ACTUALIDAD JURIDICA IBEROAMERICANA

IDIBE
Instituto de Derecho Iberoamericano

tirant lo blanch

ACTUALIDAD JURÍDICA IBEROAMERICANA / EDICIÓN SEMESTRAL / AGOSTO 2021 / VALENCIA-ESPAÑA

Publicación de circulación Internacional
Actualidad Jurídica Iberoamericana
https://www.revista-aji.com

Editan:
Instituto de Derecho Iberoamericano.
C/ Luis García Berlanga, núm. 7, 1-15 Valencia, España. 46023.
Correo Electrónico: contacto@idibe.org
web: www.idibe.org

Tirant lo Blanch.
C/Artes Gráficas, 14, 46010 Valencia (España).
Telf. +34 963 61 00 48.
Correo electrónico: tlb@tirant.com
web: www.tirant.com

ISSN 2386-4567

Actualidad Jurídica Iberoamericana se encuentra indexada en los siguientes índices de calidad: REDIB, ANVUR, LATINDEX, CIRC, MIAR y SCOPUS.

Así mismo se encuentra incluida en los siguientes catálogos: Dialnet, RODERIC, Red de Bibliotecas Universitarias (REBIUN), Ulrich's, Dulcinea.

Impreso en España
Diagramación: Elias On - elias.on@live.com

SUMARIO

15

THE FUTURE OF EUROPEAN FAMILY AND SUCCESSION LAW
Gabriele Carapezza Figlia and Lucia Ruggeri (Editors)

DOCTRINE

BOOK REVIEWS

PRESENTATION

This special issue, dedicated to the future of European Succession and Family Law, collects more than 20 articles of Scholars representing several countries, that are important contributions to their respective fields of research. We want to take this moment to thank all of our Authors for entrusting us with their reflections.

The collective volume is the result of a multi-year research program matured in the context of the following European Projects: PSEFS Personalized Solution in European Family and Succession Law n. 800821-JUST-AG-2017/JUST-JCOO- AG-2017 and EU-FamPro E-training on EU Family Property regimes n. 101008404-JUST-AG-2020 /JUST-JTRA-EJTR-AG-2020, co-funded by the European Union's Justice Programme (2014-2020).

We are very grateful to the young Scholars of the University of Camerino (Giovanna Di Benedetto, Silvia Montecchiari and Federico Pascucci) and of the LUMSA University-Department of Palermo (Francesco Disalvo, Giuseppe Garofalo, Gabriele Iacono and Francesco La Fata), who have contributed as editorial reviewers to the quality of the final published papers you read in our pages.

Gabriele Carapezza Figlia and Lucia Ruggeri

DOCTRINE

GETTING MARRIED OR ENTERING INTO A PARTNERSHIP: THE PATRIMONIAL ISSUES OF CHOICE IN FRENCH LAW

CASARSE O UNIRSE: LAS CUESTIONES PATRIMONIALES DE LA ELECCIÓN EN EL DERECHO FRANCÉS

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 14-23

Elsa BERRY

ARTÍCULO RECIBIDO: 16 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: In French law, there are only two models of couples between which a choice is really possible to organize their patrimonial relationships: partnership or marriage. But, if the couple intends to organize a transfer of assets between companions both during the union and in case of death, it is definitely marriage that offers more possibilities than partnership. Often, young French couples, who do not wish to marry, either not at the begining of their relationship or not at all, have the idea that, if marriage organizes a legal protection of the couple, the partners have the possibility to provide conventionally equivalent protection. In fact, this idea is wrong.

KEY WORDS: Marriage: partnership; transmission; legal protection; reserve.

RESUMEN: *En el Derecho francés, solo hay dos modelos de pareja entre los que realmente es posible elegir para organizar sus relaciones patrimoniales: la unión de hecho o el matrimonio. Pero, si la pareja pretende ordenar una transmisión patrimonial entre ellos, tanto durante la unión como en caso de fallecimiento, definitivamente es el matrimonio el que ofrece más posibilidades. A menudo, las parejas jóvenes, que no desean casarse, ya sea al principio de su relación o en ningún momento, tienen la idea de que, si el matrimonio ofrece una protección legal de la pareja, los unidos, tienen la posibilidad de proporcionar una protección convencional equivalente. De hecho, esta idea es incorrecta.*

PALABRAS CLAVE: *Matrimonio; unión de hecho; transmisión; protección legal; reserva.*

I. INTRODUCTION.

In French law, there are three possible models of couples: cohabitation[1], civil solidarity pact[2] and marriage[3]. However, cohabitation is not a true status of couple, it entails neither duty nor obligation nor right and, in the event of transmission due to death, the applicable taxation of sixty per cent[4] is a deterrent[5]. In the end, therefore, there are only two models of couples among which a choice is really possible in order to better organize their patrimonial relationships: partnership or marriage. Out of these two, partnership has the advantage of flexibility while marriage is more protective. The partnership is more flexible because it's easier to enter into a partnership than to marry[6]. It's also, obviously faster to get out of the partnership than to end the marriage through divorce[7]. Thus, globally speaking, a partnership is more flexible than marriage. But marriage is much more protective than a partnership. It is, above all, more protective than a partnership in the event of death, since the surviving spouse enjoys a true heir status, unlike the surviving partner. Furthermore, marriage is also more protective in the event of divorce, at least for those who have less income than their spouse[8]. Moreover, if the couple intends to organize a transfer of assets between companions both during the

1 Article 515-8 of the Civil code: "Concubinage is a union in fact, characterized by a life in common offering a character of stability and continuity, between two persons of different sexes or of the same sex, who live as a couple".

2 Article 515-1 of the Civil code: "A civil pact of solidarity (partnership) is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their life in common".

3 Articles 143 to 226 of the Civil code. There is no definition of the marriage in the Code.

4 Article 777 of the General Tax Code.

5 On the contrary, the taxation applicable to gifts and inheritances is identical for married couples and partners. Both the surviving partner and spouse benefit from an absence of taxation on property inherited from their deceased companion.

6 There are two ways of contracting a partnership: to make a joint declaration of partnership to the officer of civil status (the partnership is then a private agreement) or to ask a notary to write an authentic agreement and register it (article 515-3 of the Civil code). To get married, the steps are longer.

7 The civil pact of solidarity can be dissolved by a joint declaration of the partners or the unilateral decision of one of them (article 551-7 of the Civil code). A marriage is dissolved by divorce that may be requested on the ground of mutual consent or acceptance of the principle of the breakdown of the marriage or definitive alteration of the bond of marriage or fault.

8 One of the spouses may be compelled to pay the other an allowance intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living (article 270 of the Civil code).

• Elsa Berry
Associate Professor, University of Poitiers (France). E-mail: elsa.berry@univ-poitiers.fr

union and in case of death, it is definitely marriage that offers more possibilities than partnership. Often, young French couples, who don't wish to marry, either not at the beginning of their relationship or not at all, have the idea that, if marriage organizes a legal protection of the couple, the partners have the possibility to provide conventionally equivalent protection. In fact, this idea is wrong.

Hence, it is interesting to study the patrimonial stakes for a French couple linked to the choice of partnership or, conversely, marriage first of all during the course of the union, and then in the event of death.

II. IN THE PROCESS OF UNION.

It is not uncommon in France today to hear that partnership has become a quasi-marriage. Wrong, at least from a family level point of view, where only marriage produces effects[9]. However, from a financial point of view, there are some aspects of partnership that are close to marriage. Both models of couples have very similar effects in terms of living expenses. However, when it comes to choosing a matrimonial regime, spouses have far more options than partners.

1. Common Patrimonial Effects.

Married couples are all subject to common rules, regardless of their choice of a matrimonial regime, which constitute an obligatory primary regime[10]. Several of these rules have been reproduced identically for partners. Thus the spouses must contribute equitably to the expenses of everyday life[11]. Required to live together, spouses must pool some of their income to allow them to have the same lifestyle. This means that the spouse who has more income must contribute more to the payment of these living expenses than the spouse with a lower income. These expenses are those linked to rent, groceries, heating...but also, recently, the repayment of the loan financing the accommodation of the family[12].

9 First, marriage leads to the presumption of paternity ("a child conceived or born in wedlock has the husband as his/her father" article 312 of the Civil code) unlike the civil pact of solidarity. Secondly, adoption may be petitioned by two spouses (article 343 of the Civil code) but not by two partners and only the adoption of the spouse's child is allowed, not the adoption of the partner's child (currently, but these two rules may change, a reform on this is under discussion).

10 Articles 212 to 226 of the Civil code.

11 Article 214 of the Civil code: "If a marriage contract does not regulate the contributions of the spouses to the expenses of the marriage, they shall contribute to them in proportion to their respective means".

12 Cass. 1st civ., 15 May 2013, n° 11-26.933; Cass. 1st civ., 3 Oct. 2019, n° 18-20.828; Cass. 1st civ., 18 Nov. 2020, n° 19-15.353.

The partners, on the other hand, owe each other mutual and material help[13], which concerns the same expenses[14] and which, like the spouses, is distributed among them in proportion to their respective means[15].

Moreover, both spouses and partners are subject to the rule of household solidarity[16], which means that if a companion incurs an expenditure of daily living alone, and that it's not manifestly excessive, his or her companion is bound by it out of solidarity. The creditor then benefits from two solidary debtors: the two members of the couple, and can choose who to ask for payment.

However, the two couple statuses present differences regards to the fate of the accommodation of the family during the union. A spouse, even if he/she is the exclusive owner of this accommodation, cannot decide to sell it without obtaining the consent of his/her spouse[17]. The partner does not benefit from such protection[18].

2. The choice of a matrimonial regime.

If the partners are subject to fairly similar rules of patrimonial organization concerning daily expenses, as far as the choice of a patrimonial regime is concerned, their options are more restricted.

Married couples in France enjoy considerable freedom in choosing their matrimonial regime. They can choose a separatist regime, such as the separation of property regime[19] where their assets remain completely isolated from each other. Or a system of participation in acquets[20], by which each one of the spouses enjoy the same patrimonial autonomy during marriage but are entitled, at the end of the union, to participate by halves in value in the net acquets-found in the

13 "Partners bound by a civil pact of solidarity commit to a life in common and to material aid and to reciprocal assistance" (article 515-4 of the Civil code).

14 Even the repayment of the loan financing the accommodation of the partners: Cass. 1st civ., 27 janvier 2021, nº 19-26.140.

15 "If the partners do not provide otherwise, material aid is proportionate to their respective means" (article 515-4 of the Civil code).

16 "Each one of the spouses has the power to make alone contracts which objective is the support of the household or the education of children: any debt thus contracted by the one binds the other out of solidarity" (article 220 of the Civil code). "Partners are, out of solidarity, liable to third parties for debts incurred by one of them for the needs of daily live" (article 515-4 of the Civil code).

17 Article 215 al 3 of the Civil code: "the spouses may not, separately, dispose of the rights whereby the lodging of the family is ensured, or of the movable furnishings with which it is garnished. The one of the two who did not consent to the transaction may ask that it be annulled: the action in nullity is open to the spouse within the year from the day when he became aware of the transaction, without it being possible for this action to be instituted more than one year after the matrimonial regime was dissolved".

18 It is only if the couple's accommodation is rented that the partners benefit from protection equivalent to that of the spouses: article 1751 of the Civil code.

19 Articles 1536 to 1543 of the Civil code.

20 Articles 1569 to 1581 of the Civil code.

patrimony of the other. In these two regimes, each one of the spouses keeps the administration, enjoyment and free disposition of his or her personal assets[21] and remains alone liable for his own debts, before or during marriage[22].

Spouses may also choose a Community regime. By default, they are subject to the Community of acquets regime[23] where their income and all property acquired during the marriage are common[24]. However, the items of property the spouses owned on the day of the celebration of the marriage, or which they acquire, during the marriage, through succession, donation, or legacy[25] remain separate property. Each spouse has the administration and enjoyment of his/her separate property and has the power to administer alone the common property and to dispose of it. However,[26] the spouses cannot, one without the other, perform certain serious acts on the common property[27]. On the passive side, the regime of community is less protective than separatist regimes: the payment of debts which either spouse owes, for whatever reason, during the community, can always be enforced on community property[28] and on the separate property of the debtor[29].

The spouses can finally choose a larger, universal community[30] that includes all their assets, movables and immovable, present and future[31] and can stipulate the allocation of the entire community for the case of survival, for the benefit of whichever one survives[32]. This stipulation is not deemed to be donation[33] or succession right but an effect of the matrimonial regime[34].

Beyond this choice between four conventional regimes, spouses have a great freedom to adapt these different regimes depending on their needs[35].

21 Article 1536 and 1569 of the Civil code.

22 Article 1536 and 1569 of the Civil code.

23 Articles 1400 to 1491 of the Civil code.

24 Article 1401 of the Civil code.

25 Article 1405 of the Civil code.

26 Article 1421 of the Civil code.

27 Articles 1422 to 1425 of the Civil code. Thus, the spouses cannot, one without the other, dispose *inter vivos*, by gratuitous title, of assets in the community or alienate with real rights the immovables, business assets, and exploitations depending from the community.

28 Article 1413 of the Civil code with the exception of the earnings and wages of a spouse that cannot be attached by the creditors of his/her spouse (article 1414).

29 But not on the separate property of the other spouse: article 1418 of the Civil code.

30 Articles 1526 and 1527 of the Civil code.

31 Article 1526 of the Civil code.

32 Article 1524 of the Civil code.

33 Article 1525 of the Civil code.

34 Thus only the children not born of both spouses can demand the reduction of a matrimonial advantage that exceeds the disposable portion between spouses: article 1527 of the Civil code.

35 Article 1497 of the Civil code.

On the contrary, the partners have only the choice between two regimes. By default, they are subject to a regime equivalent to the separation of property of the spouses[36]. Otherwise, they may opt for a regime of undivided co-ownership of property[37] even if it's not advisable because this regime is not defined well enough. In addition, it seems that the partners, having this very limited choice, don't have the possibility to adapt these regimes according to their wishes. In fact, their only reasonable choice is the adoption of the regime of the separation of property, which entails no transfer of patrimony between companions.

The patrimonial organization of their relationship is, therefore, more limited in terms of partnership than in the context of marriage. In addition, in the event of the death of a partner, the protection of the survivor is also very different depending on whether the couple was married or had entered into a partnership.

III. IN THE EVENT OF DEATH.

The married spouse enjoys important legal protection, unlike the partner who can only be protected by voluntary provisions.

1. For the spouses.

The surviving spouse has benefited from numerous protections since 2001[38]. First of all, he or she is a legal heir of the deceased, with a fairly extensive legal vocation. Thus, if he or she is in competition with children of the deceased who are also all his or her own, he or she can choose to benefit from the usufruct of the entire estate of the deceased[39]. Moreover, in the absence of descendants, the spouse is a forced heir. He or she cannot then be deprived of his or her reserved portion, which is a quarter of the deceased's estate[40]. Finally, the spouse benefits from rights allowing him or her to remain in the couple's former home. In all cases, he or she has, by operation of law, during one year, the gratuitous enjoyment of

36 Article 515-5 of the Civil code.

37 Article 515-5-1 of the Civil code.

38 The law of 3 December 2001, which came into force on 1 July 2002, improved the status of the surviving spouse.

39 Articles 756 to 768 of the Civil code. The surviving spouse receives, if the deceased leaves descendants, one quarter of the assets (article 757 of the Civil code) or, at his/her choice, the usufruct of the totality of the assets if there are no descendants who are not of both spouses. In the absence of descendant, if the deceased leaves his/her father and mother, the surviving spouse receives one-half of the assets. If there is either his/her father or mother, the surviving spouse receives three-fourths of the assets (article 757-1 of the Civil code). In the absence of children or descendants of the deceased and of his/her father and mother, the surviving spouse receives the whole succession (article 757-2 of the Civil code).

40 Article 914-1 of the Civil code: "Liberalities, by acts *inter vivos* or testamentary, may not exceed three-fourths of the assets if, in the absence of a descendant, the deceased leaves a surviving spouse, not divorced".

the accommodation [41]. In addition, a surviving spouse who in fact occupied, at the time of the death, as his/her principal habitation, an accommodation belonging to the spouse or forming a part, in its entirety, of the succession, has until his/her death, a right of habitation in this accommodation[42].

Beyond these legal rights, even if a spouse leaves children or descendants, he/she can dispose in favor of his surviving spouse either in ownership that he/she may leave to an outsider, or one-fourth of his assets in ownership and the other three-fourths in usufruct, or else the totality of his/her assets in usufruct only[43]. The surviving partner is less well protected.

2. For the partners.

The surviving partner is not a legal heir of the deceased. In the absence of a will in his or her favor, he or she can only claim during one year the gratuitous enjoyment of the accommodation [44], unless there are contrary provision. However, partners often seek to establish by will the equivalent of the legal protection enjoyed by the spouse, to grant him or her the totality of accommodation assets in usufruct, or the accommodation in usufruct. However, as long as the accommodation constitutes an important part of his/her assets, the surviving partner is not assured of the effectiveness of this provision. Because, unlike the spouse, the partner cannot benefit from a usufruct on the children's reserve, if the usufruct granted to the surviving partner exceeds the disposable portion, the heirs for whom the legislation establishes a reserve may claim to obtain it free of charges and prevent the partner from benefiting from the usufruct promised[45]. Simply because the surviving partner, unlike the surviving spouse, does not have a special disposable portion and, therefore, cannot be granted usufruct rights on the reserve.

Often, the partners are very surprised to discover this solution. It's not certain that this will change in the short term because a recent report on the future of the reserved portion seems very attached to maintaining a real difference in status between marriage and partnership, mainly with regard to their rights of succession[46].

41 Whether his/her housing was secured through a lease for rent or through a lodging belonging in an undivided part to the deceased: article 763 of the Civil code.

42 Article 764 of the Civil code.

43 Article 1094-1 of the Civil code.

44 Article 515-6 of the Civil code.

45 Article 917 of the Civil code: if a disposition by act *inter vivos* or by testament is of a usufruct or of a lifetime annuity whose value exceeds the disposable portion, the heirs for whose benefit legislation establishes a reserve have the option, either to execute that disposition or to abandon ownership of the disposable portion.

46 Reserved portion Report, 13rd December of 2019, established under the direction of Cecile Pérès and Philippe Potentier: http://www.justice.gouv.fr/publications-10047/rapports-thematiques-10049/la-reserve-hereditaire-32881.html.

Thus, if a couple wants a real association and patrimonial protection, marriage remains, at present, a much better option than partnership.

PROTECTION OF THE SURVIVING SPOUSE IN FRENCH LAW

PROTECCIÓN DEL CÓNYUGE SUPÉRSTITE EN LA LEGISLACIÓN FRANCESA

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 24-33

Elsa BERRY

ARTÍCULO RECIBIDO: 16 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: While French inheritance law has recently sought to give everyone more freedom to anticipate the transmission of their estate, it still guarantees to the children a reserved portion in his estate. This guarantees the deceased's children a minimum share in his/her estate. However, the mechanisms protecting this reserve are subject to legal adjustments when spouses wish to organize the protection of the couple's survivor, either by submitting to a conventional matrimonial regime or by giving themselves gifts that improve the legal succession of the spouse. This ensures a balance between the protection of the spouse and that of the compulsory heirs. Not seeming to be satisfied, several famous French people living abroad have recently sought to escape French law in order to be able to give their surviving spouses an advantage beyond these limits, at the expense of children of first French marriage. Thus, the protection of the spouse may be both a reason to submit to French law as well as a motivation to try to escape it.

KEY WORDS: Conventional matrimonial regime; surviving spouse; reserve; gift.

RESUMEN: *La ley francesa de sucesiones ha buscado recientemente dar a todos más libertad para anticipar la transmisión de su patrimonio, sin embargo, todavía garantiza a los hijos una parte reservada. Esto asegura a los hijos del fallecido una participación mínima en su patrimonio. No obstante, los mecanismos de protección de esta reserva están sujetos a ajustes legales cuando los cónyuges desean organizar la protección del cónyuge sobreviviente, ya sea sometiéndose a un régimen matrimonial convencional o entregándose obsequios que mejoren la sucesión legal de éste. Esto asegura un equilibrio entre la protección del cónyuge y la de los herederos obligatorios. Sin parecer satisfechos, varios franceses famosos que viven en el extranjero, han intentado recientemente escapar de la ley francesa para poder dar a sus cónyuges supérstites una ventaja más allá de estos límites, a expensas de los hijos del primer matrimonio. Por tanto, la protección del cónyuge puede ser tanto un motivo para someterse a la ley francesa como una motivación para intentar escapar de ella.*

PALABRAS CLAVE: *Régimen matrimonial convencional; cónyuge supérstite; reserva; obsequio.*

I. INTRODUCTION.

In French law, among the three models of couples - the marriage[1], the civil pact of solidarity[2] and the *concubinage*[3] - only the latter provides legal protection for the surviving companion. The rights granted to the surviving spouse depend on the family composition of the deceased at the time of death.

If the deceased leaves children and a surviving spouse, they must share the estate. But, sometimes, couples want the surviving spouse to receive the entire estate, without sharing it with the children, although French inheritance law guarantees them a reserved portion of the deceased's estate. Something which isn't always well accepted by both French and foreign couples.

However, there are several ways for a person to transfer all of his/her assets to his/her spouse. These solutions may encourage foreign couples living in France to choose to comply with French law. Conversely, it seems that these solutions sometimes seem insufficient to other couples who will try to escape French law to escape the reserved portion of the succession.

II. SOLUTIONS FOR TRANSMITTING ALL THE DECEASED'S ASSETS TO THE SURVIVING SPOUSE.

In 2006[4], French inheritance law sought to give everyone more freedom to anticipate the transmission of their estate. Thereby, the mechanisms protecting the reserved portion were subject to legal adjustments. It became possible to transmit all the deceased's assets to the surviving spouse, by gift or will or by submitting to a conventional matrimonial regime.

1 Art. 143 to 226 of the Civil code.

2 Art. 515-1 to 515-7-1 of the Civil code.

3 Art. 515-8 of the Civil code.

4 Law of 23 June 2006 entered into force on the 1st January of 2007.

• Elsa Berry
Associate Professor, University of Poitiers (France). E-mail: elsa.berry@univ-poitiers.fr

1. By gifts or will.

When a disposing party has children, he/she can only freely dispose of the part of his/her estate, which isn't reserved by legislation: the disposable portion[5]. However, his/her spouse can be gratified more than any other person, because there is a special disposable portion between spouses. This allows the spouse to benefit of lifetime use on the reserved portion[6]. But sometimes, the disposing party, by a will or donation[7], decides to transmit to his/her spouse all his/her succession. The sanction of the impingement on the reserved portion is the reduction of the excessive part[8]. But, since 2006, this reduction is only in value[9]. The spouse will receive all the estate of the deceased and, if the children claim it[10], they will be entitled to a financial compensation. This will not always be the case if the couple decides instead to resort to matrimonial regimes.

2. By matrimonial regimes.

In French law, couples can, by contract, opt for a conventional matrimonial regime called universal community[11] which allows all the property of the spouses to be common. Often, it also stipulates the allocation of the entire community assets for the case of survival, for the benefit of whichever one survives.[12] The children of the first spouse deceased don't inherit any property, because his/her estate is empty.

If the children are all common to the couple, they can't reclaim anything[13], they will have to wait for the death of the second spouse to inherit from him/her. On the contrary, if there are children from a first bed, they will be able to exert a specific action. It will allow them to treat the matrimonial advantage as a gift and to

5 Art. 912 of the Civil code.

6 Art. 1094-1 of the Civil code: "If a spouse leaves children or descendants, born of the marriage or otherwise, he /she may dispose in favour of the surviving spouse, either in ownership what he/she may leave to an outsider, or one-fourth of his/her assets in ownership and the other three-fourths in usufruct, or else the totality of his/her assets in usufruct only".

7 In order to transmit all his/her patrimony to his/her spouse, the disposing party can either use a will or grant him/her a donation between spouses, which is considered an inheritance pact. The latter, granting him/her rights in his/her future succession, is considered an inheritance pact. To ensure recognition of the validity of the latter, foreign couples may choose French law as an inheritance law. Failure of doing this, will make the validity assessed in the light of the law which was intended to apply to the succession of each disposing party on the date of the act.

8 Art. 920 of the Civil code.

9 Art. 924 of the Civil code.

10 Art. 921 of the Civil code.

11 Articles 1526 and 1527 of the Civil code.

12 Art. 1524 of the Civil code.

13 Art. 1527 of the Civil code.

ask for the reduction of its excessive portion[14]. As in the previous case, they won't recover any property of the deceased, but will get a compensation.

This matrimonial regime was very often adopted before 2019 by English couples coming to France to buy a house. At the time, the rules of private international law concerning matrimonial property regimes were established by the Hague Convention of 1978[15]. It allowed couples to choose to apply the law of the country in which that immovable property was situated.[16] Furthermore, the French Civil Code allowed spouses which decided to submit their matrimonial regime to French law to opt for a conventional regime. Choosing the universal community, these English couples were ensured that their home in France would be considered as a common good attributed out of succession to the survivor. In addition, any children of a first survivor's bed could not exercise the action of reduction, the latter being attached to the applicable law of succession, generally the English law of succession[17].

Thus, these English couples benefited from the possibilities of transmission offered by the French law of matrimonial regimes, while escaping the limits resulting from the French succession law.

On the other hand, some French couples now seem to want to escape French law in order to no longer be required to respect the reserved portion of the succession.

14 Art. 1527 of the Civil code: "The advantages which either spouse may draw from the clauses of a conventional community, as well as those which may result from a mingling of movables or of debts, are not deemed donations. However, if there are children not born of both spouses, any agreement which has as a consequence of donating to one of the spouses beyond the portion regulated by article 1094-1, in the Title 'Donations Inter Vivos and of Testaments' is ineffective as to the whole excess; but mere profits resulting from common work and from savings made from the respective although unequal incomes, of both spouses, are not considered as an advantage made to the prejudice of the children of another bed".

15 Hague Convention of the 14 march 1978 on the law applicable to matrimonial property regimes.

16 The Hague Convention provided for a principle of the uniqueness of the applicable law, but with one exception: the spouses could choose their location for the immovable goods. For spouses married from January 29, 2019, the applicable law is determined on the basis of Regulation (EU) 2016/1103 of 24 June 2016 - known as the Matrimonial Property Regimes Regulation - which enshrines the principle of the uniqueness of the applicable law.

17 Seized of an action for reduction concerning an inheritance opened in 2013, (before the regulation of July 4 2012 n° 650/2012 came into force on August 17, 2015), the Court of Cassation considered that, since this action only allowed compensation, and not recovery in kind of the property transferred, it was of a movable nature and, therefore, fell within the jurisdiction of the courts of the country where the deceased had his/her last domicile: Cass. 1st civ., 14 April 2021, n° 19-24.773, FS-P: JurisData n° 2021-005372. For estates opened after August 17, 2015, the competent court to examine the action for reduction will be that of the State in which the deceased had his/her habitual residence at the time of death (except *professio juris* under certain conditions).

III. ESCAPE THE FRENCH LAW.

This intention to escape the reserved portion by submitting to a foreign succession law has been especially proven through the situation of two famous French artists. They all had children in France from a first union. Then they went to live, at least partially, in California with a new wife to whom they transmitted all their inheritance, as well as to their common children. They deprived their first children, adults, who remained in France, of all rights. Two of these cases have already been submitted to the Court of Cassation.

1. Jurisprudence.

The Court of Cassation ruled in 2017[18] on the successions of two artists, the best known of which was Maurice Jarre. He was a composer and, at the end of his life, lived in California. His succession was therefore subject to Californian succession law, which doesn't know the reserved portion of the succession. The French children of this artist asked the Court of Cassation to rule out the application of this law with regard to the infringement of the French international public policy [19]. But the Court of Cassation considered that the fact that the application of a foreign law to an estate infringes the reserved portion doesn't constitute a sufficient reason to exclude the application of this law.

The scope of these decisions is discussed. According to some authors, the reserve reserved portion, basis of internal public policy of succession, is not, except under certain conditions, a rule of French international public policy[20]. But the Court of cassation was not so categorical and specified in the two decisions that a foreign law ignoring the reserved portion « can be excluded only if its concrete application, in the present case, leads to a situation incompatible with the principles of the French law considered as essential » and verified that the French heirs were of legal age and weren't in need.

More recently, a very famous singer, Johnny Halliday, passed away and made the same arrangements as the two composers. This case, whose parties seem to have found a settlement, was the occasion of a public debate on this affair between those who took the defence of the young widow – and the singer's

18 Cass. 1st civ., 27 September 2017, n°16-17.198 et 16-13.151, D. 2017, p. 2185, note Guillaumé J.; D. 2018, p. 966, obs. Clavel S.; D. 2018, p. 2384, obs. Godechot-Patris S. and Grare-Didier C.; AJ fam. 2017, p. 595, 510, obs. Boiché A.; AJ fam. 2017, p. 598, obs. Lagarde P.; Rev. crit. DIP 2018, p. 87, note Ancel, B.; RTD civ. 2017, p. 833, obs. Usunier L.; RTD civ. 2018, p. 189, obs. Grimaldi M.; JCP 2017. 1236, note Nourissat, C. and Revillard, M.; JCP N 2017. 1305, note Fongaro, E.; RTD com. 2018, p. 110, obs. Pollaud-Dulian, F.

19 "The 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 of the forum" Règl. (UE) n° 650/2012, 4 July 2012, art. 35.

20 Usunier, L.: "La réserve héréditaire n'est pas d'ordre public international", RTD civ., 2017, p. 833 ; Legrand, V.: "La réserve héréditaire exclue de l'ordre public international", Petites aff. 2017, n° 249, p. 15.

freedom to dispose of his assets - and those who supported the two famous disinherited oldest children - and defended the reserved portion.

Since then, two reforms to enhance the protection of the reserve have been considered.

2. Prospective law.

First of all, a working group has been appointed by the Minister of Justice to discuss the future of the reserved portion. The latter has presented its report on December 13, 2019[21]. This report recommends maintaining the hereditary reserve of descendants and strengthening its protection in international estates. Two proposals are made for this purpose: on the one hand, the reserved portion should be recognized as being of international public policy in so far as it belongs to the principles attached to the political, family and social foundations of society[22]. On the other hand, the foreign law whose application would lead to the deprivation of any right a successive descendant when the deceased or the heir is French or would reside in France at the time of the death of the deceased should be considered contrary to international public policy[23].

Secondly, a draft law[24] envisages the reintroduction of the right to levy. The latter allowed that a French heir who might have received less under a foreign law than what he/she could have claimed under French law, to levy on the property situated in France the equivalent of what he/she had not received under foreign law[25]. Reserved only for French heirs, the right to levy was deemed unconstitutional in that it violated the principle of equality facing the law between French and foreign heirs[26]. The reintroduction of this right is criticized in doctrine[27] and, if it was adopted by the National Assembly in first reading, it was instead deleted by the Senate[28].

21 Reserved portion working group report under the direction of Philippe Potentier and Cécile Pérès, presented on December 13, 2019 to Nicole Belloubet, Minister of Justice. More informations (and report downloadable) in: http://www.justice.gouv.fr/publications-10047/rapports-thematiques-10049/la-reserve-hereditaire-32881.html.

22 2nd proposal of the report.

23 3rd proposal of the report. The report also envisages in its proposal 3 *bis* to extend these attachments to all nationals of a Member State or having their residence in a Member State.

