that (please note: letter (a) can only apply when the spouses have their habitual residence in the same Member State)[20]
- in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that
- in whose territory the respondent is habitually resident at the time the court is seised; or failing that

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[16] No particular problem arises if it is assumed that the agreement is reached under Brussels II *ter*. See U. Maunsbach, 'Party Autonomy in European Family and Succession Law', in T. Pfeiffer et al eds n 4 above, 29: 'The Brussels II *ter* Regulation does not entail any substantive amendments as regards party autonomy.'

[17] See R. Garetto n 2 above, 87.

[18] P. Lagarde, 'Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux' *Rivista di diritto internazionale privato e processuale*, 679 (2016). See also M.P. Gasperini n 14 above, 32.

[19] See F. Pascucci, 'Article 6', in L. Ruggeri and R. Garetto eds n 1 above, 92: 'Arts 6 of both Regulations propose a *per se* general, but subsidiary, rule of jurisdiction by exclusion.'

[20] On the common habitual residence of the spouses in a concrete case, see M.B. Barrios Garrido-Lestache, 'Transborder successions including unliquidated matrimonial property regime of a dissolved marriage', in J. Kramberger Škerl et al, *Case studies and best practices analysis to enhance EU family and succession law. Working paper* (Camerino: Facoltà di Giurisprudenza. Università di Camerino, 2019), 17.

- of the spouses' common nationality at the time the court is seised.

Consequently, in the present case the international jurisdiction will lie with the Italian courts, since these are the courts in the Member State, where the spouses had their last (common) habitual residence and Sebastiano still resided there at the time the court was seised.

The decision will be referred to the Court of Milan, seised by Sebastiano in April 2022.

4. In the event that the parties do not reach an agreement aimed at concentrating in the separation proceedings also the questions relating to the property regime, can the Italian seised court decide on the entire matrimonial property of the spouses (or shall it limit the jurisdiction to the assets located in the Member State to which it belongs)?

The Italian courts, which are competent pursuant to Article 6 of Regulation 2016/1103 (specifically: the Court of Milan, seised by Sebastiano) may decide on the entire matrimonial property, as provided for in Article 21 of the same Regulation.

Thus the Italian courts will decide on the apartment that the spouses have purchased in Italy, in Baggio neighborhood, as well as the one purchased by both in Malta, at Xlendi.

This provision is an application of the principle of unity that characterises the Twin Regulations, according to which all assets, whatever their type or nature, even if located in a third State, are subject to the law applicable under the Regulations. The principle of unity, operating with the related principle of universality (as stated in Article 20, which establishes the unity of the applicable law) contributes to strengthening the legal certainty of the regulatory system.[21]

However, it should be pointed out that, in application of the principle of unity, even if the spouses owned property in a non-participating Member State or a Third State, the Italian courts could decide on the entire property. In such a hypothesis, however, the spouses could encounter significant problems when they try to have the decision recognised and enforced in a non-participating Member State or in a Third State.[22]

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[21] See R. Garetto et al, 'Registered partnerships and property consequences', in M.J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 72-73: In the regulatory system adopted (...), in order to strengthen legal certainty, the principle of universal application is combined with the principle of unity (Article 21) according to which all assets, whatever their type or nature, even if located in a third State, are subject to the law applicable under the Regulation.'

[22] See C. Rudolf, 'European Property Regimes Regulations – Choice of Law and the Applicable Law in the Absence of Choice by the Parties' 11 *LeXonomica*, 127, 130 (2019): 'The other Member States, namely Denmark, Estonia, Hungary, Ireland, Latvia, Lithuania, Poland, Romania, Slovakia (and UK), are to be treated as third States from the point of view of the participating Member States regarding the European Property Regimes Regulations.'

5. In order to avoid the fragmentation of proceedings that occurred during the separation phase, could the spouses have entered into a choice of court agreement earlier? The courts of which Member State could they have chosen?

Article o7 of Regulation 2016/1103 allows the parties to conclude a choice of court agreement. However, the parties are rather limited,[23] if not actually 'insignificant.'[24]

In broad terms they may agree that international jurisdiction shall lie on:

- the courts of the Member State whose law is applicable pursuant to Article 22;
- the courts of the Member State whose law is applicable pursuant to letter (a) or (b) of Article 26(1);
- the courts of the Member State of the conclusion of the marriage.

As may be inferred from the first two options, the EU legislator tried to achieve the coordination of international jurisdiction and applicable law, the so-called *gleichlauf*.[25]

Since Anard and Sebastian never concluded a choice of law agreement pursuant to Article 22, the first option is not conceivable. Under the second option, the spouses may choose Maltese courts, since the law applicable to their matrimonial property is the Maltese law pursuant to letter (a) of Article 26(1): the State of the spouses' first common habitual residence,[26] after the conclusion of marriage.

The situation does not change in this case in the third option. Under this option indeed the spouses may choose the Maltese courts, as Malta is the Member State of the conclusion of marriage. The possibility of choosing the Member State of the conclusion of marriage is always open to the spouses (even if they chose applicable law pursuant to Article 22).

It is also important to note that Article 7 states that parties may conclude a choice of court agreement: the text does not expressly refer to the 'spouses'. Thus in the hypothesis of questions relating to the effects of the matrimonial property regime on a legal relationship between a spouse and third parties, a third party may also be – or sometimes needs to be – included in the choice of court agreement.[27]

The autonomy of the parties is an important means of simplifying the lives of citizens, who can thus identify the court that is more convenient, on the basis of their concrete needs. In accordance with Recital 44 of the Regulation, the choice of court should be exercised in such a way as to avoid creating dangerous 'legal vacuums.'[28]

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[23] F. Pascucci, 'Article 7', in L. Ruggeri and R. Garetto eds n 1 above, 95-96.

[24] M.P. Gasperini n 14 above, 35.

[25] J. Kramberger, 'Party autonomy regarding jurisdiction under the property regimes regulations' 15 *Actualidad Jurídica Iberoamericana*, 274, 280-289 (2021).

[26] On the concept of 'habitual residence' as laid out in the Twin Regulations, see R. Garetto et al n 20 above, 75-76.

[27] See A. Fantini, 'Article 3', in L. Ruggeri and R. Garetto eds n 1 above, 62: 'The texts do not exclude, inter alia, the qualification of a marriage or cohabitation agreement when the agreement has also obtained the consent of a third party. A tripartite agreement between two spouses and a third party, such as a member of the family of one of the spouses or a creditor, could therefore meet the European definition.'

[28] See R. Garetto et al n 20 above, 65.

The parties are enabled to avoid time-consuming proceedings such as those that effectively arose during the separation of Anard and Sebastiano.[29]

6. In the event that the parties do not agree to concentrate the matters relating to the property regime in the separation proceedings in Malta, having regard to the jurisdiction of the Italian seised court, would that court have to apply Regulation 2016/1103 or 2016/1104 instead?

Only a certain part of the participating Member States allows and recognises marriage between persons of the same sex. Italy is not among them.[30]

The Italian Supreme Court (Corte di Cassazione) with judgment no 11696 of 14 May 2018[31] established that same-sex marriage celebrated abroad cannot be registered in Italy and considers admissible only its recognition as a registered partnership. With regard to the registration in Italy of the marriage celebrated abroad between persons of the same sex, the Court recognises that the text of Article 32 *bis* of Law no 218 of 31 May 1995, with the amendments introduced by the Legislative Decree no 7 of 19 January 2017, clearly reaffirms the legislator's choice for the registered partnership model (*unione civile*), as provided for in Law no 76 of 20 May 2016, enacted after a troubled parliamentary process.

This downgrading of marriage is, however, without prejudice, since the Court does not detect a discrimination on the grounds of sexual orientation, as the European Court of Human Rights (ECtHR) ruled in 2015 in the case *Oliari et al.* v *Italy*,[32] same-sex partners must be guaranteed the right to private and family life, pursuant to Article 8 of the ECHR, without the individual State being required to adopt, specifically, marriage instead of registered partnership.

This standpoint is further strengthened by the subsequent decision in the case *Orlandi and others* v *Italy*,[33] where the ECtHR states that the institution of registered partnership offers same-sex couples the possibility of achieving a legal status equal or similar to marriage in many respects.

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29 Ibid

30 Ibid, 87-88 for an updated taxonomic framework of legally recognised same-sex couples.

31 Cass. civ., sez. I, 14 May 2018 no 11696, 5 *Familia*, 473-511 (2019) with note by M. Ramuschi: 'Sul matrimonio celebrato all'estero tra un cittadino italiano e uno straniero del medesimo sesso.'

32 Eur. Court H.R., *Oliari and Others* v. *Italy*, Judgment of 21 July 2015 (Applications nos 18766/11 and 36030/11). See the following comments to the decision: L. Lenti, 'Prime note a margine del caso Oliari c. Italia' *Nuova Giurisprudenza Civile Commentata*, II, 575-581 (2015) and M.M. Winkler, 'Il piombo e l'oro: riflessioni sul caso Oliari c. Italia' 2 *GenIUS*, 46-61 (2016). For further details, see also: M.C. Venuti, 'La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia' 47 *Politica del diritto*, 95 (2016) and M.M. Winkler, 'Same-Sex Marriage and Italian Exceptionalism' 12 *Vienna Journal on International Constitutional Law*, 433-456 (2018).

33 Eur. Court H.R., *Orlandi and others* v *Italy*, Judgment of 14 December 2017, (Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12). See a comment to the decision in F. Deana, 'Diritto alla vita familiare e riconoscimento del matrimonio same-sex in Italia: note critiche alla sentenza Orlandi e altri contro Italia (Right to Family Life and Same-Sex Marriage Registration in Italy: The ECtHR Decision in Orlandi and Others v. Italy)' 1 *Rivista di Diritti Comparati*, 153-183 (2019).

Even the Court of Justice of the European Union (CJEU) did not question the asymmetry of the models of union, deciding the *Coman* case in 2018.[34] The CJEU merely guarantees the partners the possibility of having their fundamental right recognised, even where their union model has no recognition.

In effect, however, with regards to the marriage of Anard and Sebastiano, a specific aspect must be kept in mind. One of the parties of this marriage consists of non-Italian citizens. The text of the aforementioned Article 32 *bis* is not clear about this issue.

Marriages celebrated between two Italians are certainly included in its provision, and marriages between two foreigners are reasonably excluded. On the other hand, it is doubtful whether the rule is applicable to marriages celebrated between an Italian national and a non-national. The interpretation according to which, for the application of the Italian law on registered partnerships, the Italian nationality of one of the spouses is sufficient seems to be prevalent.[35]

However same-sex marriages concluded abroad by non-Italians, even if recognised as such, will be transcribed in Italy in the specific partnerships register, in the part reserved for registered partenerships celebrated in a foreign country, pursuant to Article 134 *bis* of Law no 218 of 31 May 1995 (amended by Legislative Decree no 7 of 19 January 2017).[36]

With this national regulatory framework in mind, it seems reasonable to assume that the Italian court, in deciding on the property aspects relating to the union of Anard and Sebastiano, constituted in Malta as a marriage and transcribed in Italy as a registered partnership, will be decided by applying Regulation 2016/1104 instead of Regulation 2016/1103 (which would instead be applied by a Maltese court).[37]

The structure of the Twin Regulations, which are substantially overlapping, leads to the exclusion of significant divergences with respect to the regulation of the property consequences of registered partnership as opposed to the property regime of marriage.[38]

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[34] Case C-673/18 *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept* v *Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Judgment of 5 June 2018. For a comment on the case, see G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), 158-160.

[35] See R. Garetto, 'Different approaches to marriage downgrading: from an anti-elusive measure to an anti-discriminatory claim' 15 *Actualidad Jurídica Iberoamericana*, 129, 138 (2021).

[36] Ibid

[37] I. Viarengo et al n 4 above, 207: 'Member States that do not allow same-sex marriages are not obliged to apply the Matrimonial Property Regulation to such couples. Those Member States could, however, subject same-sex marriages at least to the Partnership Property Regulation. This may occur in particular in those States where same-sex marriages established abroad have to be characterised as registered partnerships rather than marriages. For example, the "downgrade recognition" provided in Article 32-bis of the Italian PIL Act affects also the application of the relevant private international law. Hence, the marriage at stake will fall in the scope of the Partnership Property Regulation instead of the Matrimonial Property Regulation. As a matter of fact, the very same marriage concluded between spouses of the same sex can fall, depending on the forum, under either of the Property Regimes Regulations. This depends on whether or not the *lex fori* recognizes same-sex marriages.'

[38] See R. Garetto et al n 20 above, 50.

IV. CONCLUSIONS

The hypothetical case examined concerns a same-sex couple getting married in Malta and then, after a short period, moved to Italy. The crisis in the relationship leads the Maltese spouse to file for separation in his Country, which is required in order to obtain a subsequent divorce. Shortly afterwards, the Italian spouse applies to an Italian court to obtain the judicial division of property.

The Maltese court will determine its jurisdiction by applying the Council Regulation (EC) no 2201/2003 (Brussels II *bis*) or, from August 2022, Council Regulation (EU) no 2019/1111 (Brussels II *ter*). However, no major changes were implemented in the new Regulation regarding international jurisdiction in divorce proceedings.

The case would have had a different outcome if the dissolution petition had been filed in Italy instead. As Italy does not allow same-sex couples to contract marriage, but only to enter into *unione civile* (registered partnership), the divorce decree in Italy would not refer to the dissolution of the matrimonial bond, but to the extinction of the registered partnership.

Although Regulation 2016/1103 is intended to achieve the concentration of international jurisdiction in connected proceedings, the Maltese court, seised to rule on an application for legal separation pursuant to Regulation Brussels II *bis* (or, in case, Brussels 2 *ter*), under Article 5, Paragraph 2, shall have also jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application only if the parties agree to it. Consequently, in the examined case the exercise of party autonomy becomes a determining factor.

In case the Italian party does not agree with the concentration of jurisdiction in Malta, the international jurisdiction in order to decide on the entire matrimonial property will lie, under Article 6 of Regulation 2016/1103, with the Italian court, since it is the court in the Member State where the spouses had their last (common) habitual residence and where one of the parties still resides at the time the court is seised. In order to avoid the possibility of fragmentation of proceedings, under Article 7 of Regulation 2016/1103, the spouses could have entered into a choice of court agreement previously.

If the spouses had chosen to grant jurisdiction by agreement to the Italian court, or if that jurisdiction was determined in pursuance of Article 6, it seems reasonable that the Italian court will decide by applying Regulation 2016/1104, instead of Regulation 2016/1103. As already pointed out, Italy does not provide for same-sex marriage. Marriages between persons of the same sex established in other Countries are downgraded to *unione civile* (registered partnership).

However, given the substantial overlap of the provisions on the issue in the two Regulations, it should not be considered that significant differences will arise from the application of Regulation 2016/1104, instead of Regulation 2016/1103.

PRACTICAL IMPLICATIONS OF COUNCIL REGULATION (EU) NO 2016/1103 ON MATRIMONIAL PROPERTY REGIMES AND COUNCIL REGULATION (EU) NO 2016/1104 ON THE PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIPS

Benedita Sequeira[1]

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Summary: I. Introduction. II**.** Practical implications of Council Regulation (EU) No 2016/1103 on matrimonial property regimes. 1. The issue of jurisdiction. 2. The applicable law. 3. Recognition and enforcement of decisions**.** III. Practical implications of Council Regulation (EU) No 2016/1104 on registered partnerships. IV. Conclusion.

Abstract: This article aims to analyse some practical implications of Council Regulations (EU) No 2016/1103 on matrimonial property regimes and No 2016/1104 on registered partnerships and their application in the Portuguese legal order. A hypothetical situation is proposed in order to explore both Regulations' solutions to determine the competent jurisdiction, the applicable law and recognition and enforcement of decisions, all while having in mind their application in the Portuguese legal system.

I. INTRODUCTION

Two Regulations, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions, dated from 24 June 2016 have introduced major changes in European Union (EU) Private International Law: Council Regulation (EU) No 2016/1103 on matrimonial property regimes and Council Regulation (EU) No 2016/1104 on the property consequences of registered partnerships. In this context, it is important to note that the Hague Convention on the law applicable to matrimonial property regimes, from 1978, has only reduced international influence.[2]

The EU Regulations of 2016 stems from the need to harmonise the rules that regulate private international law aspects of matrimonial regimes and registered partnerships in the borderless EU space, where there is a raising mobility of people and of couples, and a great diversity of legal solutions between MS.[3] It is estimated that over 7 million EU nationals are

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[1] Invited Assistant Lecturer at the University of Porto, Faculty of Law, and Researcher at CIJE – Centro de Investigação Jurídico-Económica, at the University of Porto, Faculty of Law.

[2] L. Lima Pinheiro, *Direito Internacional Privado*, (Coimbra: Almedina, 4ª ed., 2015), II, 652.

[3] H. Mota, *Casamento e Património nas Relações Privadas Internacionais* (Coimbra: Almedina, 2020), 90.

habitually resident in a MS of which they are not a national and that over 2 million items of real property are owned by couples in an MS other than that of their residence.[4]

II. PRACTICAL IMPLICATIONS OF COUNCIL REGULATION (EU) NO 2016/1103 ON MATRIMONIAL PROPERTY REGIMES

Let us picture the following example: Ana, a Portuguese and Turkish national, resident in Rome, Italy, since 2015, is married to Marina, an Italian national, also resident in Rome.

The marriage was celebrated in June 2020, in Granada, Spain, and the parties agreed that their matrimonial regime would be participation in the acquisitions, this meaning that "each spouse's property comprises acquisitions and reserved property"[5], under the German regime which includes a compensatory settlement and involves a calculation of initial and final property.[6]

Under Portuguese[7] and German[8] law, the spouses may agree on the application of a participation in the acquisitions' regime through a marital property agreement. Failing to choose another property regime, the property relations between spouses will be normally submitted to a "community of acquests, which encompasses all property acquired non-gratuitously throughout the duration of the marriage."[9]

In their marital agreement, the parties also agreed that Spanish courts would have exclusive jurisdiction to rule on matters relating to the matrimonial property relations, and that German law would be applicable.

After the wedding, the spouses moved to Porto, Portugal, to be closer to Ana's family.

Given that Marina had been unemployed since 2017, when she lost her sales representative job post in Italy, she decided to start her own business, opening a sales company with personal risk in Portugal[10], in January 2021. When listing assets for a credit application, she includes a property owned by Ana prior to the wedding celebration in the Portuguese Algarve coast, worth over 750.000€. A dispute consequently arose between the partners as to whether this item of property forms part of the couple's common property or rather belongs to Ana alone.

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4 J. Gray, P. Quinzá Redondo, 'Stress-testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession', *Familie & Recht*, 1, (2013).

5 K. Boele-Woelki et al, *Principles of European Family Law Regarding Property Relations Between Spouses* (Cambridge: Intersentia, 2013), 143.

6 K. Boele-Woelki et al, *The Future of Family Property in Europe* (Cambridge: Intersentia, 2011), 30.

7 According to Article 1698 of the Portuguese Civil Code, the spouses can freely choose, in a nuptial convention, their matrimonial property regime.

8 Under German law, the spouses can agree on a matrimonial property regime prior to the wedding celebration, thus derogating the general property regime. See: Bürgerliches Gesetzbuch (BGB) § 1363 Zugewinngemeinschaft.

9 K. Boele-Woelki et al, *The Future of Family Property in Europe* (Cambridge: Intersentia, 2011), 22.

10 The Portuguese "sociedade em nome coletivo" entails subsidiary personal liability before creditors of the society, as stated under Article 175.º of the Portuguese Commercial Companies Code. See: J. Coutinho de Abreu, *Curso de Direito Comercial*, (Coimbra: Almedina, 7ª ed., 2021), II, 68.

First of all, it is imperative to determine whether the EU Regulation No 2016/1103 is applicable *in casu*.

The Regulation's material scope covers, under Article 1(1), all civil-law aspects of matrimonial property regimes in transnational situations. This concept should be interpreted autonomously, as stated under Recital 18 and Article 3(1)(a), including the "set of rules concerning the property relationships between the spouses and in their relationships with third parties, as a result of marriage or its dissolution", i.e., not only the ownership of assets, but also the rules on property management and the imperative rules on property, applicable to all marriages irrespective of the property regime. It also seems to apply to liberalities *inter vivos* between the spouses.[11]

In this sense, it covers, undoubtedly, the question posed in this case regarding the ownership of a particular asset. This was confirmed by the Lisbon Court of Appeals in 2018.[12]

The Regulation does not apply in the situations listed under Article 1(2), namely to the "existence, validity or recognition of a marriage" (b), and it doesn't include a definition of marriage, given the difficulty in reaching a consensus in this area where there are manifest social, cultural, and political differences between MS. Thus, the preliminary question of the existence of a marriage should be solved by the applicable law under the *lex fori*'s conflict-of-laws rules.[13]

Some difficulties may be posed, in this sense, when dealing with MS who refuse to recognise same-sex marriages. Their participation in the enhanced cooperation may violate their *ordre public* – even though the right to marriage for same-sex couples is protected under Article 6 of the European Convention of Human Rights and Articles 7 and 21 of the European Union Charter of Fundamental Rights - or may lead to the non-recognition and refusal of enforcement of these matrimonial property regimes.