24 Draft law confirming the respect of the principles of the Republic and the fight against separatism adopted at first reading by the National Assembly the 16 February 2021, amended then adopted at second reading by the Senate the 12 April 2021. The text must be examined again by both Houses of Parliament.

25 This right was established by a law of 14 July 1819.

26 This decision was made by the Constitutional council seized of a priority constitutional issue: Cons. const., 5 August 2011, n° 2011-159 QPC, Mme Elke, B. et a.: JO, 6 August 2011; JCP N 2011, 1236, note Fongaro, E. et 1256, § 7, note Péroz, H.; JCP G 2011, 1139, note Attal, M.; Defrénois 2011, p. 1351, note Revillard, M.; D. 2012, p. 1228, obs. Gaudemet-Tallon, H.; Rev. crit. DIP 2013, p. 457, note Ancel, B.

27 Péroz, H.: "Le droit de prélèvement: tel un phœnix?", Gaz. Pal. 2021, n° 12, p. 48 ; Boulanger, D. : La réserve héréditaire: un principe républicain?, JCP N 2021, act. 1039.

28 Article 13 of the Draft law.

Therefore, at least in the current state of French positive law, it remains that the French can, by submitting to a foreign law, escape the limits of the reserve[29].

29 Provided that the reserved heirs are not in a situation of economic precarity or need.

BIBLIOGRAPHY

BOULANGER, D.: "La réserve héréditaire: un principe républicain?", *JCP* N 2021, act. 1039.

LEGRAND, V.: "La réserve héréditaire exclue de l'ordre public international", *Petites aff.* , 2017, nº 249, p. 15.

PÈROZ, H.: "Le droit de prélèvement: tel un phœnix?", *Gaz. Pal.* 2021, nº 12, p. 48.

USUNIER, L.: "La réserve héréditaire n'est pas d'ordre public international", *RTD civ.*, 2017, p. 833.

PRE-MARITAL AND PRE-UNIONAL FINANCIAL AGREEMENTS AND THEIR CIRCULATION IN THE CONTEXT OF THE NEW EU REGULATIONS 2016/1103 AND 2016/1104

ACUERDOS FINANCIEROS PREMATRIMONIALES Y PREVIOS A LA CONVIVENCIA Y SU CIRCULACIÓN EN EL CONTEXTO DE LOS NUEVOS REGLAMENTOS DE LA UE 2016/1103 Y 2016/1104

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 34-51

Paolo BRUNO

ARTÍCULO RECIBIDO: 14 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: Regulations (EU) 2016/1103 and 2016/1104 provide spouses and partners with the possibility to conclude agreements for the organization of their property regime but do not detail their content and structure. Moreover, while the possibility to conclude those agreements even prior to the marriage or the conclusion of a registered partnership is a valuable innovation in comparison with other European Regulations in family matters, some choices made by the European legislator on applicable law will likely be source of inconveniences.

Furthermore, as for their recognition and enforcement in the participating Member States – which will be based on the same rules enacted for decisions, authentic instruments, and court settlements – attention should be paid to their admissibility in some of them, like Italy, where the jurisprudence of the Supreme Court is steadily opposed to their acceptance.

KEY WORDS: Pre-marital agreements; pre-unional agreements; EU regulations.

T RESUMEN: *Los Reglamentos (UE) 2016/1103 y 2016/1104 brindan a los cónyuges y unidos la posibilidad de celebrar acuerdos para la organización de su régimen patrimonial, pero no detallan su contenido y estructura. Además, si bien la posibilidad de celebrar esos acuerdos, incluso antes del matrimonio o la celebración de una unión registrada es una innovación valiosa en comparación con otros reglamentos europeos en materia de familia, es probable que algunas decisiones tomadas por el legislador europeo sobre la ley aplicable sean fuente de inconvenientes.*

Además, en cuanto a su reconocimiento y ejecución en los Estados miembros participantes- que se basarán en las mismas normas dictadas para las decisiones, los documentos públicos y las transacciones judiciales- debe prestarse atención a su admisibilidad en algunos de ellos, como Italia, donde la jurisprudencia del Tribunal Supremo se opone firmemente a su aceptación.

PALABRAS CLAVE: *Acuerdos prematrimoniales; acuerdos previos a la convivencia; reglamentos UE.*

I. INTRODUCTION.

When Member States reached in the Council of the EU a general approach on the Regulations 2016/1103 and 2016/1104 (an outcome that only few months before could not be taken for granted) a few delicate issues were drawing the political attention, notably on jurisdiction. The focus was therefore shifted away from other aspects, yet of paramount importance, which were deemed less politically attractive.

Amongst them, the possibility for spouses and partners to enter into agreements in view of an overall composition of their economic situation and – even more interesting – to settle those issues in advance of the establishment of their family relationship (future spouses or future partners).

This is a complex issue which is strictly intertwined with different aspects of substantial national laws: notably, property, succession, and contract law.

Nevertheless, the outcome of the negotiation led the Member States' representatives to approve a piece of legislation that will bring more legal certainty in this regard, since the new Regulations duly consider the needs of international couples and their increased mobility.

Families are now provided with a set of uniform rules which will streamline the planning of their "ménage" and will positively impact on foreseeability and circulation of decisions in such a sensitive matter[1].

1 On the Regulations, see, *inter alia*: Bonomi, A., Wautelet, P. (ed.): *Le droit européen des relations patrimoniales de couple*, Bruylant, 2021; Viarengo, I., Franzina, P.(ed.): *The EU Regulations on the property regimes of international couples. A commentary*, Edward Elgar, 2020; Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffré Francis Lefebvre, 2019; Viarengo, I.: "Effetti patrimoniali delle

• Paolo Bruno
Justice and Home Affairs Counsellor, Permanent Representation of Italy to the EU. E-mail: paolo.bruno@esteri.it

II. DEFINITORY PROBLEMS AND SCOPE OF THE REGULATIONS.

Similarly to what has been done in other EU Regulations in the field of judicial cooperation in civil matters, in order to prevent different interpretations due to specific domestic patterns of certain elements of the texts, both Regulations contain some definitions which deserve an autonomous interpretation.

The Regulations define – respectively in art. 3, par. 1, lett. b) and c) – as "matrimonial [partnership] property agreement" any "agreement between spouses or future spouses [partners or future partners] by which they organise their matrimonial property regime [the property consequences of their registered partnership]"[2].

Those definitions are then complemented by a more detailed explanation in recitals 47 and 48, according to which "a matrimonial [partnership] property agreement is a type of disposition on matrimonial [partners'] property the admissibility and acceptance of which vary among the Member States. In order to make it easier for [matrimonial] property rights acquired as a result of a matrimonial [partnership] property agreement to be accepted in the Member States, rules on formal validity of a matrimonial [partnership] property agreement should be defined. At least the agreement should be expressed in writing, dated and signed by both parties".

From the analysis of the text, it seems evident that a functional approach must be followed in ascertaining the material characteristic of such an agreement; irrespective of the shape they assume in national laws, what emerges is the necessary link between the family tie and the organization of the inherent property regime.

As for the content of the agreement, the definitions do not indulge in detail: they satisfy themselves with a reference to the organization of the property regime between (future) spouses and partners and do not set any limit to their will.

unioni civili transfrontaliere: la nuova disciplina europea", *Riv. dir. int. priv. proc.*, 2018, no. 1, p. 33; Marino, S.: "Strengthening the european civil judicial cooperation: the patrimonial effects of family relationships", *Cuadernos de Derecho Transnacional,* 2017, no. 3, vol. 9, pp. 265-284; Feraci, O.: "Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate", *Riv. dir. int.*, 2016, p. 529; Lagarde, P.: "Règlements 2016/1103 et 1104 du 24 Juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Riv. dir. int. priv. proc.*, 2016, no. 3, p. 676.

2 According to the case-law of the Court of Justice of the EU, a difference can be traced already between issues falling in the scope of the EU regulations on the property regimes and on successions. See ECJ, VI, 14th June 2017, *Todor Iliev vs. Blagovesta Ilieva*, C-67/17, par. 30: "in the case of a dispute between former spouses relating to the liquidation of movable property acquired during the marriage, since that dispute concerns proprietary legal relationships between those persons resulting directly from the dissolution of the marriage, such a dispute does not come within the scope of Regulation no.1215/2012 but comes rather within that of the second category".

Therefore, the first aspect that has to be ascertained is the scope of this organization: notably, whether or not all the assets of the couple must be included in the agreement.

Secondly, whether the agreement can include also different aspects from the settlement of all the economic issues and possibly falling outside the scope of the Regulations.

As for the first aspect, lacking any other interpretative element, it seems preferable to follow a pragmatic approach. The organization of the property regime (or of the property consequences of the registered partnership) should pursue as much as possible a positive effect, able to settle all the economic consequences of the regime and even if some asset is not included in the agreement.

Let assume, for instance, that a couple concludes an agreement including all the assets of their property regime (immovable and registered movable property, cash, bonds, shares, etc.) except for a holiday property that – for whatever reason can be imagined, among which the fact that it was bought as purely financial investment and never considered as a long-term family property – should not be considered as being part of the overall property regime. In this case, considering invalid the agreement since it lacks one asset which has never been contemplated as a permanent part of the regime would be an excessively rigid decision.

On the other hand, in a different scenario, including several minor assets of the regime without the only one which has an important economic value would not make sense and would not confer to the agreement the necessary stability and efficacy. Future disputes on the ownership or use of that asset would be likely to occur.

After all, what is necessary for an asset to be considered part of the property regime is (apart from the evidence that it belongs to the parties) the consideration given to it by the owners. If two persons bought a real estate before the marriage in order to purely speculate on its value, and then some years after they decide to marry or enter into a registered partnership, one can assume that that property should not necessarily be considered as part of their matrimonial regime.

Turning to the second aspect mentioned above, it is quite frequent in practice to come across comprehensive agreements which are not strictly limited to the organization of the property regime. It is indeed common for spouses or partners to include also parental responsibility and maintenance aspects, as well as – where this is permitted under the law governing the agreement – succession issues.

In this case a reasonable decision would be to preserve the validity of the agreement, irrespective of its scope and as long as its enforcement would not be detrimental to the will of the parties and to the objective of the pact signed by them. An approach which emphasizes the partial validity of the agreement would make justice to the efforts of the couple in settling all their pending issues and preventing future disputes.

In practice, however, the various parts of the overall "package" concluded by the spouses or partners can be so strictly intertwined that it would prove difficult to enforce only part of it without undermining the delicate balance reached by them.

Another interesting aspect to be explored – which touches upon the timing for concluding the agreements[3] – is whether those falling within the scope of the Regulations can be signed also after the divorce or the dissolution of the registered partnership.

The question cannot be answered based on the mere provisions of the Regulations, as nothing in the text clarify whether the persistent existence of the marriage or the registered partnership is a pre-condition of validity for the agreement. Art. 3 defines the agreements, the court settlements, and the decisions in matters of property regimes and property consequences of registered partnerships, yet nothing in those definitions is decisive to draw a clear distinction in terms of timing for the conclusion of the agreement.

It therefore seems that a reference to the substantive applicable law be necessary, to answer the question; after all, in some legal system a marriage or a registered partnership can be dissolved without any decision being taken on some important aspects as parental responsibility or maintenance. In this case it is possible to settle all the economic issues between the parties after the divorce is granted or the court settlement is approved by the court.

One can question that – in this case – the agreement is not concluded by spouses or future spouses (or partners) but by former spouses or partners, therefore it should be understood as a mere contractual agreement between persons no longer bound by a family tie.

However, as also anticipated above when describing which assets can or cannot be included in the agreement, what seems important in this case is the link between the will of the parties and the assets. A final settlement of all the pending economic issues between the parties should therefore be possible also within a

3 Which is considered as immaterial by Rodriguez Benot, A.: "Art. 3 – definitions", in *The EU Regulations*, cit., 3.11.

reasonable period of time after the divorce or the dissolution of the registered partnership and – as such – it should be able to circulate under the conditions set by the Regulations.

As to the form of the agreements, art. 25 of the Regulations foresees that they should be expressed in writing, dated, and signed by both spouses or partners, and that any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. Additional requirements can, however, be requested according to the law of the State of habitual residence of the parties or to the law applicable to the property regime.

Also in this case a definitory problem arises, as the wording of art. 25 refers only to spouses or partners without the usual reference to "future" that in art. 3 is present.

Notwithstanding this apparent contradiction, presumably attributable to a clerical error, the provision should however be understood as encompassing also the agreements signed before the establishment of the family tie.

In any event, although nothing in the Regulations prescribes any minimum standard as regard the consent of the parties to the agreement, it seems natural that its substantial validity must be ascertained in the light of it. Irrespective of the content of the agreement, a complete understanding of all the economic consequences should therefore be indispensable for all the parties (notably when the agreement is prepared by one of them and merely signed by the other).

Two further aspects concerning the validity of the agreements in question seem worth clarifying: the possible participation of a third person, and the problem of an agreement signed by (or on behalf of) a minor.

On the first topic, it should be presumed that the vast majority of agreements would bind only the couple; however, the property regime (and the property consequences of a registered partnership) is defined in art. 3 as a set of rules concerning the property relationships between the spouses or partners "and in their relations with third parties". Art. 28 is also devoted to regulating the effects in respect of third parties.

It is therefore clear that the door is open to a tri-lateral agreement expressly involving a third person[4] (who can be a relative, but not only) or to an agreement whose effects are directly affecting a third person.

4 An example of which is the Italian "fondo patrimoniale" based on articles 167-171 of the Civil Code. For a description of its functioning see also Wautelet, P.: "Art. 3", in *Le droit européen*, cit., p. 289.

It goes without saying that – this being the case – in the first scenario the agreement would conceptually be composed by two parts that will not necessarily follow the same rules as regards recognition and enforcement; in the second case, the effects towards third parties are explicitly addressed in the Regulations.

Finally, as regards the participation of a minor in the agreement, while this is not prevented by the Regulations (which does not touch upon the validity of the marriage and the registered partnership, nor the age required to conclude them) it is to be regulated according to the applicable law as designated by the Regulations or chosen by the parties.

Issues like the legal capacity of the parties are indeed outside the scope of the EU Regulations and, accordingly, can vary among the Member States, in some of which minors can conclude a marriage or a registered partnership (and consequently can sign a property agreement) provided that they are represented by a guardian or authorized by the court[5].

III. INFORMAL AGREEMENTS, COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS.

As anticipated in par. 2, the form of the agreements that parties can conclude is regulated in the texts (art. 25). Similarly, authentic instruments and court settlements are described as acts able to contain provisions on the property regime of the marriage or on the property consequences of the registered partnership (art. 3).

However, while decisions and court settlements share the characteristic of being conceived and drafted in occasion of a civil proceeding, private agreements and authentic instruments can be drafted prior to the issue being brought before the court.

In particular, as for the authentic instruments, reference can be made not only to other pieces of legislation and their explanatory report[6] but also to the case-law of the European Court of Justice[7] which clarified the essential aspects thereof. The Court established, in this regard, that the involvement of a public authority

5 In Italy, for example, a minor acquires the legal capacity to marry when granted judicial authorization (see art. 84 of the Italian Civil Code): the assistance of a guardian or other representative during the marriage should therefore be understood as a requisite for its validity, without meaning *per se* that the traditional bilateral relation at the basis of the marriage would turn into a tri-lateral relationship. The same is valid for the signature of a property agreement based on art. 90 of the Italian Civil Code.

6 See in this regard the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) on 30th October 2007 and, before it, the Report by Mr. P. Jenard and Mr. G. Möller on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16th September 1988.

7 See ECJ, V, 17th June 1999, *Unibank*, C-260/97.

is essential for an instrument to be capable of being classified as an authentic instrument.

Coming to the substantial difference between private agreements and authentic instruments, still the Court of Justice clarified that since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.

A common denominator among these different acts is to be found in a characteristic which relates to the evidence of the agreement: all of them must be done in written form and must be able to be reproduced. Therefore, also a digital recording is accepted for their formal validity.

The same can be said for those agreements reached before the court and enclosed in the minutes of the hearing made by the clerk or the judge itself (depending on the different procedural rules and practice in the Member States).

The fact that an agreement on the property regime of the couple is transcribed into a private act, an authentic instrument, a decision, or a court settlement, does not change its substance provided that all the necessary element for its enforcement are included.

It can therefore be assumed that an informal agreement – that is one orally reached, but not transcribed in a tangible instrument – does not have the necessary characteristics for being considered as agreement for the purposes of art. 25 of the Regulations.

The same applies obviously for those agreements concluded by future spouses or future partners before entering into a family relationship, orally or in a different form than that admitted by the Regulations. In both cases their validity and attitude to circulate will be put into question, as we will clarify in paragraph 6.

IV. APPLICABLE LAW AND RELATED SHORTCOMINGS IN THE PLANNING OF PRE-NUPTIAL AND PRE-UNIONAL AGREEMENTS.

To facilitate the management of their property to spouses and partners, the Regulations authorise them to choose the law applicable to their property regime[8],

8 It seems worth mentioning that in the original proposal of the EU Commission [COM (2011)127] the choice of law was not foreseen for the registered partnerships, and that it was subsequently added after the European Parliament pleaded for it in its Report [A7-0254/2013] to avoid any discrimination with the married couples.

regardless of the nature or location of the property, among the laws with which they have close links because of habitual residence or their nationality. This choice may be made at any moment, before the marriage, at the time of conclusion of the marriage or during the marriage.

This is what the Regulations foresee to ensure legal certainty and provide the parties with an important tool for planning the economic aspects of their "ménage". At the same time, attention is paid also to third-party rights, to which different provisions are devoted.[9]

According to art. 22, moreover, the spouses or future spouses [partners] may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following: (a) the law of the State where the spouses or future spouses [partners], or one of them, is habitually resident at the time the agreement is concluded; or (b) the law of a State of nationality of either spouse or future spouse [partners] at the time the agreement is concluded.

In an attempt to provide the parties with legal certainty, the Regulations therefore limit the choice of law to those indicated in art. 22, implying a strong link between them and a certain territory (habitual residence) or a formal connection (nationality) but in both cases at the time of the agreement is signed[10].

Lacking a choice, the applicable law is limited by art. 26 to the law of the first common habitual residence, or of the spouses' common nationality or with which they have the closest connection at the time of the marriage (while for the registered partnership the law applicable by default in the absence of choice is that of the State where it was registered).

This means, in other words, that the choice of law made before the marriage or the registered partnership – and in view of it – cannot be made with reference to the law of the prospective country where possibly the parties have already decided to settle in the near future (as it frequently happens for those couples that marry shortly before moving to another Member State).

Moreover, once an agreement on the applicable law is concluded, the couple cannot rely on the escape clause set out in art. 26, par.3, which grants the possibility to ask the judge to apply the law of the State where the spouses or

9 See on this also Rademacher, L.: "Changing the past: retroactive choice of law and the protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships", *Cuadernos de Derecho Transnational*, 2018, no. 3, vol. 10, p. 7.

10 See on this, *inter alia*, Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", *Riv. dir. int.*, 2017, no. 4, p. 1103; Calò, E.: "Variazioni sulla *professio iuris* nei regimi patrimoniali delle famiglie", *Riv. not.*, 2017, no. 6, p. 1093.

partners have established their last habitual residence (and which they relied on, in arranging or planning their property relation). This possibility is not applicable when "the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State".

This means that the parties – although they have a specific reason to do so – will not have the possibility to simply ask the judge to disregard the law chosen beforehand and apply the law of the country where they have settled, and their property regime will continue to be regulated by the law of a State with which they no longer have a valuable connection.

If they want the new law to be applied, they must change the property agreement (something that cannot be taken for granted, if there is the spouses or partners do not concord on the details or the relation between them deteriorated).

As it seems clear, the European legislator somehow weakened the added value of a pre-nuptial agreement whenever the parties did not carefully examine *pros* and *cons* of the applicable law and created the conditions for possible disputes in case the consent to the original choice was given without proper consideration.

Lacking a deal for changing the agreement (and if the judge will not make use of his discretionary power, as allowed in par. 3, first sentence) the couple will be trapped in a pre-nuptial or pre-unional agreement which does not correspond to their will and to the aim of planning their property regime.

Considering the complexity of the two Regulations, a professional and independent advice should always be sought when deciding to enter into such an agreement.

V. COMMON FEATURES OF THE CIRCULATION OF AGREEMENTS IN THE AFSJ…

It is well known that one of the most valuable achievements of the European legislator is the streamlined circulation of decisions, court settlements and authentic instruments within the Area of Freedom, Security, and Justice. Thanks to the rules set out in the *acquis* it is today possible to easily relocate within the European Union and have a decision on the *status* and on other aspects of a family relationship automatically recognized and easily enforced.

Common provisions to several Regulations in the field of judicial cooperation in civil and commercial matters foresee a limited number of grounds for refusing recognition and enforcement, thus considerably narrowing the possibility to prevent the circulation of the acts above mentioned.

As for the agreements, however, things are different.

While Reg. (EC) 2003/2201 (Brussels II *bis*) deals only with enforceable agreements (thus limiting their scope to those focusing on parental responsibility matters) the subsequent Reg. (EU) 2019/1111 (Brussels III, applicable since 1st August 2022) contains provisions on the circulation of agreements in matrimonial matters as well. All the other Regulations do not.

As for maintenance, Reg. (EU) 2009/4 does not specifically tackle the issue, and the provisions therein relating to recognition and enforcement apply only to decisions, court settlements and authentic instruments.

Therefore, an agreement between the parties in matters falling within the scope of that Regulation would circulate in the EU only if it is transposed in one of the acts above mentioned, while an informal agreement they possibly have reached – even if in writing – would not be recognizable or enforceable *per se*.

We have already assumed in par. 2 that the validity of an agreement, and the applicability of the provisions concerning its recognition and enforcement, are strictly depending on its scope. Moreover, the validity aspect of the agreement and the requisites for its circulation should be kept distinct.

This should imply that, in case one of the parties questions the validity of the agreement before the judge, the latter would probably be obliged to preserve only the part of it which falls within the scope of the applicable Regulation in the specific case.

This is a major disadvantage of the way the European Regulations are structured and interact each other: it depends on the different timing they were approved and on the different sensitivity of the matters they tackle, which in turn required different approaches at the time they were negotiated.

Nevertheless, it can result in additional difficulties for the parties to find an overall compromise on their pending issues.

VI. … AND PECULIARITIES CONCERNING THE CIRCULATION OF PRE-NUPTIAL AND PRE-UNIONAL AGREEMENTS.

As we have seen in the preceding paragraph, the circulation of decisions, authentic instruments and court settlements is normally admitted within the AFSJ subject to the compliance with some strict requirements.

The Regulations on the property regimes of international couples set out an automatic recognition and a simplified exequatur procedure (as it proved impossible a complete abolition of the latter). They also tend to make uniform the requisites of the agreements on the applicable law and on the property regime – respectively described in articles 22 and 25 – prescribing that they have to be expressed in writing and should respect possible additional requirements set out by the law applicable to the property regime.

As for the pre-nuptial and pre-unional agreements, however, their circulation in the European Union will mainly depend on the form they have been concluded. In this regard, what we anticipated on the difference between their validity and their attitude to freely circulate is even more evident.

While the formal validity of an agreement can be respected in a specific case (for example because it includes the transfer of a registered moveable property and was drafted in writing, dated, and signed by the parties) its attitude to be enforced can be questioned. The party asked to deliver the property in a Member State different from the one where the agreement was concluded could oppose that the agreement – although formally valid – is not enforceable based on the European rules and should be subject to the specific enforcement procedure established in the private international rules of that Member State.

Moreover, it is easy to predict that many pre-nuptial or pre-unional agreements would be included in a single act along with a choice of law in view of a possible dispute; in this case it would be perfectly coherent to have them written, dated and signed by the parties without necessarily the assistance or the intervention of a Notary. However, while the choice of law would be perfectly valid and could be invoked before the competent judge, the same would not for the financial part of the agreement.

It is a matter of fact that prenups worldwide enforceable do not exist; there are so many differences in the way they are recognized and enforced, and nothing revolutionary is contained in the two Regulations; therefore, it seems of paramount importance to seek for a reliable expert in the jurisdiction of enforcement.

VII. THE ITALIAN EXPERIENCE IN THE LIGHT OF THE SUPREME COURT OF CASSATION'S CASE-LAW.

While the domestic law on registered partnership has been enacted only in 2016, therefore it's still early for the consolidation of a jurisprudence on agreements concluded by partners, Italy's long-standing opposition to pre-nuptial agreements

is enrooted in the assumption that this tool could be detrimental to the position of the weaker party.

The case-law of the Italian Supreme Court (Corte di Cassazione) are well-established and, except few different decisions quoted hereafter, they remain rather negative.

While oldest judgments[11] stated that agreements made by the couple before the marriage (but even in the context of the separation) and in view of the divorce are null and void because they infringe the principle of inalienability of the *status* and of the maintenance right, more recent decisions tried to draw a distinction between admissible and inadmissible agreements.

In this regard, the Supreme Court considered in some cases[12] that an anticipated waiver to the maintenance obligation would result in a relative ground of nullity of the agreement (which cannot therefore be raised *ex officio* but only by the damaged party) and later on[13] declared admissible those pre-nuptial agreements where the will of the parties was to settle their economic pending issues and the end of the marriage was not the main reason at the basis of the agreement.

In this particular case, the Court stressed the atypical nature of that agreement, considering it valid and admissible in the light of the factual circumstances of the case and of the general rules governing the Italian law of contracts; at the same time emphasizing the exceptional nature of this consideration and reiterating that in general all the agreements in which the end of the marriage is the condition which triggers the agreement are to be considered null and void.

The last published decision[14] confirmed the traditional approach of the Court and reiterated that where in the case of separation, the spouses, in defining the pending issues between them (including all the possible debt - credit reasons brought by them), have also agreed on the payment of a lifetime maintenance, the judge will have to preliminarily qualify the nature of this agreement and specify whether the annuity constituted "on the occasion" of the family crisis is unrelated to the mandatory principles governing the relations between spouses in family matters.

The judge must then decide whether this agreement is justified for another cause, and if the right to a divorce allowance is still existent.

11 See, *inter alia*, Cass., sez. I, 4th June 1992, no. 6857, *www.italgiure.giustizia.it*.

12 See Cass., sez. I, 14th June 2000, no. 8109; 21st February 2001, no. 2492; 10th March 2006, no. 5302. All in *www.italgiure.giustizia.it*.

13 See, in particular, Cass., sez. I, 21st December 2012, no. 23713, *www.italgiure.giustizia.it*.

14 See Cass., sez. I, 26th April 2021, no. 11012, *www.italgiure.giustizia.it*.

It is therefore evident that – notwithstanding the Italian Supreme Court has on some occasions recognized their profitable function of deflation of disputes in family matters – time is not ripe for a change of attitude towards the agreements in subject.

This is even more deplorable after the implementation in Italy of the law named "divorzio breve" (according to which the waiting time before the separation and the divorce has been reduced to six months) and raises the question whether an *a contrario* discrimination can be found in the different situations of a cross-border couple of spouses or partners and a totally Italian one. The latter would be prevented to agree in advance on the terms of the future settlement of their property regime, according to the well-established case-law quoted above, while the former would be allowed to introduce in the Italian legal system the same agreement through the automatic recognition procedure set out by the Regulations.

VIII. CONCLUSIONS.

The EU Regulations 2016/1103 and 2016/1104 paved the way for the international couples to solve all the issues related to their property regime or the property consequences of their registered partnership. They also contemplate the possibility to organize them in advance, to prevent possible disputes, and for this purpose allow also future spouses and future partners to enter into such agreements.

However, while the European legislator focused on the necessary requisites for the formal validity of the agreements, the international couples might still encounter difficulties in having those agreements recognized and enforced abroad.

The application in practice will show whether those agreements will be recognized and enforced entirely or partially, depending on their content and on the possible objections raised by the parties. Moreover, it remains to be seen how often the public policy clause will be opposed to refuse the circulation of agreements that may conflict with fundamental principles of domestic family law.

As for the pre-nuptial and pre-unional agreements, concluded with a view to predetermine the possible financial consequences of divorce or of the dissolution of a registered partnership, their admissibility is often questioned in the legal literature and in the national jurisprudence. While some scholars and judicial decisions have acknowledged their beneficial impact in avoiding litigation, others doubted of their admissibility referring to fundamental principles of national legal systems like the protection of the weaker party, or the need to assure a full discovery of all the

elements therein (in particular when the agreement is not negotiated within the couple but prepared by one party and simply ratified by the other).

Moreover, considering how the circulation of the agreements in family matters is generally shaped – and the need for them to be framed into decisions, authentic instruments or court settlements – it will be necessary for future spouses and future partners a supplement of professional advice, in order not to discover too late that they made some financial choice on the presumption of some arrangements that are no longer valid or enforceable.

BIBLIOGRAPHY

Bonomi, A., Wautelet, P. (ed.): *Le droit européen des relations patrimoniales de couple*, Bruylant, 2021.

Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffré Francis Lefebvre, 2019.

Calò, E.: "Variazioni sulla *professio iuris* nei regimi patrimoniali delle famiglie", *Riv. not.*, 2017, no. 6, p. 1093.

Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", *Riv. dir. int.*, 2017, no. 4, p. 1103.

Feraci, O.: "Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate", *Riv. dir. int.*, 2016, p. 529.

Lagarde, P.: "Règlements 2016/1103 et 1104 du 24 Juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Riv. dir. int. priv. proc.*, 2016, no. 3, p. 676.

Marino, S.: "Strengthening the european civil judicial cooperation: the patrimonial effects of family relationships", *Cuadernos de Derecho Transnacional,* 2017, no. 3, vol. 9, pp. 265-284.

Rademacher, L.: "Changing the past: retroactive choice of law and the protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships", *Cuadernos de Derecho Transnational*, 2018, no. 3, vol. 10, p. 7.

Rodriguez Benot, A.: "Art. 3 – definitions", in *The EU Regulations on the property regimes of international couples. A commentary*, Edward Elgar, 2020, 3.11.

Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", *Riv. dir. int. priv. proc.*, 2018, no. 1, p. 33.

Viarengo, I., Franzina, P.(ed.): *The EU Regulations on the property regimes of international couples. A commentary*, Edward Elgar, 2020.

Wautelet, P., "Art. 3" in: *Le droit européen*, cit., p. 289.

JURISDICTION IN CASES OF DIVORCE, LEGAL SEPARATION OR MARRIAGE ANNULMENT

COMPETENCIA JUDICIAL EN CASOS DE DIVORCIO, SEPARACIÓN LEGAL O ANULACIÓN MATRIMONIAL

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 52-63

Cinzia
CALABRESE

ARTÍCULO RECIBIDO: 28 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The subject of coordination is fundamental for the functioning of jurisdictional rules of the Regulation n.2016/1103 on matrimonial property regimes and Regulation n.2016/1104 on the property consequences of registered partnerships. Both Property Regimes Regulations have the purpose of gathering litigation before the courts of one Member State and have the related procedures managed by the courts of the same Member State. Recital 34 of Regulation No. 2016/1103 specifies that matters of matrimonial property regime related to proceedings pending before the court of a member state hearing an application for divorce, legal separation or marriage annulment should be dealt with by the courts of that Member State, "unless the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction. In such cases, the concentration of jurisdiction should not be allowed without the spouses' agreement".