Nonetheless, even for these MS, who do not recognise the institution of same-sex marriages, the application of the Regulation remains possible so long as the conflict-of-laws rules applicable to marriages are applied analogically – extensively and according to their *thelos* - in order to recognise these unions.[14]

Two further solutions have been advanced to circumvent this problem: (i) these States may apply the Regulation while not recognising the validity of the marriage in question, but only the factual situation to which property effects are attributed; or (ii) they may subject these marriages to a "downgrading", considering it as a registered partnership and submitting it to the application of Regulation 2016/1104.[15] Some jurisdictions operate this conversion

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[11] H. Mota, *Casamento e Património nas Relações Privadas Internacionais* (Coimbra: Almedina, 2020), 102.

[12] Lisbon Court of Appeals Decision from 24 May 2018, process No 27.881/15.0T8LSB-A.L1-6. Available at: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ba7e29566ccb514c802582c0004adea7?OpenDocument&Highlight=0,2016%2F1103

[13] J. L. Iglesias Buigues, G. Palao Moreno, *Régimen Económico Matrimonial y Efectos Patrimoniales de las Uniones Registradas en la Unión Europea: Comentarios a los Reglamentos (UE) n.º 2016/1103 y 2016/1104* (Valencia: Tirant lo Blanch, 2019), 23.

[14] H. Mota, *Casamento e Património nas Relações Privadas Internacionais* (Coimbra: Almedina, 2020), 115.

[15] H. Mota, 'Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito Internacional Privado da União Europeia. Breve Análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de Junho' 2/2017 *Revista Eletrónica de Direito*, 1-33, 14 (2016).

automatically in order to provide the couple with a unified property regime.[16] In Italy, for instance, same-sex marriages are not recognised, nonetheless, for the purposes of protecting the rights of same-sex couples, a law on civil unions was established in 2016, granting them access to a series of rights, and recognising their union through this lens.[17]

This Regulation is applicable to the proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded from 29 January 2019 onwards, as stated under Article 69. Moreover, according to Article 70(2), this enhanced cooperation includes all Member-States, listed in Recital 11, namely Portugal, Italy, Germany and Spain.

We can, thus, apply the Regulation's private international law rules in order to determine the competent jurisdiction, applicable law, and what the procedures for recognition and enforcement of decisions are.

1. The issue of jurisdiction.

First and foremost, to decide on the issue of jurisdiction, the Regulation instates a concept of court, covering "any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes", as stated under Article 3(2).

In the situations listed in Articles 4 and 5 of the Regulation, where there is a pending action in an MS referring to the succession, divorce, judicial separation or marriage annulment, the jurisdiction of the courts of that State shall be established bindingly, exclusively and automatically, and a choice of court is not possible.[18] The Regulation aimed at avoiding a dispersion, by submitting all questions related to the matrimonial property regime to the same jurisdiction where the interrelated action is being trialled.[19]

In case no court has jurisdiction pursuant to Articles 4 and 5, as stated in Article 6, parties may choose to initiate the proceedings in the courts of the MS whose law is applicable, in order to promote a *forum-ius* synchronism[20], or in the courts of the MS where the marriage was concluded, due to its proximity to the matrimonial relationship. This limited choice of court clause, provided for in Article 7, increases legal certainty, predictability and fosters party autonomy.[21]

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16 M. Soto Moya, *Uniones transfronterizas entre personas del mismo sexo* (Valencia: Tirant lo Blanch, 2013), 167.

17 C. Amunátegui Rodríguez, *Las Parejas no Casadas en España, Italia y Portugal* (Milan: Wolters Kluwer Italia, 2017), 66.

18 H. Mota, 'Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito Internacional Privado da União Europeia. Breve Análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de Junho' 2/2017 *Revista Eletrónica de Direito*, 1-33, 12 (2016).

19 U. Bergquist et al, *Commentaire des Règlements Européens sur les Régimes Matrimoniaux et les Partenariats Enregistrés* (Paris : Éditions Dalloz, 2018), 4.

20 I. Viarengo, P. Franzina, *The EU Regulations on the Property Regimes of International Couples: a Commentary* (Cheltenham UK: Edward Elgar Publishing, 2020), 87.

21 A. Sousa Gonçalves, 'O princípio da autonomia da vontade no Regulamento Europeu sobre Regimes Matrimoniais' 2/2022 *Revista Eletrónica de Direito*, 76-93, 87 (2020).

In casu, the choice-of-court agreement entered into by the parties before the celebration of their marriage, granting exclusive jurisdiction to Spanish courts, where the marriage was concluded, would be valid and would confer jurisdiction in this situation which is not connected with a succession case or with a case relating to the dissolution or annulment of a marriage or registered partnership.

Pursuant to Article 9 of the Regulation, the courts of a MS may refuse jurisdiction when the marriage cannot be recognised for the purposes of matrimonial property regime proceedings. This rule operates as a safeguard for *ordre public*[22], providing the courts of MS with the possibility to "not rule on a particular matter within the scope of the Regulation whenever the proceedings are about a situation that simply cannot fit into the standards of the forum."[23]

Spanish courts would not have a justification to refuse jurisdiction on these grounds, as same-sex marriage has been legal in Spain since 2005.

If there had not been a valid choice of court, in light of the Regulation's established rules, the Portuguese courts would be competent under Article 6(a), as the spouses were habitually resident in Portugal at the time the court was seised.

2. The applicable law

Once jurisdiction has been established, if the situation falls under the scope of the Regulation, its conflict-of-laws rules shall determine the applicable law to the dispute.

The law designated as applicable shall be applied whether or not it is the law of an MS, under the principle of universal application, as stated in Article 20 and, it shall apply to all assets falling under the matrimonial property regime, regardless of where they are located, as referred to in Article 21.[24]

Under Article 22, a choice of law is possible, provided that it corresponds to the law of the habitual residence or nationality of at least one of the spouses or future spouses at the time the agreement is concluded.[25] This possibility to choose the *lex patriae* of either spouse, and, in case of pluri-nationals, giving each nationality the same weight for choice-of-law purposes, "widens the options of the parties considerably."[26]

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[22] J. L. Iglesias Buigues, G. Palao Moreno, *Régimen Económico Matrimonial y Efectos Patrimoniales de las Uniones Registradas en la Unión Europea: Comentarios a los Reglamentos (UE) n.º 2016/1103 y 2016/1104* (Valencia: Tirant lo Blanch, 2019), 121.

[23] I. Viarengo, P. Franzina, *The EU Regulations on the Property Regimes of International Couples: a Commentary* (Cheltenham UK: Edward Elgar Publishing, 2020), 105.

[24] H. Péroz, E. Fongaro, *Droit International Privé Patrimonial de la Famille* (Paris : LexisNexis, 2017), 194.

[25] A. Dionisi-Peyrusse, 'Autonomie de la volonté et loi applicable aux régimes matrimoniaux : le règlement du 24 juin 2016 relatif aux régimes matrimoniaux' in A. Panet, P. Wautelet, *L'autonomie de la volonté dans les relations familiales internationales* (Brussels : Bruylant, 2017), 257.

[26] I. Viarengo, P. Franzina, *The EU Regulations on the Property Regimes of International Couples: a Commentary* (Cheltenham UK: Edward Elgar Publishing, 2020), 206.

Therefore, party autonomy stands as a connection to determine the applicable law to a matrimonial relationship[27], and the *electio iuris* is associated with several advantages, such as enhancing legal certainty and flexibility, thus justifying its introduction in the family and successions law realm, with certain limitations.[28]

Under Article 23, the *professio iuris* agreement should be express, dated and signed by the spouses. The admissibility of a tacit choice of law is controverted, and the Court of Justice of the EU has not affirmed its position on this issue yet.[29]

In casu, the parties would not be able to choose the German law as applicable to the matrimonial property regime, as it does not present a link to their habitual residence or nationality.

In the absence of a valid choice by the parties, according to Article 26(1), the applicable law shall be the law of the spouses' first common habitual residence after the conclusion of the marriage, or, failing that, of the spouses' common nationality at the time of the conclusion of the marriage, or, failing that, the law with which the spouses jointly have the closest connection at the time of the conclusion of the marriage. Article 26(3) instates a *clause d'exception*, provided there is another State with which a closer connection exists.

Given that the parties' first common habitual residence after the marriage was in Portugal, the applicable law to the matrimonial property regime would be Portuguese law.

The nuptial agreement would have to be "expressed in writing, dated and signed by both parties missing (Article 25(1) of the Regulation) and follow the substantial and formal requirements instated by the Portuguese law.[30] It should, therefore, be registered, as stated under Articles 189 ss of the Portuguese Civil Registry Code. This has been confirmed by the Portuguese Institute of Registration and Notary Affairs (IRN) in a report from 2019.[31]

In accordance with Article 1698 of the Portuguese Civil Code, the spouses can freely choose, in a nuptial convention, their matrimonial property regime, either by choosing one of the regimes from the Civil Code, or instating their own regime, within the limits of the law.[32]

In the context of this wide freedom which is granted to the spouses[33], although the choice of the German law would not be considered valid, its matrimonial property regime,

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[27] J. Carrascosa González, *Matrimonio y elección de Ley: Estudio de Derecho Internacionbal Privado* (Granada, Editorial Comares, 2000), 49.

[28] A. Sousa Gonçalves, 'O princípio da autonomia da vontade no Regulamento Europeu sobre Regimes Matrimoniais' 2/2022 *Revista Eletrónica de Direito*, 76-93, 83 (2020).

[29] A. Patrão, 'Admissibilidade de Escolha Tácita da Lei Aplicável ao Regime Matrimonial no Direito Internacional Privado da União Europeia' in G. Feraz de Campos Monaco, M. Rosa Loula, *Direito Internacional e Comparado: Trajetória e Perspectivas – Homenagem aos 70 anos do Professor Catedrático Rui Manuel Moura Ramos,* (São Paulo: Editora Quartier Latin do Brazil, 2021), 23-41, I, 25.

[30] H. Mota, 'A lei aplicável aos efeitos patrimoniais do casamento nas relações internacionais: Análise das soluções previstas no Regulamento (UE) 2016/1103 do Conselho de 24 de Junho de 2016' in C. Lasarte, M. Dolores Cervilla, *Ordenación Económica del Matrimonio y de la Crisis de Pareja* (Valencia: Tirant lo Blanch, 2018), 281.

[31] Instituto dos Registos e Notariado, *Parecer do Conselho Consultivo CC 114/2018 STJSR-CC* (IRN, 2019).

[32] F. Pereira Coelho, G. Oliveira, *Curso de Direito da Família*, (Coimbra: Coimbra Editora, 4ª ed, 2008), I, 485.

[33] R. Lobo Xavier, *Limites à Autonomia Privada na disciplina das Relações Patrimoniais entre os cônjuges* (Coimbra: Almedina, 2000), 503.

so long as it could be considered as a regime instated by the parties in the use of their private autonomy, could be valid. Under this regime the property in question belongs solely to Ana. It is, however, controverted, whether a simple reference to the German law could constitute a choice of a matrimonial property regime.

Nonetheless, in cases where a debt is contracted by one of the spouses in the exercise of a commercial activity, that debt will be considered common to the couple, under Article 1691(1)(d) of the Portuguese Civil Code, unless between the spouses there is a total separation of property, which is not the case. This rule aims to protect commerce, by widening the property guarantee awarded to the creditors of those who exercise commercial activities.[34]

Consequently, even though we are dealing with an asset whose proprietor is only Ana, as this debt is common to the couple, the asset could be seised after all the other assets which are common to the couple have been seised in the first place, according to Article 1695 of the Portuguese Civil Code.[35]

The Regulation also allows for a choice of law to take place after the weeding, and, under Article 22(2), the spouses may agree on a retroactive change of the applicable law, so long as it does not negatively affect the legal rights of third parties.

On that account, so long as the parties changed their habitual residence to Germany, this choice of law after the wedding could be considered valid.

A change in the applicable law inevitably modifies the substantive rules regulating the matrimonial property regimes. Since there are still legal systems that don't allow for an alteration of this regime after the marriage is celebrated – such as Portugal under Article 1714 of the Civil Code, under the immutability principle – it is important to determine which law will evaluate whether a modification is admissible.

In accordance with Article 24(1) of the Regulation, the validity of the agreement's or property regime's modification "shall be determined by the law which would govern it pursuant to Article 22, if the agreement or term were valid."[36] The Portuguese IRN notes that the immutability principle, as national norm, has a restrict scope of application, meaning it applies to national situations and to transboundary situations governed by Portuguese law. Thus, only if the Portuguese law is called upon to regulate the change in the matrimonial property regime, according to the Regulation's conflict-of-laws rules, can this norm be actioned.[37]

The Regulation excludes *renvoi* (Article 32) and allows for the consideration of both overriding mandatory provisions and the public policy exception.

In accordance with Article 30 of the Regulation, the application of overriding mandatory provisions of the law of the *forum* is to remain unrestricted.

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[34] G. Oliveira, *Manual de Direito da Família* (Coimbra: Almedina, 2020), 179.

[35] F. Pereira Coelho, G. Oliveira, *Curso de Direito da Família*, (Coimbra: Coimbra Editora, 4ª ed., 2008), I, 459.

[36] H. Mota, 'Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito Internacional Privado da União Europeia. Breve Análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de Junho' 2/2017 *Revista Eletrónica de Direito*, 1-33, 21 (2016).

[37] Instituto dos Registos e Notariado, *Parecer do Conselho Consultivo CC 114/2018 STJSR-CC* (IRN, 2019), 16.

Lois de police are norms that are applicable in a certain space, imposing their application *a priori*, regardless of the established conflict-of-laws system.[38] This particular category of material norms from the *lex fori* ensures the protection of core political, social, and economic interests (*publica utilitas*).[39]

The Portuguese IRN has referenced the norm from Article 1682-A(2), which deals with the illegitimacy to dispose, rent or constitute other property rights on the family residence, as a possible overriding mandatory provision, demanding its application in case the forum is Portuguese and the property sits in the Portuguese territory.[40]

On the contrary, the norm imposing a separation of property regime for all those who are wed after the age of 60 (Article 1720(1)(b) of the Portuguese Civil Code) does not, according to the IRN, protect a sufficiently strong public interest that could justify its application *a priori* and regardless of the otherwise applicable law.[41]

No core public interest seems to entail the functioning of an overriding mandatory provision *in casu*.

Furthermore, Article 31 allows the MS competent courts to refuse the application of the law specified by the Regulation "if such application is manifestly incompatible with the public policy of the forum."

The *ordre public* (*Vorbehaltsklausel*) operates *a posteriori*, standing as an inviolable stronghold of the forum's legal system.[42] In order for it to intervene, it isn't sufficient that the MS' legal solutions differ, the application of the foreign law "must depart so radically from the forum's concepts of fundamental justice that it would be intolerable to the *forum* legal conscience."[43] Moreover, an expressive connection to the *forum* is necessary, making it imperious and urgent to expurgate the *polluting body*.[44]

This clause actioned in exceptional circumstances and would not be relevant in this case, as there is no superior and imperious public interest of the State[45] that would justify not applying Portuguese law.

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[38] A. Marques dos Santos, *As Normas de Aplicação Imediata no Direito Internacional Privado: Esboço de uma Teoria Geral* (Coimbra: Almedina, 1991), I, 7. See also: R. Moura Ramos, 'L'ordre Public International en Droit Portugais', in R. Moura Ramos, *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional* (Coimbra: Coimbra Editora, 2002), 245-262, 250.

[39] J. Foyer, 'Lois de police et principe de souveraineté' in *Mélanges en l'honneur du Professeur Bernard Audit* (Issy-les-Moulineaux : LGDJ, 2014), 339-358, 342.

[40] Instituto dos Registos e Notariado, *Parecer do Conselho Consultivo CC 114/2018 STJSR-CC* (IRN, 2019), 13.

[41] Instituto dos Registos e Notariado, *Parecer do Conselho Consultivo CC 114/2018 STJSR-CC* (IRN, 2019), 13.

[42] A. Ferrer Correia, *Lições de Direito Internacional Privado* (Coimbra: Almedina, 2000), 405.

[43] R. Moura Ramos, 'Public Policy in the Framework of the Brussels Convention: Remarks on Two Recent Decisions by the European Court of Justice', in R. Moura Ramos, *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional* (Coimbra: Coimbra Editora, 2002), 283-300, 290.

[44] H. Mota, 'A ordem pública internacional e as (novas) relações familiares internacionais. Análise do Despacho n.º 87/2010, de 19 de Julho, do Presidente do Instituto dos Registos e do Notariado', in *Estudos em Homenagem ao Professor Doutor Heinrich Ewald Hörster* (Coimbra: Almedina, 2012), 261-284, 265.

[45] J. Baptista Machado, *Lições de Direito Internacional Privado*, (Coimbra: Almedina, 3ª ed., 2011), 260.

3. Recognition and enforcement of decisions:

Admitting that Spanish courts decide on the ownership of the property in Algarve, in accordance with Portuguese family law, how could this decision be recognised and enforced in the Portuguese territory?

Recognition, under Article 36 of the Regulation, is automatic. Nonetheless, a decision shall not be recognised on the grounds of Article 37, with observance of the principles recognised in the European Charter of Fundamental Rights, namely, the principle of non-discrimination, as stated in Article 38.

Under Articles 39 and 40, there shouldn't be any review of jurisdiction or of the substance of the decision from the court of origin. Nonetheless, in order for a decision to be enforced in another MS, it needs to be declared enforceable following the simplified procedure stated under Article 45.

III. PRACTICAL IMPLICATIONS OF THE COUNCIL REGULATION (EU) NO 2016/1104 ON REGISTERED PARTNERSHIPS

Let us, now, imagine that Marina and Ana never married, but instead lived under terms analogous to marriage, i.e., in a non-marital partnership with a communion of *tori, mensae et habitationis*.

Regulation No 2016/1104 on registered partnerships proposes very similar solutions to the Regulation on matrimonial regimes analysed beforehand. We need, thus, to verify whether or not it would be applicable *in casu*.

According to Article 1(1) defining its material scope of application, it is applicable to the property consequences of registered partnerships, defined under Article 3(1)(a) as "the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law, and which fulfils the legal formalities required by that law for its creation."

The problem lies in the fact that under Portuguese law no registration of non-marital partnerships is required[46], and, therefore, the Regulation will not be applicable to the Portuguese institute of "união de facto".[47] The Portuguese *forum* would, thus, have to resort to its own conflict-of-laws rules in order to determine the applicable law to the property consequences of this transboundary non-marital partnership. According to the majority of the doctrine, the conflict-of-laws rules applicable to marriages (Articles 52 and 53 of the Portuguese Civil Code) can be applied through analogy in this stance.[48]

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[46] Under the Law N.º 7/2001 on non-marital partnerships and Article 1 of the Portuguese Civil Registry Code, no registry is necessary for the establishment of an "união de facto". In: F. Pereira Coelho, G. Oliveira, *Curso de Direito da Família*, (Coimbra: Coimbra Editora, 4ª ed., 2008), I, 71.

[47] H. Mota, 'Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito Internacional Privado da União Europeia. Breve Análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de Junho' 2/2017 *Revista Eletrónica de Direito*, 1-33, 25 (2016).

[48] L. Lima Pinheiro, *Direito Internacional Privado*, (Coimbra: Almedina, 4ª ed., 2015), II, 644.

In case the couple's non-marital partnership was registered in Italy, Regulation No 2016/1104 would be applicable, as we are dealing with MS which are part of this enhanced cooperation and as the proceedings were instituted after 29 January 2019 (Article 69). Consequently, we would resort to the Regulation's rules covering the conflict of laws and the conflict of jurisdictions.

Under Article 7 of the Regulation, the parties would be able to choose the competent court to solve this particular issue, nonetheless, they would not be able to opt for the Spanish jurisdiction as it doesn't correspond to the MS whose law is applicable or to the MS under whose law the registered partnership was created.

Hence, under Article 6(a) the competent courts would be those of the MS in whose territory the partners are habitually resident at the time the court is seised. Given that the dispute arose after the couple moved to Portugal, Portuguese courts would be competent. It is important to note, however, that Portuguese courts could decline jurisdiction under Article 9(1), as Portuguese law does not provide for the institution of registered partnership, in the sense that the public policy exception could be actioned in case the applicable law is a law that recognises these partnerships.

The applicable law would be "the law of the State under whose law the registered partnership was created", under Article 26 of the Regulation, as the choice of the German law would not be valid pursuant to Article 22 for the reasons stated above, *mutatis mutandis*. Italian law would be applicable to all assets that are subject to the property consequences of a registered partnership, regardless of where they are located, according to the unity principle, stated in Article 21.

IV. CONCLUSION

The adoption of Regulations No 2016/1103 and No 2016/1104 mark a paradigm shift in the European Family Private International Law, revolutionizing cross-border married and unmarried couples' property regimes, simplifying all related proceedings and providing the couples with greater legal certainty.

Throughout this chapter, a hypothetical situation was proposed, in order to analyse both Regulations' solutions to determine the competent jurisdiction, the applicable law and recognition and enforcement of decisions, all while having in mind their application in the Portuguese legal system. Although there are, currently, no decisions from the Portuguese Court of Appeals or Supreme Court on these issues, our analysis of the Regulations' practical implications was based on the reports from the Portuguese Institute of Civil Registry and Notary, as well as the works of national and international academics of the field.

In the upcoming years, we expect that Portuguese Courts will begin examining the provisions of the Regulations, further developing on their scope of application, exceptions and *interfering provisions*, such as overriding mandatory provisions and the public policy exception.