Unfortunately, the purpose of concentrating the proceedings is not always met. The Eu system of private international law in family matters has gradually extended its terms of reference from divorce and legal separation to the financial aspects of family life, at least for the Member States that will take part in the enhanced cooperation. Nonetheless, practically these topics are often addressed in the same action for divorce. Issues such as assigning the matrimonial home, and the definition of the obligation of one spouse to support the other financially are strongly and substantially connected to the ruling on divorce, and to the conditions and reasons that ground that ruling. The need to coordinate between the EU instruments becomes apparent because spouses litigate over the financial consequences of divorce. As a result, it seems reasonable and in the parties' interests to have divorce and the related financial aspects handled by the same court.

KEY WORDS: Coordination; concentrating proceedings; related procedures; divorce, legal separation or marriage annulment; jurisdiction; international families; agreements.

RESUMEN: *El tema de la coordinación es fundamental para el funcionamiento de las normas jurisdiccionales del Reglamento núm. 2016/1103 sobre regímenes económicos matrimoniales y el Reglamento núm. 2016/1104 sobre las consecuencias patrimoniales de las uniones registradas. Ambos Reglamentos tienen por objeto reunir los litigios ante los tribunales de un Estado miembro y hacer que los procedimientos correspondientes sean gestionados por los tribunales del mismo Estado miembro. El considerando 34 del Reglamento núm. 2016/1103 especifica que los asuntos de régimen económico matrimonial relacionados con procedimientos pendientes ante el tribunal de un Estado miembro que conozca de una solicitud de divorcio, separación legal o anulación del matrimonio deben ser tratados por los tribunales de ese Estado miembro, "a menos que la jurisdicción para dictaminar sobre el divorcio, la separación legal o la anulación del matrimonio solo pueda basarse en motivos específicos de competencia. En esos casos, no debe autorizarse la concentración de la competencia sin el acuerdo de los cónyuges". Lamentablemente, el objetivo de acumular los procedimientos no siempre se alcanza.*

El sistema de la UE de derecho internacional privado en materia de familia se ha ampliado gradualmente en el ámbito del divorcio y la separación legal a los aspectos económicos de la vida familiar, al menos para los Estados miembros que participarán en la cooperación reforzada. Sin embargo, prácticamente estos temas suelen abordarse en una misma demanda de divorcio. Cuestiones como la asignación del hogar familiar y la definición de la obligación de uno de los cónyuges de mantener económicamente al otro están estrecha y sustancialmente relacionadas con la sentencia de divorcio y con las condiciones y razones que la sustentan. La necesidad de coordinar los instrumentos de la UE se hace evidente porque los cónyuges litigan sobre las consecuencias económicas del divorcio. Como resultado, parece razonable y en interés de las partes que el divorcio y los aspectos patrimoniales relacionados sean tratados por el mismo tribunal.

PALABRAS CLAVE: *Coordinación; concentración de procedimientos; procedimientos relacionados; divorcio; separación legal o anulación matrimonial; competencia; familias internacionales; acuerdos.*

TABLE OF CONTENTS: I. INTRODUCTION.- II. ACCESSORY JURISDICTION.- III. COORDINATION WITH MAINTENANCE PROCEEDINGS.- IV. VOLUNTARY CONCENTRATION OF PROCEEDINGS.- V. THE AGREEMENT

I. INTRODUCTION.

The subject of coordination is fundamental for the functioning of jurisdictional rules of the Regulation n.2016/1103 on matrimonial property regimes and Regulation n.2016/1104 on the property consequences of registered partnerships. Both Property Regimes Regulations have the purpose of gathering litigation before the courts of one Member State and have the related procedures managed by the courts of the same Member State.[1] Pursuant to Article 4 and Article 5, if a Court of a Member State is seised to rule on a dissolution or annulment of either a marriage or a registered partnership, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime which are connected to dissolution or annulment cases.

Proceedings in matrimonial property regimes usually concern the sell-off of the matrimonial property regime following the termination of the matrimonial relationship through the death of one spouse, legal separation or divorce. On the other hand, it must be assumed that there will be fewer cases in which a decision falling within the scope of the regulations is taken during marriage or a registered partnership.

Where matters of matrimonial property emerge in connection with the application of divorce, legal separation or marriage annulment (which occurs very often), Article 5(1) of Regulation 2016/1103 provides that the court of the Member State seised pursuant to Regulation 2201/2003 on matrimonial matters and matters of parental responsibility has jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. When the jurisdiction for divorce is based on the first four alternative criteria of Article 3(1) (a) of Regulation 2201/2003 the extension is self-activating. Likewise, jurisdiction over the property matters lies with the courts seised for divorce when it is a court of the Member State of the nationality of both spouses according to Article 3(1)(b) of Regulation 2201/2003. On the contrary, an agreement between the spouses is necessary if the jurisdiction over the divorce is based on other specific

1 See Recitals 32-34.

• Cinzia Calabrese
Avvocato, Presidente AIAF – Associazione Italiana Avvocati per la Famiglia e per i minori. E-mail: cinzia.calabrese@cinlex.it

grounds of jurisdiction: this results when jurisdiction is based on fifth and sixth indent of Article 3 (one year or six months, if national, of habitual residence of the applicant), Article 5 (conversion of legal separation into divorce) and Article 7 (residual jurisdiction). Obviously, while Regulation 2201/2003 binds all Member States, Article 5 of the Property Regulations will only affect the Member States participating in the enhanced cooperation.

Recital 34 of Regulation No. 2016/1103 specifies that matters of matrimonial property regime related to proceedings pending before the court of a member state hearing an application for divorce, legal separation or marriage annulment should be dealt with by the courts of that Member State, "unless the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction. In such cases, the concentration of jurisdiction should not be allowed without the spouses' agreement".

Unfortunately, the purpose of concentrating the proceedings is not always met. In fact, the main concern regards the fragmentation of the EU legislation on family matters. Currently, the legislation on this matter is fragmented and present in various Regulations and the underneath relations managed are related in a unsystematic way, which is unadvisable for the aimed purpose. Divorce proceedings, maintenance obligations and matrimonial property regimes have been kept conceptually separated in the framework of the European Union's law, and have been regulated with different regulations, which, in their scope, provide for express and mutual exclusions.

The Eu system of private international law in family matters has gradually extended its terms of reference from divorce and legal separation to the financial aspects of family life, at least for the Member States that will take part in the enhanced cooperation. Nonetheless, practically these topics are often addressed in the same action for divorce. Issues such as assigning the matrimonial home, and the definition of the obligation of one spouse to support the other financially are strongly and substantially connected to the ruling on divorce, and to the conditions and reasons that ground that ruling. The need to coordinate between the EU instruments becomes apparent because spouses litigate over the financial consequences of divorce. As a result, it seems reasonable and in the parties' interests to have divorce and the related financial aspects handled by the same court.

II. ACCESSORY JURISDICTION.

With the aim of reducing the number of proceedings, Article 5 is based on the principle of accessory jurisdiction. Jurisdiction over matrimonial property regimes

or property consequences of the partnership connected with the dissolution or the annulment of either a marriage or a registered partnership lies with the courts of the Member State where proceedings concerning the said dissolution or annulment are pending[2]. Under this rule, jurisdiction with regard to the main issue can depend, according to the circumstances, on Regulation 2201/2003, or on national jurisdictional rules in force in Member States for registered partnerships.

Here it is an example.

A French husband and a Portuguese wife, after having lived in France, move to Spain, where, after several years, they apply for divorce. Regarding jurisdiction, the proceedings can be concentrated in one single court. The Spanish court is competent pursuant Article 3(1)(a) first indent of Regulation 2201/2003, and Article 5(1) of Regulation 2016/1103, which provides that the court of Member State seised to rule on an application for divorce has jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

On the contrary, if the husband, after the couple lived together in France and then in Spain, moves to another country, such as Germany and, after one year, he files for divorce there, the concentration of the proceedings in the same jurisdiction is still possible, but not automatic. The jurisdiction of the Germany court is based on Article 3(1)(a) fifth indent of Regulation 2201/2003, because it is the court in which the applicant is habitually resident for at least a year immediately before the application. In order to have the related matrimonial property issues also handled by the French court, a choice-of-court agreement is needed, pursuant to Article 5(2)(a) of Regulation 2016/1103.

Article 5 states that cases of matrimonial property regimes arising in connection with proceedings pending before the court of a Member State seised for divorce, should be dealt with by the courts of that Member State, unless the jurisdiction to rule on the divorce is based on the specific grounds of jurisdiction listed in Article 3(1), fifth and sixth indent of Regulation 2201/2003. In such cases, the concentration of jurisdiction is not allowed without the spouses' agreement. Without such an agreement, the Spanish courts would have jurisdiction to rule on the couple's estate, while the German courts would pronounce the divorce.

If the couple is not married, again, we have to consider that matters in respect of property regimes are treated as accessory to the principal proceedings regarding the dissolution or annulment of the partnership. However, the extension of the jurisdiction of the principal matters is subject to the parties' agreement.

2 Recitals 34 and 33 of, respectively, Regulation n .2016/1103 and Regulation n.2016/1104.

Supplementary jurisdiction requires that divorce or dissolution of partnership proceedings must already be pending before or concurrently with the property regimes cases. Therefore, if an issue linking to the matrimonial property regime or the property consequences of a partnership emerges, Article 5 allows the matter to be heard by the Member State's courts already seised for the principal purpose of the dissolution of the union.

The expression 'court' in the Property Regimes Regulations seems to be understood in a larger meaning than in Regulation 2201/2003. Article 3(2) refers to 'any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act by delegation of power by a judicial authority or under its control'[3].

Anyway, for the purposes of Article 5 a court must be seised pursuant to Regulation 2201/2003 as defined in its Article 2(1).

As Article 4, Article 5 provides for a general reference to the courts of a given Member State. The regulation does not affect the freedom of the Member States to regulate the competence of their authorities in matters of property regimes. As a result, different courts may have jurisdiction, according to the local procedural law, with regard to divorce/dissolution issues on one hand and to the matrimonial property regime (or the property consequences of a partnership) on the other.

III. COORDINATION WITH MAINTENANCE PROCEEDINGS.

Coordination between divorce proceedings or the dissolution of a partnership and related property regimes proceedings is a concern of the Property Regimes Regulations. On the contrary, there is no provision regarding to the coordination of the latter with proceedings on matters of maintenance obligations. Regardless, separating maintenance and property for jurisdictional purpose could be very difficult, and not only for characterization problems. As already said, the liquidation of property regimes is frequently raised together with the maintenance claims in the same action for divorce or dissolution.

However, the aim to permit disputes concerning an international family to be dealt with by a single court in one place and forum may be pursued through the combined application of Article 5 of the Property Regimes Regulations, and Article 3(c) of Regulation 4/2009 on matters relating to maintenance obligations, which provides also for ancillary jurisdiction, with regard to situations where maintenance

3 See Viarengo I.: *Jurisdiction in cases of divorce, legal separation or marriage annulment [in cases of dissolution or annulment*, in T*he EU Regulations on the Property Regimes of International Couples – A Commentary*, p. 67, edited by I. Viarengo, P. Franzina, Elgar Commentaries in Private Internationa Law, 2020.

obligations are subsidiary to proceeding concerning personal status. Although this ground of jurisdiction may not be used, it allows the coordination between divorce or similar proceedings and maintenance proceedings. As a consequence, the court having jurisdiction under the Regulation 2201/2003 or over the dissolution of the partnership will likewise have jurisdiction to rule on property effects of the marriage or of the partnership as well as on maintenance matters, provided that the partners, and the spouses so agree (if needed). In brief, the rule of accessory jurisdiction of Article 5 of the Property regimes Regulations together with Article 3 of Regulation 4/2009 may ensure a concentration of proceedings.

IV. VOLUNTARY CONCENTRATION OF PROCEEDINGS.

In Regulation 2016/1103, the consent of both spouses is required where the court seised according to Regulation 2201/2003 is a possibly 'remote' forum. This occurs when jurisdiction is based:

- on the habitual residence of the applicant for one year or six months, if national, according to the fifth and sixth indent of Article 3;

- on the conversion of legal separation into divorce as provided in Article 5;

- on domestic grounds for jurisdiction applying residually in accordance with Article 7.

In these cases, the absorption of proceedings is voluntary and not compulsory.

The mandatory concentration of proceedings when the jurisdiction for divorce is founded on the first four alternative criteria of Article 3(1)(a) of Regulation 2201/2003 appears to be reasonable by the different asset of those criteria.

Notice that the identical factors are offered in Article 6 regulating jurisdiction where matters of matrimonial property regime are not related to proceedings pending before the court of a Member State on the succession of a spouse or on divorce, legal separation or marriage annulment. Recital 35 clarifies that 'these connecting factors are set in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised'.

Lacking an agreement between the spouses or the partners, jurisdiction appears to be ruled by Article 6 of both Property Regimes Regulations, even if, dissimilar in the Commission Proposal, it is not expressly provided. Article 6 sets down a 'ladder' of grounds of jurisdiction and it provides for a special additional ground for registered partnership, such as 'the courts of the Member State under whose law the registered partnership was created'. It indicates that different courts

may have jurisdiction, which reverses the purpose of the new Property Regime Regulations to reduce the fragmentation of proceedings.

Think of a case where the jurisdiction for divorce is based on the habitual residence of the applicant (according to Article 3(1)(a) fifth or sixth indent of Regulation 2201/2003) and it isn't the last habitual residence of the spouses, or with the habitual residence of the defendant or with the spouses' common nationality at the time the court is seised (as provided in Article 6(b)(c) and (d) of Regulation 2016/1103). Evidently, this lack of coordination could be reduced, or even avoided, if the grounds of jurisdiction set in Article 3 of Regulation 2201/2003 were placed in a hierarchical order. Unfortunately, they are supposed to remain equal, since the topic has not been addressed in the recast of Regulation 2201/2003.

In Regulation 2016/1104, Article 5 provides that a court of a Member State seised to rule on the dissolution or annulment of a registered partnership will also rule on the property consequences of the registered partnership only if both partner so agree.

In this case again, the Regulation intentions are concentrating litigation before the courts of one State.

Nonetheless, an agreement between the partner is always needed, while as to matrimonial property the agreement of the spouses is needed only in some cases.

In fact, it is generally agreed that cases of dissolution or annulment of a registered partnership fall outside the scope of Regulation 2201/2003. Thus, the opportunity of a reference as in Regulation 2016/1103, to common grounds of jurisdiction to decide the 'principal' matter is not possible.

Some Member States provide special provisions for the dissolution or annulment of a registered partnership.

Other member States apply the same jurisdictional rules set out for divorce or legal separation.

V. THE AGREEMENT.

With the effective date of the Property Regimes Regulations, it is possible to arrange a planning of property relations which are internationally involved.

Actually, the party autonomy provided in the EU Regulations on family matters can facilitate the consolidations of proceedings in related family matters.

Divorce proceedings founded on Article 3 of Regulation 2201/2003 may be unified with those relating to maintenance obligations and matrimonial property regimes through the application of the following rules:

- Article 5 of Regulation 2016/1103, which automatically connects divorce proceedings with proceedings on related matters of matrimonial property or allows connecting the proceedings on the basis of the spouses' choice-of-court agreements

- Article 4(1)(c)(i) of Regulation 4/2009, which enables the spouses or former spouses to confer jurisdiction on maintenance matters to the court which has jurisdiction to settle their dispute in matrimonial matters.

It is expected that choice-of-court agreements are mainly agreed upon before a dispute actually arises (e.g., immediately after the marriage or in an original matrimonial property agreement).

According to the Regulation 2016/1103 the parties may conclude a choice-of-court agreement for proceedings concerning matrimonial property in case of divorce before the court is seised.

This is supported in Article 5(3), which states that Article 7(2) must be complied with whenever the agreement 'is concluded before the court is seised'.

However, since Regulation 2201/2003 does not allow a prorogation of court, the parties at the pre-dispute stage cannot foresee which court will exercise jurisdiction in all subject matters. Regulation 2201/2003, as is well known, provides for uniform rules to settle conflicts of jurisdiction between Member States, and lay down a multitude of fora in Article 3, whereas it does not allow the spouses to designate the competent court by common agreement.

Consequently, even the operation of Article 4 of the Maintenance Regulation is weakened.

The parties may will agree, according to Article 4(1)(c)(i) of regulation 4/2009 to concentrate maintenance proceedings and property regimes proceedings before the courts which have jurisdiction for the latter.

However, they are not able to secure, by way of agreement, the court of the State that has jurisdiction. As a matter of fact, the court ruling on matters of matrimonial property which arise in connection with an application for divorce or legal separation may not be determined in advance.

It is essential that the parties are aware of the fact that such an agreement can encourage the rush to the courthouse or abusive tactics and that the spouse may rush to file the claim before the court that will apply the most beneficial substantive rules concerning the financial consequences of their divorce.

The same conclusions are valid for Article 5 of Regulation 2016/1104, unless the national rules regarding the jurisdiction over the dissolution or annulment of registered partnerships provides for a choice of court or otherwise ensure that the courts of a certain Member State have jurisdiction.

In order to come to the agreement, Article 5(2) combined with Article 7(2) wants that when 'concluded before the court is seised', the consensus shall be 'expressed in writing and dated and signed by the parties'.

Additionally, 'any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing'.

Consequently, no particular form is required when the agreement is concluded during the proceedings.

Once the court is seised under Regulation 2201/2003 or for the dissolution of the partnership both spouses or partners can accept the court extending its jurisdiction in order to cover the connected property regimes matter.

The rule suggests that the agreement can also be signed during the course of the proceedings but does not differentiate between two situations that could abstractly arise: the first, concerns the agreement prior to the commencement of the matrimonial proceedings, but subsequent to the commencement of the matrimonial proceedings; the second, concerns the agreement prior even to the commencement of the matrimonial proceedings, and therefore substantially a prenuptial agreement.

Without any specific indication in the Property Regimes Regulations, it is reasonable [4]to argue that, in the first case, the agreement may be tacit (being realized through the acceptance of the jurisdiction wrongly chosen by the party bringing the action) while in the second case, since article 7 limits the forum scene to the courts of the member states whose law is applicable or of conclusion of the marriage, that of Article 5(2) is in fact not an agreement by which the authorities of any member state can be designated but only those on the list contained in the same paragraph 2 of Article 5, since we are still moving in the area of jurisdiction by connection between the two matters (matrimonial and patrimonial).

4 See Bruno P.: *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019.

On the contrary, the choice of court agreement referred to in Article 7 shall apply only in the cases referred to in Article 6, i.e. those cases in which there is no connection with a succession or matrimonial

BIBLIOGRAPHY

BRUNO P.: *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019.

VIARENGO I.: *Jurisdiction in cases of divorce, legal separation or marriage annulment [in cases of dissolution or annulment*, in *The EU Regulations on the Property Regimes of International Couples – A Commentary*", p. 67, edited by I. VIARENGO, P. FRANZINA, Elgar Commentaries in Private Internationa Law, 2020.

FAMILY HOME RIGHTS IN DIVORCE

DERECHOS SOBRE LA VIVIENDA FAMILIAR EN EL DIVORCIO

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 64-75

Gabriele
CARAPEZZA
FIGLIA

ARTÍCULO RECIBIDO: 5 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The essay offers a "map" of the conflicting interests in allotting the family home after separation or divorce and their governing rules. The critical review of the judicial doctrine, which considers the preservation of the domestic "habitat" as an exclusive criterion, leads the Author to redefine the axiological foundation of the current legislation, to put forward a different interpretation able to optimize the promotion of child's best interest, without affecting competing interests in an unreasonable and disproportionate way.

KEY WORDS: Family home; interests; balance.

RESUMEN: *El ensayo ofrece un "mapa" de los intereses en conflicto en la asignación de la vivienda familiar después de la separación o el divorcio y sus reglas de gobierno. La revisión crítica de la doctrina judicial, que considera la preservación del "hábitat" doméstico como criterio exclusivo, lleva al autor a redefinir el fundamento axiológico de la legislación vigente, para proponer una interpretación diferente capaz de optimizar la promoción del interés superior del menor, sin afectar los intereses en competencia de una manera irracional y desproporcionada*

PALABRAS CLAVE: *Vivienda familiar; intereses; equilibrio.*

TABLE OF CONTENTS: I. INTRODUCTORY REMARKS.- II. INTERPRETATION OF THE ALLOCATION RULES AND LEGAL MODELS ON CUSTODY OF THE OFFSPRING.- III. REDEFINITION OF THE AXIOLOGICAL FOUNDATION OF THE ALLOCATION AND "CONCRETE" BALANCING OF COMPETING INTERESTS.- IV. WHAT CONCEPT OF "FAMILY HOME"?- V. JUDICIAL HARMONIZATION OF CONFLICTING INTERESTS: PARTIAL ALLOCATION AND PREVALENCE OF THE NON-CUSTODIAL PARENT EXISTENTIAL NEEDS.

I. INTRODUCTORY REMARKS.

The family home is a place of affection and the centre of interests and customs where family life is expressed and carried on. The fate of the family home after separation or divorce involves the interests of numerous stakeholders: parents, children and any third party owners[1].

The breakup of the couple requires all legal systems to address the issue of the family home[2]. A comparative survey reveals that, on the one hand, conflict resolution rules designed exclusively for personal or property situations are inadequate and, on the other hand, flexible and differentiated forms of protection are needed in actual individual cases[3].

The choice of the "right civil remedy"[4] must be informed by the criteria of proportionality, in quantitative terms, and reasonableness, in qualitative terms[5].

1 An accurate and in-depth analysis of the main issues raised by the allocation of the family home can be found in Frezza, G.: *I luoghi della famiglia*, Torino, 2004; Id.: *Mantenimento diretto e affidamento condiviso*, Milano, 2008; most recently, Id.: *Il nuovo art. 337* sexies *c.c.: appunti e spunti*, *Arch. giur.*, 2014, p. 163 ff. In the doctrine following the adoption of art. 155 *quater* of the Italian Civil Code, see also Quadri, E.: "Affidamento dei figli e assegnazione della casa familiare: la recente riforma", *Familia*, 2006, p. 395 ff.; Id.: "La crisi familiare e le sue conseguenze", *Rass. dir. civ.*, 2013, p. 154 ff.; Cubeddu, M. G.: "L'assegnazione della casa familiare", in Aa.Vv.: *Il nuovo diritto di famiglia*, I, *Matrimonio, separazione e divorzio*, directed by Ferrando, Bologna, 2007, p. 839 ff.; Cubeddu., M. G.: "L'assegnazione della casa familiare", in Patti, S. and Rossi Carleo, L.: *L'affidamento condiviso*, 2006, p. 181 ff.; Bianca, C. M.: *Diritto civile*, 2.1, *La famiglia*, Milano, 2014, p. 220 ff.; Mantovani, M.: "*Casa familiare (assegnazione della)*", in *Enc. giur. Treccani*, VI, Roma, 2008, p. 1 ff.; Irti, C.: *sub* 155 *quater*, in Patti, S. and Rossi Carleo, L.: *Provvedimenti riguardo ai figli*, in *Comm. cod. civ.* Scialoja and Branca, continued by Galgano, Bologna-Roma, 2007, p. 260 ff.; Giacobbe, G. and Virgadamo, P.: *Il matrimonio*, II, *Separazione personale e divorzio*, in *Tratt. dir. civ.*, directed by Sacco, Torino, 2011, p. 282 ff.; Ferrando, G.: "L'assegnazione della casa familiare", in Id. and Lenti, L.: *La separazione personale dei coniugi*, in *Trattato teorico-pratico di diritto privato*, directed by Alpa and Patti, Padova, 2011, p. 309 ff.; Marini, R., *Il diritto all'abitazione nei rapporti familiari*, Napoli, 2012.

2 The expression is from Jemolo, A. C.: "La famiglia e il diritto", in *Ann. Sem. giur. Univ. Catania*, 1949, p. 47.

3 Irti, N.: *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, 2006, p. 4 talks about the interweaving of a "material" profile and an "ideal" profile.

4 For this expression see Perlingieri, P.: "Il «giusto rimedio» nel diritto civile", *Giusto proc. civ.*, 2011, p. 1 ff.

5 Perlingieri, P.: *o.l.u.c.*, notes the need for congruence between remedies and interests in the light of the criteria of reasonableness and proportionality. The Author also states that «the peculiarities of the

• Gabriele Carapezza Figlia
Full Professor of Civil Law, Head of the Department of Law, Lumsa Palermo. E-mail: g.carapezzafiglia@lumsa.it

Likewise as regards the fate of the family home in the wake of a marital crisis, it is necessary to seek "personalised solutions"[6].

II. INTERPRETATION OF THE ALLOCATION RULES AND LEGAL MODELS ON CUSTODY OF THE OFFSPRING.

The law governing the allocation of the family home must be interpreted in unison with regulatory models on custody of the children.

The legislative preference for sole custody is consistent with granting a right of residence to the parent awarded custody. In this case, the marital crisis leads to a qualitative transformation of the parental relationship, with the automatic "placement" of the child with the parent to whom the home is allocated and the granting of so-called "visiting rights" to the other[7].

If by contrast shared custody becomes the ordinary and preferred solution, in light of the child's right to maintain a balanced and continuous relationship with both parents[8], what happens to the family home also needs to be reconsidered. All the more so because divorce courts, in almost all European systems, are obliged to take account of whatever agreement may have been reached between the parents and then proceed, in some systems like Italy, solely to check that any such agreement is consistent with the interests of the children[9].

From this perspective, the position established by Italian caselaw needs to be reviewed. A stance that tends to favour the old schemes of custody awarded to a single parent and considers that the only way to achieve the child's interest is through habitual residence with one of the parents and the granting to the latter of the right to reside in what is already the family home[10].

concrete case» guide the choice of the remedy also «beyond the boundaries predefined by the legislator». In this methodological perspective see, *inter alia*, Perlingieri, G.: *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo*, Napoli, 2013, p. 84 ff.; Id.: "Alla ricerca del «giusto rimedio» in tema di certificazione energetica. A margine di un libro di Karl Salomo Zachariae", *Rass. dir. civ.*, 2011, p. 664 ff.; Id.: *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici*, 2nd ed., Napoli, 2011, particularly p. 85 ff.; Lepore, A.: *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»*, Napoli, 2012, particularly p. 167 ff.; Carapezza Figlia, G.: "Diritto all'immagine e «giusto rimedio» civile. Tre esperienze di *civil law* a confronto: Italia, Spagna e Francia", *Rass. dir. civ.*, 2013, p. 859 ff.; Id.: "Tutela dell'onore e libertà di espressione. Alla ricerca di un «giusto equilibrio» nel dialogo tra Corte europea dei diritti dell'uomo e giurisprudenza nazionale", *Dir. fam. pers.*, 2013, p. 1012 ff.

6 See Carapezza Figlia, G. and De Verda Y Beamonte, J. R.: "Interessi rilevanti nell'assegnazione della casa familiare. Un confronto tra le esperienze spagnola e italiana", *Dir. fam. pers.*, 2013, p. 267 ff.; Eid.: "Problemi dell'assegnazione della casa familiare nella giurisprudenza italiana e spagnola", *Foro nap.*, 2013, p. 19 ff.

7 See on this Quadri, E.: "Affidamento dei figli e assegnazione della casa familiare", cit., p. 395 ff.

8 As already stated by Patti, S.: "L'affidamento condiviso dei figli", *Fam. pers. succ.*, 2006, 302 f.

9 The judge, to encourage an agreed solution, can also postpone the adoption of custody measures to allow the spouses to reach an agreement, possibly through family mediation (art. 338 *octies* of the Italian Civil Code).

10 See Cass., 10 December 2014, no. 26060, *Foro it.*, 2015, I, c. 1544 ff.; Cass., 26 July 2013, no. 18131, in *Dejure* online, according to which "the rule of shared custody (...) does not exclude that the minor is placed

III. REDEFINITION OF THE AXIOLOGICAL FOUNDATION OF THE ALLOCATION AND "CONCRETE" BALANCING OF COMPETING INTERESTS.

A key step is to identify the foundation of the *ratio* underlying the allocation of the family home.

A restrictive vision, rooted in the caselaw of some continental European legal systems, identifies the *ratio* for allocation of the family home as the need to safeguard the preservation of the domestic *habitat*[11]. The consequence of this approach is to allocate the property to the parent with whom the children habitually live, even in cases of shared custody. The prevalent placement of the child makes it possible to identify the "residual family group", which deserves greater protection in terms of housing[12].

However, the *ratio* for allocation can be identified in a broad sense not only in the preservation of the *habitat* but in the protection of the child's housing interests[13]. Moreover, at a time of economic crisis such as the present, the child's interest in staying in the family home may conflict with the financial but also personal interests of the non-resident parent or third parties. It should not be forgotten that having to leave the family home is often a source of serious prejudice from an economic, social and moral point of view, especially for the former spouse who, by chance or life choices, has fewer means and who deprived of the family home would not be able to easily meet their own housing needs.

with one of the parents and that a specific regime of visits with the other parent is established (...), since it is evident that it is not materially possible, nor does it seem appropriate, for the minor to conduct his or her daily life with both parents, who are no longer cohabiting". The Italian Courts of merit consider that alternate custody deprives the offspring of a stable environment, resulting in a negative commuting between one parent and another, contrary to the best interests of the child. See, on this, Trib. Savona, 11th June 2014, no. 869, ined.; Trib. Messina, 27th November 2012, *Dir. Fam. pers.*, 2013, p. 165; Trib. Trani, 11th May 2010, no. 402, *Giur. mer.*, 2013, p. 1050; App. Milano, 30th March 2006, *Fam. Pers. Succ.*, 2006, p. 781. A supportive solution can be found in Trib. Ravenna, 21st January 2014, *Guida dir.*, 2015, 14, p. 55; Trib. min. Trieste, 28th February 2012, with comment by Irti, C.: *Dopo la fine della convivenza: case divise e condivise*, *Fam., pers. e succ.*, 2012, p. 424 f.

11 Cass., 3rd June 2014, no. 12346, in *Dejure* online; Cass., 15th July 2014, no. 16171, *ivi*; Cass., 30th March 2012, no. 5174, *Giust. civ.*, 2012, I, p. 1435; Cass., 22nd March 2007, no. 6979, *ivi*, 2008, I, 466. In this regard, see Finocchiaro, M.: "Casa familiare (attribuzione della)", in *Enc. dir.*, *Agg.* I, Milano, 1997, p. 271.

12 Cass., Sez. un., 26th July 2002, no. 11096, *Fam. e dir.*, 2002, p. 461, with note by Carbone, V.: "Assegnazione della casa coniugale: la Cassazione compone il contrasto giurisprudenziale sull'opponibilità ai terzi"; Cass., 29th August 2003, no. 12705, *Dir. fam. pers.*, 2003, p. 943 identify the *ratio* of the allocation of the family home with the protection of the "interest of the residual family group".

13 See, *ex multis*, Cass., 8th June 2012, no. 9371, in *Dejure* online; Cass., 4th July 2011, no. 14553, *Fam. pers. e succ.*, 2011, p. 657, with note by Irti, C.: *La casa familiare come* habitat *domestico*; Cass., 5th June 1990, no. 5384, *Giust. civ.*, 1990, I, p. 2900.

It is thus essential to proceed on the basis not of abstract assessments but a balance capable of identifying the most suitable solution for the actual individual case[14].

IV. WHAT CONCEPT OF "FAMILY HOME"?

The concept of the family home is the test of the inadequacy of any reconstruction that claims to have a solution for any possible conflict *a priori*.

If the protected interest is solely that of continuity of the offspring's living arrangements, the "family home" is not just any property suitable in theory for the general needs of the children but the residence where the family's life occurred while the parents lived together[15].

This concept of family home - based on the connotations of stability, habituality and continuity of the habitat - has a precise legal meaning[16]. The Italian courts have ruled out allocation if the house has not in fact constituted the place where family life occurs (for example, in cases where the children and the resident parent have long since moved elsewhere[17], the child has left home for study or work reasons[18] or the property is used only on an occasional or infrequent basis[19]) and

14 The compatibility between balance and hierarchy of values is supported by Perlingieri, P.: "Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti", *Rass. dir. civ.*, 1999, p. 787 ff., now in Id.: *L'ordinamento vigente e i suoi valori. Problemi del diritto civile*, Napoli, 2006, p. 333.; Id.: "I valori e il sistema ordinamentale «aperto»", *Rass. dir. civ.*, 2014, p. 1 ff.; Id. and Femia, P.: "Sistema, gerarchia, bilanciamento dei princípi", in Perlingieri, P.: *Manuale di diritto civile*, 7th ed., Napoli, 2014, p. 13 ff. An in-depth reading of the dialectic between values and norms in Femia, P.: "Segni di valore", in Ruggeri, L. (edited by): *Giurisprudenza della Corte europea dei diritti dell'uomo e influenza sul diritto interno*, Napoli, 2012, p. 83 ff.

15 Cass., 4th July 2011, no. 14553, cit.; Cass., 20th January 2006, no. 1198, *Giur. it.*, 2006, p. 1595, which adds that "in order for the family home to be assigned to one of the separated or divorced spouses (...) it must be *the same home* in which the life of the family took place when it was united" (italics added); Cass., 16th July 1992, no. 8667, *Giust. civ.*, 1992, I, p. 3002. Among the Courts of merit see Trib. Matera, 24th November 2007, *Giur. mer*, 2008, p. 1609, which has the aberrant consequence of considering the assignee's right to enjoy the family home inalienable.

16 In doctrine, an objective notion of family home is welcomed by Trabucchi, A.: note to Cass., 19th May 1978, no. 2462, *Giur. it.*, 1978, I, 1, p. 2106 ff.; Quadri, E.: *La nuova legge sul divorzio*, II, *Presupposti. Profili personali e processuali*, Napoli, 1988, p. 213 ff.; following the 2006 reform see Frezza, G.: *Mantenimento diretto e affidamento condiviso*, cit., p. 144 f. With regard to the suitability of the housing interest to be objectified, see in this volume Migliaccio, E.: "La destinazione a casa familiare".

17 Cass., 8th June 2012, no. 9371, cit., considers to be legitimate the judgement of the Courts of merit which had denied the assignment of a house to a mother who, together with her daughter, had been away for about three years.

18 According to Cass., 22nd March 2012, no. 4555, *Foro it.*, 2012, I, c. 1384, in order to allocate the family home, the legally relevant notion of cohabitation coincides with the stable residence of the child at the home of one of the parents, so that the circumstance that the child – for study or work needs – has to go away from it for long periods, undermines the foundation of the institute.

19 In this perspective Cass., 4th July 2011, no. 14553, cit., with regard to a property purchased in a rustic state, object of completion works and used by the family, during the marriage, for the holidays. On the contrary, see Quadri, E.: "L'attribuzione della casa familiare in sede di separazione e divorzio", *Fam. e dir.*, 1995, p. 283; Cubeddu, M. G.: "L'assegnazione della casa familiare", cit., p. 34, who note that even the holiday home can represent a seasonal extension of the *habitat*.

will provide for revocation if the child's interest in continuity of *habitat* no longer exists (for example, a prolonged stay with the grandparents)[20].

However, the court's discretion should include power to nominate a different dwelling from that already in the family, when this - for example, due to the geographical location or state of repair[21] - is the choice that best meets the needs of the child or is better able to strike a balance with the needs of the parent not awarded custody. This is the solution suggested by the most recent Spanish caselaw, which is open to the possibility of nominating a separate house provided it is able to adequately (or even more adequately) meet the child's interests[22].

Moreover, the legal notion of a family home must be influenced the weight afforded to any agreement between parents by the most recent European rules on family crisis.

In all separation or divorce proceedings, the will of the parties is called upon to play a central role in the division between parents of the tasks of child support and care[23], including the identification of the residence at the outcome of the crisis[24]. Worth mentioning in this regard is Article 268 of the French Civil Code, as per its new wording, "In the context of consensual divorce, the fate of the dwelling shall be a matter for agreement. In other divorce proceedings, in the event of an agreement regarding the dwelling, the spouses may submit that agreement for the approval of the court". It should not be forgotten, among other things, that the free choice of family residence is considered one of the aspects of the right to respect for one's home enshrined in Article 8 of the European Convention on Human Rights.

Accordingly, it is necessary to reject an objective notion of a family home and embrace a subjective notion resulting from the agreement reached between the partners, possibly subject to a determination by a court that it meets the interests

20 Cass., 16th May 2013, no. 11981, *Guida dir.*, 2013, 33, p. 50.

21 Among the judgements of the Courts of merit see Trib. Modena, 24th November 2004, in *Dejure* online, which assigns the spouse who is the custodian of the offspring not the marital home, but a different apartment, owned by the husband, closer to the school attended by the younger daughter; as well as App. Perugia, 24th-30th June 1989 (reformed by Cass., 16th July 1992, no. 8667, *Giust. civ.*, 1992, I, p. 3002), which attributes the property where the foster spouse went to live after the crisis.

22 Reference is made to the case law carefully analysed in this volume by De Verda Y Beamonte, J. R.: "La atribución del uso de la vivienda familiar en casos de divorcio en España: la superación del Derecho positivo por la práctica jurisprudencial".

23 On the subject, see Di Gravio, V.: "Gli accordi tra genitori in sede di separazione" and Bellisario, E.: "Autonomia dei genitori tra profili personali e patrimoniali", in Patti, S. and Rossi Carleo, L. (edited by): *L'affidamento condiviso*, Milano, 2006, respectively pp. 55 ff. and 83 ff.

24 In these terms see Corte cost., 21st October 2005, no. 394, *Foro it.*, 2007, I, c. 1083 ff. See also Corte cost., 13th May 1998, no. 166, *Dir. fam. pers.*, 1998, p. 1349 ff., according to which the content of the parental obligation to maintain the offspring includes first of all "the predisposition and conservation of the domestic environment, considered as a centre of affection, interests and habits of life". See, early, Corte cost., 27th July 1989, no. 454, *Foro it.*, 1989, I, c. 3336, which clarify that the family home "cannot be confined to the building, deprived of the normal supply of furniture and furnishings for the daily use of the family".

of the offspring[25]. If the parents can make an agreement (approved by the court) that envisages nominating a dwelling other than the original one, there is no reason why the court could not adopt that solution even at the behest of only one of the parents, when it is a decision that strikes the best balance between all the interests at stake in the dispute.

In other words, courts should be permitted to nominate a house that, although not the *habitat* of the family while all the members lived together, appears in the circumstances of the case to be a place conducive to the harmonious development of the children's personality[26].

V. JUDICIAL HARMONIZATION OF CONFLICTING INTERESTS: PARTIAL ALLOCATION AND PREVALENCE OF THE NON-CUSTODIAL PARENT EXISTENTIAL NEEDS.

The need to strike the best balance between all the interests at stake in the actual case - including those of the parent (owner or co-owner of the property but) not living with the children - throws up some interesting solutions developed by the courts.

First of all, partial allocation comes to mind. In cases where property can be split or easily subdivided, the court may limit allocation to the part that is strictly necessary to satisfy the living needs of the children, taking into account the living needs of the other spouse and the possibility of separate and independent enjoyment of the property[27]. Partial allocation seems appropriate especially in the case of absence of conflict between the parents, given the material proximity of the living quarters. In these cases it is a solution that fosters the principles underlying shared custody because it enables children to maintain equal and meaningful relationships with both parents[28].

25 According to Giacobbe, G. and Virgadamo, P.: *Il matrimonio*, II, *Separazione personale e divorzio*, cit., p. 282 f., the discipline introduced by l. no. 54 of 2006 and today merged into art. 337 *ter* of the Italian Civil Code offers the starting point for a subjective view of the family home "resulting from the parents' agreement, implemented during the separation".

26 See, on this, Ruscello, F.: "Il rapporto genitori-figli nella crisi coniugale", *Nuova giur. civ. comm.*, 2011, II, p. 405.

27 In this way, Cass., 17th December 2009, no. 26586, *Dir. fam. pers.*, 2010, 674. See also Cass., 11th November 2011, no. 23631, *Arch. loc.*, 2012, 165, according to which partial allocation is admissible not only if the property is independent and distinct from that intended for the family's home, but also whether the latter "exceeds the needs of the family by extension and is easily divisible"; Cass., 11th November 1986, no. 6570, *Nuova giur. civ. comm.*, 1987, I, 361, which emphasizes the judicial discretion in limiting the allocation of the family home to the part necessary for the needs of the family, in order to "take into account the life needs of the other spouse".

28 Among the Courts of merit, Trib. Bari, 17th November 2010, in *Dejure* online and Trib. Napoli, 21th November 2006, *Foro it.*, 2007, I, c. 237 attribute to the partial allocation the purpose of facilitating the meeting of children with both parents

Rotational allocation is another model, further to which the child is the assignee of the house where the parents alternate according to shifts determined by a veritable schedule. While shared parenting, i.e. the division of the offspring between parental residences, has proved to be contrary to the harmonious growth of the children, rotational allocation ensures that children have a stable *habitat,* with the ensuing preservation of relationships and the usual environment[29].

But, more generally, important questions are raised by cases in which the parent not awarded custody has a personal interest in living in the family home that outweighs those of the children[30]. For example, the situation of a seriously ill spouse or one suffering from a disability, who would suffer a disproportionate loss as a result of being uprooted compared to the advantage that the children would gain by remaining in the home[31]. In these instances, not only the parent's interest as an owner (normally subordinate) but also that parent's existential needs (arguably paramount) must be balanced with the children's interest.

In conclusion, the "mapping" of the interests involved in what becomes of the family home in the wake of a marital crisis discloses a very varied picture, which requires interpreters to avoid any automatism in order to accommodate flexible solutions capable of optimising the promotion of the children's personality without unreasonably and disproportionately sacrificing the competing interests in play.

29 See Dell'Anna Misurale, F.: "La casa nella disgregazione della famiglia (adeguatezza e proporzionalità delle tutele)", in Dell'Anna Misurale, F. and Viterbo, F. G. (edited by): *Quaderni di «Diritto delle successioni e della famiglia»*, Napoli, 2018, 263 ff.

30 See, on this, Auletta, T.: *sub* art. 155 *quater*, in Balestra, L. (edited by): *Della famiglia*, I, Artt. 74-176, in *Comm. cod. civ.*, directed by Gabrielli, Milano, 2010, cit., p. 728 s., which recalls cases of handicap or serious infirmity.

31 See Cass., 24th August 1990, no. 8705, *Nuova giur. civ. comm.*, 1991, I, p. 92 ss., which verbatim excludes the allocation of the family home "when the advantage of such stay (of the children), in light of the peculiarities of the case, is not *proportionate* to the burden of the solution for the non-assignee parent" (italics added); Cass., 30th August 1995, no. 9163, *Giur. it.*, 1996, I, p. 4, with note by Frezza, G., according to which the assignment to the foster parent is a preferential and not automatic criterion, intended to yield in front of the particular interest of the spouse who owns the property to stay there, due to the particular conditions of age and health. Particularly interesting App. Venezia, 6th March 2013, no. 25, *Fam. dir.*, 2013, p. 1009 ff., which does not attribute the enjoyment of the home to the parent cohabiting with the offspring, in consideration of the fact that the other "is blind and uses a dog for accompaniment. Therefore, a change of the house where the non-foster parent lives from when he was born and where he lived first with his parents and then with his sister and then with his wife and daughter, would have created considerable problems in the organization of his life which were absolutely unsustainable". According to the Venetian decision "in the face of an interest of the minor to remain in the marital home and other precise, concrete, appreciable and worthy interests to protect a disable parent (…), the Court believes that the latter has to prevail".

BIBLIOGRAPHY

Auletta, T.: *Sub* art. 155 *quater*, in Balestra, L. (edited by): *Della famiglia*, I, Artt. 74-176, in *Comm. cod. civ.*, directed by Gabrielli, Milano, 2010, p. 728 ff.

Bianca, C. M.: *Diritto civile*, 2.1, *La famiglia*, Milano, 2014, p. 220 ff.

Carapezza Figlia, G. and De Verda y Beamonte, J. R.: "Interessi rilevanti nell'assegnazione della casa familiare. Un confronto tra le esperienze spagnola e italiana", *Dir. fam. pers.*, 2013, p. 267 ff.

Carapezza Figlia, G. and De Verda y Beamonte, J. R.: "Problemi dell'assegnazione della casa familiare nella giurisprudenza italiana e spagnola", *Foro nap.*, 2013, p. 19 ff.

Carapezza Figlia, G.: "Diritto all'immagine e «giusto rimedio» civile. Tre esperienze di *civil law* a confronto: Italia, Spagna e Francia", *Rass. dir. civ.*, 2013, p. 859 ff.

Carapezza Figlia, G.: "Tutela dell'onore e libertà di espressione. Alla ricerca di un «giusto equilibrio» nel dialogo tra Corte europea dei diritti dell'uomo e giurisprudenza nazionale", *Dir. fam. pers.*, 2013, p. 1012 ff.

Cubeddu, M. G.: "L'assegnazione della casa familiare", in Aa.Vv.: *Il nuovo diritto di famiglia*, I, *Matrimonio, separazione e divorzio*, directed by Ferrando, Bologna, 2007, p. 839 ff.

Cubeddu., M. G.: "L'assegnazione della casa familiare", in Patti, S. and Rossi Carleo, L.: *L'affidamento condiviso*, 2006, p. 181 ff.

Dell'Anna Misurale, F. and Viterbo, F. G. (edited by): *Quaderni di «Diritto delle successioni e della famiglia»*, Napoli, 2018, 263 ff.

Dell'Anna Misurale, F.: "La casa nella disgregazione della famiglia (adeguatezza e proporzionalità delle tutele)", in Dell'Anna Misurale, F. and Viterbo, F. G. (edited by): *Quaderni di «Diritto delle successioni e della famiglia»*, Napoli, 2018, 263 ff.

Di Gravio, V.: "Gli accordi tra genitori in sede di separazione" and Bellisario, E.: "Autonomia dei genitori tra profili personali e patrimoniali", in Patti, S. and Rossi Carleo, L. (edited by): *L'affidamento condiviso*, Milano, 2006, respectively pp. 55 ff. and 83 ff.

Femia, P.: "Segni di valore", in Ruggeri, L. (edited by): *Giurisprudenza della Corte europea dei diritti dell'uomo e influenza sul diritto interno*, Napoli, 2012, p. 83 ff.

Ferrando, G.: "L'assegnazione della casa familiare", in Id. and Lenti, L.: *La separazione personale dei coniugi*, in *Trattato teorico-pratico di diritto privato*, directed by Alpa and Patti, Padova, 2011, p. 309 ff.;

Frezza, G.: *I luoghi della famiglia*, Torino, 2004.

Frezza, G.: *Il nuovo art. 337* sexies *c.c.: appunti e spunti*, *Arch. giur.*, 2014, p. 163 ff.

Frezza, G.: *Mantenimento diretto e affidamento condiviso*, Milano, 2008.

Giacobbe, G. and Virgadamo, P.: *Il matrimonio*, II, *Separazione personale e divorzio*, in *Tratt. dir. civ.*, directed by Sacco, Torino, 2011, p. 282 ff.

Irti, C.: *Sub* 155 *quater*, in Patti, S. and Rossi Carleo, L.: *Provvedimenti riguardo ai figli*, in *Comm. cod. civ.* Scialoja and Branca, continued by Galgano, Bologna-Roma, 2007, p. 260 ff.;

Irti, N.: *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, 2006, p. 4 talks about the interweaving of a "material" profile and an "ideal" profile.

Jemolo, A. C.: "La famiglia e il diritto", in *Ann. Sem. giur. Univ. Catania*, 1949, p. 47.

Lepore, A.: *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»*, Napoli, 2012, particularly p. 167 ff.

Mantovani, M.: "Casa familiare (assegnazione della)", in *Enc. giur. Treccani*, VI, Roma, 2008, p. 1 ff..

Marini, R., *Il diritto all'abitazione nei rapporti familiari*, Napoli, 2012.

Migliaccio, E.: "La destinazione a casa familiare".

Patti, S.: "L'affidamento condiviso dei figli", *Fam. pers. succ.*, 2006, 302 f.

Perlingieri, G.: "Alla ricerca del «giusto rimedio» in tema di certificazione energetica. A margine di un libro di Karl Salomo Zachariae", *Rass. dir. civ.*, 2011, p. 664 ff.;

Perlingieri, G.: *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo*, Napoli, 2013, p. 84 ff.;

Perlingieri, G.: *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici*, 2nd ed., Napoli, 2011, particularly p. 85 ff.;

Perlingieri, P.: and Femia, P.: "Sistema, gerarchia, bilanciamento dei princípi", in Perlingieri, P.: *Manuale di diritto civile*, 7th ed., Napoli, 2014, p. 13 ff.

Perlingieri, P.: "I valori e il sistema ordinamentale «aperto»", *Rass. dir. civ.*, 2014, p. 1 ff.;

Perlingieri, P.: "Il «giusto rimedio» nel diritto civile", *Giusto proc. civ.*, 2011, p. 1 ff.

Perlingieri, P.: "Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti", *Rass. dir. civ.*, 1999, p. 787 ff., now in Id.: *L'ordinamento vigente e i suoi valori. Problemi del diritto civile*, Napoli, 2006, p. 333.;

Quadri, E.: "Affidamento dei figli e assegnazione della casa familiare: la recente riforma", *Familia*, 2006, p. 395 ff.;

Quadri, E.: "La crisi familiare e le sue conseguenze", *Rass. dir. civ.*, 2013, p. 154 ff.;

Quadri, E.: *La nuova legge sul divorzio*, II, *Presupposti. Profili personali e processuali*, Napoli, 1988, p. 213 ff.; following the 2006 reform see

Ruscello, F.: "Il rapporto genitori-figli nella crisi coniugale", *Nuova giur. civ. comm.*, 2011, II, p. 405.

AGREEMENTS REGARDING THE PROPERTY RELATIONS OF TRANSNATIONAL COUPLES AND THEIR EFFECTS UNDER THE APPLICATION OF THE TWIN REGULATIONS*

ACUERDOS SOBRE LAS RELACIONES ECONÓMICAS DE LAS PAREJAS TRANSNACIONALES Y SUS EFECTOS BAJO LA APLICACIÓN DE LOS REGLAMENTOS GEMELOS

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 76-109

This work is carried out in execution of the European Project EU-FamPro - 101008404 *E-training on EU Family Property Regimes,* and in the framework of Research Group SEJ-235, attached to the Research Centres CIDES and CEIA3.

Marie José
CAZORLA
GONZÁLEZ

ARTÍCULO RECIBIDO: 13 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: It is a true and verifiable fact that the family institution has evolved over recent decades in Europe and throughout the world, but not uniformly or at the same time. This is because it is influenced by social and cultural connotations specific to each State. All of which are respected under EU Regulations 2016/1103 and 2016/1104.

This work analyses the Twins Regulations, that gives the couples the possibility of choosing the jurisdiction (art. 7) and applicable legal system underpinning the property consequences of the marriage and registered partnerships (art. 22.1). However, we try to show you these rules absolute freedom of choice is not granted to the parties, because this freedom is conditional. This freedom of choice is limited for several reasons that we analysed in this paper.

KEY WORDS: Cross-border couples; property relations; agreement; applicable law; twin Regulations.

RESUMEN: *Es un hecho cierto y comprobable que la institución familiar ha evolucionado durante las últimas décadas en Europa y en todo el mundo, pero no de manera uniforme ni al mismo tiempo. Esto se debe a que está influenciado por connotaciones sociales y culturales propias de cada Estado. Todo lo cual se respeta según los Reglamentos de la UE 2016/1103 y 2016/1104.*

Este trabajo analiza los Reglamentos gemelos, que dan a las parejas la posibilidad de elegir la jurisdicción (art. 7) y el ordenamiento jurídico aplicable que sustenta las consecuencias patrimoniales del matrimonio y las uniones registradas (art. 22.1). Sin embargo, tratamos de mostrarles que la libertad de elección que se le otorga a las partes no es absoluta sino condicional. Esta libertad de elección está limitada por varias razones que analizamos en este artículo.

PALABRAS CLAVE: *Parejas transfronterizas; relaciones económicas; acuerdos; ley aplicable; reglamentos gemelos.*

I. EQUAL TREATMENT THROUGH SEPARATE REGULATIONS IN THE PROPERTY RELATIONS OF CROSS-BORDER COUPLES.

The Regulations 1103/2016 and 1104/2016, which came into force on May 29, 2019[1], share the same structure, objectives and practically all of their literality, although the first regulates matrimonial property regimes while the second enshrines the property consequences of registered partnerships, following the principle of equality in the exercising of the rights that correspond to it, both for the spouse and for the registered partner.

Both Regulations, as we can see, constitute a further advance towards the unification of private international family law, by determining a personal, material, temporal and territorial scope of application, directed more to the creation of a uniform framework for conflicting rules[2], allowing those issues that arise within the cross-border family to be resolved, than to the unification of its substantive norms.

And although both rules are binding in their entirety, they are only directly applicable in those Member States participating of the enhanced cooperation in the field of jurisdiction, applicable law, and the recognition and enforcement of

1 Council Regulation (EU) 2016/1103 of 24th June 2016, establishing enhanced cooperation in the field of jurisdiction, applicable law, and the recognition and enforcement of decisions on matrimonial property regimes, and Regulation (EU) 2016/1104 of the Council of 24th June 2016, which establishes enhanced cooperation in the field of jurisdiction, applicable law, and the recognition and enforcement of decisions on the property consequences of registered partnerships.

2 Dicey, Morris and Collins: *The Conflict of Laws*, 15th ed., Sweet & Maxwell Ltd, October 2012, Vol. 2, p. 37.

• Marie José Cazorla González
Senior Lecturer (Full Professor) of Civil Law (SEJ235-CIDES-CEIA3), University of Almeria. E-mail: mcazorla@ual.es

decisions relating to the property regimes of international couples, both in matters of matrimonial property regimes and the property consequences of registered partnerships, under Decision (EU) 2016/954, or by virtue of a decision adopted in accordance with Article 331, section 1, second and third paragraph of the TFEU (Whereas 13).

And as a common element they both refer only to cross-border situations, leaving any purely national case out of their scope[3]

Consequently, when evaluating a specific case, we must pay attention to the criteria that will define its cross-border nature (or not), and only when we are in the first scenario, should we determine the repercussion based on the criteria that both European Regulations establish.

This repercussion will be assessed based on the relationship of the parties. If we are dealing with a cross-border marriage, Regulation 2016/1103 will apply whereas, if it is a cross-border registered partnership, Regulation 2016/1104 will be applicable.

1. Equal treatment and non-discrimination without equalization by analogy.

The option of having two Regulations, popularly known as The Twins, is due to the recognition of giving each institution its place, but without identifying them in an analogous way, thus following the line established both by the European Court of Justice and by the jurisprudence of other Member States, as in the case in Spain.

The jurisprudence of the Spanish Supreme Court has constantly established the absence of analogy between both realities[4], because it does not accept equality or assimilation of the registered partnership to marriage, but limited to applying certain protective norms in favour of the party that has been harmed by reason of cohabitation in order to avoid unjust harm to the weakest.

It is determined, therefore, that there is no identity between marriage and registered partnerships, since it would be unjustifiable not to respect the presumed will of the cohabitants in a voluntary legal agreement, either as a married couple or as a registered partnership, given that Spain admits and regulates both options. In such a way, those who joined together and yet could have married, did so precisely to be excluded from marital discipline and not to be subjected to it; therefore, acting against such a decision would not conform to the values and principles

3 Gallant, E.: "Le nouveant droit international privé européen des régimes patrimoniaux de couples", *Europe: actualité du droit communautaire,* 2017, Vol. 27, No. 3, pp. 5-10.

4 The majority opinion of our jurisprudence since 1992 with the STS (Supreme Court Judgement) of 21st October 1992.

established in our legal system; that is to say, there is no analogous application of the matrimonial regulations to extramarital unions because this would constitute a flagrant violation of the principle of individual freedom and would be equivalent to imposing legal effects on the partners that, at the time, they did not want.

Nor can we say that we find a legal loophole that protects the analogous recourse[5] - that there are countries that do not regulate this does not mean that they are not aware of the casuistry, simply that they do not have a registry where the union is recorded; nor does this mean that there is a void that must be filled by the legal framework that regulates marriage, as this would involve establishing a de facto regulatory application that runs contrary to exercising their freedom.

2. Jurisprudential arguments of the Spanish Supreme Court and the CJEU.

The Spanish Supreme Court, in ruling 3544/2012[6], affirms that *more uxorio* unions are more and more numerous, and constitute a social reality, which, when they meet certain requirements - voluntary constitution, stability, permanence over time, and with the public appearance of conjugal cohabitation similar to marriage - they have deserved recognition as a family modality, although there is no equivalence with marriage; consequently, the legal regime for this cannot be transposed, except for some of its aspects.

The awareness of the members of the union to operate outside the legal regime of marriage is not a sufficient reason for disregarding the important consequences that might occur in certain cases (...), it is necessary to declare that the de facto union is an institution that has nothing to do with marriage. And even more today, where many states regulate homosexual marriage and unilateral divorce, it is easy to argue that the de facto union is made up of people who do not want to enter into marriage, with its attendant consequences, at all. Therefore, in Spain, both the Supreme Court[7] and the Constitutional Tribunal[8] consider that the application of their own marriage rules by *analogia legis* should be avoided.

5 Álvarez Lata, N.: "Las parejas de hecho: perspectiva jurisprudencial", *Derecho privado y Constitución,* 1998, No. 12, pp. 7-68.

6 STS of 10th May 2012. Appeal number (836/2011). Roj: STS 3544/2012 - ECLI:ES:TS:2012:3.

7 STS, 1st Chamber, of 17th January 2003 (Appeal: 1270/1998), citing the judgments of 10th March 1998 and 27th March 2001. STS, 1st Chamber, of October 19th 2006 (Appeal 4985/1999, STS, of 12th September 2005, in the Plenary of the 1st Chamber, (Appeal 980/2002) and the STS, 1st Chamber, of 16th June 2011 (Appeal 10/2008).

8 Judgements of the Constitutional Court 184/1990 and 222/92. STC (Constitutional Court Judgement) of 222/1992. Both judgments determine that marriage and extramarital cohabitation are not for all purposes "equivalent realities" STC184/1990 (3rd legal basis). This doctrine of the Spanish Constitutional Court concludes that "de facto unions and marriage are different realities, so automatically translating the entire normative complex referring to marriage to the first reality is not possible, thus no injury to equality is appreciated in denying the requested license ", because a consequence relevant to the interests of this decision is that, between both realities, no reason is identified to justify a possible analogous application of the 15-day marriage license regulation to grant it to a member of a *de facto* (common-law) union. This

For its part, the CJEU, in its 2008 judgment in the case of Metock et al.[9], the spouse is likened to the common-law partner when the spouse, under the definition in Article 2.2 of Directive 2004/38, recognises the spouse as a member of the family on a level of equality and non-discrimination; however, this is not by analogous application since they are two different institutions (marriage and a registered partnership) that are formed with the freedom of the parties according to the formal aspects that define the legal agreement[10].

This line of argument from the CJEU can be found in other judgments where the Court of Justice has declared, in relation to the registered life partner, as regulated in the German Law on registered stable partnerships (*Gesetz über die Eingetrangene Lebenspartnerschaft*)[11], that comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses, and of the members of the registered stable partnerships, as these result from the applicable domestic laws that are pertinent in light of the object and the conditions for recognising the provision that the main lawsuit deals with, without such comparison having to verify whether the national law has carried out a general and complete legal equalisation of the relationship for the stable registered partnership as for a married couple (see the Römer judgment, section 43)[12].

This legal doctrine of the CJEU was the one that the Spanish Supreme Court established by majority opinion (STS, 21st October 1992)[13] in which, without ceasing to apply the principle of equality as spouses or as partners *more uxorio,* under Articles 32 and 39 of the Spanish Constitution, the application of the same legal regime was not equalised under analogy for the purpose following the break-up.

The argument is based on the principle of non-discrimination, which is the motivation for the Twin Regulations, developed to respect fundamental rights and to observe the principles recognized in the Charter of Fundamental Rights of the European Union in the application of both Regulations (Whereas 73 of Regulation 2016/1103 and Whereas 71 of Regulation 2016/1104).

harmonizes the jurisprudence of the Constitutional Court with the jurisprudence of the Spanish Supreme Court, whose First Chamber has constantly established an absence of analogy between both realities.

9 CJEU in the judgment of 25th July 2008, Metock et al., C-127/08, EU: C: 2008: 449, paragraphs 98 and 99. ECLI identifier: ECLI:EU:C:2008:449.

10 It should be noted that it is mostly the Member States who regulate the freedom of agreement, but with some differences in the formalization and timing of carrying them out. Thus, Austria, Croatia, Germany, Spain, Estonia, France, Greece, Finland, Italy, Lithuania, Latvia, Luxembourg, Poland, Malta, and the Netherlands, among other States, admit agreements both before and after the celebration of marriage.

11 Judgment of the Court of Justice (Fifth Chamber) of 12th December 2013, case C 267/12, Document 62012CJ026. ECLI identifier: ECLI:EU: C:2013:823.

12 Judgement of the Court (Grand Chamber) of 10th May 2011. Jürgen Römer v. Freie und Hansestadt Hamburg Case C-147/08. Judgement ECLI:EU: C:2011:286.

13 The majority opinion of our jurisprudence since 1992 with the STS (Supreme Court Judgement) of 21st October 1992.

II. PROPERTY CONSEQUENCES OF TRANSNATIONAL PARTNERSHIPS.

It is a true and verifiable fact that the family institution has evolved over recent decades in Europe and throughout the world, but not uniformly or at the same time. This is because it is influenced by social and cultural connotations specific to each State, all of which are deserving of respect under EU Regulations 2016/1103 and 2016/1104.

We appreciate this diversity in parallel in the legal regimes of marriage and registered partnerships in the different Member States of the EU, which present different regulations according to the national law[14], determining the family model and the legal regime of marriage or partnership, which is the reason there is no unification in this regard across Europe.

States such as Italy, Romania, Slovakia, Greece and Lithuania, only regulate marriage between people of different sexes; Croatia and Slovenia only regulate registered partnerships between people of the same sex; and in Denmark, Finland and Germany, people of the same or different sex are encouraged to marry, if able to do so, instead of forming an unmarried partnership[15]; while Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia do not regulate registered partnerships or same-sex marriage.

Thus, the heterogeneity and the dynamic family model that becomes contextualized in each society over time is evident, as can be seen in its evolution across European territory, where in the last two years, there have been developments in thirteen European countries that affect their law. Germany, Malta, the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, Luxembourg, Finland, Ireland, Austria (as of 2019) and the United Kingdom (including Northern Ireland as of 2019) have approved marriage between people of the same sex, granting the same rights in full to the family based on partnerships of the same or different sexes[16].

14 Pintens, W.: "Europeanization of Family Law", *Perspectives for the Unification and Harmonization of Family Law in Europe* (K. Boele-Woelki), Intersentia, Antwerp/Oxford/New York, 2003, pp. 9-11.