INTERPLAY OF EU AND DOMESTIC PRIVATE INTERNATIONAL LAW-PROPERTY RELATIONS OF CROSS-BORDER COUPLES IN SLOVENIA

Filip Dougan[1]

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Summary: I. Introduction. II. Domestic and EU legal framework. 1. International jurisdiction. 2. Applicable law. 3. Recognition and enforcement. 4. Property relations of *de facto* unions in Slovenian private international law. III. Case law. 1. Maribor Higher Court, Decision I Cp 653/2017 (5 September 2017). 2. Ljubljana Higher Court, Decision I Cp 628/2019 (10 July 2019). IV. Conclusion.

Abstract: In June 2016, Slovenia joined 17 other EU Member States in the enhanced cooperation in the area of the property regimes of international couples. The Twin Regulations therefore represent a binding legal source in Slovenia and have been applied by Slovenian courts since 29 January 2019. A comparison of domestic private international law provisions, dealing with the property relations of international couples, and the provisions of the Twin Regulations shows considerable differences. Unfortunately, publicly accessible court practice concerning the application of the Twin Regulations is still scarce. The existing cases, presented in this contribution, demonstrate that the courts (as well as the parties) often encounter difficulties already at the stage, where they need to identify the correct legal source of private international law rules. Considering that certain provisions of domestic private international law continue to apply even after the entry into force of the Twin Regulations, judges and other legal practitioners need to pay special attention to the interplay between the EU and domestic private international law.

I. INTRODUCTION

The process of adopting the Matrimonial Property Regulation[2] and the Regulation on the Property Consequences of Registered Partnerships[3] (together the Twin Regulations) proved

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[1] Filip Dougan is a teaching and research assistant and a doctoral candidate at the Faculty of Law of the University of Ljubljana.

[2] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183/1.

[3] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183/30.

to be lengthy and difficult.[4] Since consensus among Member States was impossible to reach, 18 Member States (including Slovenia) decided to establish enhanced cooperation in the area of property regimes of international couples. The Twin Regulations have been thus in force in Slovenia since 28 July 2016[5] and applicable since 29 January 2019.[6]

Their adoption represents the first change to the Slovenian private international law in the field of property relations of international couples since 1999 when the Slovenian Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku, ZMZPP)*[7] entered into force.

Unfortunately, (publicly accessible) decisions of Slovenian courts concerning the application of the Twin Regulations are still rare. At the time of writing this contribution, only two decisions of higher courts were published online and will be presented below.

In addition to presenting the relevant court practice, this contribution will also aim to briefly present the relevant rules of Slovenian private international law, which apply in cases falling outside the scope of application of the Twin Regulations.

II. DOMESTIC AND EU LEGAL FRAMEWORK

Despite important changes brought by the Twin Regulation to Slovenian private international law in the field of matrimonial property regimes and property consequences of registered partnerships, Slovenian courts will still have to apply domestic private international law in certain cases. This coexistence of various legal sources appears due to limited temporal, territorial, personal and material scope of application of the Twin Regulations.[8] Thus, judges and other legal practitioners need to pay special attention to the determination of the right legal source. This section is aimed at presenting the interplay between the Twin Regulations and domestic private international rules found in *ZMZPP*, which apply in the absence of EU law or bilateral and multilateral treaties.[9]

1. International jurisdiction

Pursuant to Article 69(1) of the Twin Regulations (Transitional provisions), their rules in Chapter II, aimed at determining international jurisdiction, apply to all legal

[4] See: E. Kavoliunaite-Ragauskiene, 'The Twin Regulations: Development and Adoption', in L. Ruggeri, A. Limante, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 25-37; F. Dougan, 'Property Relations of Cross-Border Same-Sex Couples in the EU', in L. Ruggeri, A. Limante, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 221-223.

[5] The Twin Regulations entered into force the twentieth day following the day of their publication in the Official Journal of the European Union (Article 70 of the Twin Regulations).

[6] Article 70(3) of the Twin Regulations.

[7] Uradni list RS, št. 56/99, 45/08 – ZArbit in 31/21 – odl. US.

[8] For more information on the scope of application of the Twin Regulations see: M.J. Cazorla Gonzáles and M. Soto Moya, 'Main Concepts and Scope of Application of the Twin Regulations', in L. Ruggeri, A. Limante, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 41-100.

[9] See Article 4 of the *ZMZPP*.

proceedings instituted in participating Member States on or after 29 January 2019. The application of domestic private international law rules governing international jurisdiction is thus entirely excluded for all legal proceedings instituted on or after the abovementioned date. Consequently, in disputes concerning matrimonial property regimes and property consequences of registered partnerships Slovenian courts will no longer be allowed to apply the relevant provisions, found in *ZMZPP*.

Although no longer in use, the provisions of *ZMZPP* governing jurisdiction in property disputes of spouses will be briefly presented in the following paragraphs in order to demonstrate the significance of changes brought by the adoption of the Twin Regulations and to facilitate the understanding of the court practice, presented below.

Prior to 29 January 2019, the international jurisdiction of Slovenian courts in matrimonial property disputes could be established on several grounds. Under Article 48 of *ZMZPP* (general rule)[10] international jurisdiction lies with Slovenian courts when the defendant is permanently resident Slovenia (*actor sequitur forum rei*). If the defendant does not have his permanent residence either in Slovenia or in any other State, Slovenian courts also hold the jurisdiction if the defendant has his temporary residence in Slovenia (Article 48(2) of *ZMZPP*). Under this general rule, Slovenian courts could decide on the entire matrimonial property (regardless of where the property is situated).[11]

In Article 67, *ZMZPP* also regulated a subsidiary ground for international jurisdiction, which could be used when the defendant did not have his residence in Slovenia (and the general rule could not apply). According to this ground, Slovenian courts also held international jurisdiction in matrimonial property disputes, when such property was located in Slovenia (*forum patrimonii*). However, when international jurisdiction was established solely on the location of the matrimonial property, Slovenian courts were not allowed to decide on the property that was situated abroad. This was only possible if three additional conditions were cumulatively met (Article 67(2) of *ZMZPP*): (a) the court decided on the property that was located both in Slovenia and abroad; (b) the majority of property was located in Slovenia; and (c) the defendant consented to the jurisdiction of Slovenian courts.

Furthermore, *ZMZPP* also allowed parties to enter into choice of court agreements regarding matrimonial property disputes (Article 52 of *ZMZPP*).[12] The rules distinguished between the choice of a foreign court and the choice of a Slovenian court. The jurisdiction of a *foreign court* could only be chosen if at least one party was a foreign national and the dispute did not fall under the exclusive jurisdiction of Slovenian courts. On the other hand, the jurisdiction of Slovenian courts could be chosen if at least one party was Slovenian

[10] Article 48 of *ZMZPP* applies to all kind of disputes regarding personal, family, labour, social, patrimonial and any other private law relationship with an international element. However, its application is excluded in those disputes, where international jurisdiction needs to be established in accordance with the harmonised EU rules of private international law (e.g. the Twin Regulations, the Brussels I bis Regulation etc.).

[11] M. Ilešič, A. Polajnar-Pavčnik, D. Wedam-Lukić, *Mednarodno zasebno pravo, Komentar zakona* (Ljubljana: Časopisni zavod Uradni list Republike Slovenije, 2nd ed., 1992), 103. However, the authors also argue that a limitation of jurisdiction would be sensible in cases where the matrimonial property consists of real property situated abroad, if the courts of that State hold exclusive jurisdiction to decide on such property.

[12] Like Article 48 (see n 10 above), Article 52 also applies to various kinds of disputes and remains in force even after 29 January 2019. However, since this date it can no longer be used for the choice of court agreements in matrimonial property disputes.

national. Under the same conditions the jurisdiction of Slovenian courts could also be based on submission by appearance (Article 53 of *ZMZPP*).

The comparison of the abovementioned articles in *ZMZPP* and the provisions from the Twin Regulations shows considerable differences. *ZMZPP* did not include any provisions, that would allow for concentration of international jurisdiction in closely connected cases as envisaged in Articles 4 and 5 of the Twin Regulations. Furthermore, the Twin Regulations refer to habitual residence as the central connecting factor, while *ZMZPP* refers to permanent (or temporary) residence. In addition, several other differences in connecting factors may be observed (most notably, under the Twin Regulations the jurisdiction of *forum patrimonii* is envisaged in exceptional cases only)[13]. Finally, the conditions for a valid choice of court agreement in the Twin Regulations do not distinguish between the choice of a foreign or domestic court. Nonetheless, even under the Twin Regulations important restrictions to party autonomy exist as can be observed in their Article 7.[14]

2. Applicable law

Under the Twin Regulations, the applicable law is determined in accordance with the rules found in Chapter III. However, pursuant to transitional provisions of the Twin Regulations, Chapter III only applies to spouses (or registered partners) who married (or registered their partnership) or who designated applicable law to the matrimonial property regime (or the property consequences of their registered partnership) on or after 29 January 2019.[15] This means that in all other cases, the law applicable to the matrimonial property regimes and to property consequences of registered partnerships needs to be determined in accordance with domestic conflict-of-laws rules.[16] In Slovenia, these rules can be found in Articles 38 and 39 of *ZMZPP*.[17]

Article 38 of *ZMZPP* envisages a cascade of connecting factors. The law applicable to the property (and personal) relations of spouses is:

- the law of the State of spouses' common nationality; or failing that
- the law of the State of spouses' permanent residence; or failing that
- the law of the State of spouses' last common residence; or failing that
- the law with which the relation has the closest connection.

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[13] See Article 10 of the Twin Regulations (Subsidiary jurisdiction).

[14] The restrictions in Article 7 of the Twin Regulations are predominantly aimed at achieving coordination between international jurisdiction and applicable law ("Gleichluaf").

[15] Article 69(3) of the Twin Regulations.

[16] C. Rudolf, 'European Property Regimes Regulations - Choice of Law and the Applicable Law in the Abscence of Choice by the Parties' 11 *LeXonomica* 2, 132 (2019).

[17] The applicable law as determined under Articles 38 and 39 may exceptionally not apply where - in the light of all the circumstances of the case - it is clear that the relationship has no substantial connection with that law but there is a manifestly closer connection with some other law (Article 2 of *ZMZPP*). The application of foreign law may also be excluded if the effect of its application would be contrary to the public policy of the Republic of Slovenia (Article 5 of *ZMZPP*). It should further be noted that pursuant to Article 6 of *ZMZPP renvoi* is not excluded.

While Article 26 of the Matrimonial Property Regulation, expressly states that the applicable law is determined in accordance with the relevant connecting factor that existed at the time of marriage, Article 38 of *ZMZPP* remains silent on this issue. This raises two questions. What is the relevant time of connection and how does a change of connecting factors influence the applicable law? According to Slovenian legal theory, a change of circumstances that underlay the determination of applicable law (e.g. the change of the permanent residence) changes the applicable law.[18] However, the new law only applies prospectively, which means that the property relations of spouses which existed prior to the change will be governed by a different law.[19] Thus an important difference may be observed between the Twin Regulations and the *ZMZPP*. While the former adopts the immutability of applicable law,[20] the latter allows the changes. The law determined in accordance with Article 38 governs the entire property of the spouses.[21]

In a separate Article 39, *ZMZPP* regulates the applicable law to "contractual property relations of spouses". The law governing such relations is the law applicable to matrimonial property relations (as determined under Article 38) at the time the contract was concluded. Article 39 thus refers to Article 38, but also includes an important difference. While the law applicable to matrimonial property relations may change through time (as described above), the law applicable to contractual matrimonial property relations remains immutable. Article 39(2) also allows a choice of applicable law. This possibility is, however, very limited. A choice of law may only be made if a choice is allowed under the law that would apply to the contractual matrimonial property relations of spouses in the absence of choice (as determined under Article 39(1) of *ZMZPP*).

It can be observed that *ZMZPP* only refers to the law applicable to property relations of spouses. On the other hand, no reference is made to registered partners.[22] Unfortunately, no court practice concerning property relations of registered partners is publicly available in Slovenia. Nonetheless, *ZMZPP* provides guidance on how to fill such legal lacuna. Pursuant to Article 3, the provisions and principles of *ZMZPP*, the principles of legal order of the Republic of Slovenia and the principles of private international law apply *mutatis mutandis* to cases where applicable law cannot be determined in accordance with a specific provision of *ZMZPP*. Thus, it can be reasonably argued that the applicable law for the property consequences of registered partnerships may be determined in accordance with Articles 38 and 39 of *ZMZPP.*

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[18] M. Ilešič, A. Polajnar-Pavčnik, D. Wedam-Lukić, *Mednarodno zasebno pravo, Komentar zakona* (Ljubljana: Časopisni zavod Uradni list Republike Slovenije, 2nd ed., 1992), 70-71.

[19] Ibid.

[20] D. Martiny, 'Article 26', in P. Franzina and I. Viarengo eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: E. Elgar, 2020), 245-246.

[21] M. Ilešič, A. Polajnar-Pavčnik, D. Wedam-Lukić, *Mednarodno zasebno pravo, Komentar zakona* (Ljubljana: Časopisni zavod Uradni list Republike Slovenije, 2nd ed., 1992), 70.

[22] The lack of an express conflict-of-laws rule concerning registered partnerships is not surprising considering that *ZMZPP* was adopted in 1999 and that its provisions on property relations of cross-border couples remained unchanged since its adoption.

3. Recognition and enforcement

In addition to international jurisdiction and applicable law, the Twin Regulations also regulate the recognition and enforcement of decisions. The relevant provisions can be found in Chapter IV. However, they will only be applicable if certain criteria are met. In all other cases, the recognition and enforcement will follow the rules under domestic private international law. In Slovenia such rules may be found in Articles 94 to 103 of the *ZMZPP*.

To determine whether the Twin Regulations will apply to recognition and enforcement, the court needs to examine whether the decision before it complies with the definition of a decision in Article 3 of the Twin Regulations[23] and whether it was issued by a court as defined in the same Article.[24] Furthermore, it needs to pay attention to the material, personal, territorial and temporal scope of application of the Twin Regulations.[25] The Twin Regulations will thus govern only recognition and enforcement of decisions regarding matrimonial property regimes or property consequences of registered partnerships that were given in another participating Member State in legal proceedings that were instituted on or after the 29 January 2019.[26]

This means that on the other hand, domestic rules from *ZMZPP* will apply to recognition and enforcement in Slovenia when a decision is made in a non-participating Member State or a third State (regardless of when the decision was made) and to decisions that were made in a participating Member State before 29 January 2019.

The rules regarding recognition and enforcement in *ZMZPP* demonstrate some important differences compared to the rules found in Chapter IV of the Twin Regulations.[27]

According to *ZMZPP* a foreign decision may either be recognised in a special 'delibation' procedure, where the recognition is the main object of the procedure[28] or incidentally,

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[23] Article 3 of the Twin Regulations defines a 'decision' as any decision in a matter of a matrimonial property regime or property consequences of registered partnerships made by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court.

[24] Under Article 3 the term court takes a broad meaning and may under certain conditions also include other authorities and legal professionals, who exercise judicial authority.

[25] See: J. Kramberger Škerl, 'Recognition, Enforceability and Enforcement of Decisions under the Twin Regulations', in L. Ruggeri, A. Limante, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 131-136.

[26] The transitional provision (Article 69 of the Twin Regulations) additionally stipulates that Chapter IV may also be applied if a decision was given in another participating Member State in legal proceedings that were instituted before 29 January 2019, under the condition that the decision was issued after that date and as long as the rules of jurisdiction applied comply with those set out in the Chapter II of the Twin Regulations.

[27] The scope of this contribution does not enable a detailed presentation of the provisions dealing with recognition and enforcement in *ZMZPP*. A more comprehensive overview may be found in: J. Kramberger Škerl, 'The Recognition and Enforcement of Foreign Judgements in Slovenia, National Law and the Brussels I (Recast) Regulation' 20 *Yearbook of Private International Law,* 281-315 (2018/2019).

[28] M. Geč Korošec, *Mednarodno zasebno pravo, Druga knjiga - posebni del* (Ljubljana: Uradni list Republike Slovenije, 2002), 239; J. Kramberger Škerl, 'The Recognition and Enforcement of Foreign Judgements in Slovenia, National Law and the Brussels I (Recast) Regulation' 20 *Yearbook of Private International Law,* 287-288 (2018/2019). Such recognition renders the foreign decision equal to a Slovenian decision (Article 94(1) of *ZMZPP*).

where the recognition appears as a preliminary question (Article 108(6) of the *ZMZPP*)[29]. There exists no automatic (*ipso iure*) recognition as envisaged in Article 36(1) of the Twin Regulations.

ZMZPP also does not provide for a declaration of enforceability and for an *exequatur*.[30] Thus, the creditor may achieve the enforcement in two ways. He may request the recognition of a foreign decision, which will render it equal to a Slovenian decision, allowing him to initiate enforcement proceedings before the competent local court.[31] Or, he may directly initiate enforcement proceedings before the competent local court in Slovenia, which will be able to (incidentally) examine the existence of any grounds for refusal of recognition.[32]

The recognition and enforcement may be refused:

a) if the defendant could not have participated in the proceedings because of irregularities in the proceedings (Article 96 of *ZMZPP*);

b) if the court or other authority of the Republic of Slovenia has exclusive jurisdiction over the matter in question (Article 97 of *ZMZPP*);

c) if the jurisdiction of the foreign court was based solely on (1) the nationality of the claimant, (2) the defendant's property in the country where the decision was made, or (3) personal service on the defendant of the statement of claim in the State of origin; and if the court, which rendered the decision, did not comply with the choice of court agreement conferring the jurisdiction on the courts of the Republic of Slovenia (Article 98 of *ZMZPP*);

d) if a court or other authority of the Republic of Slovenia has rendered a final judgment in the same subject matter or if another foreign decision rendered in the same subject matter has been recognised in the Republic of Slovenia (Article 99(1) of ZMZPP);[33]

e) if the effect of recognition of a foreign decision would be contrary to the public policy of the Republic of Slovenia (Article 100 of ZMZPP); and

f) if there is no reciprocity (Article 101 of ZMZPP).

4. Property relations of *de facto* Unions in Slovenian private international law

Slovenia counts among the legal orders where the legal effects stemming from a *de facto* union closely resemble the legal effects of marriage. According to Article 4 of the Slovenian

[29] Such recognition only produces effects in the proceedings, where the preliminary question of recognition appeared.

[30] J. Kramberger Škerl, 'The Recognition and Enforcement of Foreign Judgements in Slovenia, National Law and the Brussels I (Recast) Regulation' 20 *Yearbook of Private International Law,* 301 (2018/2019).

[31] Ibid., 302-303.

[32] Ibid., 303.

[33] The court stays the recognition of a foreign judgment if an earlier litigation in the same subject matter and between the same parties is pending before a court of the Republic of Slovenia. The recognition is stayed until the litigation has been finally concluded (Article 99(2) of *ZMZPP*).

Family Code *(Družinski zakonik, DZ)*[34] a *de facto* union (*zunajzakonska skupnost*)[35] produces the same legal consequences between the partners as envisaged for marriage under the Family Code. Thus, the property consequences of a *de facto* union and of marriage are the same.[36] On the other hand, in all other legal areas (not regulated by the Family Code) a *de facto* union will produce the same legal effects as marriage only if the law so provides (Article 4 of *DZ*). Such examples in Slovenia are numerous and can be found in the field of succession law, tax law, social security law, housing law etc.[37]

Regulation of *de facto* unions in Slovenian law has been in place since 1977[38] and is deeply engrained in Slovenian society as well as in the awareness of the people. Statistics from 2021 show that 17.4% of families in Slovenia are formed around a *de facto* union and this trend has been increasing over time.[39] This also means that Slovenian courts are often faced with questions concerning property consequences of a *de facto* union, which include an international element (most typically cases of two Slovenian *de facto* partners with property abroad).

It is important to note that the property consequences of *de facto* unions are not regulated by the Twin Regulations.[40] Therefore, when faced with cross-border property disputes of *de facto* couples, Slovenian courts will have to rely on the provisions of domestic private international law.

ZMZPP includes only one provision, which expressly refers to *de facto* unions. This is Article 41, which sets out the rules for determination of applicable law to the property relations of *de facto* couples in cross-border cases. Such relations are governed by the law of the State of partners' common nationality (Article 41(1) of *ZMZPP*). In case the partners do not have the same nationality, their property relations will be governed by the law of the State of partners' permanent residence (Article 41(2) of *ZMZPP*). A change of the relevant connecting factor will also cause the change of applicable law (as with the property relations of spouses).[41] Contractual property relations of *de facto* unions are regulated by the law applicable to their property relations at the time when the contract was concluded (Article 41(3) of *ZMZPP*). However, unlike spouses, partners in a *de facto* union cannot choose the applicable law.

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[34] Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C in 200/20 – ZOOMTVI.

[35] A *de facto* union (*zunajzakonska skupnost*) is defined in the Family Code as a long-term living union between a man and a woman who have not concluded marriage and there are no grounds for the marriage between them to be void.

[36] B. Novak, '4. člen', in B. Novak ed, *Komentar Družinskega zakonika* (Ljubljana: Uradni list Republike Slovenije, 2019), 45.

[37] Ibid., 46-47.

[38] The regulation of *de facto* unions was introduced by the former Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih*). The family law reform of 2019 left the regulation of *de facto* unions unchanged.

[39] SURS, 'Število gospodinjstev in družin se je povečalo', available at https://www.stat.si/StatWeb/News/Index/9973 (last visited 1 May 2022).

[40] S. Winkler, 'De Facto Couples, Between National Solutions and European Trends', in L. Ruggeri, A. Limante, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 266.

[41] See above the section on the applicable law to matrimonial property relations. See also: M. Ilešič, A. Polajnar-Pavčnik, D. Wedam-Lukić, *Mednarodno zasebno pravo, Komentar zakona* (Ljubljana: Časopisni zavod Uradni list Republike Slovenije, 2nd ed., 1992), 74.

On the other hand, no special provision regulating international jurisdiction for property disputes of *de facto* unions can be found in *ZMZPP*. Thus, international jurisdiction in such cases should be determined in accordance with the general rule found in Article 48 (*actor sequitur forum rei*). Article 67, which provides a subsidiary ground for jurisdiction (*forum patrimonii*) only refers to spouses. In line with a (strict) grammatical interpretation it would seem that this ground for jurisdiction cannot be used to determine international jurisdiction for property disputes of *de facto* unions.[42] Nonetheless, it can be observed that Slovenian courts sometimes rely on Article 67 even in case of *de facto* unions.[43]

To avoid any uncertainty, a special provision dealing with international jurisdiction in property disputes of *de facto* couples could be included into *ZMZPP* as was done in Article 49(2) of the new Croatian Private International Law Act (*Zakon o međunarodnom privatnom pravu*)[44].

III. CASE LAW

1. Maribor Higher Court, Decision I Cp 653/2017 (5 September 2017)

FACTS OF THE CASE: After V.H. died on the 25 May 2016, succession proceedings were initiated before Slovenj Gradec Local Court (Slovenia) pursuant to the Succession Regulation.[45] Parties to the succession proceedings were the deceased's daughter and his partner, with whom he lived in a *de facto* union.[46] The estate included five apartments and offices in Slovenia, a car, and a house in Croatia. During the succession proceedings the deceased's partner argued that the estate was not the sole property of the deceased, but represented the common property of the partners. She was of the opinion that her share amounted to ½ and should be excluded from the estate.

Pursuant to Article 212 of the Slovenian Succession Act (*Zakon o dedovanju, ZD*),[47] the court suspends succession proceedings and refers parties to contentious litigation if there

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[42] *DZ* stipulates that a *de facto* union produces the same legal consequences between the partners as envisaged for marriage only under the Family Code (in other fields of law an equalisation of the legal consequences needs to be determined by the relevant law).

[43] Ljubljana Higher Court, Decision I Cp 628/2019, 10 July 2019; Maribor Higher Court, Decision I Cp 653/2017, 5 September 2017.

[44] NN 101/17.

[45] In accordance with Article 4 of the Succession Regulation, the international jurisdiction to decide on the succession as a whole lied with Slovenian courts, as the deceased had his habitual residence in Slovenia at the time of death. The case also falls into the temporal scope of application of the Succession Regulation as the deceased died after 17 August 2015 (see: Article 83(1) of the Succession Regulation).

[46] In accordance with Article 20 of the Succession Regulation, the law applicable to the succession as a whole was Slovenian law, as the deceased had his habitual residence in Slovenian at the time of death. Pursuant to Slovenian succession law, partners in *de facto* union enjoy the same rights, obligations, restrictions and the status as the spouses (Article 4.a of *ZD*). In the present case the deceased's daughter and the partner inherit equal shares of the estate (Article 11 of ZD - first order of inheritance).

[47] Uradni list SRS, št. 15/76, 23/78, Uradni list RS, št. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US in 63/16.

is a dispute between the heirs as to whether certain property belongs to the estate. Thus, the deceased's partner initiated (separate) contentious proceedings against the deceased's daughter and requested the court to determine that the *de facto* union existed and to rule that the property, forming the estate, actually represented the partners' common property and that her share on this property was ½.

In these (separate) contentious proceedings, initiated by the deceased's partner, the Slovenj Gradec District Court (Slovenia) declared that is lacks jurisdiction to decide on the applicant's claim concerning the house in Croatia. It reasoned that the international jurisdiction to decide on the immovable property in Croatia needs to be determined in accordance with the Regulation Brussels I bis.[48] Since its Article 24(1) stipulates that the courts of the Member State, in which the property is situated have the *exclusive* jurisdiction in the proceedings on the rights *in rem* in immovable property, the court concluded that the decision regarding the applicant's share on the house in Croatia, may only be taken by Croatian courts. The decision was appealed against by the applicant.

REASONING OF THE COURT: In the appellate proceedings the Maribor Higher Court upheld the appeal, set aside the contested decision and referred the case back to the first instance court for further proceedings.

The appellate court firstly pointed out that pursuant to Article 1(2)(a) of the Brussels I bis Regulation, the Regulation does not apply to rights in property arising out of matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage. The dispute concerning the house in Croatia cannot be qualified as a dispute concerning the rights *in rem* in immovable property, but a dispute as to whether certain property forms part of the community of property. Therefore, the application of Brussels I bis Regulation is excluded.

It continued to argue that the community property of partners is a single concept, therefore, the property relations arising out the *de facto* union must be treated uniformly. The court invoked Article 67(2) of *ZMZPP* and explained that a Slovenian court may also decide on the property located abroad under the condition that it also decides on the property located in Slovenia (which represents the majority of property in the procedure) and the defendant consented to the jurisdiction of Slovenian courts.

Furthermore, the court stated that Article 4 of the Matrimonial Property Regulation cannot be applied to the present case, since at the time (the proceedings were taking place in 2017) the Twin Regulations did not begin to apply.

COMMENTARY REGARDING THE APPLICATION OF THE TWIN REGULATIONS: The court correctly explained that the Matrimonial Property Regulation, although adopted in 2016, did not began to apply until 29 January 2019. However, it should be pointed out that even after that date the Matrimonial Property Regulation only applies to the property relations of spouses and cannot be applied in property disputes of *de facto* union.

[48] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

2. Ljubljana Higher Court, Decision I Cp 628/2019 (10 July 2019)

FACTS OF THE CASE: A dispute regarding property consequences of a *de facto* union was initiated before a first instance court. The property, disputed between the former partners (both Slovenian nationals with permanent residence in Slovenia) included immovable property, money, securities and gold, which was located both in Slovenia and abroad (Switzerland, Austria and Croatia). In addition to the main claim, the applicant requested the first instance court to issue two interim orders aimed at preventing the respondent to encumber and alienate the property (located both in Slovenia and abroad).

The court initially granted both requests and issued the interim orders (in an *ex parte* proceedings). Afterwards, an opposition was lodged against both orders by the respondent, which was partially upheld by the first instance court leading to partial setting aside of the two interim orders. The court argued that interim orders aimed at property located abroad need to be rejected, as the Slovenian courts lack jurisdiction to carry out enforcement measures abroad or to authorise enforcement abroad.

The first instance decision regarding respondent's opposition to the interim orders was then appealed against by the applicant. The appeal argued among other that the first instance court wrongfully rejected the application of the Matrimonial Property Regulation when taking a decision on the interim orders.

REASONING OF THE COURT: In the appellate proceedings the Ljubljana Higher Court partially upheld the appeal.

It concurred with the first instance court that the Matrimonial Property Regulation cannot be applied to the present case and rejected the claims of the applicant that it has been applicable in Slovenia, Croatia and Austria since 2016. The court explained that the Matrimonial Property Regulation is only applicable to proceedings initiated on and after 29 January 2019. The adoption of the Council Decision (2016/954) of 9 June 2016 authorising enhanced cooperation does not mean that the Twin Regulations are applicable from that date on.

The court also agreed with the decision of the first instance court to reject the application for the interim orders that were aimed at prohibiting the respondent to encumber or alienate property located abroad. It explained that Slovenian courts hold no jurisdiction to carry out or authorise enforcement abroad (as such decisions of Slovenian court would not be recognised abroad). For this reason, the applicant does not have any legal interest for the interim ordered aimed at property abroad to be issued.

COMMENTARY REGARDING THE APPLICATION OF THE TWIN REGULATION: While the Higher Court correctly pointed out that the provisions of the Matrimonial Property Regulation applied to proceedings that were initiated on or after 29 January 2019, it overlooked that the property relations of *de facto* couple fall out of material and personal scope of application of the Twin Regulations.

IV. CONCLUSION

The adoption of the Twin Regulations brought significant changes to Slovenian private international law in the field of property relations of cross-border couples. Slovenian courts are now faced with a new set of rules, which considerably differ from domestic rules found in *ZMZPP*. This will undoubtedly present them with some challenges. On the other hand, when applying the Twin Regulations Slovenian courts will be confronted with a more coherent and well thought out system as well as with an abundance of scientific literature. All this may also facilitate the decision-making process of the courts. Additionally, more awareness of the new EU rules by other legal practitioners such as lawyers and notaries will also be needed to ensure that cross-border couples enjoy sufficient legal certainty and predictability as desired by the EU legislator.

THE APPLICATION OF REGULATION 2016/1103 IN SPAIN

Luis F. Carrillo Pozo[1]

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Summary: I. The Spanish perspective. II. Some disorientation regarding the entry into force of the Regulation. III. Delineating regulations. IV. The division of property and the liquidation of the matrimonial property regime: the scope of judicial jurisdiction. V. A pending task: the central role of the spouses' habitual residence.VI. A final remark.

Abstract: Spanish case law relating to Regulation 2016/1103 is currently very limited, concentrated on questions of international jurisdiction. However, it is expected that it will have a very notable application in a country receiving migrants and tourism. In any case, the first question to be resolved is the delimitation between the conflict-of-laws rules for inter-regional (those of the Civil Code) and international (RMPR) cases, whose solutions are far from coinciding.

I. THE SPANISH PERSPECTIVE

In Spain, Regulation 2016/1103 on matrimonial property regimes (hereinafter RMPR) has a double interest, real (in its international dimension) and potential (in its interregional dimension):

a) From the first perspective, its incidence will have to reach a truly remarkable volume, given the extraordinary proportion of marriages with elements of internationality that have economic interests in our country: almost six million foreigners are legally resident in Spain. By excluding other investments that are difficult to control and focusing exclusively on property acquisitions, we can link the nationality of the buyers to the areas where the highest volume of transactions is recorded. These are generally located in coastal areas and are holiday homes, many of them built by foreign retirees[2].

b) Except for the issues of jurisdiction, whether or not acquisitions are accompanied by the transfer of the habitual residence of the investor is, in most cases, irrelevant (it does not alter the legal discipline), taking into account that what is relevant for determining

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[1] Professor of Private International Law University of Almería.

[2] According to data from the Association of Registrars, in 2021, 12.61% of real estate acquisitions were made by foreigners. In terms of nationality, the ranking is occupied by the British, German and French (in that order), and the preferred areas are the islands, Valencia, Murcia, Andalusia and Catalonia. Less frequent are "labour acquisitions", where Moroccans and Romanians occupy the first positions.

the applicable law is the first residence after the marriage and the choice of applicable law in the terms set out in Article 22 of RMPR.

c) In the internal dimension, it is well known that there is no single Spanish system of *property regimes* but rather that there are up to nine forms of organisation. These systems range from the universal community of property contained in the Baylio charter to the separation of property in Catalonia and the Balearic Islands and include the most widespread regime, community property rights. Article 35 of the Regulation exempts Member States that have several territorial units with their own rules on the matter from extending their solutions to exclusively inter-regional conflicts of laws, and for the moment, this exemption has not been extended to this area. Consequently, we find ourselves in a situation of coexistence of rules that incorporate quite different connections[3] and generate difficulties in application. So far, these have been separated by a very subtle line in which everything depends on the definition of internationality: What are the factual elements that make it possible to speak of an international private relationship? Could it be two Spanish nationals resident in Spain who have a small investment in the London Stock Exchange? What should the response be to the supervening nationalisation of relations that initially had elements of foreignness[4]? And the other way around? Since this is an issue of extraordinary importance for legal certainty in the forum, we will have to wait for the SC to issue a clear response, presumably concerning a more extensive application of the Regulation as a suitable instrument for guaranteeing the strengthening of such legal certainty[5].

In addition to problems of coexistence, it is clear that the effectiveness of the reference to the Spanish legal system in Article 22 or 26 of RMPR depends on specifying the applicable Spanish law, for which the reasoning is developed in two phases. In the first phase, the European rule comes into play. In the second, a system is individualised using our model of *ad*

[3] The applicable conflict-of-laws rule is that of Article 9.2 CC for conflicts of laws in general (common national law, law chosen before the celebration of the marriage, law of the common habitual residence immediately after the celebration, law of the place of celebration) together with Article 16.3 CC, which seeks to safeguard the application of the first of the connecting criteria in the case of Spanish citizens, preventing in such case the application of a foreign legal system. Allow me to give an example, which I take from P. Jiménez Blanco, *Regímenes económicos matrimoniales tansfronterizos*, Valencia, 2021, 230: Spanish citizens with Aragonese civil status, residents since their marriage in Italy, who transfer their residence to Barcelona: the regulation declares Italian law applicable, which for the Spanish system is inadmissible.

[4] Consider, for example, the case of two Spaniards who get married and, for work reasons, move to live in Brussels. After a while they return to Spain. If the relationship is considered to be domestic, Spanish law will apply; if it is international, Belgian law will apply.

[5] As in Regulation 650/2012, the RMPR only requires its application to relationships with cross-border implications, without further specification or definition. The CJEU of 16 July 2020 (Case C-80/19) could be used as a guide for interpretation, considering that it should be applied when the residence of one of the spouses is located in a different place from that of the other, when there is a marital property asset located in another country or when a contract with international effects has been concluded. That in theory? it may be excessive is clear, but it should not be forgotten that there are corrective instruments in the hands of individuals (choice of law), which can control - at low cost - the risks of internationality. A. Rodríguez Benot recounts the unsuccessful efforts to define transnationality during the negotiation process of the regulations: 'El proceso de elaboración normativa en la UE: a propósito de los Reglamentos sobre régimen económico matrimonial y de las uniones registradas', in V, Cuartero/J. M. Velasco, *La vida familiar internacional en una Europa compleja: cuestiones abiertas y problemas de la práctica*, (Valencia 2021), 154.

intra distribution of legislative competence (Article 33 RMPR), without ensuring consistency between the principles inspiring each of these phases[6].

The above data notwithstanding, it is not difficult to assume that the RMPR currently generates more doubts than certainties. As long as the JC does not provide answers, we do not have authoritative solutions that illuminate it, suitable for answering the aforementioned questions and, of course, the general, permanently open questions, such as the concept of habitual residence or the integration of flexible connections.

Moreover, as was to be expected in light of provisions of transitional law, most of the scarce judicial decisions issued in Spain, that in one way or another have had recourse to the RMPR, deal with issues of international jurisdiction and come from courts in those areas where such acquisitions are concentrated: Alicante, Balearic Islands, and Barcelona. The issues on which controversy has arisen and to which I will devote the following pages concern, first and foremost, the procedural dimension of the property regime: the delimitation of the material scope of application of the RMPR, the criteria for international jurisdiction and the concept of the spouses' habitual residence[7]. Moreover, it is not surprising that in the appeals, the parties refer to the equality between men and women sanctioned in Article 38 of RMPR in a radically different context, evidence of the poor legal technique of so many Spanish lawyers, so prone to accumulating legal materials without rhyme or reason. Indeed, the courts have not paid the slightest attention to these allegations and have not developed anything in this regard.

First of all, it should be recalled that the Directorate General for Legal Certainty and Public Trust is also involved in matters relating to external private (real estate) transactions and that due to its greater immediacy, it has already applied the RMPR rules in their entirety, including the conflict rules.

Although its actions have been minimal, its authoritative doctrine clearly goes hand in hand with that of the courts, almost all of them related to a typical case, namely, the registry accreditation of the matrimonial property regime of foreign spouses who acquire a property or constitute a fundamental right over a property located in Spain, in terms of Article 92 RH. The solution adopted (mentioning that the purchase is subject to the legally established regime and postponing such accreditation until the moment of the execution of some act of disposition or encumbrance) makes it possible to avoid the problems of private international law[8], and, until that moment arrives, the registers are satisfied with the declarations of the parties, offeexceptring scarce public content[9]. The

[6] Consider the management and application of Spanish law as the law of the closest links, when Article 9.2 CC is unable to give an answer, J. L. Iglesias Buigues, 'La remisión a la ley española en materia sucesoria y de régimen económico matrimonial', in *CDT*, 244, (2018); or in the claims of strict territoriality of regional law (that is, practically disconnected from any conflictual reasoning) that for political reasons has been maintained in many Catalan courts. So far, the big problem has been the game of the return-forwarding when the first connection of the Article 9.2 CC came into play.

[7] It should be recalled that the aim of this book is not to deploy a systematic study of RMPR but of judicial practice. Consequently, the present pages offer only isolated glimpses.

[8] No "a priori" accreditation of the matrimonial property regime is required, it being sufficient that the registration is made in favour of the married acquirer or acquirers, it being stated in the registration that it will be verified in accordance with their matrimonial property regime.

[9] For example, the decision of 28 September 2020 does not go into whether the spouses' habitual residence after the marriage was indeed what it is said to have been (Great Britain), nor whether the nationality of the other

derivative is that, as a generic reference to a foreign property regime is sufficient, it is not necessary to identify the specific foreign law in question without further specification. It, therefore, avoids all the consequences to which the implementation of the RMPR conflict-of-laws rule could lead. The consequence of all of the above is a reduction in the protection of third parties. Since the requirements for the disclosure or registration of the matrimonial property regime specified by the law of the place of location of the property have been fulfilled (at least formally) (Article 28(2)(b) of RMPR), it cannot be denied that it is permissible to consider that the third party knows what such a regime is. However, it is debatable whether this is what the legislator had in mind when drafting the unenforceability rule of Article 28 of RMPR[10].

II. SOME DISORIENTATION REGARDING THE ENTRY INTO FORCE OF THE REGULATION

Let us humbly admit that Spanish judicial practice has difficulties with the actual practice of private international law. While it is true that the complexity of the sources is of little help (up to four regulations and a Hague Convention come into play in a standard divorce case), these are the tools with which we have to work.

I would like to briefly allude here to an almost anecdotal issue that illustrates the distance *(rectius*, ignorance) with which EU rules are handled. STS 89/2021 of 17 February[11] dealt with a divorce claim and subsequent claim for compensation for work in the home by two French citizens married in 1994 and residing in Spain. When it comes to the question of whether the Spanish courts have jurisdiction or not, the position of the SC leaves no room for doubt: it is a matter regulated in Article 22c) LOPJ (*Ley Orgánica de Poder Judicial*, in English, Parliament Act governing the judiciary, hereinafter, LOPJ), *being the regulation applicable to marriages celebrated after 29 January 2019*[12]. Irrespective of whether this was the correct conclusion in this specific case (it is not conceivable that the claim was filed before the critical date), what is clear is that Article 69 RMPR does not state that. There is also a risk that this deficient way of applying the rule will become generalised, with the consequent violation of the regulatory provisions (or we are heading for a scenario in which one or the other competence criteria will be applied depending on whether or not the court has interpreted the transitional provision correctly[13]).

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spouse is indeed what it is said to be (British). Consequently, a married person has mortgaged a property without knowing whether he or she actually had the power to do so.

[10] Article 60 of LRC provides for the registration in the CR of the economic regime together with the registration of the marriage, but foreigners married outside Spain do not have access to it, so the only possible publicity is that offered by the land registry.

[11] ECLI:EN:TS:2021:532.

[12] Own italics. That it is not exceptional is demonstrated by the SAP de Madrid (24th Section) 843/2021 of 30 September (ECLI:ES:APM:2021:9947), which applies the LOPJ to the question of jurisdiction.

[13] It would be disturbing if we had to wait for the TC to impose rationality... in a few years' time. For the time being, the SC can impose its reading by means of appeals for procedural infringement.

III. DELINEATING REGULATIONS

The uncertainties arise when Article 3 RMPR states that "matrimonial property regime" is the set of rules relating to the property relations between the spouses and with third parties, as a result of the marriage or its dissolution."[14] This principle is too generic and can result in specific problems that will have to be subsumed. Is any agreement between spouses or future spouses a matrimonial property regime? What "belongs" to Rome I Regulation and what to RMPR? In particular, what about the gist of the contracts between spouses[15]? It all comes down to the appraisal of the main claim, and here Spanish practice is encouraging. The distribution of functions of the different regulations involves assigning to the RMPR the function of prior control and setting, and where appropriate, the requirements to contract, and to Rome I Regulation the task of providing contract discipline once this prior control has been passed. It does not seem onerous to admit that the relations between third parties and spouses undoubtedly belong to the core of what is contractual, without the interference of the rules on the effects of marriage. There may be more significant suspicions of "contamination" (donations *propter nuptias,* whether made by third parties or between the future spouses) and given the uncertainties of the autonomous definitions; there is the only recourse to the *lege fori* qualification protected by Article 12 CC. This Article implies that they are also considered contracts, subject to the general rules on gifts, Article 1337 CC, and as such, fall under Rome I Regulation. After the marriage, the nature of the assets can be altered, should the spouses decide so[16]. The line is, therefore, very clear[17].