15 Cazorla González, M. J.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio después de la entrada en vigor del reglamento UE 2016/1104", *Revista Internacional de Doctrina y Jurisprudencia,* Volúmen 21st December 2019, pp. 92-93.

16 Cazorla González, M. J.: "Introduction", in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid, 2020, pp. 15-19. Recalls the judgement of the European Court of Human Rights case of Rees v. United Kingdom. Judgement 17th October 1986. ECHR. 1986/11. A married person changes sex but does not want to change the marital status to married even though the UK does not regulate same-sex marriage because he has a daughter. The court understands, the annotation in the birth register would entail some kind of change in the British system of recording civil status; the practice in other States has shown that this was not an inevitable consequence.

1. Matrimonial property regimes.

Although Regulation (EU) 2016/1103 does not modify the substantive law of the States, since its function is to strengthen cooperation in matters of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes, it is necessary to know the substantive law of each of the States involved, not only to resolve conflicts when they arise, but also as information prior to exercising the right of option that the parties have in many States to choose the applicable law, or when they do not do, then for the place of marriage or residence. In this sense, we understand that the law is more useful from a temporal and property point of view if it is informed and advised before the problem exists, which is the point the marriage crisis emerges or because of the death of one of the members, without any prior choice having been decided.

The differences between one applicable law and another in each State of the European Union are decisive for liquidating or dissolving the property regime, since the distribution in a community property regime is not the same as when assets liquidation takes place under the deferred or limited property separation or community property regime.

Currently, the 27 Member States have a legal property regime applicable in the absence of an agreement, so there is no legal vacuum in this regard and, consequently, once residence has been determined, or failing that, common nationality or, in the absence of this, the place of greatest connection, the legal property regime regulated in that country will be applied.

However, it must be borne in mind that, although the United Kingdom is no longer a Member State, its citizens have married European citizens, and although it is a State that did not participate in the enhanced cooperation since it already anticipated its departure, what is most important now is to know that neither England nor Wales regulate a legal property system, although Scotland does, which determines the separation of property in the absence of an agreement made when the couple marries. In this sense, it can be said that the advantage of the English system would be the possibility of devising a solution tailored for each couple, adapted to their individual needs, because in England and Wales, the statutes provide a framework in which judges can redistribute property[17].

Furthermore, matrimonial regimes have important and direct effects for third parties. Therefore, it is evident that the rights, powers, and responsibility of a third party with respect to one or both spouses, may depend on the substantive rules

17 Cooke, E. et al.: *Community of property. A regime for England and Wales*, London: The Nuffield Foundation/ Policy Press, 2006, 2, available at: https://www.reading.ac.uk/web/files/law/CommunityofProperty_Version021106.pdf

of the property regime. Consequently, a third party may be legally prejudiced by the application of one property regime over another.

One should consider that, although the legal matrimonial property regime in most European countries is the community of property (Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, and Slovenia), in others this is not the case, as in Denmark, Germany, Finland and Sweden where a deferred community property system governs; and still others have a separation of assets regime: Austria, Cyprus, Greece, Ireland or multi-legislative territory countries such as Scotland in the United Kingdom and the regions of Catalonia and the Balearic Islands in Spain[18].

In general, one should recall that Regulation (EU) 2016/1103 determines that, in the absence of choosing the law applicable to the matrimonial regime, the criteria for determining said choice are found in Article 26, and that they will not only apply to marriages celebrated after 29th January 2019, but also those celebrated previously where the spouses have chosen the applicable law and have expressly declared so, following the formalities established in the Regulation.

Given the premises, the results are diverse. Thus, a marriage between a French person and a Spanish person with Andalusian *civil residence* (*vencindad civil*), who decide to reside in one or another State, in the general scope of the regulation there are not many differences because both countries participate in enforced cooperation, they recognize marriage between people of the same or different sexes, with both regulating the principle of free choice of legal regime, and allowing agreements to be made before a notary with a 'community of property' as regime. Therefore, there would be no substantial differences *a priori*, beyond the limits and requirements established by each Code, and whose rules should be followed.

The situation can become complicated if we introduce a country like Spain, with multiple regulations applicable both to matrimonial property regimes and to the diversity of de facto partnerships that exist today. This means that when a citizen of any Member State marries a Spanish person, or when two citizens move to Spain to live, depending on their residence (by birth or by continuous residence – "vecindad civil")[19], the applicable legal regime will be different. For example, a Finn and a Spanish woman (in a registered partnership under Finnish law) with Catalan civil residency (Law 25/2010 of 29th July) are nationals of countries that participate in enhanced cooperation, recognize and regulate

18 https://www.euro-family.eu/eu-database

19 Pérez Vallejo, A. M. and Cazorla González, M.J.: Spain, pp. 610-657, *Family Property and Succession in EU Member States National Reports on the Collected Data* (ed. L. Ruggeri, I. Kunda, S. Winkler), *Sveu□ilište u Rijeci, Pravni fakultet*/University of Rijeka, Rijeka, 2019. https://psfes.euro-family.eu/pagine-15-results

marriages and domestic partnerships. between people of the same and different sexes and have 'separation of property' as the established legal regime, although since 2017 a Finnish registered partnership can become a marriage if the parties file a joint application in the Civil Registry; however, if they decide not to do so, the parties continue to live as a registered partnership. New partnerships can no longer register, while in Catalonia they can register through the Permanent Partnership Registry. Therefore, they can register in the Catalonian Registry, and their relationship will be recognized in Finland.

2. Property consequences of cross-border registered partnerships.

The Regulation (EU) 2016/1104, following the provisions of Article 3.1 b), regulates only the property consequences of registered partnerships with cross-border repercussions, regardless of the country where they are registered. Such patrimonial effects are defined as the "set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution".

Another aspect to assess will be the neutrality of the EU Regulation with respect to the inclusion or not of same-sex couples, as this implies that in all cases arising related to their property regime, it will be essential to resolve the prior question of whether or not they are included in its scope of application, a matter that will be resolved differently depending on the EU Member State where the dissolution of the partnership occurs, that this knows about the succession of one of the members of that couple, where they want to make the marriage contract, etc.[20].

The truth is that one of the fundamental problems of registered partnerships is the lack of agreement in the property area when the partners want to separate. The regulation of the property consequences of these partnerships varies greatly from State to State, even more so if one considers that these consequences include not only the possible property regime that may have been created when the partnership was formed, but also other property consequences that may derive from having had a life in common, such as nourishment or a pension due to an imbalance with the other member, or common children, the fate of the home and the family furnishings, or the possible inheritance rights of the surviving member with respect to the deceased's estate. To this can be added other issues, such

20 Soto Moya, M.: *Uniones transfronterizas entre personas del mismo sexo*, Tirant lo Blanch, Valencia, 2013, pp. 17-32.

as the possibility of claiming compensation for damages due to the death of the partner or the possibility of subrogation in the renting of the family home[21].

Let's look at an example dealing with the differences between an Austrian and a Latvian, where the State of the latter not only does not regulate registered or unregistered couples, but only recognizes heterosexual marriage and, moreover, does not participate in enhanced cooperation. Here, we must answer two questions: on the one hand, in the absence of a choice of applicable law, could the Austrian or Latvian law apply if the couple settled in Austria? The answer is affirmative in accordance with paragraph 1 of Article 26, and the separation of property would govern in the absence of an agreement. Nevertheless, they might get married in Austria and then move to Latvia and take up residence.

In such a case, as a Member State, it cannot claim to consider same-sex marriage as a matter of public order because the free movement of people within Community territory is a limit that cannot be violated. Therefore, when it comes to liquidating the assets, it is not the same to apply the property separation system established in Austria as the community property system that is applied in Latvia, and the Latvian court could end up having the jurisdiction to resolve it by heeding Austrian law, since the marriage was validly celebrated in a Member State.

The fundamental difference with respect to matrimonial property regimes is that the members of the registered partnership do not have a legal framework in the absence of an agreement (or pact) that attributes property consequences. That is why we find that jurisprudence has resorted to concepts such as 'unjust enrichment' to compensate for the economic imbalances that may have arisen from the dissolution of the partnership, because as we have seen in the previous section, it is not possible to apply marriage provisions by analogy.

III. THE FREEDOM OF CHOICE IN THE PROPERTY RELATIONSHIPS OF CROSS-BORDER COUPLES.

Assessing the impact of freedom of choice on regulating relationships between individuals, generated in the European legal framework and configured in the field of national and international private law[22], there is a marked plurality of laws on civil matters that coexist on an equal footing.

The consequences of such pluralism are the conflicts of laws that arise from the existence of multi-localized private-legal relationships, from the moment that

21 Cebrian Salvat, M. A.: "The property consequences of unregistered couples in Spanish private international law", *Cuadernos de Derecho Transnacional*, March 2018, Vol. 10, No. 1, pp. 127-143.

22 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations on Matrimonial and Patrimonial Property,* Oxford, March, 2018, p. 7.

they present elements of contact, subjective or objective, with at least two of the legal systems that coexist in Europe, whose heterogeneous private relations affect Interregional Law when the issue arises between two internal legal systems in a multi-legislative State.

Faced with this plural reality, solutions must be found when a conflict between rules arises, respecting the equality between the civil legal systems, applying both Regulations, which introduce freedom of choice as the preferred criterion when determining both the competent court and the applicable law[23].

From our point of view[24], there are more advantages than disadvantages derived from applying the Regulations under freedom of choice than in the absence of choice by the parties, because their economic interests will be more appropriately supported both by their agreeing on the court and on the applicable law, provided that they are informed before each agreement on the limits, consequences, and requirements for its validity that are required before carrying it out, avoiding confusion that eventually end up in the opposition of one of the parties, or even in totally or partially invalidating the agreement, which would not produce the intended effects either because it is null or void, or because it causes harm to third parties in good faith; or, because being valid, it is ineffective (when it is necessary to redress the injury or harm suffered by one of the contracting parties as a result of the agreement entered into).

The areas of the Twin Regulations under which it is possible for cross-border marriages and registered partnerships to establish an agreement are the agreement to choose the forum, the choice of the applicable law, and any property agreement of the cross-border couple by which they organize the property consequences of their marriage or registered partnership.

To find out which court and which applicable law have jurisdiction, it is necessary to analyse the two regulations from an international perspective, as a consequence of the different nationality of its members, their residence in a country other than that of their nationality, the possession of property in different States of the European Union, or where the divorce, dissolution of the partnership, or death of one of the members took place, if in countries other than those of origin.

1. Choice of forum agreement.

Under Article 7 of both Regulations, the spouses or members of the registered partnership are allowed to make use of their freedom of choice to agree on which

23 De Sousa Gonçalves, A. S.: "El principio de la autonomía de la voluntad en los reglamentos europeos sobre derecho de familia y sucesiones", *Diario La Ley*, 2016, No. 8835, p. 78.

24 Cazorla González, M.J. and Soto Moya, M.: "Material, territorial, and temporal scope of the twin Regulations", Chapter IV, Intersentia, 2021 (in press).

court will have jurisdiction to hear questions relating to their matrimonial property regime or property consequences of their partnership.

However, this freedom of choice is limited for several reasons:

- Firstly, it will only be possible to submit to the Courts of a State that is party to the Twin Regulations; that is, one of the 18 States that are part of the enhanced cooperation. This is because, if they agree to a court in a non-participating State, the consequences of their choice will not be guaranteed by the Regulation. However, it should be assessed whether this choice could be validly concluded in accordance with the national rules of private international law of that State and, therefore, if the agreement agreed by the parties to choose the court would be respected.

- Secondly, the choice is limited to the Courts of a State whose law is applicable by virtue of Article 22 or Article 26, paragraph 1, a) or b) for spouses or Article 22, and failing that, Article 26, Section 1, for registered partnerships[25]; as well as to the Courts of the Member State in which the marriage was celebrated or the registered partnership was registered - except in those cases where the objective is to challenge the jurisdiction, or applying the connection rules through Article 4, which refers to jurisdiction in the event of the death of one of the members of the couple.

For both marriages and registered partnerships, the time when they can agree on the choice of forum may be before or after the celebration of the marriage or registration of the partnership.

- and thirdly, when a lawsuit for divorce, legal separation or marriage annulment is brought before a court of a Member State under Regulation (EC) 2201/2003, the courts of that Member State shall be competent to decide on the matrimonial property regime that arises in connection with said lawsuit; that is to say, the spouses in this scenario will not be able to make use of their freedom of choice due to the *vis atractiva* of Regulation 2201/2003[26].

And for registered partnerships, the agreement can be celebrated "in silence" at the beginning of the legal proceedings by means of the respondent appearing before a court in which the applicant has initiated the procedure (Article 8),

25 Peroz, H.: "Le nouveau règlement européen sur les regimes matrimoniaux", JPC èd, 22nd July 2016, étude 1241, p. 35.

26 Specifically, the competent Courts must be the same as those that heard the divorce (separation or annulment), if their jurisdiction has been based on Regulation 2201/2003, in the forums provided for in Articles 3.1 a) parts 1-4 or 3.1 b). If the jurisdiction has been based on parts 5-6 for the divorce court to be seized, the spouses have to agree.

provided that the court has also been chosen by an express choice of court agreement (Article 7)[27].

Ultimately, it is possible to enter into an agreement to choose the court of a Member State by applying Article 7 of Regulation 2016/1103 and Regulation 2016/1104, provided that said country participates in enhanced cooperation, and is chosen to resolve the questions related to the matrimonial property regime or the property consequences of the registered partnership, leaving the formalized agreement (art. 7.2 of the Regulation[28]) in two different areas[29]:

- When the agreement is made based on any of the scenarios laid out in Article 6 of the Regulation, where situations related to habitual residence or nationality are described, so that they can choose the court of a member state whose law is applicable by virtue of Article 22 (valid agreement by choice) or Article 26.1 a) or b) (valid agreement in the absence of choice).

- When the agreement is made by choosing the Courts of the Member State where the marriage or registered partnership was entered into.

Since both regulations became applicable as of 29 January 2019, any lawsuit filed, judgement or other acts issued that day, at a later date, or by voluntary submission of the parties, are thereby determined under the rules contained in Regulation 2016/1103 for marriages, and in Regulation 2016/1104 for registered partnerships, in matters that affect the property field, and that deal with different forums according to the circumstances, since this is not the same as when the relationship terminates due to death (connected to successions; art. 4), that by divorce, separation or annulment of the marriage, or the dissolution or annulment of the registered partnership (art. 5), or attending to the express submission (arts. 6 and 7) or tacit forums (arts. 4, 5.1 and 8), to the objective forums (art.6), *forum necessitatis* (art. 11), by alternative jurisdiction if the court is inhibited (art. 9), or by subsidiary jurisdiction attending to the location of the immoveable property (art. 10 of the Regulation).

27 Dougan, F. and Kramberger Þkerl, J.: "Guidelines for registered partnerships under Regulation (EU) 2016/1104", pp. 44 and 45, in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid, 2020.

28 Judgment of the Court of 14th December 1976. Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH. Case 24-76. European Court Reports 1976 -01831. ECLI identifier: ECLI:EU: C:1976:177.

29 Cazorla González, M.J.: "Guidelines for determining the competent court in matters of matrimonial property regimes", p. 20, in "Guidelines for professionals on cross-border family property and succession consequences. A collection of model acts accompanied by comments and guidelines for their drafting" (ed. Cazorla González, M. J. and L. Ruggeri), Dykinson, Madrid, 2020.

Within this framework of respect and legal certainty, both Regulations speak of competent jurisdictional bodies, making mention not only of the courts but also of notaries, who are assigned jurisdictional functions in some Member States; under application of Article 3.2.[30], they are non-judicial authorities that exercise jurisdictional functions under conditions equal to those of the courts, unless we are facing a lawsuit, in which case the jurisdiction will correspond to the competent court.

However, notaries have been designated in some Member States as courts within the meaning of Article 3.2 of the Regulations, and are consequently bound by these competency rules, although they can continue to act freely in the drafting of a contract. marriage or choice-of-law agreement. This is the case in Spain, Luxembourg, and the Czech Republic, among others.

In most countries, Germany, Austria, Belgium, Bulgaria, Italy, Malta, the Netherlands, Portugal, and Slovenia, notaries are not bound by these competency rules (unless they are appointed by their State in compliance with the provisions of 3.2) and therefore they can act freely, for example, in the drafting of a marriage contract or a choice-of-law agreement. The situation in Greece is similar, where the notary has the power to draft a cohabitation contract but not a marriage contract; or in Slovenia, which from 15 April 2019 notaries have been able to draft a formal marriage contract (a notarial act). Notaries in the Netherlands are not considered judicial bodies within the meaning of this Regulation.

Both regulations prohibit the courts and other competent authorities (such as notaries in some States) from applying a public order argument in refusing to recognize or enforce a decision, a public document or a judicial transaction of another Member State when this is contrary to the Charter and, in particular, Article 21, on the principle of non-discrimination[31].

2. Agreement on the applicable law.

EU Regulation 2016/1103 gives the spouses the possibility of choosing the applicable legal system underpinning the property consequences of the marriage. And so, in the same sense, does EU Regulation 2016/1104, for registered partnerships. The rules for these purposes are those provided for in Article 22,

30 Opinions of the Advocate General Y. Bot, presented on 28 February 2019. WB v. Notariusz Przemysława Bac. Request for a preliminary ruling from the Sąd Okręgowy w Gorzowie Wielkopolskim. Case C-658/17. European Jurisprudence Identifier: ECLI: EU: C: 2019: 166. CELEX code: 62017CC0. Specifically, in Whereas 29 of the Regulation, the term judicial body must be understood in a broad sense, including notaries as competent courts in matrimonial property regime matters (Whereas 30 and 31), provided that they comply with the provisions of art. 3 of the Regulation, and in their respective States they can exercise their powers, so that the acts issued by notaries in this matter circulate in accordance with the provisions of the Regulation regarding public documents.

31 Whereas 54 of Regulation 2016/1103, and 53 of Regulation 2016/1104.

Section 1, in which absolute freedom of choice is not granted to the parties. This freedom is conditional on the chosen law having a close connection, either with their habitual residence or with their nationality.

Both Regulations offer the partners the possibility of choosing the law applicable to property consequences (Article 22.1), but limiting its scope of application, that is, without giving the parties absolute freedom of choice:

1. The first limits the freedom of choice of the parties by subjecting it to the condition that the chosen law be closely related to the parties, attending to the criterion of their habitual residence or to the criterion of their nationality.

In this way, the European legislator grants a limited *freedom of choice*[32]*;* because the choice-of-law agreement must have a certain connection with the real situation of the parties: either the State Law, in which both or one of them have their habitual residence, or the Law of the State of nationality of one of them, thus favouring the conclusion of pacts, agreements or settlements, and also allowing them to agree the legal system applicable (the choice of applicable law agreement) at the base of the property consequences of the marriage or registered partnership. The provisions of this agreement of choice become the first point of connection[33].

Consequently, there is no freedom of choice of applicable law in the sense that the parties can freely establish the agreements, clauses, and conditions that they deem appropriate, rather it is limited to the legal system of the habitual residence or nationality of both, or of one of them (Whereas 45).

2. The second limit is found in the scope of temporal application, in that the effects of the agreement will not be retroactive. Here, it should be noted that the spouses/partners are allowed to choose the applicable law under Regulation 2016/1103 if the marriage was celebrated before 29 January 2019 and by Regulation 2016/1104 if the partnership was registered before the aforementioned date, provided that they agree to it in accordance with the provisions of art. 22 of the respective Regulations, thus modifying the applicable law in force up to that time to resolve possible conflicts of laws with the express choice of both parties, and without retroactive effects, unless expressly provided for on their part. Both

32 Vinaixa Miquel, M.: "The freedom of choice in the recent EU regulations with regard to matrimonial property regimes (2016/1103) and the property consequences of registered partnerships (2016/1104)", *Internal, European and International civil public order.* Act in homage to Dr Núria Bouza Vidal, *Indret*, 2017, pp. 302-309; Grieco, C.: "The role of party autonomy under the regulations on registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations on European Private International Law", *Transnational Law Journals*, 2018, No. 2, pp. 457-476.

33 Pérez Vallejo, A.M.: "Matrimonial property regimes with cross-border repercussions: Regulation (EU) 2016/1103", in *The property relationships of cross-border couples in the European Union* (ed. M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler), Edizioni Scientifiche Italiane, Napoli, 2020, pp.: 15-27.

spouses and members of registered partnerships can make agreements before and after the celebration of the marriage or registered partnership.

Therefore, it must be the law of the State either in which both, or one of them, have their habitual residence, or of the State of nationality of either of them (in both cases referring to the moment the agreement was made). Nevertheless, there are exceptions that we must assess before choosing the applicable law because each regulation establishes the materials that are freely available from those that are not, as would be the case of a marriage where the man is a Cuban national and the woman has Italian nationality.

In this case, Italy recognizes the premarital and postmarital agreements that both agree, but Cuba establishes that the agreements of the parties cannot derogate the provisions of the Cuban legal regime[34]. Therefore, if the closest connection to which Regulation 1103 applied were the application of Cuban law, the alternative to ensure the pacts agreed by the parties could not meet the validity requirements, and a new agreement on the applicable law would be needed before the competent court where the application for separation or annulment is presented.

On the other hand, we must remember that the choice of law by mutual agreement, although it can change at any point, is always set at the time of the agreement in order to protect third parties that could be affected by the agreements made by the spouses or members of the registered partnership[35]. It is thus fixed at the specific and concrete moment in time, granting legal security and avoiding possible fraud in the applicable law, because if the couple decide to choose another law later in the marriage, exercising their freedom of conflictual choice, it only has effects for the future unless otherwise agreed, and the chosen law will not negatively affect the rights of third parties derived from said applicable law in the absence of choice[36].

Thus, the choice remains linked to the connection with proximate rules indicating the material orientation of the conflict rule, this being necessary to set the temporal scope, since the spouses and members of registered partnerships can make an agreement choosing the law applicable to their matrimonial property regime or the property consequences of the registered partnership before, during or after celebrating the marriage or partnership - this is because the applicable

34 Bonomi, A. and Wautelet, P.: "Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104", Bruylant, Bruxelles, 2021, pp. 592-597.

35 Garetto, R.: "Registered partnerships and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, p. 91.

36 Moreno Sánchez-Moraleda, A.: "The conflict rules of European Union Regulation 2016/1103 on matrimonial property regimes: materially-oriented rules", *Direito electronic magazine*, February 2019 – No. 1 (V. 18), pp. 13-15.

law in the absence of choice is applied to the parties (Article 26) if they do not choose it.

However, no agreement on the applicable law (art. 22) modifies the substantive law of the States, since the objective is to reinforce cooperation in jurisdiction, applicable law, and the recognition and enforcement of decisions with property consequences in cross-border marriages or registered partnerships, it being necessary to know the substantive law of each of the States involved, not only to resolve conflicts when they arise but as information prior to the parties exercising the right to choose the applicable law, which they have in many States, or if not, then based on the place where the marriage or partnership was celebrated, or establish their residence.

In this regard, we understand that the applicable law under the parties' freedom of choice is more useful from the temporal and economic standpoints if it is informed and advised prior to the marriage or partnership crisis arising, or the death of one of the members.

The differences between one applicable law and another in each State of the European Union is decisive in the legal liquidation of the matrimonial property regime or the termination of the property consequences of the registered partnership, since the community of property distribution is not the same - when the liquidation of assets takes place under a separation of assets regime or a pact in which there are only agreements on family charges while each partner retains ownership of his/her property.

On the other hand, the legal regime applicable to marriage is different in each country, since we find States that recognize and regulate marriages of the same and opposite sexes, while others do not regulate the former at all. Furthermore, if we talk about registered partnerships, the differences are even greater - in some States, they are not regulated whereas in others, they are only allowed between people of the opposite sex[37].

IV. LIMITS TO FREEDOM OF CHOICE WHEN CHOOSING THE APPLICABLE LAW.

37 In relation to marriage, the law of the State in which the spouses or future spouses, or one of them, have their habitual residence at the time of concluding the agreement, or the law of the State of nationality of either spouse or future spouses at the time the agreement is entered into.
In relation to the registered partnership, the law of the State in which the members or future members of the registered union, or one of them, have their habitual residence at the time of concluding the agreement, the law of the State of nationality of any of the members or future members of the registered partnership.
All this provided that the chosen law, whatever it may be, attributes property consequences to the institution of the registered partnership.

The connection criteria therefore address elements of proximity (residence rather than nationality), although the preferred criterion for the application of the conflict rule, as we have indicated above, is based on freedom of choice. Therefore, Article 26 will only be applied when the parties have not agreed on the property relations of their marriage or registered partnership.

Under agreement (art. 22.1), they can choose common nationality, or the place of habitual residence of both, or one of them, or the law of the State that best regulates their situation, thus altering the order of priority established in Article 26, where habitual residence appears as a preferential connection over nationality, and without territorial limit under the universal application of Article 20 of the Twin Regulations, where it is allowed to determine the applicable law under this Regulation, even if it is not that of a Member State.

1. Habitual residence.

Article 22 of each of the Regulations recognizes, under the principle of free choice, that the interested parties can determine or change by common agreement the law applicable to their matrimonial property regime or the property consequences of their registered partnership, establishing habitual residence as the connection point option, in which there are two different perspectives between the application of national civil law and the right to cross-border mobility in Community territory for all European citizens and their family members, as would be the spouse or registered partner, in accordance with the current legislation of any of the member states, from which exercising their right of residence can begin[38].

In this context, where mobility, together with the free movement of people[39], makes the habitual residence appear in the two Regulations as a flexible and necessary connection point that allows the parties to determine the place where the cross-border relationship is most linked, either by agreement or in the absence of an agreement (art. 26 of the Twin Regulations)[40]. Hence, the spouses

38 Jiménez Blanco, P.: "The cross-border mobility of same-sex married couples: the EU takes a step. Judgment of the Court of Justice of 5 June 2018, Case C-673/18: Coman", *The European Union Law*, No. 61, 31st July 2018.

39 Clerici, R.: "Alcune considerazioni sull'eventuale enlargement of the ruolo della residenza abituale nel sistema italiano di diritto internazionale privato", in Campiglio, C. (ed.): *Un nuovo diritto internazionale privato*, Cedam, Milán, 2019, pp. 56-64.

40 In the absence of agreement, art. 26 of Regulation 2016/1103 provides that, in the first place, it deals with the common residence following the celebration of the marriage, failing that, the common nationality (this provision will not apply if at the time of celebrating the marriage the spouses have more than one nationality), and finally, to the common place with the closest connection at the time of celebrating the marriage. Exceptionally, and at the request of either spouse, the judicial authority that has jurisdiction to determine on the matrimonial property regime may decide on the law of a State other than the State whose law might be applicable by virtue of common residence if the applicant shows that:
- the spouses had their last common habitual residence in that other State for a considerably longer period of time than in the designated State.

or members of the partnership can find themselves in different settings depending on the habitual residence:

- The simplest would be when both reside in the same place and decide to choose the law of that State, although they can agree on any other; however, in this case, the agreement is limited by the connection points established in art. 22, so they will presumably agree on the criterion of nationality or any other of the criteria that jurisprudence establishes to consider it a habitual residence[41], and about which we will talk briefly in this section.

- A more complicated scenario, because it requires prior negotiation, would occur when both reside in different States and must agree whether to choose one of the States or a third, with which they maintain family connection points, or for assets located in that territory, or by nationality.

- When it is not possible to establish a habitual residence, probably because both have a place where they live, but not for a long time, or with ties that allow the courts to establish that we are dealing with a habitual residence. Here, the applicable law agreement remains within the limits of Article 22.

This choice seems to be based on giving certain harmonization to the European rules of family law[42], through habitual residence, a criterion as flexible as it is indeterminate, on which will be determined by agreement or by default thereof, the place where the couple is effectively linked.

- both spouses relied on the law of that other State to organize or plan their property relations.
The law of that other State alone shall apply from when the marriage was celebrated unless one spouse disagrees. In the latter case, the law of that other State will take effect from when the last common habitual residence in said State was established, and its application will not negatively affect the rights of third parties derived from the applicable law under paragraph 1 a)
The present paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.
While, for registered partnerships, art. 26.1 of Regulation 2016/1104 regulates that it will be the law of the State according to whose law the registered partnership was created, adding in the second paragraph the possibility that a lawsuit may be filed by either partner before a competent judicial authority whose applicable law, either because the members of the registered partnership maintained their last common habitual residence in said State for a significantly long period of time, or that both members of the registered partnership relied on the law of that different State to organize or plan their property relations.

41 The criterion of habitual residence appears as a parameter that expresses the flexibility necessary to determine the place where the couple is effectively integrated. It deals with a criterion of transversal connexion that has been consolidated to the detriment of other parameters, such as domicile, precisely for being provided for in other European legislation, such as Regulation 2201/2003, Regulation 2010/1259, Regulation 2012/650. See Garetto, R., Giobbi, M, Giacomo Viterbo, F. and Ruggeri, L.: "Registered unions and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, pp. 77 and 78.

42 Boele-Woelki, K.: "The principles of European family law: its aims and prospects", *Utrech Law Review,* 2005, Volume 1st, Issue 2 (December), p. 161.

It is, therefore, a criterion of transversal connection that has been consolidated to the detriment of other parameters, such as that of domicile[43], precisely because it is provided for in other European legislation, such as Regulation 2201/2003, Regulation 2010/1259 and Regulation 2012/650)[44]; while in the Rome I and Rome II Regulations, relating to the law applicable to contractual and non-contractual obligations, the habitual residence criterion has been introduced.

Some authors tend to differentiate both concepts according to the consequences they are affected by or dependent on. In this regard, the concept of domicile is usually linked to a more economic sphere, for example to taxation, while residence deals more with the personal relationships of the couple's family life and to the place where they carry out their professional work. In this way, when interpreting in the absence of an agreement or choosing by agreement, the Regulations opt for the habitual residence criterion because it is more flexible when applying the law to the complex family situations that usually affect couples; thus, it is more complicated when dealing with a cross-border couple.

Although we share this argument, we consider that it would have been desirable for the legislator to have given a definition of habitual residence, thus avoiding it ending up being the object of interpretation by the Courts of Justice, as happened in the CJEU, of 17 October 2018, regarding the High Court of Justice (England and Wales), Family Division, where it was pointed out that the concept of "habitual residence" continues to raise questions that have not yet been examined by the Court of Justice, in particular it analyses whether the physical presence of the minor in a Member State constitutes a necessary shaping element of this concept[45].

2. Nationality.

Nationality is the second point of connection, which operates when an agreement of choice by the parties is absent. For example, when it is not possible to determine habitual residence.

43 See Chap. IV, infra. About this argument, see Rogerson, P.: "Habitual residence: the new domicile?" 9, *Int'l & Comp. L.Q.* 86, 86-96 (2000).

44 Also in the so-called Rome I and Rome II Regulations, relating to the law applicable to contractual and non-contractual obligations, the criterion of habitual residence has been introduced. See Cazorla González, M.J.: "Matrimonial property regimes after the dissolution by divorce: connections and variables that determine the applicable law", in Kramberger Škerl, J., Ruggeri, L., Viterbo, F. G. (ed.), n 16 *supra*, 40-48; Damascelli, D.: "Applicable law, jurisdiction, and the recognition of decision in matters relating to property regimes of spouses and partners in European and Italian Private International law", *Trust & Trustees*, 6-11 (2019).