In this sense, the judgment of the High Court of Justice of Catalonia 23/2019 of 18 March is illustrative, which certainly does not apply RMPR but uses it profusely as an element of interpretation. The case concerned the marriage of two Spaniards with Catalan civil status celebrated in 1998, subject to the separation of property regime. In 2007, they bought a property in Sweden in equal shares, and in 2011 they agreed in a public document to change to the Catalan community regime. A year later, in a private document, the husband donated 40% of the estate to his spouse, and a few months later, the remaining 10% and the full ownership of the estate was registered in the Swedish register[18]. When in 2013, they divorced by mutual consent without expressly agreeing to anything about the aforementioned property,

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[14] Nothing new, moreover, with respect to what was stated in the judgment of the CJ of 27 March 1979, Case C-143/78, De Cavel v De Cavel.

[15] It is not unusual for them to conclude sales, donations, mandates or guarantees between themselves, or to form companies.

[16] The same solution should apply to contributions of private assets to the community of property: The SC is clear that they are not presumed to be a donation and that they are covered by the freedom of contract, taking part in the characteristics of a loan: STS of 10 January 2022 (ECLI:ES:TS:2022:22).

[17] It is eloquent that in the first versions of the RMPR, donations made in contemplation of marriage were expressly excluded, as opposed to the silence of the final text. This is the same as in the case of marital partnerships: M. Guzmán Zapater/I. Paz Ares Rodríguez, 'La competencia judicial internacional en materia de la disolución del régimen económico del matrimonio en el Reglamento UE núm. 2016/1103', in M. Guzmán Zapater/I. Herranz Ballesteros (eds.), *Crisis in international marriages and their effects. Spanish and European Union law. Normative and jurisprudential study*, (Valencia 2018), 289.

[18] In addition, in the private document of February 2012 the husband assumes a number of financial obligations in relation to the construction of a new building on the estate and with regard to maintenance costs and taxes.

the controversy arose because the wife filed a lawsuit claiming, among other things, that she should be declared the private owner by donation of the property. The claim was dismissed at the first instance on the grounds of infringement of the formal requirements of the law governing the donation, identified in Article 10(7) CC, the Provincial Court of Appeal redirected the issue to Rome I Regulation and gave it validity. The appeal invokes, *inter alia*, the aforementioned Article 9(2) CC (i.e., marital qualification of the donation). I said that the judgment is significant because it makes a very clear distinction between contractual and matrimonial matters and is a point of reference for the future by expressly taking up the words of Recital 18 and Article 3 of the regulatory text, identifying the applicable conflict-of-laws rule on the grounds of legal discipline. Does any specific rule cover the dispute? Is the fact of marriage the efficient cause of the emanation of this regulation? Consequently, the core of the matrimonial property regime includes the transactions entered into in consideration of the marriage and the property relations generated between the spouses by direct reason of the marriage[19]. Outside this core are the other transactions - for consideration or free of charge - which the spouses carry out in exercising their freedom of contract (Article 231-11 CCC and 1323 CC). These transactions do not result or derive directly from the matrimonial bond; they are donations that take place in the family sphere and whose effects are produced independently of the matrimonial regime. Property transactions made by the spouses between themselves under the freedom of contract and which are not a direct result of the marriage and are not concluded as a result of the marriage are subject to Rome I Regulation.

These guidelines find their corollary in the treatment of liquidation operations following the regime's dissolution, which is the subject of the following section.

IV. THE DIVISION OF PROPERTY AND THE LIQUIDATION OF THE MATRIMONIAL PROPERTY REGIME: THE SCOPE OF JUDICIAL JURISDICTION

If the key lies in identifying the cause of the operation that generates the controversy, then it is not difficult to admit that the vicissitudes concerning the distribution of the assets owned by the spouses but not integrated into the estate created by matrimonial cause do not fall within the scope of application of the RMPR. The judicial pronouncements on this point (all) refer to Chapter II of the European text.

Allow me to take a step back to frame the issue, recalling two rules of Spanish law which, although not on the same level, illustrate the channels designed by the legislator to put an end to community situations: i) Article 434.4 LEC (acronym for *Ley de Enjuiciamento Civil,* Civil Procedure Law, hereinafter: LEC) is a rule of applicable jurisdiction that exceptionally allows the accumulation of actions in oral proceedings, providing that in separation, divorce or annulment proceedings, and in those whose purpose is to obtain the civil effectiveness of ecclesiastical decisions or rulings. It states that either spouse may simultaneously bring an action for the division of the common property in respect of the assets which they hold in an undivided ordinary community of property. (ii) Article 806 LEC heads the chapter devoted to regulating the particular procedure for the liquidation of the matrimonial property regime

[19] Of course, it is the law governing the economic regime that establishes whether or not they can contract with each other, as well as any special conditions that may be imposed.

based on the grounds that it applies when there is a common mass of assets and rights subject to certain burdens and obligations.

There is, therefore, no interference. Of course, everything depends on properly identifying the nature of the assets to be distributed. This being the case, it is not difficult to accept that:

- Echoing the logic that inspires the entire legal system, the Spanish legislator has facilitated the liquidation of joint estates but has done so by modulating procedural rules and establishing rules on functional jurisdiction. It has never elevated connection of causes to a criterion of territorial or international judicial competence, not even in 2015 when it reformed the LOPJ and still had the capacity to legislate on the consequences of a dissolution.
- The prerequisite is always the verification of international jurisdiction. A rule of jurisdiction cannot be constructed on the basis of a rule of functional competence, however sensible it may be (STC 61/2000).
- Therefore, the provision of Article 5 applies only to cases in which the economic regime is discussed within the meaning of Article 3 (and provided that matrimonial proceedings are pending, of course). The above-mentioned procedure of Article 806 ff. LEC complements the RMPR, while that of Article 434 LEC cannot be used where no estate is affected by a matrimonial purpose, even if it is a matrimonial proceeding. In this case, we are talking about an accumulation that focuses on assets considered individually: If the procedural channel of this rule is contingent, it is because it displaces the *natural* one, that is, the ordinary one. It is an expeditious mechanism in which substantive issues are not debated, which explains the exclusion of cumulation when there are doubts or disputes over the ownership of an asset[20].

The procedure for establishing the inventory and distribution of the assets laid down in Article 806 ff. LEC can only be applied when a joint estate has been formed, and it is necessary to calculate assets and liabilities before distributing[21], which leaves out of its sphere those regimes not subject to community property. An asset's movable or immovable nature does not condition its inclusion or exclusion in the economic regime and thus the application of the RMPR, which has left out of its scope of application matters related to the transfer of property (Article (1)(2)(h). Moreover, the mere existence of a community of property regime does not inexorably result in the application of these provisions because it will, as noted above, depend on the nature of the property.

- Of course, the RMPR does not interfere with the domestic conduct of proceedings: Our courts can continue to reject any discussion of liquidation of the property regime or ownership of assets in divorce proceedings.

We have witnessed a certain level of conflict regarding the distribution of assets in Spain. When Article 27 RMPR states that the competent law includes "the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property"

[20] The judgment of the High Court of Catalonia of 8 October 2012 excludes the examination in the matrimonial proceedings of the cumulative action of division of assets, when there are still disputes about the common or private nature of the assets, and with respect to the accounts and financial products contracted. Such issues are outside the matrimonial proceedings and will be pursued in the relevant declaratory proceedings.

[21] For example, SAP of Barcelona of 23 February 2010.

within its scope of application. This has been misinterpreted insofar as it has been claimed that the reference to assets would be broader and would operate independently of the delimitation of the concept of matrimonial property regime in Article 3.

It goes without saying that no question of applicable law subject to the RMPR has arisen to date. However, there are questions of international jurisdiction, and we have fairly good illustrations of the questions I have been dealing with: What is the procedure for the distribution of assets? What are the criteria of international jurisdiction to be retained by the court? Let us consider:

a) Immovable property located in a Member State other than the Member State of residence of the spouses. The order of the Barcelona Provincial Court of Appeal 256/2021 of 18 June[22] resolves the appeal raised concerning the distribution of a property located in England (before Brexit). In the course of a divorce proceeding, the defendant filed an international declinatory plea with the aim that the judge of the Court of First Instance should abstain from hearing the extinction (and liquidation) of the condominium of the real estate located in London of which they were half and joint owners. This was upheld. The appeal to the Provincial Court alleges Article 5(1) of the RMPR is unconditional in the appellant's view and confers jurisdiction to hear any dispute involving the marital property. The Court highlights the distance between functional competence (Article 437(4) LEC) and the international competence and, after reviewing the matters included in the concept of the economic regime (with express reference to the catalogue of Article 27 RMPR), concludes by stating that division and liquidation are distinct realities, so that "the division of joint assets in joint ownership is not governed by Regulation 2016/1103, but by Regulation 1215/2012. Only if a court has jurisdiction over divorce, separation or marriage annulment according to Regulation 2201/2003 and also has jurisdiction according to Regulation 1215/2012 for the division of community property in joint ownership may Article 437(4)(4) LEC be applied in order to be able to join the division". In the present case, it was clear that Article (24) RBI bis attributed exclusive jurisdiction to English courts[23]. The problem in these cases is that it is impossible to guarantee a coherent judicial response to complex cases (the ritual law does not serve this purpose) as the extent of the jurisdiction in both RB II bis and the aforementioned Article 24 is unknown.

b) Immovable property located in a Member State other than the Member State of residence of the spouses. Ruling Judgement 679/2021 of 9 November of the same PA[24] presents a differential element, and that is that two assets owned by both spouses were involved but located in Bolivia, with which the discussion turns to focus on the mirror effect of Article 24 RBI bis. The petition for divorce by common consent filed by two Spanish nationals residing in Spain also included an action for the division of such assets. Having been dismissed at first instance for lack of international jurisdiction of the Spanish courts, an appeal was lodged, basically arguing that all matters relating to the divorce must be heard before the same judicial body. The Provincial Court starts from the distinction between functional and international jurisdiction, emphasising

22 ECLI:ES:APB:2021:5125A.

23 CJEU of 17 December 2015, Case C-605/14.

24 ECLI:ES:APB:2021:13403.

the type of action brought (division of Article 437(4)(4)ª LEC and 232-12 CCC, not liquidation of the economic regime), delimits very well the scope of application of RMPR (to exclude that it can be applied in this case) and concludes by rejecting the reflex effect of Article 24 RBI bis. In their view, exclusivity only applies when the matter concerns rights in rem relating to immovable property situated in the territory of a Member State so that the general forum of the defendant's domicile confers jurisdiction on the Spanish courts. Therefore, separating matrimonial proceedings and those concerning the distribution of immovable property for all purposes is entirely consistent with the interpretation of RMPR. The problem lies in understanding the mirror effect of exclusive forums, an issue that has not been resolved[25].

c) Divorce abroad and liquidation of the community property regime before Spanish courts[26]. The order of the Alicante Provincial Court 340/2020 of 22 December[27] dealt with the liquidation of the matrimonial property regime of community property. Two Russian nationals residing in Russia had obtained a divorce in their home country. The character of an immovable asset as a community or private property was a matter of dispute and, as a consequence, the formation of an inventory and the liquidation of the partnership were contested. When the liquidation of the assets in that country was requested, the Russian judges refrained from hearing the case for reasons that were not stated in the Spanish decision. When the claim was reiterated in Spain, the Court of First Instance found that the RMPR was inapplicable due to the date on which the claim was filed, declaring that it lacked jurisdiction based on the LOPJ, which was applicable... as both were Russian nationals *(sic*). The AP, on the basis of Articles 22(c) LOPJ underlines that it is not a question of "the exercise of an action in rem in matters of rights in rem but an action derived from the dissolution of the marriage by divorce," and the spouses having always had their residence in Russia, there is no doubt that the Spanish judicial bodies lack jurisdiction.

The case is of interest because it exemplifies very well the *forum necessitatis* of Article 11 RMPR (substantially fungible with 22 *g* LOPJ): It cannot be excluded that the divorce courts decline jurisdiction in favour of the courts of the State where the property is located and that the latter decline jurisdiction in favour of the former. Since the debate is about an asset located in our territory, there can be no doubt that there is a sufficient connection and that both rules must allow, once the abstention of the former has been accredited, the knowledge of the case.

Secondly, the discipline of jurisdiction gives rise to another problem, namely that of identifying a court with jurisdiction for the liquidation of the community of property. Consider a case such as the one we are looking at, in which a judge has heard the divorce of a third State (outside de EU) based on something as logical as the spouses being nationals and residents there, and yet part of the assets are located in Spain (or in any other Member State, or dispersed in several). Article 5 (thinking of pending divorce proceedings) does not apply here, nor, it turns out, does Article 6, as there

[25] And on which the JC seemed to take a more open position than the Provincial Court (Judgment of 1 March 2005, Owusu v Jackson and others).

[26] First of all, it should be ruled out that in these cases the rule of relatedness of Article 18 RMPR.

[27] ECLI:ES:APA:2020:473A.

is no link between the spouses and a European forum. Likewise, Article 10 does not apply if the assets concerned are not real estate (not to mention the inevitable ordeal of pilgrimages in the event of dispersal of assets). Only this last resort of Article 11 would offer an escape route. Of course, the doubts do not end there as there is still the matter of identifying a territorially competent court in Spain: True to the (quite sensible) desire to concentrate jurisdiction, Article 807 LEC resolves the question of territorial jurisdiction by disciplining the functional jurisdiction and provides that the liquidation is heard by the same body that has ruled on the matrimonial question. Which, if foreign? One may have recourse to the rules which, in their absence, are called upon to intervene (the general rules on territorial jurisdiction, Articles 50 ff. LEC), but these are still based on a certain presence of the parties in the forum, which is not the case[28]. The issue remains open; the most reasonable would be to attribute jurisdiction to the court where the property (not necessarily real estate) or the bulk of the estate is located.

d) Liquidation claim and *ex officio* review of jurisdiction. Order 97/2021 of 24 March of the Provincial Court of Alicante[29] dealt with a claim for liquidation of the community of property according to the procedure in Articles 806 ff. LEC, brought by a French national residing in France, divorced from an Algerian national residing in Spain. The habitual residence was in France. The only marital property was a property located in Spanish territory[30]. In the first instance, the Spanish courts declare of their own motion that they lack jurisdiction (Article 15 RMPR). The appeal alleges infringement of Article 5(1) RMPR. It is difficult to ascertain the meaning of this argument as it was probably based on an erroneous understanding of the rule, assuming that economic matters can be heard by the court which has jurisdiction in the abstract for the marital crisis. It also ignores that the prerequisites are the pendency of a dispute concerning the marital relationship, there is no *perpetuatio iurisdictionis*[31] and that the courts are hearing it of a Member State. It is an allegation that was expeditiously dealt with by showing that the implementation of this article would have served to confer jurisdiction on the divorce courts, i.e., Algerian courts.

The appellant also argued that the only marital property was an immovable property in Spain. The usefulness of such a plea in order to get the Spanish court to declare that it has

[28] In the only reported case I know of, the defendant lived in Spain, so the problem does not arise in such a dramatic way. *Vid.* AAP of Madrid 286/2007 of 27 November.

[29] ECLI:ES:APA:2021:116A.

[30] Although this is not an issue that should concern us now, it should be borne in mind that there is no shortage of decisions that consider the procedure of Article 806 ff. LEC when there is no estate but the community of property has only one asset. For all, AAP Madrid of 10 May 2012.

[31] Another interpretation in P. Peiteado Mariscal, 'Competencia internacional por conexión en materia de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relationship between EU Regulations 2201/2003, 650/2012, 1103/2016 and 1104/2016', in *CDT*, 2017, p. 311. Identical confusion in the SAP of Alicante 194/2019 of 3 April (ECLI:ES:APA:2019:1289), which - on the other hand - evidences the lack of knowledge of the dates of applicability of the regulation to which I referred above (it is sufficient to see the date of the decision to understand that it has been applied before its time): In a dispute concerning the drawing up of the inventory of the community property, the Court held that the liquidation should have been heard by the same Belgian court that decreed the divorce, *ex* Article 5 RMPR, when it turns out that we know that such a rupture occurred before 2013, which is when the husband died.

jurisdiction is rather doubtful; at most, it can serve to exclude the procedure of Article 806 ff. LEC. However, the Court makes two statements on this point: i) On the one hand, it points out with impeccable correctness that the location of a building is only considered as a point of connection*(sic*) for the subsidiary jurisdiction provided for in Article 10 RMPR when no court of a Member State has jurisdiction; ii) On the other hand, it continues, in the present case it is not necessary to have recourse to that rule because "in the default of the Algerian courts *and always according to the facts alleged in the application*, the competent jurisdiction would be the French court by application of Article 6(b) of the same Regulation'. What is meant by 'in the default of the Algerian courts' is worrisome because if the Provincial Court assumes that it is these courts that should primarily hear economic matters, it is because they have not grasped that the regulatory legislator makes an *ad intra* EU distribution, without giving relevance to the possible assumption of jurisdiction by the courts of third States (outside the EU) or establishing a mechanism for collaboration in cases of *lis pendens*. The rule is to verify whether or not competence is conferred under any RMPR rules. If it does not have competence, it refrains from hearing the case, regardless of the possible declaration made by a court of a third State (outside the EU), and it is always subject to the *forum necessitatis*, which depends on the initiative of the plaintiff. Secondly, being a dispute unrelated to inheritance or matrimonial crisis, there is no choice but to turn to Article 6. However, in this regard, there are some points in the resolution that are not sufficiently clear. It has sometimes been interpreted that the *ex officio* control, regulated in detail by Article 36 and 38 LEC, can be done *in limine litis*, without the need to notify the defendant, and can be heard only between the plaintiff and the public prosecutor. This appears to have happened in this case because it does not appear that the defendant was summoned nor that they have appeared. Consequently, they were never able to allege circumstances that would have allowed the Spanish judge to decide whether or not to take up the case. Without such notification, the courts take the party's assertions at face value, and several questions remain unanswered. a. Was a choice of law made, and could it have brought into play the rule on prolongation *ex* Articles 7 or 8, in so far as Article 69 does not apply the rules on jurisdiction conditional on the election being held after January 2019? b. Was the last common habitual residence really in France?

V. A PENDING TASK: THE CENTRAL ROLE OF THE SPOUSES' HABITUAL RESIDENCE

This is an issue of general scope, somewhat more complex because it involves two persons and because the operability of the presumption of cohabitation depends on the applicable law (for example, in Catalan law, it does not exist). During the validity of Article 9(2) CC, the question sometimes arose as to which was the habitual residence of the spouses immediately after the marriage, in the absence of common nationality. Now that residence has acquired a preponderant role in the system of connections and the jurisdiction criteria (Article 26 and Articles 4, 5 and 6 RMPR), it is foreseeable that litigation will increase. The position of Spanish courts in this respect is consolidated concerning CC, and is destined to continue in the interpretation of RMPR (as long as the CJ does not establish a European one).

That it is not a merely academic issue and that very substantial economic attributions depend on its solution is shown by a case resolved by the Judgement of the Provincial Court

of Appeal of Barcelona 408/2018 of 4 April[32] (prior to RMPR), in which the application of laws as disparate as Dutch (universal community) or Irish (absence of property transfers between ex-spouses) depended on its existence and specification.

There is a constant in the jurisprudential doctrine, which stresses that: i) Habitual residence is where one actually dwells[33]. It does not matter whether it was the only common one or the last one during the life of the marriage, as some decisions have sometimes pointed out, but the rigour of the rule requires looking at that specific moment retained by the rule; ii) Periods of time characterised by temporariness can be disregarded. If two people marry but live apart for a period of time only for medical reasons or because administrative leave is being processed, for example, this time of separation does not affect the content of the criterion of connection; iii) Even if it is a criterion of connection, it does not affect the time of separation; (iii) Although it is an eminently objective criterion, the autonomy factor must be taken into account, taking into consideration the place where the spouses wished to live[34]; (iv) Precisely because of its objective nature, the determination of the habitual residence immediately after the marriage is not affected by intervening factors such as the acquisition of a nationality, the purchase of a house (the location of the property in general), where one lives at present or the place where the marriage was celebrated, factors which may serve to determine the law of the closest ties, but not for the residence[35].

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[32] ECLI:EN:APB:2018:1999: Irish national who married a Swede in Ireland. She claimed that their common residence had been in Eindhoven; he claimed that there had never been a common residence immediately after the marriage. The debate shifted to the sufficiency of the evidence (she provided her own census certificate and a rent receipt), but the judgment is interesting because it introduces a factor of reasonableness into its reasoning: Admitting that the husband worked in Sweden, it was not plausible that he lived in the Netherlands, and consequently the connection based on common residence is discarded and the law of the place of celebration of the marriage is applied, the connection of the close of Article 9(2) CC.

[33] Two conceptual approaches are worth mentioning: SAP de Málaga of 9 June 2008 (ECLI: ECLI:ES:APMA:2008:2375): "The habitual residence is determined by the place where the spouses develop their life together, form their family and carry out their economic, work or professional activities"; SAP Baleares of 30 October 2014 (ECLI:ES:APIB:2014:2143): "The place of habitual residence is the one that corresponds to the permanent and intentional residence in a specific place, taking into account the effective living and the habituality, with economic and family roots".

That residence is held in only one place is made clear in the CJEU of 25 November 2021, Case C-289/20.

[34] SAP of Barcelona of 11 May 2018 (ECLI:ES:APB:2018:4893): "the will of the spouses was to be governed by Spanish law from the beginning, since the wife's residence in Cuba was provisional and the definitive one in the will of the parties was Spanish, as their first common habitual residence (...) the wife's domicile was merely instrumental and provisional after the marriage, since the entry and residence in Spain required certain formalities that were essential".

[35] Which is precisely what the SAP of the Balearic Islands of 13 February 2019 (ECLI:ES:APIB:2019:165) does: It must not have been very clear what that residence was when all that is known is that after an indeterminate period of time (between fifteen days and four months) after their wedding in Moscow, a German and a Russian come to live in Mallorca, and therefore Balearic law applies to them.

A reconstruction of the concept that brings together all these elements in L. A. Pérez Martín, 'Determinación y transcendencia de la residencia habitual en las crisis familiares internacionales', in M. Guzmán Zapater/I. Herranz Ballesteros (eds.), *Crisis matrimoniales..., op. cit. cit.*, p. 958. It goes without saying that it confuses habitual residence with centre of main interests, something that the CJEU clearly distinguishes: Judgment of 25 October 2011, joined cases C-509/09 and 161/10.

In this context, the question referred for a preliminary ruling by the Barcelona Regional Court in its order of 15 September 2020[36] is of particular interest: although it is based on Regulation 2201/2003, the doctrine laid down by the JC undoubtedly extends to RMPR. The case involved an application for divorce by a Portuguese and Spanish couple residing in Togo, where they work for the European Commission as contract staff. What is the habitual place of residence in cases such as this, which are markedly provisional? Do they really reside in Togo? It is important to underline how the order expresses the concern to flee from national interpretations to avoid the game of Article 40 CC (which could have led to the assertion that they were residents in Spain) and constructs a European concept of habitual residence. At the time of writing, only the conclusions of the GA[37] are available, which emphasise the objective element (stability or regularity) and the subjective element (intentionality), also endowing the residence with the characteristics of uniqueness and being the centre of life. It does not seem foreseeable, therefore, that the solutions envisaged in the *leges fori* will have much space to be applied.

VI. A FINAL REMARK

At present, it would be risky to bet on what paths Spanish judicial practice will take in terms of the interpretation of the basic concepts of Regulation 2016/1103, among other reasons because there is, in fact, not a single pronouncement on the conflictual problems. However, there is a notable handling by the judiciary of the normative sources in matters of international jurisdiction, distinguishing what is and what is not effects of marriage, and separating at this level the declarative issues (dissolution) from those marked by a predominantly *enforceable* content (liquidation). A source of optimism is the experience of cooperation with the CJEU in the application of the "Brussels system", which has produced quite positive results. Spain's demographic and economic background will find in this a perfect instrument to enhance legal certainty.

[36] ECLI:ES:APB:2020:6151A.

[37] Case C-501/20 (ECLI:EU:C:2022:138). Conclusions presented on 24 February 2022.

(PRACTICAL) APPLICATION OF REGULATION (EU) 2016/1104 IN SPAIN

Mercedes Soto Moya[1]

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Summary: I. Introduction. II. Factual background. III. Issues. IV. Legal grounds. 1. Would Regulation 1104/2016 apply to this case? Preliminary questions. 2. Do Spanish courts have jurisdiction to rule on the issue? 3. What law would be applicable?

Abstract: Following the structure of a legal opinion, this paper presents, analyses and develops a case study in which Regulation (EU) 2016/1104 would be applicable in Spain. The territorial, temporal and personal scope of the EU legal instrument is studied as a preliminary question; we then proceed to establish which court of which Member State is competent to hear the matter, as well as the law applicable to the case.

I. INTRODUCTION

Although several years have passed since the implementation of Regulation (EU) 2016/1104, of 29 January 2019, the fact is that in Spain there is still no case law regarding its application. While it is true that there are some court decisions that make reference to the EU regulation, this is only indirect, referring to the concept of registered partnership contained in the Regulation for the purposes of applying for a widow's pension, albeit in internal rather than international cases, and never in order to establish international jurisdiction or the law applicable to a particular case[2]. For such reason, it was considered most appropriate to analyse a realistic case study, far removed from theoretical suppositions, which could reflect the problems of applying the Regulation in Spain. Thus, we have chosen to reflect the reality of Spain's multi-unit state, in which there is no unified regulation on registered partnerships. On the contrary, Spain has a fragmented and patchy legislative system for registered partnerships, which differs in each Autonomous Community. In our case study, the starting point is the recording in the Balearic Islands' register of partnerships of the partnership between a mixed nationality couple (Ecuadorian/Spanish), who later seek to dissolve their partnership and

[1] Associate Professor of Private International Law at the University of Granada (sotomoya@ugr.es). Paper written within the framework of the R+D+I Project: "The challenges of the legal and financial regulation of marriage and other realities (partnerships) at suprastate and state level (REJURPAT in Spanish)", code PID2019-106496RB-I00, within the framework of State Programmes for Knowledge Generation and Scientific and Technological Strengthening of the R+D+I System. IP: D. Andrés Rodríguez Benot.

[2] By way of example, STSJ Madrid (Social), Sec. 1, S 07-06-2019, No 644/2019, rec. 1322/2018; STSJ Catalunya (Social), Sec. 1, S 09-02-2021, No. 805/2021, rec. 4230/2020.

liquidate their partnership property regime. The problems faced by the competent authority vary. Firstly, it will have to determine whether Regulation (EU) 1104/2016 is applicable to the case, by clarifying some preliminary questions related, above all, to its personal scope. Secondly, it will have to establish its international jurisdiction over the matter, and where applicable, apply a specific law, either Ecuadorian or Spanish, to rule on the case. Within the latter, it must choose one of multiple existing regulations on registered partnerships in Spain. Using the structure of a legal opinion, we will now analyse the specific case outlined in this study.

II. FACTUAL BACKGROUND

Juan, a Spanish national with habitual legal residence in the Balearic Islands, and Maria, an Ecuadorian national, register their partnership in the Balearic Islands (4 April 2019) and continue to reside there after said registration. On 25 March 2022 there is a conflict between the couple and they seek to dissolve their partnership and liquidate their property regime.

III. ISSUES

1. Would Regulation 1104/2016 apply to this case? Preliminary questions
2. Do Spanish courts have jurisdiction to rule on the issue?
3. What law is applicable?

IV. LEGAL GROUNDS

1. Would Regulation 1104/2016 apply to this case? Preliminary questions

To define which authority has jurisdiction, or which law is applicable to the determination of the couple's property regime, the legal practitioner will have to establish, firstly, whether Regulation (EU) 2016/1104 is to be used for this purpose or not.

Accordingly, it will be essential to clarify whether the temporal, material and personal scope is met in the case being analysed.

- With regards to the temporal scope, the Regulation entered into force on 29 January 2019. However, to determine its application to our case study, we need to differentiate between jurisdiction and applicable law. With regards to international jurisdiction, the Regulation will only apply to proceedings commenced after its entry into force. As for the applicable law, Article 69(3) of the Regulation stipulates that the provisions of Chapter III will only be applicable to those members of the partnership that have registered it or that have specified the law applicable to the property consequences of the partnership registered on or after 29 January 2019.

CONCLUSION: the analysed case falls within the Regulation's temporal scope, since the partnership was constituted after 29 January 2019 and the intention is to file the lawsuit as of 25 March 2022.

- With regards to the territorial scope, the Regulation is fully applicable to Spain, as a participating State in the enhanced cooperation process. This is a procedure whereby, with a minimum of nine EU Member States, progress can be made in matters of non-exclusive competences and the Common Foreign and Security Policy, in accordance with the provisions of Article 20 TEU and Articles 326 et seq. TFEU. This procedure has been designed to overcome deadlock, whereby a proposal is blocked by a single country or small group of countries that do not wish to participate in the initiative, thus creating the so-called multi-speed or variable geometry Europe. In this case, the fear of some countries that adopting Regulation (EU) 2016/1104 could lead to a gradual opening to the regulation of same-sex partnerships discouraged their accession, forcing a turn to the enhanced cooperation process. Currently, only Belgium, Bulgaria, the Czech Republic, Greece, Germany, Spain, France, Croatia, Cyprus, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden are part of the Regulations (together with Cyprus, which a few months later expressed its desire to join them).
- Regarding the personal scope, the important point is that we should be dealing with: a) a registered partnership; b) with cross-border implications. In the case we are analysing, we will have to study whether it fulfils these two requirements.

With regards, firstly, to the cross-border aspect, although there is nothing stipulated in the Regulation, such requirement can be said to be fulfilled when the case is linked to two or more national legal systems. Moreover, the foreign element would have to be pertinent. In this case, the partners' different nationalities (Spanish and Ecuadorian) mean that the partnership has a markedly cross-border nature, hence the requirement is fully met.

As for whether it constitutes a registered partnership or not, Article 3(1)(a) of the Regulation itself offers a definition of such partnerships, understanding them as: "*the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation*". Additionally, Recital 16 limits the application of the Regulation (EU) to "*couples whose union is institutionally sanctioned by the registration of their partnership with a public authority*". Therefore, according to the provisions of Article 3(1)(a), the European law is only operative in the case of registered partnerships. It seems clear that any partnership which is not registered will not fall under the personal scope of this Regulation, thereby ruling out couples in *de facto* cohabitation or, perhaps more precisely, unregistered partnerships.

Will the partnership created in the Balearic Islands be considered a registered partnership for the purposes of applying the Regulation? In order to properly answer this question, we must analyse what kind of registers the Regulation considers feasible to create the partnership. European law makes no reference to whether this must be constitutive or not, whether it must be a single register or if several different registers can exist in the same State, whether there is the possibility of it being an administrative record or it must be a civil register, whether it is necessary for it to constitute a public registry vis-à-vis third parties, the principles and requirements of registration, the authorities competent to record the registrations... All of these questions, which are essential to clarifying the preliminary question of whether a specific partnership will fall within the scope of said legal instrument, are left to the discretion of

each Member State. The decision, however, is a complicated one bearing in mind the patchy existing regulations on registered partnerships.

This scattered legislation perhaps reaches its peak in the Spanish legal system, where there is no state-level regulation of registered partnerships, which are negligently ignored, in our view. Such inactivity on the part of the state legislator sits in stark contrast to the intense activity undertaken by the regional legislator. Each Autonomous Community has drafted laws on partnerships (cohabitation, unmarried, registered... each with its own specific designation)[3].

Regional laws differ not only in their nomenclature, but also in content. Each Autonomous Community regulates the issue in a unique way: in some, registration is constitutive, while in others merely declaratory. In some, registration is mandatory, while in others it is not. In all of them, however, these are administrative records that do not alter the civil status of the cohabitants, who continue to be single, divorced or widowed, and who are at full liberty to marry another person. Nor do these registers enjoy two essential privileges that the Registry Office does: official authority and public registry vis-à-vis third parties.

What we do deem vital to highlight is the fact that in Spain, there is no single register of couples; rather, these are as numerous as the Autonomous Communities themselves, and they are not interconnected, which can lead to duplicate recordings in registers. However, this multiplicity of records does not preclude application of Regulation 2016/1104. Nor that registration is declaratory, or even that it is an administrative record. The only thing that seems clear, therefore, is that the register must exist and must be mandatory. In other words, only non-marital unions that arise from legislation in which recording on a public registry is mandatory can be included in the scope of Regulation (EU) 2016/1104.

Indeed, Article 1 of Law 18/2001, of December 19, on rules governing stable couples in the Balearic Islands [*Ley de Parejas Estables de las Islas Baleares* in Spanish] states that "*in order for this Law to be applicable, voluntarily register with the Stable Couples Register of the Balearic Islands. Recording in this registry is of a constitutive nature*". Thus, it seems clear that recording in a register is mandatory, and that partnerships formed at the dawn of this Law fall within the personal scope of Regulation (EU) 2016/1104.

CONCLUSION: in our case study, Regulation (EU) 2016/1104 is applicable because the temporal scope is fulfilled (couple formed after 29 January 2019), as is the territorial (Spain

[3] In Catalonia, Law 10/1998, of 15 July, on stable couple unions; in Aragon, Law 6/1999, of 26 March, on unmarried stable couples; in Navarra, Regional Law 6/2000, of 3 July, for legal equality for stable couples; in the Balearic Islands, Law 18/2001, of 19 December, on the rules governing stable couples; in the Basque Country, Law 2/2003 of 7 May 2003 on domestic partnerships; in the Valencian Community, Law 1/2001 on domestic partnerships; in the Principality of Asturias, Law 4/2002 of 23 May 2002 on stable couples; in Andalusia, Law 5/2002 of 16 December 2002 on domestic partnerships; in Castilla y León, Decree 117/2002 of 24 October 2002 creating the Civil Partnerships Registry of Castilla y León and regulating its operation; in Extremadura, Law 5/2003 of 20 March 2003 on domestic partnerships of the Autonomous Community of Extremadura; in the Community of Madrid, Law 11/2001 of 19 December 2001 on domestic partnerships; in the Canary Islands, Law 5/2003 of 6 March 2003 on the regulation of domestic partnerships in the Autonomous Community of the Canary Islands; in Cantabria, Law 1/2005 of 16 May 2005 on domestic partnerships of the Autonomous Community of Cantabria. Law 7/2018, of 3 July, on Domestic Partnerships in the Autonomous Community of the Region of Murcia (BORM of 6 July 2018); Decree 30/2010, of May 14, creating the Registry of Domestic Partnerships of La Rioja.

is one of the Member States participating in enhanced cooperation) and personal scope (the union has a cross-border nature with the parties being of different nationalities, and, moreover, registration is mandatory according to Law 18/2001 on the rules governing stable couples in the Balearic Islands).

2. Do Spanish courts have jurisdiction to rule on the issue?

Once the application of Regulation (EU) 2016/1104 to the case study being analysed has been determined, it must then be established whether the Spanish courts have jurisdiction in the resolution of this matter. To this end, we have to turn to the forums provided for under the regulation. Rather than hierarchical forums, analysed one by one, these are better described as blocks of forums. The first block would be that concerning the concentration of jurisdiction (Articles 4 and 5). The second is *prorrogatio fori* and the general forums (Articles 6, 7 and 8). The third block can be called the successive forums (Articles 9, 10 and 11).

For the case we are analysing, in principle, Article 5 (from the first block of forums) would be applicable, as liquidation of the partnership's property regime is a direct consequence of the dissolution of the same. As the EU legislator understands that on many occasions the two issues are inextricably linked, it has provided for the concentration of jurisdiction in the authority seised of said dissolution, to bring together jurisdiction in a single Member State. It does however require the agreement of the constituent parts of the registered partnership.

In this case, the couple was formed and has habitual residence in the Balearic Islands, where it also seeks to dissolve the union, hence in principle, the Spanish courts would, by the consolidation provided for in Article 5 of Regulation (EU) 2016/1104, also have jurisdiction to liquidate their property regime. However, it must be underlined that, in Spain's case, there is no regulation at state level on registered partnerships. Such patchiness mainly affects the preliminary question of whether such partnerships fall within the scope of Regulation (EU) 2016/1104, as we have discussed, as well as, tangentially, the matter of international jurisdiction. In effect, it will need to be determined whether the Autonomous Communities' legislation provides for the possibility that the authority competent for dissolution be a court, and if so, whether liquidation of the partnerships' property regime can be cumulated to this matter (remember that it must be of a cross-border nature, i.e., either it is a mixed-nationality couple, or they have created their union in one country and seek to liquidate the property regime in another).

However, Law 18/2001 of 19 December, on the rules governing stable couples in the Balearic Islands, does not provide for the possibility of a legal declaration of dissolution of the union (the same happens in all regional legislations). In all cases, the partnership is ended upon the death of one of the members of the partnership, by decision of the parties, whether by mutual agreement or unilaterally, or by the registrar[4]. The party autonomy is the guiding principle, both in the creation and termination of the partnership.

[4] A list of the specific articles of the legislation from each of the Autonomous Communities that provide for this can be found in J. L. IGLESIAS BUIGUES, "Competencia en caso de divorcio, separación judicial o anulación del matrimonio o de disolución o anulación de una unión registrada", *Régimen económico matrimonial y efectos patrimoniales de las uniones registradas en la Unión Europea. Comentarios a los Reglamentos (UE) 2016/113 y 2016/1104,* (Valencia, Tirant Lo Blanch, 2019), 79-93.

Therefore, in principle, Article 5 of the Regulation will not be applicable in this case. We would have to turn to the second block of forums provided for in the Regulation, Articles 6, 7 and 8 ("other cases" segment) to elucidate if Spanish courts would have jurisdiction. Despite what it may initially seem from the wording of Article 6, jurisdiction in "other cases" is not only regulated in this provision but, as we have noted, this "other cases" segment encompasses Articles 6, 7 and 8. Only in the event that the first block of forums (those whose function is to concentrate jurisdiction) is not applicable, can we turn to the second segment comprising Articles 6, 7 and 8. In this second block of forums, the party autonomy takes priority. Thus, Articles 7 and 8 (express and tacit acceptance of the jurisdiction, respectively) apply in preference to Article 6. Only in the absence of application of these provisions is it possible to move to the general forums provided for in Article 6.

Between Articles 7 and 8 the precedence is clear. Tacit acceptance of the jurisdiction (Article 8) overrules express acceptance, as it is considered a subsequent agreement. Thus, if one of the parties files a lawsuit with a court of a Member State and the defendant enters an appearance (even where they have a prior agreement of express submission), that Court will have jurisdiction. Of course, in both cases it is a question of limited party autonomy. The choice must comply with the provisions of Articles 7 and 8, which confine the choice to the court of the Member State whose law is applicable, either as a result of a choice of law agreement, or, in the absence of such, as a result of an objective link (courts under whose law the registered union was created).

In the first case, if the choice of court of jurisdiction coincides with the *lex causae* reference must be made to Articles 22 and 26 of the Regulation. The aim of the EU legislator is to encourage *forum legis*, a laudable solution, initially, that seeks to promote objectives such as legal certainty and the proper administration of justice. Thus the application of foreign law is avoided, facilitating the work of the competent authority and reducing costs. Moreover, it ensures that settlement of the case is not affected by the mandatory or public policy rules of any system other than that chosen[5]. However, the correlation between *forum/ius* does not meet the intended purpose provided for in all cases, due to the existence of an evident discrepancy between jurisdiction and the applicable law. The clearest example found in the matter we are analysing: a Spanish/Ecuadorian couple who created their union in the Balearic Islands, where they live. Let us suppose they enter into an express submission agreement. Article 7 gives them several options, including choosing the law of the nationality of one of the parties. And this is what they do - they enter into a choice of court agreement in favour of the courts of Ecuador. The agreement is valid because it fulfils the requirements established by Article 22(1)(a) of Regulation (EU) 2016/1104, thus Ecuadorian law shall apply. The problem is that, by transferring the parties' free will to the scope of international jurisdiction, a discrepancy is created. Let us remember that Articles 7 and 8 permit express or tacit acceptance of the jurisdiction to "*the courts of the Member State whose law is applicable in accordance with Article 22*". In accordance with these provisions, there would be no objection to the parties agreeing that the court which has jurisdiction to deal with the matter be Ecuadorian. This is, however, impossible, as Ecuador is not a State party to Regulation (EU) 2016/1104. Therefore, the limit to party autonomy is twofold: on the one hand, an intrinsic

[5] P. FRANZINA 'Jurisdiction in matters relating to property regimes in EU Private international law', *Yearbook of Private International Law,* Vol. 19, 159-194, (2017-2018).

limit, related to the very nature of international jurisdiction, and stemming from enhanced cooperation. On the other, an extrinsic limit, resulting from the wording of the articles in the Regulation, which provides a restrictive list of courts that can be seised to rule on the case, linked to the applicable law provided for in Articles 22 and 26, as stated. It would not be possible to establish the jurisdiction of Ecuadorian courts. But what about Spanish courts? In this case, yes, both tacit and express submission would be possible, due to being the place where the partnership was registered as well as its place of residence.

The agreement of express acceptance of the jurisdiction referred to in Article 7(1) shall be expressed in writing, dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. These strict requirements as to form guarantee that the will of the parties can be established with sufficient certainty, based on the appropriate evidence. Moreover, they also serve to support the informed choice of the parties and the well-thought-out organisation of their interests.

CONCLUSION: Spanish courts might have jurisdiction to rule on the property consequences of the partnership, albeit not due to the concentration of matters provided for in Article 5 of Regulation (EU) 2016/1104, but rather by express or tacit acceptance of the jurisdiction provided for in Articles 7 and 8, respectively.

Let us suppose there is no agreement on express or tacit acceptance of the jurisdiction. Which courts would then have jurisdiction?

Where the first block of forums ("concentration of jurisdiction") is not applicable, we must move on to the second block ("other cases") which encompasses Articles 6, 7 and 8, as noted. Hierarchically, submissions are applied with priority and only in the absence of these may Article 6 be turned to[6]. This is inferred from the joint reading of Articles 4, 5, 7 and 8. That it is applied in the absence of concentration of jurisdiction is clear from the wording of Article 6: *"where no court of a Member State has jurisdiction pursuant to Articles 4 or 5..."*. Subordination to party autonomy is a little more convoluted, but Article 7 still leaves no room for doubt when it states that: *"in the cases referred to in Article 6, the parties may agree that the courts of the Member State (...) shall have exclusive jurisdiction to rule ..."*. Translation: in the cases referred to in Article 6, i.e., in "other cases" different to the concentration of jurisdiction, the parties can agree to an express submission so that the courts of a State may have "exclusive" jurisdiction, understood to be hierarchically superior to the general forums governed by Article 6. Therefore, the starting point must be that, once the second block applies - only when the members of a registered partnership have not expressly or tacitly agreed to confer international jurisdiction - the court having jurisdiction may be determined by application of Article 6. The subsidiary nature of this provision is clear, although it could have been drafted with greater clarity by the EU legislator.