45 Campuzano Díaz, B.: "A new ECJ judgment about the concept of habitual residence in the framework of Regulation 2201/2003: Judgment 17 October 2018, ud v. xb, c. 393/18", *Transnational Law Journals* (October 2019), Vol. 11, No. 2, pp. 462-471; Davies, G.: "Any Place I Hang My Hat?" or: Residence is the New Nationality," European Law Journal 11, No. 1 (2005), pp. 43-56; Hilbig-Lugani, K. "Habitual Residence in European Family Law: The Diversity, Coherence and Transparency of a Challenging Notion", in Boele-Woelki, K, Dethloff, N. & Gephart, W. (ed.): *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, Intersentia, 2014, pp. 249-262.

But if the parties agree to designate or change, by common agreement, the law applicable to their matrimonial property regime or the property consequences of their registered partnership, provided that it is one of the laws determined in Articles 22 of the respective Regulations, and that it meets the formal and material requirements of validity, it will be applicable. However, the choice of the applicable law by nationality increases the complexity of applying the criterion in cases in which the spouses have common dual nationality at the time of the marriage.

In such a case, it is necessary to assess the fact when a person has multiple nationalities, because it is a matter that must be left to the discretion of the National Law, and of the international conventions that may be applicable, with full respect for the general principles of the European Union. Therefore, this consideration should not have any impact on the validity of the choice of applicable law in accordance with the Twin Regulations.

On this matter, the conclusions of the general counsel in the case, Laszlo Hadadi (Hadady)[46] versus Csilla Marta Mesko, referring to a divorce procedure, determines that the courts of the Member States of which the spouses have dual nationality are competent, and that the spouses can freely choose the court of the Member State to which the dispute will be submitted. In this way, coexistence is permitted without establishing a hierarchy of the same.

It therefore follows, according to the reasoning of the Court of Justice, that there can be no basis for establishing the predominant nationality to the extent that "it would have the consequence that individuals are limited in their choice of the competent court and, in particular, in the exercise of the right to free movement of persons"[47]. Therefore, it cannot be established that one nationality takes precedence over another, even when it comes to identifying the applicable law.

One of the innovative aspects of Regulations 2016/1103 and 2016/1104 is the regulatory framework that has emerged under them, where couples of different nationalities can find an appropriate and specific discipline for the protection of the property aspects of their union, even when the relationship is not based on marriage[48].

46 Laszlo Hadadi (Hadady) versus Csilla Marta Mesko, épouse Hadadi (Hadady). Judgment of the Court (Third Chamber) of 16 July 2009. Laszlo Hadadi (Hadady) v Csilla Marta Mesko, spouse of Hadadi (Hadady). Case C-168/08. European Court Reports 2009 I-06871. ECLI Identifier: ECLI:EU:C:2009:474.

47 Case C-168/08. Ms Jualiane Kokott, filed on 12 March 2009, Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, Hadadi's wife (Hadady, paragraph 53. ECLI:EU: C:2009:152.

48 Garetto, R.: "Registered partnerships and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, Edizion Scientifiche Italiane. Napoli, 2020, pp. 87-97.

Finally, if the parties have dual nationality, we can reduce the different state legal systems to a maximum of six, and if they only have one nationality each, we can reduce it to four. One option for each nationality and a different place of habitual residence from each one. Options that may be reduced for same-sex marriages in twelve EU Member States that do not contemplate their regulation: Bulgaria, The Czech Rep., Cyprus, Slovenia, Slovakia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Croatia and Romania.

From the possible options, the three potential scenarios that could affect marriages and registered partnerships in determining the applicable law must consider whether or not there is enhanced cooperation[49]:

- when both nationals are from the countries mentioned in Whereas 11 above,

- if only one of spouses or partners is a national of a State that is part of the enhanced cooperation and the other is not,

- and when none of the nationals is from a State that submits to enhanced cooperation, in which case we will be dealing with the Rome III Regulation and the applicable State regulations.

This apparently simple approach contains asymmetries in the material and geographical scope of application of both Regulations, which will have to be elucidated according to the specific case.

3. Territorial limit on the choice of applicable law agreement.

The territorial scope of application of both Regulations is limited to those Member States that participate in enhanced cooperation, who are bound by the agreement to choose the applicable law for their application.

However, not every court in the Member States is bound by the choice-of-law agreement.

Thus, only the Member States participating in enhanced cooperation will have to establish their international competence in accordance with the rules of Regulations (EU) 2016/1103 and 2016/1104. In other words, in the non-participating States, international jurisdiction will correspond to their respective courts.

49 https://www.euro-family.eu/eu-database In this link, the reader will find an interactive map in which, selecting two countries and two situations (marriage or registered partnership), general information is obtained on the applicable legislation. However, to determine exactly the applicable law of each specific case, it is necessary to consider numerous circumstances, since the nationality criterion is not enough to determine the applicable law in all cases. For judicial questions, we advise seeking the assistance of a professional assessor. The taxonomy allows one to search for the different typographies of mixed marriages and transnational families with people from different countries.

Consequently, the application of the Twins Regulations is not guaranteed in what, for the purposes of a choice of applicable law agreement, would result under the application of its rules. However, if the agreement met the requirements established in the State's rules of private international law, which has international jurisdiction, it would continue to validly produce effects.

A different issue is when the court opposes it, alleging incompatibility with the public order of the forum.

It seems that the provisions of Regulations 1103 and 1104, in the respective Article 30, state that they will not restrict the application of the laws of the (national) forum, when the observance of which was considered essential, to the point of being applicable to all situations that occur within its scope of application, regardless of the matrimonial property regime applicable pursuant to this Regulation. Adding below, in Article 31, the question of public order as a cause for refusing the application of the national law of a State when the application of the provision is manifestly incompatible with the public order of the forum.

European society has been changing over recent decades, and this is reflected in the different family models that currently coexist within our European territory, and the reality of which, under the principle of equality and non-discrimination, has been maintained by the European Court of Human Rights when determined in their judgements[50], that a homosexual couple can be included in the concept of "private life" and in that of "family life" in the same way as that of a heterosexual couple in the same situation.

But this is only appearance, since the Grand Chamber of our CJEU in the ruling of 5 June 2018, which affected the marriage of two people of the same sex, one of them a Romanian citizen, and for which Article 277 of the Romanian Civil Code prohibits marriage between people of the same sex, denying all legal recognition to those marriages contracted outside their State. However, the judgement ends in the 4th paragraph determining that the legal provisions relating to the free movement of citizens of the Member States of the European Union and European Economic Area shall apply in Romanian territory.

50 ECHR, Judgement of 7th November 2013, Vallianatos and others v. Greece, CE: ECHR: 2013: 1107JUD002938109 and the ECHR judgement of 14th December 2017, Orlandi and others v. Italy, CE: ECHR: 2017: 1214JUD002643112.

Our Court of Justice gives an account of this, under the application of Directive 2004/38, Article 2 (entitled "Definitions"), which establishes the following in points 2 a) spouse and b) partner[51].

And more recently, the Grand Chamber of the CJEU, in the judgement of 5th June 2018, has recalled that a Member State cannot invoke its national law to oppose recognition in its territory, for the sole purpose of granting a derivative right of residence to a national of a third State, from the marriage contracted by that State with a citizen of the Union of the same sex in another Member State in accordance with the law of the latter.

For its part, the Latvian Government pointed out at the hearing that, assuming that the refusal, in circumstances such as those at issue in the main proceedings, to recognize same-sex marriages contracted in another Member State, constitutes a restriction in Article 21 of the TFEU, such a restriction is justified for reasons related to public order and national identity, as referred to in Article 4. 2 of the TFEU.

This court has reiterated that public order can only be invoked in the event of there being a real and sufficiently serious threat affecting a fundamental interest of society[52].

In this regard, it should be noted that the obligation of a Member State to recognize a marriage between persons of the same sex contracted in another Member State in accordance with the law of that State, for the sole purpose of granting a derivative right of residence to a national of a third State, does not adversely affect the institution of marriage in the first Member State, which is defined by national law and falls within the competence of the Member States, as mentioned in section 37 of this judgment. It does not imply that the Member State contemplates, in its national law, the institution of marriage between persons of the same sex. It is limited to the obligation to recognize such marriages, contracted in another Member State in accordance with its law, and this for the sole purpose of exercising the rights for those people that derive from Union law.

51 'For the purposes of this Directive: 2) "Member of the family" means:
a) the spouse; The concept of "spouse" referred to in said provision designates a person joined to another by the bond of marriage (see, in this regard, the judgment of 25th July 2008, Metock et al., C-127/08, EU: C: 2008: 449, sections 98 and 99) equates it to the common-law partner
b) the partner with whom the Union citizen has entered into a registered partnership, in accordance with the legislation of a Member State, if the law of the host Member State accords to the treatment of registered partnerships equivalent to marriages and in accordance with the conditions laid down in the applicable law of the host Member State; [...] '.

52 See, in this regard, the judgments of 2nd June 2016, Bogendorff von Wolffersdorff, C-438/14, EU: C: 2016: 401, section 67, and of 13th July 2017, E, C-193/16, EU: C: 2017: 542, section 18, and the case law cited).

Thus, such an obligation of recognition for the sole purpose of granting a derivative right of residence to a national of a third State does not undermine national identity or threaten the public order of the affected Member State.

V. MATERIAL VALIDITY OF THE AGREEMENTS UNDER THE LIMIT OF RETROACTIVE EFFECTIVENESS.

Both Regulations establish requirements for material validity[53] and formal agreements entered into by the parties, to which the requirements established in the law of the country of residence must be added for their formalization, as we will see below.

Considering Whereas 45 of Regulation 2016/1103 and 44 of Regulation 2016/1104, in conjunction with Article 22 of both Regulations, the choice of applicable law agreement may be made at any time before, during or after the marriage, or before or after the registering of the partnership. That is, as long the couple remains together, they can make all the modifications that they deem appropriate.

Although there are some exceptions in countries such as Cyprus, where prenuptial agreements are not allowed, and others, such as Slovakia, that only admit them in a limited way, since it only regulates agreements after the celebration of marriage to expand or reduce the community of property.

However, the biggest difference between European countries lies in the authority before which the agreement is formalized: countries such as Hungary, give validity to the agreement whether it is made in a public document or in a private document signed by a lawyer, while Portugal admits that the drafting can be performed by both a civil law notary and an official of the civil registry office, whereas in Sweden, the marriage contract shall be made in writing and filed with the Swedish Tax Office.

The material validity, as regulated in both Regulations, safeguards third parties against changes in the applicable law, granting legal security to third parties in good faith, but making their application difficult due to the lack of unification of the Civil Registry institutions in the European Union.

53 Regulation 2016/1103 does not expressly establish concrete effects, but generally links the applicable law of the matrimonial property regime and its effects. On the other hand, it does establish the areas of application, in a positive sense, under the agreement of the applicable law to the matrimonial property regime regulated in art. 27, and in a negative sense, in whereas 20 and 21 on the areas of exclusion that should not be applied.

1. The effectiveness limits on the choice of applicable law agreement vis-à-vis third parties.

Article 22 of both Regulations operates under the limit of retroactive effectiveness, that is, the agreement will not affect previously made agreements with third parties if it is detrimental to them. And, in the legal relations between a spouse and a third party, referring to the property effects of the matrimonial property regime (Article 27 f), the law applicable to the matrimonial property regime between the spouses may not be invoked by one of them against a third party in a dispute between the third party and either spouse, or both, unless the third party knew or, acting with due diligence, should have had knowledge of said law. In other words, it must be guaranteed that the agreement is in accordance with good faith.

For this, in Article 28 of Regulation 2016/1103, it considers that the third party knows the law applicable to the matrimonial property regime[54], as the law applicable between one of the spouses and the third party to the transaction, that is, that of their habitual residence, that is, the law of the State where the property is situated; or when (art. 28 b) either spouse had met the requirements for the disclosure or registration of the matrimonial property regime specified by the same criteria mentioned (place of transaction, residence, or location of the property).

It is possible that the law applicable to the matrimonial property regime may not be invoked by one of the spouses before a third party in accordance with Section 1, the effects of the matrimonial property regime being regulated against said third party:

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

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

As for marriages, the choice-of-law agreement of the members of the registered partnership in relation to third parties is conditioned by the knowledge of the chosen law, that is, they must know the law either because it is applicable to the transaction, or it is that of the habitual residence of the third party and one of the spouses, or because it is the law of the place where the property is located.

54 Mota, H.: "The protection of third parties in Regulation (EU) 2016/1103" (Protection of Third Parties in the Regulation (EU) 1103/2016), *Annals of Private International Law*, 2018, vol. XVIII.

Thus, under Article 27 f), the law chosen by the members of the couple governs the effects of the property consequences of the registered partnership in a legal relationship between a partner and third parties. And Article 28 of Regulation (EU) 2016/1104 establishes that the law applicable to the property consequences of the registered partnership may only be invoked by a partner against a third party (in a dispute between one of the partners, or both, and the third party) if the third party knew or, in the exercise of due diligence, should have known said law[55].

In cases where the applicable law cannot be invoked against a third party (Whereas 46), the property consequences of the registered partnership, with respect to the third party, will be governed by the law of the State whose legislation is applicable to the transaction between one of the members of the partnership and the third party or, in cases relating to immoveable property, or registered property or rights, by the law of the State in which the property is located or in which the property or rights are registered.

It is expected that they are duly formalized before a notary public and registered, so that they take effect against third parties from that moment on. Thus, marriage contracts made before a notary will only be applicable if the marriage is celebrated later on, and those made before a notary after the marriage will also be effective from the moment of their formalization.

However, they will only be enforceable against third parties from the date of their registration in the corresponding registry. In this context, we find other countries whose regulations incorporate prerequisites, such as Slovenia, which does allow pre-marriage agreements, linking them to prior information between the parties of the property situation and limiting the agreements that stipulate the separation of property regime from the community property regime to the time during which the marriage is in force.

Consequently, the effectiveness limits on the choice of applicable law agreement vis-à-vis third parties is governed by the provisions of Article 22.2, so that any change in the agreement, or a new agreement, made by the parties will only take effect *ex nunc*[56].

In this way, the effects of any agreement will not affect the legal regulatory regime of certain previously acquired assets, although attention will be required

55 Dougan, F. and Kramberger Škerl, J.: "Model clauses for registered partnerships under Regulation (EU) 2016/1104", in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid 2020, pp. 42-45.

56 Palao Moreno, G.: "Determination of the applicable law in Regulations 2016/1103 and 2016/1104 on the matrimonial property regime and the property consequences of registered partnerships", *Spanish Journal of International Law*. Vol.71/1, January-June 2019, Madrid, p. 104.

when the moment arrives to liquidate or dissolve the property regime of the marriage or the partnership. Nevertheless, the wording of the article in both regulations incorporates the final tagline *unless otherwise agreed to allow its retroactivity*. This gives the parties involved the possibility of conferring retroactive effects to the agreement, but without altering the established limit of not harming the rights of third parties (art 22.3). From this, we suppose two situations are the exception: either the third party is given a deliberation time where the "possibly affected" third party receives notified information of the agreement and does not show opposition; or the retroactive effect will not take place if it causes damage or prejudice that they are not prepared to assume.

Once it has been demonstrated that one of the main problems posed by the agreement is the effect on third parties, there being as many modifications as there are agreements that the cross-border couple, whether married or a registered partnership, may wish to adopt. Hence, Article 28 states that a member of the couple may not oppose the third party in a possible dispute, between the latter and one or both members, over the property consequences of the registered partnership in the legal relationship between a spouse and the third party descending from *professio iuris*[57], "unless the third party has had knowledge of this law or has been required to know it by exercising due diligence".

Ultimately, third-party protection is the protection that all European civil codes and laws provide for third parties in good faith. This subjective good faith of the third party, is understood as the excusable ignorance regarding the applicable law to the property consequences of the marriage or registered partnership, on which the right of opposition is exercised.

1. The legal presumptions that both Regulations establish.

Regarding the legal presumptions that both Regulations establish, it is evident that they are not means of proof in themselves, nor activities of proof, but are a method of proof of great importance in the field of European jurisprudence and of the member countries, but are therefore not considered evidence. These presumptions established by the law will admit proof to the contrary, except in cases where it expressly prohibits it.

However, in this regard, when the EU legislator enumerates the presumptions, she/he does so as presumptions *iuris et de jure* (art. 28.2 Twin Regulations)[58], relating

57 The *professio iuris* must be expressed, contained in a dated document, in written form or in an equivalent electronic form: just as in the agreements referred to in art. 7, it is necessary to comply with the additional formal requirements provided by the law applicable to the agreement.

58 Under Article 28, paragraph 2, the third party is presumed to have knowledge of the applicable law if it is that of the State whose legislation is applicable to the transaction between one of the two members and the third party. Likewise, knowledge is presumed if the applicable law of the State in which the contracting

to the good faith of the third party, of full and absolute right, a presumption that does not admit evidence to the contrary.

In summary, any choice-of-law agreement requires that the formalities provided for in both regulations be complied with in accordance with the provisions of the state regulations connected with the pact or agreement, to give formal validity both to the applicable law agreement (in art. 23), as well as to the marriage contract or the registered partnership (in art. 25).

For the agreement to be valid, it requires the concurrence of requirements of substance (*ex* art. 24 "Consent and material validity" and of form (*ex* art. 23), which must be in writing, dated and signed. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. Said provision establishes that if the law of the State of common habitual residence at the time of the conclusion of the agreement establishes additional formal requirements for capitulations, said requirements will be applicable. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. If only one of the spouses has his/her habitual residence in a Member State at the time the agreement is concluded and the law of that State establishes additional formal requirements for capitulations, these requirements will apply.

party and the third party have their habitual residence. When the third party has rights to real estate, it is presumed that he/she has knowledge if the applicable law is that of the State in which the property is located. The third party may not object to the fact that the applicable law for the property consequences of the union is not known if the pertinent disclosure or registration requirements "prescribed by the law of the State whose legislation is applicable to the transaction between a contracting party and the third party have been met, the State in which the contracting party and the third party have their habitual residence or, in cases related to immoveable property, the State in which the property is located.

BIBLIOGRAPHY

Álvarez Lata, N.: "Las parejas de hecho: perspectiva jurisprudencial", *Derecho privado y Constitución,* 1998, No. 12, pp. 7-68.

Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations on Matrimonial and Patrimonial Property,* Oxford, March, 2018, p. 7.

Boele-Woelki, K.: "The principles of European family law: its aims and prospects", *Utrech Law Review,* 2005, Vol. 1st, Issue 2 (December), p. 161.

Bonomi, A. and Wautelet, P.: "Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104", Bruylant, Bruxelles, 2021, pp. 592-597.

Campuzano Díaz, B.: "A new ECJ judgment about the concept of habitual residence in the framework of Regulation 2201/2003: Judgment 17 October 2018, ud v. xb, c. 393/18", Transnational Law Journals (October 2019), Vol. 11, No. 2, pp. 462-471. https://e-revistas.uc3m.es/index.php/CDT/article/view/4972/3450.

Cazorla González, M. J.: "Introduction", in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid, 2020, pp. 15-19.

Cazorla González, M. J.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio después de la entrada en vigor del reglamento UE 2016/1104", *Revista Internacional de Doctrina y Jurisprudencia,* vol. 21st December 2019, pp. 92-93.

Cazorla González, M.J. and Soto Moya, M.: "Material, territorial, and temporal scope of the twin Regulations", Chapter IV, Intersentia, 2021 (in press);

Cazorla González, M.J.: "Guidelines for determining the competent court in matters of matrimonial property regimes", p. 20, in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González, M. J. and L. Ruggeri), Dykinson, Madrid, 2020.

Cebrian Salvat, M. A.: "The property consequences of unregistered couples in Spanish private international law", *Cuadernos de Derecho Transnacional*, March 2018, Vol. 10, No. 1, pp. 127-143.

Clerici, R.: "Alcune considerazioni sull'eventuale enlargement of the ruolo della residenza abituale nel sistema italiano di diritto internazionale privato", in Campiglio, C. (ed.): *Un nuovo diritto internazionale privato*, Cedam, Milán, 2019, pp. 56-64.

Cooke, E. et al.: *Community of property. A regime for England and Wale*s, London: The Nuffield Foundation / Policy Press, 2006, 2, available at: https://www.reading.ac.uk/web/files/law/CommunityofProperty_Version021106.pdf.

Damascelli, D.: "Applicable law, jurisdiction, and the recognition of decision in matters relating to property regimes of spouses and partners in European and Italian Private International law" *Trust & Trustee*s, 6-11 (2019).

Davies, G.: "Any Place I Hang My Hat?" or: Residence is the New Nationality," European Law Journal 11, No. 1 (2005), pp. 43-56.

De Sousa Gonçalves, A. S.: "El principio de la autonomía de la voluntad en los reglamentos europeos sobre derecho de familia y sucesiones", *Diario La Ley*, 2016, No. 8835, p. 78.

Dicey, Morris and Collins: *The Conflict of Law*s, 15th ed., Sweet & Maxwell Ltd, October 2012, Vol. 2, p. 37.

Dougan, F. and Kramberger Škerl, J.: "Model clauses for registered partnerships under Regulation (EU) 2016/1104", in in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid 2020, pp. 42-45.

Dougan, F. and Kramberger Þkerl, J.: "Guidelines for registered partnerships under Regulation (EU) 2016/1104", pp. 44 and 45, in *Guidelines for practitioners in cross-border family property and succession law (A collection of model acts accompanied by comments and guidelines for their drafting)* (ed. M.J. Cazorla González and L. Ruggeri), Dykinson, Madrid, 2020.

Gallant, E.: "Le nouveant droit international privé européen des régimes patrimoniaux de couples", *Europe: actualité du droit communautaire,* 2017, Vol. 27, No. 3, pp. 5-10.

Garetto, R., Giobbi, M, Giacomo Viterbo, F. and Ruggeri, L.: "Registered unions and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, pp. 77 and 78.

Garetto, R.: "Registered partnerships and property consequences", in *Property relations of cross-border couples in the European Union*, Edizioni Scientifiche Italiane, Napoli, 2020, p. 91.

Grieco, C.: "The role of party autonomy under the regulations on registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations on European Private International Law", *Transnational Law Journals*, 2018, No. 2, pp. 457-476.

Hilbig-Lugani, K.: "Habitual Residence in European Family Law: The Diversity, Coherence and Transparency of a Challenging Notion", in Boele-Woelki, K, Dethloff, N. & Gephart, W. ed.): *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, Intersentia, 2014, pp. 249-262.

Jiménez Blanco, P.: "The cross-border mobility of same-sex married couples: the EU takes a step. Judgment of the Court of Justice of 5 June 2018, Case C-673/18: Coman", *The European Union Law*, No. 61, 31st July 2018.

Moreno Sánchez-Moraleda, A.: "The conflict rules of European Union Regulation 2016/1103 on matrimonial property regimes: materially-oriented rules", *Direito electronic magazine*, February 2019, No. 1 (V. 18), pp. 13-15.

Mota, H.: "The protection of third parties in Regulation (EU) 2016/1103" (Protection of Third Parties in the Regulation (EU) 1103/2016), *Annals of Private International Law*, 2018, vol. XVIII.

Palao Moreno, G.: "Determination of the applicable law in Regulations 2016/1103 and 2016/1104 on the matrimonial property regime and the property consequences of registered partnerships", *Spanish Journal of International Law.* Vol.71/1, January-June 2019, Madrid, p. 104.

Pérez Vallejo, A. M. and Cazorla González, M.J.: Spain, pp. 610-657, *Family Property and Succession in EU Member States National Reports on the Collected Data* (ed. L. Ruggeri, I. Kunda, S. Winkler), *Sveu□ilište u Rijeci, Pravni fakultet/* University of Rijeka, Rijeka, 2019. https://psfes.euro-family.eu/pagine-15-results.

Pérez Vallejo, A.M.: "Matrimonial property regimes with cross-border repercussions: Regulation (EU) 2016/1103", in *The property relationships of cross-border couples in the European Union* (ed. M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S, Winkler), Edizioni Scientifiche Italiane, Napoli, 2020, pp.: 15-27.

PEROZ, H.: "Le nouveau règlement européen sur les regimes matrimoniaux", JPC èd, 22nd July 2016, étude 1241, p. 35.

PINTENS, W.: "Europeanization of Family Law", *Perspectives for the Unification and Harmonization of Family Law in Europe* (ed. K. BOELE-WOELKI), Intersentia, Antwerp/Oxford/New York, 2003, pp. 9-11.

ROGERSON P.: "Habitual residence: the new domicile?" 9, *Int'l & Comp. L.Q.* 86, 86-96 (2000).

SOTO MOYA, M.: *Uniones transfronterizas entre personas del mismo sexo*, Tirant lo Blanch, Valencia, 2013, pp. 17-32.

VINAIXA MIQUEL, M.: "The freedom of choice in the recent EU regulations with regard to matrimonial property regimes (2016/1103) and the property consequences of registered partnerships (2016/1104)", *Internal, European and International civil public order.* Act in homage to Dr Núria Bouza Vidal, *Indret*, 2017, pp. 302-309.

EUROPEAN CITIZENSHIP: OPPORTUNITIES AND ABUSES IN PRIVATE INTERNATIONAL FAMILY LAW

CIUDADANÍA EUROPEA: OPORTUNIDADES Y ABUSOS EN EL DERECHO DE FAMILIA INTERNACIONAL PRIVADO

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 110-117

Giovanna
CHIAPPETTA

ARTÍCULO RECIBIDO: 26 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The essay focuses on the role of legal autonomy in the regulation of family status and family relations between members of the typical or atypical family unit. Indeed, the role of legal autonomy has also been expanded by European citizenship understood by the European Court of Justice as an autonomous source of rights. This citizenship, which is added to the national one, has allowed the "static" couple, even in the absence of the transnational character of the family situation, to choose the law and the instruments of foreign legal systems to be applied to the patrimonial and existential relations of the community of life. The essay aims to demonstrate how the EU family regulations can also apply to "static" European citizens, allowing the choice of foreign laws with solutions unrelated to national law, in compliance with the constitutional public order limit of each member country.

KEY WORDS: Status family; family relations; legal autonomy; "static" European citizens.

RESUMEN: *El ensayo se centra en el papel de la autonomía jurídica en la regulación del estado familiar y las relaciones familiares entre los miembros de la unidad familiar típica o atípica. De hecho, el papel de la autonomía jurídica también ha sido ampliado con la ciudadanía europea, entendida por el Tribunal de Justicia de la Unión Europea como una fuente autónoma de derechos. Esta ciudadanía, que se suma a la nacional, ha permitido a la pareja "estática", aún en ausencia del carácter transnacional de la situación familiar, elegir la ley y los instrumentos de los ordenamientos jurídicos extranjeros a aplicar al ámbito patrimonial y a las relaciones existenciales de la comunidad de vida. El ensayo tiene como objetivo demostrar cómo las regulaciones familiares de la UE también pueden aplicarse a los ciudadanos europeos "estáticos", permitiendo la elección de leyes extranjeras con soluciones no relacionadas con la ley nacional, de conformidad con el límite constitucional de orden público de cada país miembro.*

PALABRAS CLAVE: *Estado familiar; relaciones familiares; autonomía jurídica; ciudadanos europeos "estáticos".*

TABLE OF CONTENTS: I. PRELIMINARY CONSIDERATIONS.- II. INTRODUCTION.- III. LEGAL AUTONOMY IN EUROPEAN PRIVATE INTERNATIONAL LAW.- IV. CONCLUSIONS.

I. PRELIMINARY CONSIDERATIONS.

The paper examines the role of legal autonomy in the regulation of family status and relationships in light of the fact that the European Court of Justice, on the basis of European citizenship, has allowed the application of European Private International Law to situations without a cross-border character.

So, the core question is: to what extent can European citizenship allow the use of instruments provided for in legal systems other than those of national citizenship?

II. INTRODUCTION.

Article 3, Paragraph 2, of the Treaty of Lisbon (TEU) clarified some of the relevant aspects related to European citizenship, including "offering" to "its citizens an area of freedom, security and justice without internal borders".

The main rights linked to the status of a European citizen are listed in Article 20 of the Treaty on the Functioning of the European Union.

This article states:

"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States […]".

The European Court of Justice has endowed the status of the European citizenship with superior and autonomous rights when compared to national

• Giovanna Chiappetta
Ordinario di diritto privato, Università della Calabria, E-mail: giovanna.chiappetta@unical.it

citizenship. Over time, it has transformed citizenship "from a merely symbolical gesture to an independent source of rights for Member State nationals"[1].

European jurisprudence has identified an autonomous set of rights linked to European citizenship, independent of, and sometimes prevailing over, national citizenship.

II. LEGAL AUTONOMY IN EUROPEAN PRIVATE INTERNATIONAL LAW.

In order to guarantee and facilitate the free movement of persons within the territories of its member States, the European Union has regulated matters, traditionally not associated with citizenship, such as divorce, parental responsibility[2], maintenance claims[3] and patrimonial family relations[4].

Important new principles about applicable law stem from Private International Law and European legislation[5].

In European international law the *pactum de lege utenda* has been transformed into the priority criterion of general application to identify the applicable law in many areas, including within family relationships.

1 Van Elsuwege, P.: "Shifting the Boundaries? European Union and the Scope of Application of EU Law", Legal Issue of Economic Integration, 2011, p. 263 ss.

2 Council Regulation (EC) No 2201/2003 of 27th 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, Regulation that will be replaced starting from 1st Agust 2022, by Regulation 2019/1111 adopted on 25th June 2019. Council Regulation (EU) No 1259/2010 of 20th December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in *www.eur-lex.europa.eu*

3 Council Regulation (EC) No 4/2009 of 18th December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *www.eur-lex.europa.eu*

4 Council Regulation (EU) 2016/1103 of 24th 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) 2016/1104 of 24th 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. See all in *www.eur-lex.europa.eu*

5 The choice of law sometimes becomes the means to overcome the obstacles linked to the lack of equivalence between national rights and the election of the forum instrument for "*désactiver l'impérativité*" of national legislative prohibitions. Thus, Hammje, P.: "Ordre public et lois de police limites à l'autonomie de la volonté", in *L'autonomie de la volonté dans les relations familiales internationals* (ed. A. Panet, H. Fulchiron, P. Wautelet), 2017, p. 112 ff. which highlights how european discipline, in order to ensure certainty and predictability of the applicable law, strongly frames the use of defence mechanisms through which Member States or participants in enhanced cooperation can protect national public policy. All the European regulations in family law present the only reserve of the public policy exception not to safeguard the national conceptions of the Member States, but to promote a real *ordre public européen de la famille* which not only transcends, but can wipe out the diversity of national conceptions (p. 130). See, e.g., recital 54 of Regulation No. 1103 of 2016. In relation to public policy as a protection for the various national conceptions, regulations are generally expressed in this way "The 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" Art. 31 of Reg. 2016/1103. Only Council Regulation (EC) No 4/2009 of 18th December 2008 (concerning the regulation of maintenance and divorce obligations) provides for the instrument of compliance with the mandatory rules of the forum.

Recent indications by the European legislator point in the direction of mutual recognition of measures, decisions or acts perfected abroad[6].

In this regard, the Regulation (EU) n. 2019/1111 (which will come into force on 1st August 2022), provides in Article 65 for the automatic recognition, without the need of any *exequatur*, of "privileged decisions" also on parental responsibility and those on the so-called private divorces.

The choice as between several applicable laws or the choice of the mechanism of recognition opens the door wide to the phenomenon of forum or system shopping, and this even with regard to "static" European citizens married or living together (who are not transnational families)[7].

The condition of the cross-border element, once considered a dogma, is now, as a result of the use (or judicial interpretation) of European citizenship, assimilated to purely internal situations.