Having examined the order of priority of the forums provided for in this block, we will now analyse the content of Article 6. The first point to bear in mind is that the provision lists a series of forums that are hierarchical, in cascading order. The next one will apply only in the absence of the previous one. There is no possibility for the parties to make a choice here - an option which, as already discussed, they do have access to by means of express

[6] Also, where submission is not valid, due to a formal or substantive defect, for instance, having chosen a Court that is not party to Regulation (EU) 2016/1104.

or tacit submission. Therefore, if they do not make use of this option under Regulation (EU) 2016/1104, the provisions of Article 6 shall perforce apply: (a) habitual residence of the partners at the time the court is seised, or failing that; (b) last habitual residence of the partners, insofar as one of them still resides there at the time the court is seised, or failing that; (c) habitual residence of the respondent at the time the court is seised, or failing that; (d) common nationality of the partners at the time the court is seised, or failing that; (e) under whose law the registered partnership was created. In this case, the first paragraph would apply, since the members of the couple are habitually resident in Spain at the time the court is seised. The forums listed in the following paragraphs would not be applicable.

CONCLUSION: in the case at hand, since Article 5 is not applicable and in the absence of an express or tacit acceptance of the jurisdiction, Spanish courts would have jurisdiction according to the first forum provided for in Article 6: "habitual residence of the partners at the time the court is seised".

3. What law would be applicable?

Based on the fact that Spanish courts have jurisdiction to rule on the matter, as discussed, either by express or tacit acceptance of the jurisdiction, or according to the first forum provided for in Article 6, the next question to ponder is which law will be applicable: Spanish or Ecuadorian? If Spanish law is applicable, exactly which one of the various Autonomous Communities' legislation shall apply?

Regulation (EU) 2016/1104 grants the parties the possibility to choose which law they want to apply to the liquidation of their property regime in Article 22. However, this party autonomy is limited to laws related to the case, i.e.: (a) the law of the State in which the members or future members of the registered partnership, or one of them, have their habitual residence at the time of conclusion of the agreement; (b) the law of the State of nationality of any of the members or future members of the registered partnership at the time in which the agreement is concluded, or (c) the law of the State under whose law the registered partnership was created.

Therefore, if the partners had entered into an agreement, they could have chosen Spanish law (as the law of their habitual residence as well as the law of where the partnership was created) or Ecuadorian law due to this being the nationality of one of the parties. The choice of Ecuadorian law is perfectly feasible even though Ecuador is not a party to the Regulation, since the applicable law is of a universal nature (Article 20).

In the absence of a choice of law, where the parties have not made any decisions in this regard, Article 26 will be applicable, stating that: "*In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created.*"

In both cases (having chosen or not), the problem is that if Spanish law is chosen, it implies renvoi to a multi-unit state. How does the Regulation resolve this issue?

Specifying which law is applicable to a given case among those in force in a multi-unit state is something which, in comparative PIL, has been approached using a variety of

methods. "Direct" and "indirect" renvoi are the two primary models[7]. A combination of both, with a complementary or supplementary nature, can give rise to the "mixed" and "subsidiary" system. In Article 33, Regulation 1104/2016 opts precisely for the latter. The indirect and subsidiary renvoi model depicted implies that firstly, to determine the applicable law under a multi-legislative state, the rules of the State in question on internal conflict are applicable (Article 33(1)). Secondly, in the absence of these rules, one would have to turn to the subsidiary links established in the Regulation to determine the applicable internal law (Article 33(2)). This provision is very similar to those contained in other Regulations, thus in principle its practical application should not give rise to any problems[8].

Therefore, firstly, one would need to turn to Spanish rules governing internal conflict, which in the absence of a specific inter-regional law, revolves around Article 16 of the Civil Code (CC), which refers to the provisions of Chapter 4 of the CC itself. The problem is that Chapter 4 contains no conflict-of-laws rules regarding the property regime of partnerships. That being said, such renvoi can be interpreted in a broad sense, referring to the solutions given in Regulation 2016/1104 itself. Thus, Article 35 states that: "A Member State which comprises several territorial units, each of which has its own rules of law in respect of the property consequences of registered partnerships, shall not be required to apply this Regulation to conflicts of laws arising between such units only." However, taken in *sensu contrario*, there is nothing to prevent the application of the Regulation to purely inter-regional conflicts. In other words, it can be applied to all types of international and inter-regional property regime disputes. Therefore, opting for this solution, the provisions of Article 26 can be applied: "the law of the State under whose law the registered partnership was created", which in this case would be the law of the Autonomous Community of the Balearic Islands.

Another solution, which in my view would prove less convoluted, would be to accept that the Spanish rules on conflicts of laws (Chapter 4 CC) are not adapted to this specific case study, and thus to apply the subsidiary provisions of Regulation 1104/2016 (Article 33(2)). In our opinion, the third paragraph of the aforementioned Article 33(2) would apply, which states that "*In the absence of such internal conflict-of-laws rules: (c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located*". In this

[7] Indirect renvoi leaves precise identification in the hands of the legal instruments of the State whose law has been requested under the conflict rule. Conversely, direct renvoi bypasses the rules on resolving internal conflicts of law and uses the connecting factors of the conflict-of-laws rules as the criteria to identify the specific law applicable. S. ÁLVAREZ GONZÁLEZ, "El Reglamento 650/2012, sobre sucesiones y la remisión a un sistema plurilegislativo: algunos casos difíciles o simplemente llamativos", *Revista de Derecho Civil*, Vol. II, No. 4, 7-2, (2015).

[8] Among others, Regulation (EC) No. 4/2009 of 18 December 2008 on the jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters of maintenance obligations (OJEU No. 7 of 10 January 2009), (Article 15), Regulation 650/2012 of the European Parliament and Council, of 4 July 2012 on the jurisdiction, applicable law, recognition and enforcement of judgments, acceptance and enforcement of authentic instruments in matters of succession mortis causa and the creation of a European certificate of succession (OJEU No. 201, of 27 July 2012), (Article 36) and Regulation (EU) 2016/1103 of 24 June establishing enhanced cooperation in the field of the jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes, (*OJ* EU 183/1-29 of 8 July 2016 2016/1103), (Article 33).

case the "pertinent element" is the legislation of the Autonomous Community where the partnership was created - in our scenario, the legislation of the Balearic Islands.

Therefore, whichever interpretative solution we opt for, the applicable law shall be that of the Balearic Islands. However, one final problem arises: its substantive content will have to be taken into account. In other words, the court will have to analyse whether this legislation contains substantive rules on the property consequences of the partnership. Thus, Law 18/2001, of 19 December, on Stable Couples of the Balearic Islands, establishes that "*in all property relationships, where there is cohabitation, Article 4 of the Compilation of Civil Law of the Balearic Islands shall be of supplementary application*", which relates to the marital property regime (Article 5(5)).

In short, if the rules of the Regulation lead us to apply the legislation of a specific Autonomous Community, the first step will be to determine whether it contains a definition of partnership that complies with that set out in Article 3(1). Remember that not only is registration required, but also that said law also ascribes property consequences to the union. This is not always the case. Secondly, it would be necessary to analyse whether the specific regional law provides for substantive regulation of the partnership's property regime. If these suppositions are not fulfilled, the options open to the competent authority would be the following: a) to consider that the case does not fall within the scope of Regulation 1104/2016 and opt to treat the partnership as a civil partnership. The solutions would be those employed so far: simultaneously or additionally resort to a variety of instruments or institutions such as the corporate regulations, life annuity, joint ownership of assets, unjust enrichment, compensation for services rendered, etc.; (b) apply, by way of analogy, the rules governing the marital property regime, although this solution is difficult to adopt due to civil unions not being identified on a par with marriage, and, above all, the fact that there are two different EU Regulations for each of these institutions; (c) in the absence of regulation, to apply the Law of the forum, if it is being heard by an authority of a Member State that does have a regulation on the matter. The legal basis for this could be recourse to public policy, provided for in Article 31 of the Regulation.

CONCLUSION: if Spanish law is applied, both by choice of law or by imposition of the Regulation, being the country under whose law the partnership was created (Article 26), renvoi to a multi-unit state, such as Spain, will ultimately lead to the application of Law 18/2001, of 19 December, on Stable Couples of the Balearic Islands. Under this law, registration is mandatory and although it does not contain specific rules for substantive regulation of the partnership property regime, it refers to those contained in the Compilation of Civil Law of the Balearic Islands relating to the marital property regime.

THE IMPLEMENTATION OF THE REGULATION 2016/1103 ON MATRIMONIAL PROPERTY REGIMES IN SWEDEN

María José Cazorla González[1]

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Summary: I. Regulatory framework in Sweden. II. Swedish judgments. 1. Swedish judgments 2021-09-17. Notified Västeräs Mäl mr T 4259-21, T 2669-21. 2. Swedish judgments 21 December 2020. 3. The assessment of the Swedish court of the validity of spouses' or prospective spouses' agreements. III. Hypothetical case. 1. Which court has jurisdiction for the dissolution of a marriage concluded before the entry into force of Regulation 2016/1103? 2. Is it necessary to know the substantive law of each of the states involved in the case as information prior to exercising the parties' right of option to choose the applicable law? 3. Analysis of potential scenarios. IV. A final remark.

Abstract: This paper aims to comment on the application of Regulation 1103 regarding matrimonial property regimes of cross-border marriages with connecting factors in Sweden, analysing the determination of the competent court and the law applicable to matrimonial property regimes by commenting on two Swedish judgments decided under the influence of Regulation 2016/1103 but applying the rules of Swedish private international law, and concluding with a hypothetical case.

I. THE REGULATORY FRAMEWORK IN SWEDEN

When the Marriage Code entered into force in the 1980s, significant amendments were made to the Inheritance Code, including extending succession rights for surviving spouses. Since then, however, the Marriage Code has undergone two subsequent reforms. One in 1990[2] (Law 1990:272) and the other in 2019 (Law 2019:234): Moreover, it should not be forgotten that in between these two reforms, the opportunity for two persons of the same sex to enter into marriage was introduced in Sweden in 2009, and as a consequence, the Marriage Code and other statutes concerning spouses were made gender-neutral, and the Registered Partnership Act was repealed in Sweden.

In addition, the Swedish regulatory framework affirms that the spouses have equal rights and obligations under Marriage Code. Furthermore, there are acts contained within International Family and Private Law in Sweden concerning the liquidation of matrimonial

[1] Professor of Civil Law University of Almería. Paper carried out within the framework of the European Project EU FamPro and SEJ-235 research group, attached to the CEIA3 and CIDES researchers centres..

[2] D. Bradley, 'Marriage, Family, Property and Inheritance in Swedish Law', *The International and Comparative Law Quarterly*, Vol. 39, No. 2, (April, 1990).

property regimes involving cross-border elements. Although its Constitution does not have any substantial regulation on families, Sweden has indeed joined the European Convention on Human Rights and Fundamental Freedoms, which has legal effects on families. This Member State has also ratified several other international conventions concerning Family Law.[3]

In this context and in line with the EU and other international organisations, which are also not bound to a single concept of "family", the institution of the family in Sweden is flexible and is not defined by a single family model[4] but instead is considered to be a concept that is not static. This is why they focus the objective of their family law rules on protecting all families and their relationships.[5]

Since the entry into force of the Twin Regulations on jurisdiction and applicable law in cross-border matrimonial property matters, their application has been different in each of the countries participating in enhanced cooperation. Given that they apply to marriages and registered partnerships entered into as of 29 January 2019 (or by agreement of the parties as of that date if the union was entered into previously), the truth is that the case law obtained from the courts in these three years has been resolved more under the rules of private international law of the country where the conflict was determined, than under the application of EU Regulations 2016/1103 and 2016/1104. However, we believe that, in time, this situation will be reversed in favour of the aforementioned Regulations. These Regulations are characterised by their flexibility, given the increased mobility of cross-border couples and are better adapted to their specific needs in the event of dissolution of the couple, whether they are married or in a registered partnership.[6]

This flexibility can be applied either before the family crisis arises by agreement of the parties (Article 22) as to the choice of forum and applicable law[7], taking into account that free will could be politically difficult to accept for Member States averse to other forms of marriage (same-sex marriages) or partnerships (registered partnerships of the same or different sex); or subsequently when the conflict has arisen, and it is necessary to determine the competent court to resolve the matter in accordance with the provisions of Article 26 in each of the Regulations.

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[3] A. Kronborg, 'Family Formation in Scandinavia: A comparative study in family law', *Utrecht Law Review* 12(2):81, (2016).

[4] Maunsbach, "Report on the Swedish Exchange Seminar", http://www2.ipr.uni-heidelberg http://www2.ipr.uni-heidelberg.de/eufams/index Dateien/microsites/download.php?art=projektbericht&id=11

[5] Following a flexible and dynamic concept, the EU recognises the right to marry and the right to found a family under the national laws of the EU Member States that regulate their exercise (Article 9 of the Charter of Fundamental Rights of the European Union), as well as the protection of the family in the legal, economic and social fields (Article 33(1) of the Charter of Fundamental Rights of the European Union). Similarly, General Comment 19 of the International Covenant on Civil and Political Rights states that the protection of the family requires the recognition of different types of family organisation or family models, adding single-parent families and unmarried couples in Observation 23. Vid. S. Sanz Caballero, *La familia en perspectiva international y europea*, (Publishers Tirant lo Blach, Valencia, 2006), 26, and S. Sanz Caballero, 'Familia (en derecho internacional y europeo)' in *Diccionario analítico de derechos humanos e integración jurídica* http://opendata.dspace.ceu.es/bitstream/10637/7809/1/Familia_en%20derecho%20internacional%20y%20europeo.pdf accessed 30.07.2021

[6] MJ. Cazorla González y M. Soto Moya, *The EU Regulations on matrimonial property and property of registered partnerships*, Publishers Intersentia, (2021).

[7] E. Alina Oprea, 'La autonomía de la voluntad y la ley aplicable a los regímenes matrimoniales en Europa', *Cuadernos de Derecho Transnacional,* Vol.10. N° 2 (Octubre, 2018).

In this chapter, we will focus on the application of Regulation 1103, where cross-border matrimonial property regimes are involved with connecting factors in Sweden. However, we will not analyse the application of Regulation 2016/1104 as in the context of Sweden, we have not found (in our search completed in April 2022) any case law on the property consequences of registered partnerships to which the Regulation governing the property consequences of registered partnerships has been referred to or applied. Consequently, the primary purpose of this paper is to analyse the determination of the competent court and the law applicable to matrimonial property regimes by commenting on two Swedish judgments decided under the influence of Regulation 2016/1103 but applying Swedish private international law rules; and to conclude with a hypothetical case.

II. SWEDISH JUDGMENTS

1. Swedish judgements 2021-09-17. Notified Västeräs Mäl mr T 4259-21, T 2669-21

The judgment of 17 September 2021 was delivered by the District Court of the District of Västeräs (Sweden) in two separate cases (T 4259-21, which corresponds to the claim submitted by the claimant and T 2669-21 of the defendant)[8], which were heard, and admitted and confirmed the covenants that both parties had agreed upon: that the defendant would be responsible for the payment of the mortgage on the habitual residence and that each party would pay their own costs. According to the Swedish Marriage Code, spouses and prospective spouses may, through a marital property agreement, determine that specific property belonging or accruing to either one of them shall be that person's separate property instead of marital property. According to Chapter 7, Article 3 of the Marriage Code, a marital property agreement must be in writing and registered with the Tax Agency[9]. According to the Cohabitees Act Article 9, these agreements also apply to cohabitants, the difference being that these agreements do not have to be registered.

According to the Swedish Marriage Code, let us remember that spouses keep their own property and debts during the marriage. They are free to make their own decisions about their property, except for some restrictions concerning divesting the spouses' habitual residence and household goods.

The matrimonial property agreement agreed by the parties and set out in the Swedish judgment of 2021 meets the requirements in the Swedish Matrimonial Code and the Swedish Tax Agency. Although it was agreed before the entry into force of Regulation 2016/1103, the claim was filed after 29 January 2019; therefore, the temporal scope provisions of Articles 69 and 70 of the Regulation would have applied to these proceedings, but the judgment of 17 September 2021, rendered by the District Court of Västeräs (Sweden), was decided under Swedish domestic rules.

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[8] VÄSTMANLANDS TINGSRÄTT Enhet A. DOM 2021-09-17 Meddelad Västeräs Mäl mr T 4259-21, T 2669-21.

[9] The Swedish Tax Agency has marriage records, in which the marital property agreements are registered. Only when registered is the marital property agreement binding between the spouses. Ownership cannot be transferred through such an agreement.

2. Swedish judgement of 21 December 2020

The facts presented before this court concern two Iranian nationals who married in Iran in 2012. The couple had a daughter in common with whom they had resided in Sweden from 2014. In 2021, the wife applied to the Swedish court for a declaration of divorce and requested that she be paid what was stipulated in a prenuptial agreement that followed Islamic tradition. The husband responded without objecting to the divorce declaration but refused to comply with the prenuptial property agreement.

The court declared the divorce but rejected the payment of the 314 gold coins (*Mahr*) included in the Islamic prenuptial agreement because it considered that there is no legal basis for the need to compensate the wife in Sweden for reasons of financial inequality or inequality between spouses in marriage. This reasoning was based on the Swedish Constitution and its Family Code which regulates the equality of spouses and states that the Swedish system is that of a deferred community property regime. This means that, upon marriage, there is an implied right to one-half of the value of both spouses' marital property (including pre-marital assets) after deduction for debts. It also means that when the regime is dissolved in a divorce, the value of the marital property is to be shared equally between the spouses, without regard to the length of the marriage, the nature of the relationship, the contribution of either party to the source or the growth of the assets, or any other factors of fairness.

In this case, the jurisdiction and applicable law are governed by the rules of Swedish private international law because both spouses had established their residence in Sweden, and the division of matrimonial property is therefore governed by the law of 1990:272, to which reference is made by the currently applicable law 2019:234 on matrimonial property regimes with cross-border effects. Although the husband was residing in Iran when the lawsuit was filed, the wife continues to reside in Sweden, so Swedish jurisdiction is competent under Chapter 1 Section 2 of the 2019 Act and also under the application of Article 5 of EU Council Regulation 2016/1103 of 24 June 2016, to which the 2020 judgment refers. According to the Swedish Marriage Code, spouses and prospective spouses may, through a marital property agreement, determine that specific property belonging or accruing to either one of them shall be that person's separate property instead of marital property. According to Chapter 7, Article 3 of the Marriage Code said marital property agreement must be in writing and registered with the Tax Agency. According to the Cohabitees Act Article 9, these agreements also apply to cohabitants, the difference being that these agreements do not have to be registered.

According to the Swedish Marriage Code, let us remember that spouses keep their own property and debts during the marriage. They are free to make their own decisions about their property, except for some restrictions concerning divesting the spouses' habitual residence and household goods.

3. The assessment of the Swedish court of the validity of spouses' or prospective spouses' agreements

Both judgments contain property agreements: the Swedish judgment of 2021 discusses an agreement made at the time of marriage, while the judgment of 2020 refers to a prenuptial

agreement. In Sweden, prenuptial or marriage agreements have no requirements as to form or legal representation, except that they must be in writing and that they must be registered with a district court, which in turn is responsible for registering them in a national register. Although the Swedish courts usually enforce them, the courts have the power to issue a judgment overturning a prenuptial agreement to avoid disproportionality in its application or unreasonableness of the agreements entered into by both spouses. Moreover, if the spouses entered into the contract in full knowledge of what they were doing, this power of the Swedish courts is somewhat limited. Prenuptial agreements are generally enforced in Sweden. There is no requirement as to form or legal representation other than that they must be in writing and registered at a district court which then procures registration in a national register. Swedish courts have the power to make an award in derogation of the prenuptial agreement in order to avoid unreasonableness, but if the spouses entered into the contract with full knowledge of what they were doing, that power is quite limited.

The 2020 and the 2021 judgments are in accordance with national law because, in matters of jurisdiction and applicable law on matrimonial property regimes, Sweden regulates international situations in Act 234 of 2019. Thus, in applying the Swedish law of 1990, it is not possible to apply the prenuptial agreement of the *mahr,* whose purpose is to balance the economic rights of the woman in order to avoid her abandonment after the divorce, because these are already taken into account in the liquidation of the regime economic status of the spouses under Swedish law, where the principle of equality prevails.

In determining the applicable law in the 2020 judgment, it is to consider two preliminary questions:

- if the parties have agreed that the applicable law is the law of the country in which the spouses had their residence prior to the marriage, it would be Iranian law.
- if both spouses have taken up residence after marriage in a State other than the one in which they were married (in our case in Stockholm, Sweden), the Swedish law of 1990 regulated in Article 4 that a residence of at least two years states that under the rules of private international law, the applicable law is the law of Sweden. This is because the principle of residence allows for applying family law rules consistent with the social values and other laws of the environment in which the person lives, in which case it would be Swedish law.

In either case, the solution regarding the marriage agreement is different. If Iranian law is considered applicable, it is clear that the agreement meets the requirements of validity of the country where it was formalised. However, if we look at Swedish law, its validity is questioned because the reason for the *Mahr* agreement is only applicable as compensation for the lack of equality in cases of dissolution of Arab marriages, which is not the case in Swedish marriages because both spouses are equal before the law.