Pursuant to Article 31 of Regulation (UE) 2016/1104, a restriction may be applied in exceptional cases: for example, if Islamic law, which allows polygamous marriage, repudiation of marriage or the marriage of child brides, were to be applicable.

For example, Article 22 of (UE) Regulation 1104/2016 allows "static" couples to choose the place of registration of the union and so to choose the substantive law applicable to their property relations also in the eventuality of the break of the union.

Exactly as happened for Italian static couples married through the use of the so-called Regulation Brussels II-*bis* in order to be able to obtain immediate divorce.

Therefore, a *quaestio iuris* arises:

"Is it possible that through the abuse of the rights connected to European citizenship, the couple might evade the application of an unavailable national law?"

The answer is "no" if the application of foreign legislation is in compliance with the constitutional public order (*lex fori*).

6 Council Regulation (EU) 2016/1103 of 24th June 2016 cit.; Council Regulation (EU) 2016/1104 of 24th June 2016 cit.

7 The Court of Justice examined the rejection of applications for residence submitted by parents for the purposes of family reunification with their children as "static" european citizens. ECJ 5th May 2011, Case C-434/09, Shirley McCarthy; ECJ 15th November 2011, Case C-256/11, Murat Dereci; ECJ, 8th November 2012, Yoshikazu Iida; ECJ 6th December 2012, Cases C-356/11 and 357/11, O. and S.; ECJ 8th May 2013, Case C-87/12, Kreshnik Ymeraga; ECJ 10th October 2013, Case C-86/12, Adzo Domenyo Alokpa; ECJ, 13th September 2016 Case C-165/14, Redòn Marìn, para. 81, Case C-304/14, CS, para. 36 respectively.

In this way, the distinction between cross-border and purely internal situations is blurred[8].

III. CONCLUSIONS.

One still has to identify the potential limits imposed by public order concerning the choice of the applicable law provided by EU Regulations to static citizens. Not all situations of non-derogation derived from the Italian law are characterized by unlawfulness.

An infringement of the constitutional public order can be detected only if the effects of the foreign applicable law violate the fundamental rights and freedoms of the individuals.

In relation to the direct application of the fundamental principles of the human person, the European Court of Human Rights in Strasbourg espouses, in its judgments, the fundamental importance of the prohibition of discrimination on grounds of sex, gender or similar status[9].

This was echoed by the Advocate General of the Court of Justice in relation to a case of repudiation under *Sharia* law, which does not give the wife equal conditions of access to divorce.

8 See Pagano, E.:, *La rilevanza della cittadinanza e dell'unità della famiglia nella recente prassi della Corte di giustizia in tema di ricongiungimento familiare*, *Il diritto dell'Unione Europea*, 2017, 279 ff.

9 Thus, Strasbourg Court 22th march 2012 Konstantin Markin v. Russia Para. 150 (in *www.echr.coe.int*). This statement is recalled in the judgment of the Grand Chamber, 19th December 2018, given for the case of Molla Sali v. Greece concerning the application of the sacred law of Islam (*sharia*) to a succession dispute, although the *de cujus* (a Greek of the Muslim minority) had made a will according to Greek civil law. However, in paragraph 160, the Court inexplicably refers to marriage and divorce "le 15 janvier 2018, la loi visant à abolir le régime spécifique imposant le recours à la charia pour le règlement des affaires familiales de la minorité musulmane est entrée en vigueur. Le recours au mufti en matière de mariages, de divorce ou d'héritage ne devient désormais possible qu'en cas d'accord de tous les intéressés (paragraphe 57 ci-dessus). Cela étant, les dispositions de la nouvelle loi n'ont aucune incidence sur la situation de la requérante, dont le cas a été tranché de manière définitive sous l'empire du régime antérieur à celui prévu par cette loi". The sentence reports the "contrary voices" to the repudiation. See e.g. para. 83 of the judgement, in which the Court points out that "Dans un autre État (Royaume-Uni), en Mai 2016, le gouvernement a commandé une étude indépendante en ce qui concerne l'application de la charia (en Angleterre et au pays de Galles) afin d'examiner «s'il était fait un mauvais usage de la charia et si celle-ci était appliquée de manière incompatible avec le droit interne de l'Angleterre et du pays de Galles et, en particulier, s'il y avait des pratiques discriminatoires contre les femmes qui avaient recours aux tribunaux islamiques affiliés à une mosquée locale (sharia councils). Dans son rapport de février 2018, l'étude indépendante a constaté que les sharia councils n'avaient pas de statut juridique, ni de pouvoir juridique contraignant en vertu du droit commun. Alors que la charia était une source de conduite pour nombre de musulmans, les sharia councils n'avaient pas de compétence juridictionnelle en Angleterre et au pays de Galles. Ainsi si les sharia councils prenaient de décisions ou faisaient de recommandations incompatibles avec le droit interne (y compris avec les politiques en matière d'égalité, telle que la Loi sur l'Égalité de 2010), le droit interne devait prévaloir. Les sharia councils agiraient illégalement s'ils tentaient d'écarter l'application du droit interne. Même s'ils ne revendiquent pas un pouvoir juridique contraignant, ils disposent en réalité d'une capacité décisionnelle dans le domaine du divorce islamique".

If the husband is granted a right to divorce unilaterally, this right is denied to the wife who may resort to a judicial divorce on the basis of specific conditions, namely a husband's illness or disease.

In his Opinion in Case C-372/16, finally decided by the Court on 20th December 2017[10], Advocate General Saumandsgaard Øe, points out that the wife's prior consent to repudiation cannot affect and cannot overcome the violation of the principle of non-discrimination on grounds of sex.

The ban on child brides (under the age of 16) laid down by the German law *Gesetz zur Bekämpfung von Kinderehen* moves in this direction.

So, to sum up, there is no blanket general prevalence of the European Private International family law over national law.

Grounds of public order based on the safeguarding of fundamental principles of national law may allow national authorities to refuse recognition, in whole or in part, of the effects deriving from law "abusively" chosen by family members.

The Italian Constitutional Court, with the judgment number 269 of 2017, postulated that the violation of human rights requires an *erga omnes* intervention placed above the decisions on the basis of the preliminary reference by the Court of Justice.

10 Thus, Strasbourg Court 22th march 2012 Konstantin Markin v. Russia Para. 150, recalled by the Advocate General in his Opinion delivered on 14th May 2017 in Case C-372/16 decided by the Court of Justice on 20th December 2017, cit. which claims the irrelevance of the consent expressed by the spouse discriminated against, given the breach of the fundamental principle of non-discrimination.

BIBLIOGRAPHY

HAMMJE, P.:, "Ordre public et lois de police limites à l'autonomie de la volonté", in *L'autonomie de la volonté dans les relations familiales internationales* (a cura di A. PANET, H. FULCHIRON, P. WAUTELET), 2017, p. 112 ff.

PAGANO, E.:, *La rilevanza della cittadinanza e dell'unità della famiglia nella recente prassi della Corte di giustizia in tema di ricongiungimento familiare*, *Il diritto dell'Unione Europea*, 2017, 279 ff.

VAN ELSUWEGE, P.: "Shifting the Boundaries? European Union and the Scope of Application of EU Law", *Legal Issue of Economic Integration*, 2011, p. 263 ss.

THE VARIATION OF THE LAW APPLICABLE TO THE FAMILY PROPERTY REGIME IN EU REGULATIONS N. 2016/1103 AND 1104

LA VARIACIÓN DE LA LEY APLICABLE AL RÉGIMEN ECONÓMICO FAMILIAR EN LOS REGLAMENTOS DE LA UE N. 2016/1103 Y 1104

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 118-129

Nicola
CIPRIANI

ARTÍCULO RECIBIDO: 4 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The essay examines the discipline of EU regulations n. 2016/1103 and 1104 concerning the identification of the law applicable to the family property regime. Specifically, the work reflects on problems arising after a change, during the relationship, of the substantial law applicable to the couple's property regime.

KEY WORDS: EU regulations n. 2016/1103 and n. 2016/1104; family property regime; international private law.

RESUMEN: *El ensayo examina los reglamentos de la UE n. 2016/1103 y 1104 en lo que respecta a la identificación de la ley aplicable al régimen económico familiar. En concreto, la obra reflexiona sobre los problemas que surgen tras un cambio, durante la relación, de la ley sustancial aplicable al régimen patrimonial de la pareja.*

PALABRAS CLAVE: *Reglamentos UE n. 2016/1103 y n. 2016/1104; régimen económico familiar; derecho privado internacional.*

TABLE OF CONTENTS: I. FOREWORD. THE LAW APPLICABLE TO PROPERTY RELATIONS IN THE FAMILY. THE N. 1103 AND 1104/2016 EU REGULATIONS.- II. THE POSSIBILITY OF VARIATION OF THE LAW APPLICABLE TO THE FAMILY PROPERTY REGIME.- III. THE EFFECTIVENESS RESPECT TO THIRD PARTIES OF THE VARIATION OF THE APPLICABLE LAW.

I. FOREWORD. THE LAW APPLICABLE TO PROPERTY RELATIONS IN THE FAMILY. THE N. 1103 AND 1104/2016 EU REGULATIONS.

In their intense activity aimed at pursuing rapprochement amongst law systems and identifying measures to ensure the compatibility of the rules applicable in the Member States to conflicts of law and jurisdiction, the European legislator has always looked with particular attention to the context of family relations. However, among the numerous interventions made, the investigation of property regimes between spouses has always been avoided[1] due to a series of details of the single systems and technical difficulties that the connection of the disciplines of family property regimes posed. Of course, this omission constituted a limitation of the European legislation on family law, which became more and more problematic over time[2].

In 2016, the Council, with the two twin regulations, nos. 2016/1103 and 1104 of 24th June, both intervened in the field of enhanced cooperation in the area of jurisdiction, applicable law, recognition, and enforcement of decisions concerning, respectively, matrimonial property regimes and the property consequences of registered partnerships. The regulations came into force on July 28th, 2016, but

1 A first attempt to standardize legislations was made with The Hague Convention on the law applicable to matrimonial property regimes of 14th March 1978. However, the attempt was unsuccessful, because the convention has been ratified only by France, Luxembourg and the Netherlands.

2 See the Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, presented by the EU Commission on 17th July 2006, which notes the following: "A particular consequence of the increased mobility of persons within an area without internal frontiers is a significant increase in all forms of unions between nationals of different Member States or the presence of such couples in a Member State of which they do not have the nationality, often accompanied by the acquisition of property located on the territory of several Union countries. The preliminary study commissioned by the Commission in 2006 revealed that more than 5 million foreign EU nationals lived in another Member State of the Union, while there were around 14 million non-EU foreign residents in the Union in 2000. This study estimates that almost 2.5 million items of real property were owned by spouses and located in Member States different from that of their residence. The Commission impact study relating to its proposal for a Regulation on applicable law and jurisdiction in divorce matters shows that there are approximately 170000 international divorces in the Union each year, i.e. 16% of all divorces".

• Nicola Cipriani
Full Professor of Private Law, Lum – Libera Università Mediterranea "G. Degennaro"-Bari. E-mail: cipriani@lum.it

their actual application was postponed to January 29th, 2019[3]. More precisely, art. 69 of both regulations, while indicating the transitional discipline, identifies two parameters to determine the actual effectiveness of the regulations. The first, formalized in paragraph 1, is of a procedural matrix, following a consolidated practice in the transitional disciplines of private international law norms[4], so that each regulation "applies only to proceedings initiated to public deeds formally drawn up or registered and to approved judicial settlements concluded on or after January 29th, 2019". The second parameter - used in the discipline regulating the identification of the law applicable to the family property regime and contained in art. 69 paragraph 3 - is instead substantial. It is envisaged that "the provisions of the third chapter apply only to spouses [or to partners] who have married [or registered their partnership] or who have designated the law applicable to the matrimonial property regime after January 29th, 2019".

Needless to say, the two regulations' problematic aspects are numerous and complex[5]. These pages aim to briefly reflect on some profiles specifically related to identifying the substantive law applicable to family property regimes. Such discipline is described in the third chapter, and includes articles from 20 to 35 of the regulations. Because of its complexity, it is better first to illustrate the essential features, stating that, given the almost identity of the disciplines, reference will be made to the reg. n. 1103, giving account, when necessary, of the differences that emerge concerning reg. 1104.

3 On the two regulations, with particular reference to the perspective of Italian law, see Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", in *Riv. dir. int.*, 2017, p. 1103 ff.; Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (ue) n. 2016/1103 in materia di regimi patrimoniali tra i coniugi", in *Riv. dir. internaz. priv. e proc.*, 2017, p. 356 ff.; Malagoli, E.: "Regime patrimoniale dei coniugi ed effetti patrimoniali delle unioni civili: i Regolamenti UE «gemelli» n. 2016/1103 e n. 2016/1104", in *Contr. impr. Europa*, 2016, p. 828 ff.; Pinardi, M.: "I regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate", in *Europa dir. priv.,* 2018, p. 733 ff.; Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", in *Riv. dir. internaz. priv. e proc.*, 2018, p. 33 ff.; Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali", in *Nuove leggi civ. comm.*, 2019, p. 1529 ff.; Colonna, G.V.: "I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate", in *Fam. dir.*, 2019, p. 839 ff.; Nencini, G.: "I rapporti patrimoniali tra i coniugi e gli uniti civilmente nella normativa comunitaria", in *Stato civ. it.*, 2019, p. 213 ff.
More in general, see also Vinaixa Miquel, M.: "La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)", in Aa.Vv., *El orden público interno, europeo e internacional civil*, Barcelona, 2017, p. 274 ff.; Lagarde, P.: "Reglements 2016/1103 et 1104 du 24 juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres", in *Riv. dir. internaz. priv. e proc.*, 2016, p. 676 ff.; Gallant, E.: "Le nouveau droit international privé européen des régimes patrimoniaux de couples", in *Europe. Actualité du droit de l'Union Européenne*, 2017, p. 5 ff.

4 Think of art. 72 of the Italian law n. 218 of 1995, for the reform of private international law. Adopting such a transitional provision entails the possibility that the same substantial relationship is subject to different rules depending on the moment in which the trial started.

5 The two regulations have universal range, so that the conflicting provisions they contain apply even if the law they designate as applicable is not that of a UE State or is that of a Member State not participating in enhanced cooperation: see Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali", cit., p. 1533.

The first criterion to identify the applicable law is parties' (spouses, future partners, or partners) choice. Such choice must fall within the framework of the State's law in which at least one of them has their habitual residence or of which at least one of them was a citizen at the time of the conclusion of the agreement (art. 22.1, letter *a* and *b*). For registered unions, the law of the State under the law of which the partnership was established may also be indicated (art. 22.1, letter *c*, reg. 1104).

In the absence of an express agreement on the applicable law choice, art. 26 determines the connection criteria for its identification, stating rules that are partially different for marriage and registered unions.

Indeed, with regards to marriages, reference must be made to the "law of the State a) of the first common habitual residence of the spouses after the conclusion of the marriage or, in lack thereof, b) of the common citizenship of the spouses at the time of the marriage or, in lack thereof, c) with which the spouses have the closest connection together at the time of the marriage taking into account all the circumstances" (art. 26.1, reg. 1103). If the spouses have several common citizenships at the time of the marriage, the criterion indicated in lett. *b* of art. 26.1 does not apply (art. 26.2, reg. 1103). Registered partnerships require the application of the law "of the State under whose law the registered partnership was established" (art. 26.1 reg. 1104).

As an exception, and upon request by either spouse, the judicial authority, instead of applying art. 26.1*a*, reg. 1103 and 26.1 reg. 1104, may apply the law of another State. This may happen if the applicant demonstrates that a) the spouses had their last common habitual residence in that other State for a significantly longer period compared to the State of first official common residence[6]; b) both spouses or partners "had relied on the law of that other State in arranging or planning their property regimes" (art. 26.3 reg. 1103; art. 26.2 reg. 1104).

Some preliminary clarifications are necessary. First of all, it should be highlighted that for marriage, regulation 2016/1103 identifies three different "cascade" connection criteria in the absence of choice. In other words, they are ordered so that the applicability of one of them excludes that of the following[7]. Moreover, it

6 Art. 26.2.a reg. 1104 requires the petitioner to prove that «the partners had their last common habitual residence in that other State for a significantly long period of time» thus diverging from the analogous provision of art. 26.3.a regulation 1103. It is, after all, a consequence of the fact that regulation 1104 in art. 26.1 does not provide for the plurality of connection criteria but only refers to the State›s law in which the union was established. Damascelli, D. writes about this in "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", cit., p. 1146 f. He states that the formulation of reg. 1104 was essentially inevitable, given that only in the system of art. 26 of Regulation (EU) 2016/1103 lies the possibility of comparing the duration of two common habitual residences and of giving prevalence to the (also in this case, significantly) longer one.

7 Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione", cit., p. 360.

is worth underlining that the three criteria are structured in a partially different way from each other for the relevant purposes here. On the one hand, all three are "fixed", *i.e.*, not intended to change. Indeed, the criterion consists of a complex case in point, in which not only an evaluation of factual and legal elements is relevant (habitual residence, citizenship, closest connection). It also encompasses - directly or indirectly - a specific time to verify them (for instance, the moment of the conclusion of the marriage, for the criteria under lett. *b* and *c*; the first common habitual residence, for the criterion under lett. *a*. On the other hand, however, the case identified by the criterion under lett. *a*, unlike what happens for the other two, may not exist at the time of the marriage and may occur later.

The so-called exception clause, arising from art. 26.3 reg. 1103 (and from art. 26.2 reg. 1104) identifies an alternative connecting factor structured in a very peculiar way. Indeed, the possibility of exceptionally exceeding the law of the State identified by art. 26.1.a (26.1 for reg. 1104) exists only if, alternatively, reference is made to the State in which the spouses or partners had their last common habitual residence. In other words, it is not enough that the common residence of the spouses has changed since the marriage celebration and that they have relied on the applicability of the law of the State of the new residence to their property relations. It is also necessary that the spouses have not moved to another State again later on. Structured this way, the connecting factor can be considered effective or disappear depending on whether the spouses further move their habitual residence[8].

II. THE POSSIBILITY OF VARIATION OF THE LAW APPLICABLE TO THE FAMILY PROPERTY REGIME.

This concise description introduces a delicate aspect: the possible change – during the relationship - of the substantial law applicable to the couple's property regime.

In particular, several hypotheses of variations can occur. First of all, in the event of a voluntary change made by the spouses/partners during the relationship, art. 22.1 allows this possibility provided that "a) the law of the State of the habitual residence of the spouses or future spouses, or of one of them, at the time of the agreement; or b) the law of a State of which one of the spouses or spouses is a national at the time of the conclusion of the agreement".

8 An example can help understand the issue. Imagine two spouses who, at the time of the marriage, reside in Italy. After two years, they move to France, where they remain for 15 years and where they organize their property relations considering French law to be applicable. Later on, they move to Spain, where, a year later, they divorce. The criterion identified by article 26.1.a reg 1103 establishes the discipline of their property relationships in substantive Italian law. The criterion identified by article 26.3 reg 1103 should lead to the applicability of French law, which, however, is not the last common habitual residence.

Moreover, after the marriage or registered union, a variation to the law applicable to the property regime is possible even without an express agreement of the spouses or partners. Therefore, the cases of marriages and registered partnerships must be distinguished.

It may happen that the spouses do not have a common habitual residence at the time of marriage, and this occurs only at a later time. In fact, given the wording of art. 26.1, in the absence of a common residence, the connecting factor must be identified in the common citizenship under art. 26.1.b; the subsequent occurrence of habitual residence produces the priority of the connecting factor established by art. 26.1.a, and thus involves a modification of the applicable substantive law.

Furthermore, a variation in the applicable law is also possible if the exception clause is used. As illustrated, the variation is contemplated by art. 26.3 reg. 1103, according to which the criterion established by art. 26.1.a can be replaced if the spouses have resided in another state for a longer period than their first residence and have relied on the applicability of the law of that second state in organizing their property regimes. Art. 26.2 reg. 1104 admits the exception clause also in registered partnerships.

It is easy to understand that the variation of the law applicable to property regimes among spouses or partners involves a problem.

First of all, the property regimes of a couple are usually destined to encompass years or even decades, during which many events may happen. So, it is just appropriate that such events are treated uniformly.

Secondly, it must be considered that the regulation of a couple's property regime affects all the goods that, during the marriage duration, become part or are excluded by the estate of the spouses or partners. Such goods inevitably have a diverse nature and are potentially placed in different States.

Furthermore, the discipline of the property regime has a double front of relevance, both internal to the couple and towards third parties, for which the opposability of any variation of the applicable substantive law poses a series of complicated problems.

It is no coincidence that in most cases, the regulations of private international law make use of connecting criteria that are as stable as possible, like, for example, the national law common to the spouses.

All these problematic aspects were kept in mind in the impact assessment accompanying the Commission proposal for a Council regulation of 2011[9]. There, in illustrating the policy options, on the one hand, the importance of applying the same substantive law to all assets subject to the regime was emphasized; on the other, it was proposed that "The conflict of law rule in property matters should be based on the principle of immutability of the property regime. This means that the legal framework of the spouses' property regime will remain unchanged during the marriage or partnership. In particular, there will be no automatic change of the property regime on the ground that a relevant connecting factor has changed"[10]. And the same document, in identifying the proposal to be preferred, indicated the regime's immutability as a goal to be pursued[11].

Nevertheless, these proposals were only partially incorporated in the regulations' final text, where some contradictions emerge. In fact, in the recitals, the idea of the regulatory law's uniqueness appears on the one hand[12]. On the other hand, the non-modifiability of the same is affirmed, if not by the parties' express will. In particular, recital no. 46, reg. 1103 (and similarly, recital n. 45 reg. 1104) provides that "To ensure the legal certainty of transactions and to prevent any change of the law applicable to the matrimonial property regime being made without the spouses being notified, no change of law applicable to the matrimonial property regime should be made except at the express request of the parties. Such a change by the spouses should not have retrospective effect unless they expressly so stipulate. Whatever the case, it may not infringe the rights of third parties".

However, as already shown, both regulations entail the variation of the law regulating property regimes not only by an express agreement but also by substantial behavior. More, the exception clause introduces a further level of complexity, because it leaves it to the judiciary authority (especially *a posteriori*) to decide on the applicability of a law different from the ordinary one.

Of course, it cannot be an entirely discretionary decision. Still, certainly, the parameters on which the judge must decide are far from being clear and objective,

9 The document can be read at *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0327:FIN:EN:PDF.*

10 *Cfr. Impact assessment*, cit., p. 27, *sub Policy Option* 4.

11 *Cfr. Impact assessment*, § 12, *Preferred policy option*: "Furthermore, the principle of immutability and a unitary system would be included, thus ensuring that the law applicable to the matrimonial property regime does not change when the spouses move to another Member State and applies to all assets".

12 See in particular recital no. 43, reg. 1103: "For reasons of legal certainty and in order to avoid the fragmentation of the matrimonial property regime, the law applicable to a matrimonial property regime should govern that regime as a whole, that is to say, all the property covered by that regime, 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 no. 42 reg. 1104.

in particular, the parameter regarding the significantly longer residency period in the State where the law must be applied[13].

The application of the exception clause thus risks introducing an element that is difficult to control by the spouses or partners themselves, who, for example, could place their reliance on the applicability of the law and organize their property regimes by referring to it. But this would not be effective until after sufficient time has elapsed (or, better, until after a period the judge considers sufficient).

If this is the case, it is a question of identifying the problems that may arise if the applicable law changes. On the one hand, such problems concern the internal relationship between the parties; on the other, that of the third parties' protection. From the first perspective, the problem is the retroactive effects of the variation. The matter also concerns whether third parties can know the variation and object to it. The European legislator must be acknowledged to have been well aware of these issues, focusing on specific regulations.

For the hypothesis of voluntary express variation of the applicable law, art. 22 clarifies that the change only has future effects "unless otherwise agreed" (art. 22.2) and that retroactive variation cannot prejudice third parties' rights (art. 22.3).

For the case regulated by art. 26.3, on the other hand, the rule is apparently the opposite. The applicable law of property regimes variation retroactively acts right to the beginning of the union unless one of the spouses objects to this (26.3, second paragraph). Clearly, even in this hypothesis, the variation in the substantial law cannot operate to the detriment or prejudice of third parties.

The third case of possible variation of the applicable law, the one extracted from art. 26.1.a (*i.e.*, the hypothesis of spouses or partners' common residency, which was missing at the establishment of the union), is not expressly regulated. Of course, it must be said that this is a presumably residual hypothesis because it is certainly not frequent that spouses or partners do not have a common residence at the time of marriage or union. Moreover, the importance of the requirement of habituality has been emphasized by scholars[14].

Identifying the discipline to apply to the case, however, deserves a brief reflection. As already mentioned, in the other two cases, for which the regulation dictates an express discipline, there is an apparent dyscrasia since art. 22.2 provides for non-retroactivity unless otherwise agreed; art. 26.3, on the other hand, provides for the retroactivity of the new applicable law unless one of the spouses opposes

13 Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione", cit., p. 366 s.

14 Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione", cit., p. 359 ss.

it. The contradiction, however, is only apparent. In both cases, the retroactivity of the variation operates if there is an agreement, while the dissent of only one of the spouses is enough to prevent it. The substantial difference lies in the fact that for the hypothesis provided for by art. 22.2, the spouses' agreement for retroactivity must be expressly stated while in that of art. 26.3 it is deemed to exist except for the manifestation of a contrary will of the individual.

This difference, however, finds a partial explanation in the fact that article 22.2 refers exactly to the hypothesis in which the spouses formalize their will to change the applicable law, so that the European legislator requires spouses or partners, on that occasion, to take an expressed position also on retroactivity. Instead, in the art. 26.3 case, the identification of the parties' will to change the substantive law governing their property regime is presumed in the presence of the elements referred to in letters *a* and *b* of art. 26.3, first paragraph.

Quid iuris, then, for the hypothesis that the change in the applicable law results from the arrival of the common residence? The most reasonable solution seems to be the application of a rule modeled on the scheme of art. 26.3, therefore, of the tendential retroactivity, unless a spouse opposes.

Another aspect that must be considered is that the transition from one substantive law to another can have a very different impact on the actual situation. For example, it is possible to change from a substantive law that establishes the sharing of acquired assets as a legal regime, to another that establishes an analogous regime, which in substance changes little; but it is also possible that the new substantive law provides an opposite regime, like the separation of goods. In such cases, having to proceed with the dissolution of the old regime may become a problem. A problem that spouses or partners could also not consider, especially in the event of a change not expressly agreed under art. 22 reg. 1103.

From this point of view, the choice of allowing the spouse or partner, even *a posteriori*, to oppose retroactivity appears to be reasonable since this opposition would allow intervening critically on a choice that was not pondered enough during the relationship.

III. THE EFFECTIVENESS RESPECT TO THIRD PARTIES OF THE VARIATION OF THE APPLICABLE LAW.

The matter is partly different when it comes to relations with third parties, which are the subject of express provision both for an express variation in the applicable law (art. 22.3) and for the case of clause of exception (art. 26.3). The discipline of the two hypotheses is, however, partially different because art. 22.3

establishes that the retroactive variation of the law governing property regimes does not affect the rights of third parties deriving from the previous law. The unenforceability, therefore, only concerns the profile of retroactivity, while from the change onwards, relations with third parties are also governed by the new law (with the limit established by art. 28).

For the exception clause hypothesis, however, art. 26.3, paragraph 3, reg. 1103, and art. 26.2 paragraph 3 reg. 1104 provide that the application (determined by the judge) of the new law may not affect the rights of third parties deriving from the previous law without referring to retroactivity. The question is whether the exception clause (which, as already seen, is normally retroactive, without prejudice to the opposition of one of the parties) is radically unenforceable against third parties, even starting from the moment in which the new regime is active (if there is opposition by a party, said moment is that of the establishment of the last common habitual residence in the new State[15]). And the answer must be affirmative, for the reason that the activation of the exception clause is subject not only to the request of the party but also to the judge's decision, so that it becomes a mere possibility, totally uncertain. For this reason, the exception clause cannot institutionally affect the rights of third parties, who, moreover, would be extraneous to the judgment in which the judge decided on it[16].

Such observations open up a further particularly complex and delicate scenario. It becomes evident that the variation in the property regime can create a double path, with a substantial law operating between the parties and a substantial law operating towards third parties.

The position of third parties, on the other hand, is not regulated due to the hypothesis identified above, in which the change in the law applicable to the matrimonial property regime depends on the establishment of a common habitual residence initially missing at the time of the conclusion of the marriage (art. 26.1.a). Obvious needs to protect third parties' leads to deeming the law of the first common residence State non-objectionable in prejudice of rights acquired by third parties in the previous period, in which art 26.1.*b* or *c* could be applied.

Many other issues would deserve further analysis. It can be certainly said that the two twin regulations are destined for a wide and repeated application so that it can be foreseen that the contribution of case-law in identifying problematic profiles and related solutions will not be lacking.

15 Art. 26.3, II reg. 1103; art. 26.2, II reg. 1104.

16 Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", cit., p. 1140.

BIBLIOGRAPHY

Colonna, G.V.: "I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate", in *Fam. dir.*, 2019, p. 839 ff.;

Damascelli, D.: "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo", in *Riv. dir. int.*, 2017, p. 1103 ff.;

Gallant, E.: "Le nouveau droit international privé européen des régimes patrimoniaux de couples", in *Europe. Actualité du droit de l'Union Européenne*, 2017, p. 5 ff.;

Lagarde, P.: "Reglements 2016/1103 et 1104 du 24 juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres", in *Riv. dir. internaz. priv. e proc.*, 2016, p. 676 ff.;

Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniugi» del regolamento UE 2016/1103 e i modelli nazionali", in *Nuove leggi civ. comm.*, 2019, p. 1529 ff.;

Malagoli, E.: "Regime patrimoniale dei coniugi ed effetti patrimoniali delle unioni civili: i Regolamenti UE «gemelli» n. 2016/1103 e n. 2016/1104", in *Contr. impr. Europa*, 2016, p. 828 ff.;

Nencini, G.: "I rapporti patrimoniali tra i coniugi e gli uniti civilmente nella normativa comunitaria", in *Stato civ. it.*, 2019, p. 213 ff.;

Pinardi, M.: "I regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate", in *Europa dir. priv.,* 2018, p. 733 ff.;

Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", in *Riv. dir. internaz. priv. e proc.*, 2018, p. 33 ff.;

Vinaixa Miquel, M.: "La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)", in AA.VV.: *El orden público interno, europeo e internacional civil*, Barcelona, 2017, p. 274 ff.;

Vismara, F.: "Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (ue) n. 2016/1103 in materia di regimi patrimoniali tra i coniugi", in *Riv. dir. internaz. priv. e proc.*, 2017, p. 356 ff.

DIFFERENT APPROACHES TO MARRIAGE DOWNGRADING: FROM AN ANTI-ELUSIVE MEASURE TO AN ANTI-DISCRIMINATORY CLAIM

DIFERENTES ENFOQUES SOBRE LA DEGRADACIÓN DEL MATRIMONIO: DE UNA MEDIDA ANTIELUSIVA A UN REMEDIO ANTIDISCRIMINATORIO

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 130-147

Roberto
GARETTO

ARTÍCULO RECIBIDO: 7 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The essay focuses on the different mechanisms of marriage downgrading. Given the principle of "cross-border continuity" of statuses, limits to this continuity are sometimes admitted and they are placed through downgrading mechanisms. That can occour in the case of same-sex marriages transcription in a Member State which does not allow such marriages, but which does allow same-sex registered partnerships. Downgrading mechanism has an anti-elusive function, but it is not without problems in terms of discrimination on the grounds of sexual orientation. A different approach is taken in the case of an opposite-sex couple requesting the downgrading of their marriage, celebrated before the Member State allowed access to registered partnerships for all sex couples. The element of voluntariness seems to be the prerequisite for a proper anti-discrimination rule.