The prenuptial contract referred to in the Swedish judgment of 2020 is a pre-marital agreement common in Arab marriages, known as *Mahr*. The function of *Mahr* is that the man, at the end of the marriage, undertakes to give certain goods to the woman or a sum of money, which reminds us of the *donatio propter nuptias* that was regulated as a "dowry" in most civil codes of Latin tradition such as the French, Spanish or Italian. Moreover, there are differences between the two institutions regarding who makes the donation and the voluntariness of doing

so. In the case of *Mahr*, it is the husband, and it is considered an obligation in all Muslim marriages. The "dowry" or *dos/res uxoria*, on the other hand, is bequeathed by a woman's parents or relatives and was considered an obligation imposed by social morality on her father. On the other hand, the two institutions differ because "dowry" refers to the money, goods, or property that a woman brings to the marriage, usually provided by her parents or relatives. In Islamic marriages, such property that the wife brings into the marriage can only be accepted by the husband after he has paid her *Mahr*.

This type of Muslim contract has a religious origin (mentioned several times in the Koran). It is based on the cultural and social customs of Muslim countries such as Iran, where, without determining the maximum or minimum amount, it must meet the needs of the wife, who must be able to survive for a certain period of time in the event of divorce (also in the event of the husband's death, where it is a compensatory pension to be paid to the wife). Above all, let us remember that, unlike in Sweden, in Islamic marriage, there is no marital equality between the spouses.

Why, then, does the Swedish court, in the judgment of 21 December 2020, reject the payment provided for in the prenuptial agreement?

The husband's objections to the prenuptial agreement concluded in Iran under Iranian law are based on the claim that it is an obligation imposed on husbands as a deterrent to possible future divorce to avoid women's economic vulnerability after divorce. Furthermore, the Swedish court ruled by admitting the husband's opposition and rejecting the claim for payment requested by the wife because it considered that the wife was not vulnerable, given that the spouses resided in Sweden and were subject to the law and courts of that Member State, the division of the property in the divorce was carried out in accordance with the provisions of the Marriage Code: when the deferred community property regime is dissolved, it is divided equally between the spouses so that the application of the Swedish court is not considered valid.

Finally, as far as the 2021 judgment is concerned, the agreement is respected because it is adopted close to the time of execution and in accordance with the principles and requirements of validity set out in Swedish law.

III. HYPOTHETICAL CASE

A Swedish national (i.e., from a country that participates in enhanced cooperation and that regulates marriage and same-sex and union partnerships), manager of a multinational company, married an Irish woman, a part-time translator, on 6 January 2012 in Ireland (a country that does not participate in enhanced cooperation and regulates both marriage and same-sex and non-marital partnerships.

According to her, their habitual place of residence after the marriage was the Netherlands, but he says that he worked in Stockholm (Sweden) and lived there, so it was impossible to have a common habitual residence after the marriage, though he acknowledges that his wife did live in the Netherlands until July 2016 before they both moved to Stockholm where they bought a house and established their common habitual residence. Three years later, on 1

December 2019, they separated *de facto*, with him moving to Germany and her remaining in Stockholm (Sweden).

Later, on 5 February 2022, he filed for divorce in the Stockholm courts, requesting the dissolution and liquidation of the matrimonial property regime.

This is a marriage between persons of different nationalities from two EU Member States: Sweden and Ireland, where the place of residence after the conclusion of the marriage is not clear from the facts stated, making determining the applicable law difficult. There is also no evidence of an agreement or pact. There are, however, several proven facts, one, that immediately after the marriage, he worked in Sweden and she worked in the Netherlands; two, that in July 2016, they both moved to Stockholm; and three, that in February 2022, he decided to file for divorce, although both had separated *de facto* and he resided in Germany.

It is important to remember that when the Swedish national brought the action in 2022, Council Regulation (EU) 2016/1103 of 24 June implementing enhanced cooperation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters concerning matrimonial property regimes, was already in force. However, the marriage occurred before the Regulation entered into force, namely in 2012. Therefore, it would not be applicable because this regulation will affect marriages celebrated after entering into force, i.e., from 29 January 2019. This notwithstanding, we must remember that the choice of law after that date will be allowed when the marriage was celebrated previously, in which case Regulation (EU) 2016/1103 may apply.

The issues to be analysed will be those relating to the jurisdiction of the court and the determination of the applicable law when they opt for the applicable law or in the absence of an agreement.

1. Which court has jurisdiction for the dissolution of a marriage concluded before the entry into force of Regulation 2016/1103?

The jurisdiction of the court of a marriage concluded before or after the entry into force of Regulation (EU) 2016/1103, in the absence of a choice of applicable law (as is the case here), will be determined by applying Brussels IIa Regulation[10], in order to subsequently assess the law applicable to the property regime after dissolution by divorce or death if Regulation (EU) 2016/1103 applies by choice of the spouses.

[10] The regulatory framework governing matrimonial breakdowns with elements of foreignness is contained in two regulations, which will continue to apply territorially in states that do not participate in enhanced cooperation and if in those states under the rules of private international law or if the parties by choice determine otherwise: one concerning international jurisdiction and the recognition and enforcement of judgments is contained in Council Regulation (EC) 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 (hereinafter the Brussels IIa Regulation), which is binding on all Member States of the European Union with the exception of Denmark. And the second concerns the law applicable to divorce and legal separation, but not to marriage annulment. Council Regulation (EU) No 1259/2010 of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter Rome III Regulation), which binds 17 Member States of the European Union, including Spain.

Consequently, we will look at Brussels IIa Regulation, Article 3, which sets out seven alternative fora to which we must refer in order to resolve our hypothetical case and thus avoid situations of conflict when determining the competent court, as has happened in other occasions, as evidenced by Swedish case law:

- The Swedish Supreme Court found[11] no Swedish jurisdiction to deal with a divorce application filed by a Swedish citizen living in France against a Cuban citizen living in Cuba. The decision was based on a preliminary ruling from the CJEU[12]. The ruling made it clear that Articles 6 and 7 Brussels II bis Regulation are to be interpreted in the sense that even though the defendant is neither domiciled nor is a national of a Member State, the national court's (*in casu* Sweden) national jurisdictional grounds for divorce must not be used if the court of another Member State (*in casu* France) has jurisdiction under Article 3 Brussels II bis Regulation. In the present case, French jurisdiction under Article 3 Brussels II bis Regulation could be based on the applicant's French residence for at least one year or, alternatively, on the couple's last joint residence with the applicant's continued residence in France.
- In another case, a Swedish court[13] of appeal held that pursuant to autonomous Swedish jurisdictional rules, there was Swedish jurisdiction to deal with a divorce petition filed by a Philippines national with habitual residence in Sweden against her husband living in the Philippines. It is submitted that relying on autonomous Swedish jurisdictional rules was incorrect, as Swedish jurisdiction followed instead from Article 3 (1) Brussels II bis Regulation (cf. Article 7 (1) Brussels II bis Regulation).

In our case, this conflict does not arise because the husband (a Swedish national) is the one who filed for the dissolution of the marriage before the Stockholm Courts, the city where they both resided until they separated in 2019, although the wife (an Irish national) continues to reside in Stockholm. Therefore, the Swedish courts have jurisdiction to decide on the divorce, as the only proven common habitual residence before the court would be in Stockholm. Moreover, she still resides there and is the defendant[14], thus complying with the

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[11] Thomas Pfeiffer Quincy C. Lobach Tobias Rapp (Eds.), "Facilitating Cross-Border Family Life – Towards a Common European Understanding EUFams II and Beyond, Published by Heidelberg University Publishing (heiUP) Heidelberg Dresden, 2021. https://heiup.uni-heidelberg.de/reader/download/853/853-68-95417-3-10-20211014.pdf

[12] CJEU 29.11.2007, C-68/07 (Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo). Judgment of the Court (Third Chamber) of 29 November 2007. Reference for a preliminary ruling: Högsta domstolen - Sweden. Regulation (EC) No 2201/2003 - Articles 3, 6 and 7 - Jurisdiction - Recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility - Jurisdiction in divorce proceedings - Respondent not a national or a resident of a Member State - National rules providing for exorbitant jurisdiction. ECLI:EU:C:2007:740.

[13] Court Svea Court of Appeal. Date of decision 2013-06-14. Case number T7721-12. Chapter 3. Section 4 of the Act (1904:26 p. 1) on certain international legal relations concerning marriage and guardianship

Literature Prop. 1973:158 p. 85 and p. 107 /Swedish Judicial Authority- RH 2013:46): Spouses A and B are Filipino citizens. Wife A, resident in Sweden since 2004, brought an action for divorce before a Swedish court against B, resident in the Philippines, together with the couple's two children. B opposed the divorce, arguing that there were no grounds for the dissolution of the marriage under Philippine law. Special grounds against divorce were not considered to exist (Chapter 3. Section 4(3) of the Act, 1904:26 s. 1, on certain international legal relations concerning marriage and guardianship). https://lagen.nu/dom/rh/2013:46

[14] Council Regulation (EC) 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, repealing Regulation (EC) No 1347/2000. Article 3. General jurisdiction

provisions of Article 3 Brussels IIa Regulation, and to two specific forums: first, the forum of the last habitual residence of the spouses in so far as one of them still resides there and, secondly, the habitual residence of the defendant since the marriage was entered into before the entry into force of the Regulation.

As there was no election of law and the spouses did not have a common nationality at the time of the marriage, the applicable law is the Sweden Family Code for divorce and settlement, according to which, when a divorce leads to the dissolution of the deferred community property regime and property division needs to be performed, the decisive date is the date when the proceedings were commenced (Chapter 9 Article 2 of the Marriage Code, 'the critical time'). The property that is divided is the marital property. The spouses' shares in the marital property shall first be calculated (Chapter 11 Article 1 of the Marriage Code). When calculating the shares, a deduction shall be made from each spouse's marital property sufficient to cover the spouse's debts. Each spouse shall be liable for his or her debts out of his or her own assets, and both spouses shall contribute to the payment of the debts held in common under the community of property. Debts that carry a preferential right in that spouse's separate property, or were incurred keeping up or improving his or her personal property, shall only be covered by that spouse's marital property if the payment cannot be obtained out of his or her separate property (Ch. 11 Article 2 of the Marriage Code). After deduction to cover the debts, the combined balance of the spouses' marital property shall then be calculated. The value is then divided equally between the spouses (Chapter 11, Article 3 of the Marriage Code), although the rule of dividing the value equally is dispositive and can be set aside by an agreement between the spouses. Hence, the rules concerning cohabitants are based on the Marriage Code with some differences. A division of property only takes place on the request of one (or both) cohabitant(s) (Article 8 of the Cohabitee Act), and instead of marital property, it is the cohabitee property that is divided, which only includes joint dwelling and household goods acquired for joint use.[15]

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1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

[15] S. Thorslund, 'Sweden' in L. Ruggeri I. Kunda and S. Winkler Eds. *Family Property and Succession in EU Member States National Reports on the Collected Data, (*Universuty of Rijeka, Ed. PRAVI, 2018), 664.

2. Is it necessary to know the substantive law of each of the states involved in the case as information prior to exercising the parties' right of option to choose the applicable law?

The difference between one applicable law and another is decisive in the legal liquidation of the property regime in the absence of an agreement. The distribution in a community of property regime (Sweden) is not the same as when the liquidation corresponds to the separation of property (Ireland).

We, therefore, believe that it is necessary to consider the different possibilities regarding the marriage of a Swedish national to an Irish woman relating to specific issues that affect the substantive national law of each Member State as regards the liquidation of the matrimonial property since, in a marital crisis, the first thing that most couples think about is what their finances will look like after separation, divorce or annulment. In this sense, it is decisive to know the applicable law by choice if there has been one, or failing that, the one that is legally determined in a supplementary manner, i.e., whether or not they have foresight, it is in the most economically beneficial interest, and not the nationality or habitual residence as the regulatory framework known to them; because practice shows that in any commercial company, as in the liquidation of a civil company, the parties wish to benefit in relation to the rest of the partners or co-owners, but also regarding third-party creditors if any.

Thus, the Swedish national who earned more than his wife would reasonably prefer the legal application of the Irish regime because the principle of community of property does not apply under Irish law and property held by each of the spouses prior to the marriage or acquired by one spouse in the course of the marriage remains the property of that spouse. The principle of community of property is not applicable. Furthermore, the spouses cannot choose between matrimonial property regimes, in contrast to the Swedish system of community of property. In this context and according to Article 27 of the Regulation, it is necessary to know which assets are included within the patrimony. A family home must be differentiated from other properties that do not enjoy the same protections. In other words, the ownership of movable and immovable property will need to be classified according to the different categories and protection because the regulation of the liability of each or both spouses towards third parties is not applied in the same way. In Irish nationality law, assets contributed and acquired during the marriage do not become community property, unlike the Swedish Civil Code, where the law of community of property is applied.

3. Analysis of potential scenarios.

a) If the parties choose to apply Regulation 2016/1103, will there be variations in determining the court's jurisdiction?

The entry into force of the Regulation implies that parties who have previously concluded their marriage may freely choose the applicable law of one of the EU States under Regulation

2016/1103, effective as of 29 January 2019, and consequently, with possible application in 2020, the year in which the divorce petition is filed.

In the case under discussion, we can assume that there is no objection to the international jurisdiction assigned to the Swedish court either under Rome III Regulation or Regulation 2016/1103. However, we must remember that under the application of Regulation 2016/1103[16], jurisdiction is understood in a broad sense[17]because it includes courts in the strict sense of the word, exercising judicial functions, and, for example, notaries. This, however, is not the case in Sweden, where the only competent court for divorce is the court of law.

On this basis, and in accordance with Article 5 of the Regulation on matrimonial property regimes 2016/1103, the court having jurisdiction will be the court of the Member State in which an application for divorce is lodged which has jurisdiction to rule on questions relating to the matrimonial property regime which arise in connection with the application for divorce. Article 3 provides that a spouse may bring an action for divorce before the courts of the Member State in which he or she has his or her habitual residence if he or she has resided there for at least one year immediately before the application is made and the other spouse still resides there, which is the case here. It should be added that under the application of the Regulations, we must take into account the connecting factor regulated in Article 5 of Regulation 1103, which states: *where a court of a Member State is seised of an application for divorce, legal separation, or marriage annulment under Regulation (EC) 2201/2003, the courts of that Member State shall have jurisdiction to rule on the matrimonial property regime arising in connection with that application*.

b) If the spouses opt for the application of EU Regulation 2016/1103, will there be any differences in the applicable law?

Regulation (EU) 2016/1103 differentiates between two situations: where there is a choice of law by the parties, we will follow the provisions of Article 22 in both Regulations; and where there is no choice of law by the parties, we will apply Article 26 of the Regulation. Both situations differentiate the hierarchical order according to whether or not the spouses have exercised their right to choose the applicable law and the determination of international jurisdiction.

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[16] M. Guzmán Zapater, I. Paz-ares Rodríguez, 'La competencia judicial internacional en materia de disolución del régimen económico del matrimonio en el Reglamento UE núm. 2016/1103', en *Crisis matrimoniales internacionales y sus efectos: derecho español y de la Unión Europea: estudio normativo y jurisprudencial* / Mónica Guzmán Zapater (dir.), Mónica Herranz Ballesteros (dir.), (2018), 277-316.

[17] Recital 29: This Regulation should respect the different systems for dealing with matters of the matrimonial property regime applied in the Member States. For the purposes of this Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the strict sense of the word, exercising judicial functions, but also for example notaries in some Member States who, in certain matters of matrimonial property regime, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given matrimonial property regime by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of matrimonial property regime, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.

In the case at hand, the first option is not exercised by the parties, so Article 26 applies, which establishes a hierarchy that helps to determine the law applicable to the matrimonial property regime:

- of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
- of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
- with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

If we add that exceptionally and at the request of either of the spouses with more than one common nationality (Article 26(2)) to whom only paragraphs 1(a) and (c) shall apply, the judicial authority having jurisdiction to rule on the property consequences of a marriage, as determined in the third paragraph of Article 26, may decide on the law of a State other than the State whose law is applicable under paragraph 1, if that other State's law is applicable under paragraph 2. The law of a State other than the State whose law is applicable under paragraph 1 may be applied if the law of that other State attaches property consequences to the institution of the registered partnership and if the applicant proves by this exceptional means that:

- the spouses had their last common habitual residence in that other State for a significantly more extended period of time than in the State designated under paragraph 1(a), and
- both parties had relied on the law of that other State to organise or plan their property relations.

Both connections reflect certain proximity to the personal circumstances of the spouses and are ordered subsidiarily and temporally fixed to avoid problems of mobile conflict. By way of exception and at the request of either spouse, the judicial authority having jurisdiction to decide on the matrimonial property regime may decide that the law of a State other than the State whose law is applicable under paragraph 1(a) shall govern the matrimonial property regime if the applicant proves that: the spouses had their last common habitual residence in that other State for a considerably more extended period than in the State of the spouses' first common habitual residence after the conclusion of the marriage; and that both spouses relied on the law of that other State in organising or planning their property relations.

Recital 49 of Regulation 1103/2016 literally states that in the event that the applicable law is not chosen, the already analysed scale of connecting factors (first common habitual residence of the spouses immediately after the marriage should be the first criterion, over and above the law of the common nationality of the spouses at the time of the conclusion of the marriage. Moreover, in the absence of both criteria, since it is not proven that there is no first common habitual residence and the spouses do not have a common nationality at the time of the celebration of the marriage, the third criterion will be the law of the State with which the spouses have the closest connection. In applying the latter criterion, all circumstances must be taken into account, and it must be clear that these connections must be those existing at the time of the conclusion of the marriage. Applying Irish law would therefore be inconsistent with Recital 51 of the Regulation, which allows, in exceptional cases, the judicial authority of

a Member State, at the request of either spouse, where the spouses have moved to the State of their habitual residence for an extended period, to conclude that it is the law of that State which may apply where the spouses rely on it, subject to the limit that its application may prejudice the rights of the third party.

From this wording, it appears that both spouses' most prolonged period of residence during the marriage was in Sweden, specifically in the city of Stockholm. Nevertheless, it is not sufficient that this requirement alone is fulfilled, but it is necessary that both spouses organised their property relations during the years of marriage under the Swedish Civil Code and, consequently, in a community of property.

According to the facts set out in the judgment, we understand that after the celebration of the marriage, there was no common residence, although the most extended period of joint residence was in Stockholm, and by connection, if we consider the law of the place of celebration of the marriage, Irish law must be applied. Irish law, where we must remember there is no concept of matrimonial property regime - a common law solution -, i.e., the assets acquired before and during the marriage belong to each spouse, a circumstance which in the judgment has been assimilated to the existence of a kind of separation of property regime.

Therefore, Article 26 of the Matrimonial Property Regime of Regulation 2016/1103, which regulates the applicable law in the absence of a choice of the parties, shall apply the law corresponding to the State of the first common habitual residence of the spouses after the conclusion of the marriage. The first and only common habitual residence was in Sweden, therefore, Swedish law will be the applicable law for the division of their property[18]because two conditions are fulfilled: her habitual residence in Stockholm is maintained after the *de facto* separation as well as her intention to remain there, they had both been living in this territory during the twelve months preceding his change of residence and his filing of the divorce petition. Therefore, Swedish courts have jurisdiction to decide on the divorce, and the separation of property will govern the division of their property. However, there are two different times for the liquidation: one from the beginning of the marriage until their residence in Stockholm was governed by the place of celebration of the marriage (Irish law) and since they established their residence in Stockholm by the Swedish Civil Code.

IV. A FINAL REMARK

After analyses two judgments that contain property agreements and which were settled by the Swedish courts after the entry into force of the Regulations 1103/2016; one of 2020, referred to a prenuptial agreement and other of 2021 that discusses an agreement made at the time of marriage, we come to the conclusion that autonomous free will is essential in marriages in general, but even more so in those with transnational elements, because In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should, under certain circumstances, enable the parties to conclude a choice of court agreement in favour

[18] Rasmus Engelsted Jonasen (ed.), 'The division of property between unmarried cohabitees - a Nordic perspective on living together', aolf Legal Publishers, Oslo, 2020, 117 et seq. https://files.elsa.org/AA/National_LRGs/Nordic_LRG.pdf.

of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage.

On the other hand, with the development of the hypothetical case which analyses the importance of the material and temporal scope of application of Regulation 1103, we must be understood as a criterion of jurisdiction that makes it possible to preserve respect for the rights of both contracting parties in a State, although the jurisdiction favouring is the defendant spouse's habitual residence under Regulation 1103/2016. And with respect to the applicable law, we highlight two moments to be assessed under the criterion of habitual residence for the liquidation matrimonial property regime at this time with the time of celebration of the marriage and since the couple y established their residence in a member State, where its possible apply their Civil Cod, because the date from which the provisions of the regulations apply, which is 29 January 2019 and in this moment the most cross-border marriages were concluded earlier.

In conclusion, the Regulation 1103 constitute a further step towards t the creation of a uniform framework of conflict rules to resolve cross-border issues arising within the family and not at the unification of its substantive rules, since all of these are determined by respecting the principle of free movement as a right regulated in the EU. And although we expected that Regulation matrimonial property regime will came fully into force on 29 January 2019 in Member State participating enhance cooperation; the true is that moment on, the private international law of the Member States, participating in the enhanced cooperation continues to be applied.