KEY WORDS: Family; cross-border couple; marriage; registered partnership; downgrading; discrimination.

RESUMEN: *El ensayo se centra en los diferentes mecanismos de degradación del matrimonio. Dado el principio de "continuidad transfronteriza" de los estatutos, en ocasiones se admiten límites a esta continuidad y se colocan mediante mecanismos de degradación. Eso puede ocurrir en el caso de la transcripción de matrimonios entre personas del mismo sexo en un Estado miembro que no permite tales matrimonios, pero que sí permite las uniones registradas entre personas del mismo sexo. El mecanismo de degradación tiene una función anti-elusiva, pero no está exento de problemas en términos de discriminación por motivos de orientación sexual. Se adopta un enfoque diferente en el caso de una pareja del sexo opuesto que solicita la degradación de su matrimonio, celebrado antes de que el Estado miembro permitiera el acceso a las uniones registradas para todas las parejas sexuales. El elemento de la voluntariedad parece ser el requisito previo para una regla adecuada contra la discriminación.*

PALABRAS CLAVE: *Familia; pareja transfronteriza; matrimonio; uniones registradas; degradación; discriminación.*

TABLE OF CONTENTS: I. "CROSS-BORDER CONTINUITY" OF STATUSES.- II. DOWNGRADING MECHANISMS IN FAMILY LAW.- III. MARRIAGE DOWNGRADING AS AN ANTI-ELUSIVE MEASURE.- IV. MARRIAGE DOWNGRADING AS AN ANTI-DISCRIMINATORY CLAIM.- V. CONCLUSION.

I. "CROSS-BORDER CONTINUITY" OF STATUSES.

The protection of the "cross-border continuity" of statuses acquired abroad is a matter concerning, *inter alia*, the protection of human rights[1]. Two decisions of the European Court of Human Rights (ECtHR) on adoption are significant in this regard: *Wagner and JMWL v. Luxembourg*[2] and *Negrepontis-Giannisis v. Greece*[3].

From these decisions we derive the principle that the non-recognition of status constitutes a violation of the right to family life when the status corresponds to a family bond actually existing in social reality. On the other hand, similar references to the prevalence of an established social reality can be found – albeit limited to relations between EU Member States – in the case law of the Court of Justice of the European Union (CJEU) on the right to a name. The following cases are significant in this regard: *Garcia Avello*[4] (C-148/02) and *Grunkin-Paul*[5] (C-353/06). In both the decisions, the CJEU expressed its view on the necessity to harmonize national legislation with the needs of free movement and residence of EU citizens on the EU territory.

1 Franzina, P.: "Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad", *Diritti umani e diritto internazionale*, 2011, vol. 5, p. 614 f.: "from the standpoint of Article 8 of the ECHR, the shift towards «transnationality» in public policy is not just a cultural option, or a strategy that States are free to decide whether to implement, or not: it rather reflects the increasingly complex perspective from which private international law issues must be dealt with in Europe, i.e. a perspective where the point of view of the forum is no longer a merely «national» one, but embodies that State's international undertakings concerning, inter alia, the protection of human rights".

2 *Wagner and J.M.W.L. v. Luxembourg*, No. 76240/01, ECHR 2007-I, with note by Kinsch P.: *Note (1-2) sous l'arrêt de la CourEDH de 28 juin 2007, Wagner c. Luxembourg*, *Revue critique de droit international privé*, 2007, vol. 96, no. 4, pp. 815-822 and D'Avout, L.: *Note*, *Journal du Droit International-Clunet,* 2008, no. 1, p. 187 ff.

3 *Negrepontis-Giannisis v. Greece*, No. 56759/08, ECHR 2011-I, with note by Kinsch P.: *La non-conformité du jugement étranger à l'ordre public international mise au diapason de la Convention européenne des droits de l'homme*, in *Revue critique de droit international privé*, 2011, vol. 100, no. 4, pp. 817-823 and Dionisi-Peyrusse, A.: "Convention européenne des droits de l'homme (articles 8, 14, 6 et article 1er du protocole nº 1)", *Journal du Droit International-Clunet,* 2012, no. 1, p. 215.

4 CJEU, Case C-148/02, *Carlos Garcia Avello v Belgian State,* [2003] ECR I-11613.

5 CJEU, Case C-353/06, *Grunkin & Paul*, [2008] EUECJ C353/06.

• Roberto Garetto
Research Fellow, School of Law, University of Camerino. E-mail: roberto.garetto@unicam.it

Furthermore the Advocate General in the case *Dafeki*[6], on the free movement of workers and probative value to certificates of civil status, recognises that the protection of "cross-border continuity," deeply rooted in the idea itself of integration pursued by the European legal order, imposes the "immutability of status whenever [...] it constitutes an element of or prerequisite for a right of the individual"[7].

However, the need to take account of the requirements of protection of fundamental human rights and of European integration does not automatically give rise to an absolute obligation to recognise legal situations established abroad. In fact, on the basis of Article 8 of the European Convention on Human Rights (ECHR) itself, a margin of appreciation is ensured to the State[8]. It is worth highlighting that, since the rights guaranteed by Article 8 of the ECHR correspond to those guaranteed by Article 7 EU Charter, according to Article 52 EU Charter, the latter must be interpreted to be consistent with the former.

This assessment of the Member State may, of course, go so far as to sanction abuse of the right. In the case *Sayn-Wittgenstein* (C-208/09)[9] the CJEU supported the Member State from refusing to recognize all the elements of the surname of a national of that State, as determined in another Member State at the time of her adoption as an adult by a national of that other Member State. The reasons for the refusal are that the surname includes a title of nobility which is not permitted in the first Member State under its constitutional law. A different decision by the CJEU would probably have favoured conduct in breach of the law. The CJEU's decision is therefore clear in its determination not to give effect to anti-elusive conduct carried out in a transnational context. However, it should also be noted that, in the latter case, it would have been quite difficult to identify a violation of fundamental human rights in the non-recognition of a family name obtained through the adult adoption for the sole purpose of bearing a title of nobility and achieving social prestige.

6 CJEU, Case C-336/94, *Eftalia Dafeki v Landesversicherungsanstalt Württemberg*, [1997] ECR I-6761, Opinion of Advocate General La Pergola delivered on 3 December 1996, ECLI:EU:C:1996:462.

7 *Ibid.*, § 6.

8 It should also be borne in mind, at the actual level of the regulation on the circulation and cross-border recognition of public documents, the possibility of overlapping plans: over the broader aim of international harmonisation, which is precisely that of the Commission Internationale de l'État Civil, tends to prevail the intra-European integration expressed in the "Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No. 1024/2012."{COM(2013) 228 final}{SWD(2013) 145 final}.

9 CJEU, Case C-208/09, *Sayn-Wittgenstein*, [2010] EUECJ C-208/09. The case refers to an Austrian national, adopted by a German national with a title in his surname Fürst von Sayn-Wittgenstein (Prince of Sayn-Wittgenstein) and that thereby acquired the same surname. The entry of such surname was refused by Austrian courts due to the prohibition of titles of nobility, which is considered to be part of Austrian public policy.

The provision of cross-border continuity of subjective statuses therefore presupposes an assessment by the receiving Member State of their recognisability and the concrete possibility of attributing legal effects to them, which cannot derive from the mere capacity of those statuses to produce effects in the State of origin. It is thus possible to impose limits on the "cross-border continuity" of status, which can ensure the compatibility of the status with a given legal framework.

Differences being made, the CJEU rule of reason applied in the *Cassis de Dijon* decision[10] for goods also applies to the status[11]: national restrictive measures are permitted in the absence of common rules, provided that they pursue an objective of general interest which may override the principle of free movement.

II. DOWNGRADING MECHANISMS IN FAMILY LAW.

Domestic restrictive measures can be imposed by using adapted recognition mechanisms. These mechanisms mostly have an impact of a status-limiting character, and tend to take the form of downgrading.

A Council Decision of 2001 provides a definition of downgrading as follows: "The term 'downgrading' (*déclassement*) means a reduction in the level of classification"[12]. Applying this general scheme[13] in the context of private international law, it is possible to set up a downgraded recognition. This involves implementing a redevelopment technique whereby a situation created abroad can be recognised in a given State, after the same situation has been reconverted into one corresponding to that envisaged by the State itself.

Downgrading finds application in various areas of family law. In the cases (highlighted in the previous paragraph) of adoption and family name, and in other similar ones, namely the refusal to recognise foreign birth certificates stemming from international surrogacy arrangements[14]. The most frequent application, however, concerns marriage and, consequently, registered partnerships.

10 CJEU, Case C-120/78, *Rewe-Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), [1979] ECR 649.

11 Borgmann-Prebil, Y.: "The Rule of Reason in European Citizenship", *European Law Journal*, 2008, vol. 14, no. 3, p. 349: "the rule of reason approach coined in Cassis remains the principal paradigm of Community free movement law."

12 Council of the European Union, "Council Decision adopting the Council's security regulations", Brussels, 28 February 2001, 5775/01, Section II, p. 18.

13 A similar notion of downgrading can also be encountered in non-European contexts, e.g. in the United States. Cf. the definition in the Electronic Code of Federal Regulations, 49 CFR § 8.5: "Downgrading means a determination by a declassification authority that information classified and safeguarded at a specific level shall be classified and safeguarded at a lower level." The text is available at *www.law.cornell.edu/cfr/text/49/8.5* (last visited: 4 July 2021).

14 Several refusals to recognise cross-border surrogacy arrangements and the various consequences entailed have been challenged before the ECtHR on the grounds of the violation of the child's right to respect for private and family life (article 8 of the European Convention on Human Rights). Cf. *Mennesson v. France*,

The downgrading of marriage to registered partnership leads to a sort of redefinition of the legal protection reserved to same-sex couples. The ECtHR does not seem to consider that the loss of the *nomen iuris* "marriage" in itself could determine an illegitimate interference with the right to family life[15].

In the case *Orlandi and others v. Italy*[16], 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. The assimilability of the two legal forms therefore leads the Court to hold that the possibility of transcribing and recognising same-sex marriage as a registered partnership is, in principle, a sufficient condition for meeting the standard of protection offered by the ECHR.

As a precedent for this approach, reference may also be made to the case *Hämäläinen*[17], which concerned the "forced" conversion of a marriage into a registered partnership, following the gender reassignment of one of the spouses. The case is clearly characterised by two peculiarities, which in themselves place it at the margin of the downgrading theme we are addressing. It has no cross-border dimension and concerns the issue of a change of sex with respect to a marriage already celebrated. However, the case is interesting because, in its decision, the ECtHR does not find a violation of the ECHR in the downgrading of a marriage into a registered partnership. According to the Court, in fact, a different formal union, which preserves the same rights and duties as marriage, achieves a fair balance of two competing interests[18]: the person's right to have his or her sexual identity recognised – even in the event of change of sex – and "the State's interest to maintain the traditional institution of marriage intact"[19].

The mentioned *Orlandi* case also provides an interesting insight that we cannot avoid considering. Of the six applicant couples, three were married in Canada, a fourth in California and the remaining two in the Netherlands. Only three of the six couples were in the State of celebration of the marriage for work purposes, whereas the others, even at the time of the celebration, were permanently resident in Italy.

No. 65192/11, ECHR 2014-III; *Labassée v. France*, No. 65941/11, ECHR 2014-V; *Paradiso and Campanelli v. Italy* [GC], No. 25358/12, ECHR 2017.

15 Scaffidi Runchella, L.: "Il riconoscimento e la trascrizione dei matrimoni same-sex conclusi all'estero alla luce delle recenti decisioni del Tribunale di Perugia e della Corte europea dei diritti dell'uomo nel caso *Orlandi ed altri c. Italia*", *GenIUS*, 2018, vol. 1, p. 147.

16 *Orlandi and others v.Italy,* Nos. 26431/12; 26742/12; 44057/12 and 60088/12, ECHR 2017. Cf. a comment to the decision in Deana, F.: *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)*, *Rivista di Diritti Comparati*, 2019, num. 1, pp. 153-183.

17 *Hämäläinen v. Finland* [GC], No.37359/09, ECHR 2014-IV.

18 Salzberg, D.A.G.: "Confirming (the illusion of) heterosexual marriage: Hamalainen v Finland", *Journal of International and Comparative Law*, 2015, vol. 2, num. 1, p. 176.

19 *Hämäläinen v. Finland* [GC], cit., § 38.

With regard to these last three couples, therefore, it seems likely that they moved abroad with the intention of eluding the Italian law that prohibited them from getting married[20].

This anti-elusive mechanism operated at the time of celebration of the six marriages in a legal system – the Italian one – which did not offer yet same-sex couples any form of recognition, leaving them in a legal vacuum. When the ECtHR's decision passed, in 2017, Italy already had adopted the model of registered partnerships for same-sex couples. But a different form of anti-elusive mechanism – the downgrading of marriage to registered partnership – is still effective in the State, as it is based on domestic legislative provisions and is confirmed by case-law of the Italian Supreme Court of Cassation.

III. MARRIAGE DOWNGRADING AS AN ANTI-ELUSIVE MEASURE.

In its decision of 21th July 2015, case *Oliari and Others v. Italy*[21], the Strasbourg Court condemned Italy for the failure of the legislature, despite numerous reminders from its superior courts[22], to provide for a legal institution distinct from marriage that would recognise a relationship between persons of the same sex, since the lack of legal recognition of such unions resulted in a violation of the right to respect for private and family life as set out in Article 8 of the Convention.

In light of this condemnation by the Strasbourg Court, Italy thereafter passed Law No. 76 of 20 May 2016, which entered into force on 5th June 2016, and the subsequent implementing decrees (Legislative Decrees No. 5, 6 and 7 of 19th January 2017).

The law, which is the result of a troubled parliamentary process, was drafted using a regulatory technique that is unusual in civil law systems: that of a single article composed of several (precisely: 69) paragraphs.

20 Scaffidi Runchella, L.: "Il riconoscimento", cit., p. 140, *sub* note 40.

21 *Oliari and Others v. Italy*, No. 18766/11 and 36030/11, ECHR 2015. Cf. the following comments to the decision: Lenti, L.: "Prime note a margine del caso Oliari c. Italia", *Nuova Giurisprudenza Civile Commentata*, II, 2015, pp. 575-581 and Winkler, M.M.: "Il piombo e l'oro: riflessioni sul caso *Oliari c. Italia*", *GenIUS*, 2016, no. 2, pp. 46-61. For further details, see also: Venuti, M.C.: "La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia", *Politica del diritto*, 2016, vol. 47, p. 95 ff. and Winkler, M.M.: "Same-Sex Marriage and Italian Exceptionalism", *Vienna Journal on International Constitutional Law*, 2018, vol. 12, pp. 433-456.

22 Corte Cost., 15th April 2010 No. 138, in *Giurisprudenza Costituzionale*, 2010, no. 2, pp. 1604-1628, with note by Romboli, R.: *Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" o "troppo poco"*, in the same review, pp. 1629-1642 and Cass. civ., sez. III, 15th March 2012 no. 4184, in *Famiglia e diritto*, 2012, no. 7, pp. 665-691, with note by Gattuso, M.: *"Matrimonio", "Famiglia" e orientamento sessuale: la Cassazione recepisce la "doppia svolta" della Corte europea dei diritti dell'uomo.*

Paragraph 1 defines a registered partnership ("*unione civile*") between persons of the same sex as a specific social formation pursuant to Articles 2 and 3 of the Italian Constitution. It thus includes this social formation among those protected by the State, because it is the "place" where the personalities of the individuals, who are part of it, take place. The explicit reference to social formations makes it possible to create a legal link between the constitutional protection of the person's fundamental rights and personal freedom[23].

However, regulating registered partnerships as social formations and not as a family is a controversial solution[24], as it excludes the possibility of referring to a plural concept of a (matrimonial) family, extended to the point of including same-sex couples[25].

In spite of this dogmatic approach, there are similarities between marriage and registered partnership. In fact, previous marriage is an impediment to a registered partnership (cumulation of marriage and registered partnership is not allowed) and the conversion of a marriage into a registered partnership is foreseen if one spouse changes his or her sex. In addition, the last name of the "united" partners is common, and there is provision for extending any reference to "spouses" to the case of "united partners" (if only for the effectiveness of protection). The "united" partners are conferred the typical rights and duties of spouses and, lastly, the need for the joint determination of the life in common is established.

On the other hand, there is no obligation of fidelity, which is present in marriage, and no right to adopt the child of one of the "united" partners, a right recognised in marriage.

The notable omission[26] of fidelity in registered partnerships is the matter of reflection in legal doctrine[27]. Although fidelity in (heterosexual) marriage is to be seen in relation to the presumption of paternity, which cannot be expected in the

23 On constitutional protection and private autonomy: cf. Pace, A.: *Problematica delle libertà costituzionali. Parte generale*, Padova, 2003, p. 20.

24 It does not seem to be the competence of the ordinary legislator to define the constitutional classification of the issued norm. Cf. De Cristofaro: "Le «unioni civili» fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°-34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal D.lgs. 19 gennaio 2017, n. 5", in *Le nuove leggi civili commentate,* 2017, no. 1, p. 118: "*non può né deve essere attribuita soverchia importanza alla statuizione del comma 1°, che definisce in termini di (mera) formazione sociale la coppia del medesimo sesso che abbia costituito una unione civile. Non è infatti certamente compito del legislatore ordinario individuare la corretta qualificazione di una fattispecie ai fini del suo inquadramento in questa o quella disposizione della Costituzione*".

25 Scaffidi Runchella, L.: "Il riconoscimento", cit., p. 143.

26 Sesta, M.: "La disciplina dell'unione civile tra tutela dei diritti della persona e creazione di un nuovo modello familiare", *Diritto e Famiglia*, 2016, vol. 10, p. 886: "*con riferimento ai rapporti personali tra le parti dell'unione civile, resta la* vistosa omissione *dell'obbligo reciproco di fedeltà*" (emphasis added).

27 Fidelity was included in the original text of the draft law, but was deleted by a subsequent – and controversial – amendment. Cf. Ferrando, G.: *Diritto di famiglia. Unioni civili e convivenze. Aggiornamento 2016*, Torino, 2016, p. 7.

case of homosexual unions, nonetheless there seems to be a determination on the part of the Italian legislature not to give relevance to sexual relations in (same-sex) registered partnerships. If so, such a determination should, however, be supposed in relation to outdated moral judgments[28]. This certainly cannot be disregarded in the case of a "forced" downgrading of a same-sex marriage (celebrated abroad) into a registered partnership under Italian law.

Among the aforementioned implementing decrees of the law establishing registered partnerships, Legislative Decree no. 7 of 19th January 2017, at Article 1, amends Law no. 218 of 31th May 1995. In particular, it inserts in that law a new article, Article 32 *bis*, that provides that marriage contracted abroad by Italian citizens with a person of the same sex produces the effects of a registered partnership regulated by Italian law[29].

The text of Article 32 *bis* is not clear: marriages celebrated between two Italians are certainly included in its provision, and marriages between two foreigners are reasonably excluded[30]. 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 preferred[31].

The *ratio legis* of Article 32 *bis* is clearly identifiable. It is attributable to the intention to prevent Italian nationals, who in their own State are not allowed to contract a marriage with a person of the same sex (but only to enter into a registered partnership) from celebrating a marriage abroad and subsequently obtaining recognition of it in Italy. On the absolute presumption of a *fraude à la loi*, Italian law is made applicable to these marriages. A forced downgrading of marriage in registered partnerships is thus actuated[32]. In this way, a significant *deminutio* is

28 Sesta, M.: "La disciplina dell'unione civile", cit., p. 886.

29 Legislative Decree of 19th January 2017 no. 7, G.U. 27th January 2017 (Amendments and re-ordering of the norms of private international law for the regulation of civil unions, pursuant to Article 1(28)(b) of Law no. 76 of 20th May 2016): "Art. 1, Modifiche alla legge 31 maggio 1995, n. 218: 1. Alla legge 31 maggio 1995, n. 218, sono apportate le seguenti modificazioni: a) dopo l'articolo 32 sono inseriti i seguenti articoli: Art. 32-bis. (Matrimonio contratto all'estero da cittadini italiani dello stesso sesso). - 1. Il matrimonio contratto all'estero da cittadini italiani con persona dello stesso sesso produce gli effetti dell'unione civile regolata dalla legge italiana".

30 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 19th January 2017). Cf. Scaffidi Runchella, L.: "Il riconoscimento", cit., p. 142.

31 Biagioni, G.: "Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017", *Rivista di diritto internazionale*, 2017, no. 2, p. 498.

32 Boele-Woelki, K.: "The Legal Recognition of Same-Sex Relationships Within the European Union", *Tulane Law Review*, 2008, vol. 82, no. 5, p. 1967 ff.: "This means that the foreign institution is recognized as the national institution of the jurisdiction where recognition is sought. This can either lead to an upgrade or a downgrade depending on (1) which institution is to be recognized and (2) where the institution is to be recognized. This leads to entirely different results. In those countries where a domestic form of registered

realised with respect to the institution of marriage, not only in order to the *nomen iuris* in itself – which in the case of marriage certainly has greater evocative force and recognised social impact – but also with concern to the relational sphere, with the exclusion of the obligation of mutual fidelity. In addition, other exclusions and limitations are provided, first and foremost that relating to adoption.

The Italian Supreme Court of Cassation – with Judgment no. 11696 of 14th May 2018 – ruled on the issue of the recognition of same-sex marriages celebrated abroad[33]. The Court operates by way of interpretation with respect to Law no. 76 of 20th May 2016 and the implementing decrees. It admits that the text of Article 32 bis, inserted by means of the implementing decrees, leaves unresolved a specific aspect: the question relating to the transcription in Italy of marriages contracted abroad between persons of the same sex, in case one of them is an Italian national and the other a non-national. However, it seems clear to the Court that Art. 32 *bis* expresses a legislative choice in favour of the registered partnership model, in so far as it is a provision aimed precisely at regulating the circulation and recognition of the effects of marriage acts celebrated by same-sex couples abroad.

The downgrading of marriage is considered appropriate by the Court[34], which does not perceive the *fumus* of discrimination on the basis of sexual orientation, since – as established by the European Court of Human Rights in 2015 in the case *Oliari et al. v. Italy* –[35], same-sex partners must be guaranteed the right to private and family life, pursuant to Article 8 ECHR, without it being possible to impose on the single State the adoption, in a specific way, of marriage instead of registered partnership. It is however significant that, referring to the conversion of marriage into a registered partnership, the Supreme Court of Cassation uses the English expression "downgrading"[36] twice in its Judgment, drafted in Italian. This expression manifests – as noted above – in an objective manner a "demotion". The clear awareness of the fact that it is allowed a "forced-lowering" of the union – legally constituted in the form of a marriage in another State – between two persons on the ground of their sex, characterises the Court's decision in a particular way.

partnership has been created, same-sex marriages celebrated abroad are often afforded recognition as the domestic form of registered partnership".

33 Cass. civ., sez. I, 14 May 2018 No. 11696, in *Familia*, 2019, num. 5, pp. 473-511, with note by Ramuschi, M.: *Sul matrimonio celebrato all'estero tra un cittadino italiano e uno straniero del medesimo sesso.*

34 Cf. Tonolo, S.: "La tutela internazionale del diritto fondamentale alle relazioni interpersonali e l'introduzione nell'ordinamento italiano degli istituti delle unioni civili", in AA.VV.: *Diritto, economia e società. In ricordo di Luisa Cusina*, Trieste, 2018, p. 255.

35 *Oliari and Others v. Italy*, cit.

36 Cf. Cass. civ., sez. I, 14th May 2018 No. 11696, cit. The use is noticeable in the decision, at § 9.1 ("*L'applicazione del cd.* downgrading *(ovvero l'applicazione della disciplina normativa delle unioni civili)*") and § 13.2 ("*l'applicazione del cd.* downgrading *ovvero la conversione della loro unione matrimoniale in unione civile*").

IV. MARRIAGE DOWNGRADING AS AN ANTI-DISCRIMINATORY CLAIM.

It is easy to perceive that a forced downgrading of marriage into a registered partnership represents, for those who suffer it, a sort of "demotion" of their formally constituted relationship. This may also have implications on a social level, since the denomination "marriage" implies full, agreed acceptance of the bond. On the other hand, if the downgrading is not the result of a legal imposition, but constitutes an option, albeit temporary, offered to the married parties, the perspective changes completely. The parties can freely exercise a right relating to the qualification of the legally established bond and they can do that on the basis of equal treatment, without distinction with regard to their sex (or sexual orientation). The most significant hypothesis is related to a different scenario from the one laid out in the previous paragraph, as the downgrading does not concern same-sex marriages, but opposite-sex marriages.

The condition is that the possibility of entering into a registered partnership was not available to heterosexual couples at the time of their marriage and was subsequently allowed. This can only be the case when a State, as has frequently occurred, has offered registered partnership (reserved for same-sex couples) as the first form of recognition for same-sex couples. In subsequently admitting same-sex couples to marriage, some states have prohibited the formation of new registered partnerships (allowing already registered partnerships to upgrade their union to marriage). Others have simply allowed same-sex couples to choose between entering into a marriage or a registered partnership. This has led to a discriminatory situation to the detriment of heterosexual couples, which has only been remedied by extending to them the possibility of entering into a registered partnership.

The case in point specifically concerns the United Kingdom. Despite the fact that due to the Brexit vote this State, as of 31th January 2020, is no longer a member of the European Union[37], it offers a very interesting scenario that could potentially occur also in other Member States in the future. It should furthermore be borne in mind that three different legal systems coexist in the United Kingdom. This makes the reconstitution rather complex. Until 2019, the situation was as follows: opposite-sex and same-sex couples in England and Wales and in Scotland were allowed to marry without any distinction; in Northern Ireland, only heterosexual couples were allowed to marry, whereas all same-sex couples were admitted to

37 Dagilyte E.: "The Promised Land of Milk and Honey? From EU Citizens to Third-Country Nationals after Brexit", in S. Mantu, P. Minderhoud and E. Guild (ed.): *EU Citizenship and Free Movement Rights*, Leiden, 2020, pp. 351-352. On the effects of Brexit on family law, from a transnational perspective, cf. Ruggeri, L.: "Brexit and new European framework in family property regimes', in *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings*, 2019, pp. 59-64.

register their union; opposite-sex couples were not allowed to register their union in the whole United Kingdom[38].

In 2014, while the "Equal Civil Partnerships" movement was growing in the Country, Rebecca Steinfeld and Charles Keidan, de facto heterosexual cohabitants, took legal action, claiming discrimination in the Civil Partnership Act of 2004, which did not allow same-sex couples access to registered partnerships[39]. Their reasons were not recognised at first instance and on appeal[40], but in 2018 the Supreme Court found that there was a clear difference in treatment to the detriment of opposite-sex couples[41]. According to the Court, at the same time as the enactment of the Marriage (Same Sex Couples) Act of 2013 (which allowed same-sex couples to enter marriage), the Civil Partnership Act of 2004 should have been repealed or provided for to be extended to opposite-sex couples[42]. In fact, sections 1 and 3 of the Civil Partnership Act 2004, which do not allow a heterosexual couple to register their union, are incompatible with section 4 of the Human Rights Act 1998. The Court also notes a clear conflict between this Act and Article 8, in conjunction with Article 14, of the ECHR.

Although the Supreme Court could not repeal the law, it recognised the discrimination taking place and made a strong recommendation for the Government of England and Wales to reform registered partnerships[43]. In response to this solicitation, the Government launched a legislative initiative that ended on 16 March 2019, with the enactment of the Civil Partnerships, Marriages and Deaths (Registration etc) Act.

On 13th January 2020, in Northern Ireland, the Marriage (Same Sex Couples) and Civil Partnership (Opposite Sex Couples) (Northern Ireland) Regulations 2019 came into force. The 2019 Regulations allow same-sex marriage and at the same time, applying the reasoning of the English Supreme Court ruling, amend the Civil Partnership Act 2004 and also allow heterosexual couples to enter into

38 Garetto, R.: "Opposite-sex registered partnerships and recognition issues", in Kramberger Škerl, J., Ruggeri, L. and Viterbo, F.G. (eds): *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper,* Camerino, 2019, pp. 89-90.

39 Garetto, R.: "Civil Partnerships: the EU Framework for Cross-Border Couples and the Recent Legislative Reform in the UK", in *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings,* 2019, p. 66 f.

40 Hayward, A.: "Relationships between adults: Marriage, Civil Partnerships, and Cohabitation", in Lamont, R. (ed.): *Family Law*, Oxford, 2018, p. 50 f.

41 *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*, [2018] UKSC 32, no. 3: "same sex couples have a choice. They can decide to have a civil partnership or to marry. That choice was not - and is not - available to heterosexual couples".

42 *Ibid.*, no. 48.

43 Hayward, A.: "Equal Civil Partnerships, Discrimination and the Indulgence of Time: R (on the application of Steinfeld and Keidan) v Secretary of State for International Development", *Modern Law Review,* 2019, vol. 82, p. 925.

registered partnerships[44]. On 23th June 2020 the Scottish Parliament enacted the Civil Partnership (Scotland) Act 2020, that enables persons of different sexes to be in a civil partnership. It received royal assent on 28th July 2020, entered into force on 30th June 2021, and now awaits further secondary legislation from the Scottish Parliament.

The most interesting situation, however, occurred in Northern Ireland. On 7th December 2020 the Marriage and Civil Partnership (Northern Ireland) (no. 2) Regulations 2020 came into force. They provide a conversion mechanism. The Regulations indeed allow for a three-year period in which couples in a same-sex civil partnership formed in Northern Ireland may upgrade to a marriage, and couples in an opposite-sex marriage formed in Northern Ireland may downgrade to a civil partnership. As explicitly stated by the UK Government, the possibility of conversion introduced by the Regoulations "aims to be fair to both same-sex and opposite-sex couples in Northern Ireland who have historically not had access to certain legal relationships'[45]. In this sense it can be considered an adequate response to anti-discriminatory claims. In any case the Regulations provide that all conversion rights will then be brought to an end after three years.

Conversion right for married opposite-sex couples is provided only in Northern Ireland at the moment, due to a very recent legislation.

In Scotland secondary legislation still needs to be progressed, and this issue is not yet settled. A possibility similar to that of Northern Ireland is currently under consideration in England and Wales. In July 2019 – a few months after the enactment of the Civil Partnerships, Marriages and Deaths (Registration etc) Act – the Government Equalities Office (GEO) published a paper and consultation "Implementing Opposite-Sex Civil Partnerships: Next Steps, Implementing Opposite-Sex Civil Partnerships: Next Steps'[46]. It sought views on proposals to introduce the right for opposite-sex couples to convert from a marriage to a civil partnership for a limited period of time.

V. CONCLUSION.

It may be said that there is – in specific situations – a transversality between marriage and registered partnership. The conversion from one form to the other may take place by choice of the parties or by legal obligation.

44 McCormick, C. and Stewart, T.: "The Legalisation of Same-Sex Marriage in Northern Ireland", *Northern Ireland Legal Quarterly*, 2020, vol. 71, no. 4, p. 565.

45 HM Government, *Marriage and Civil Partnership - Conversion entitlements in Northern Ireland. UK Government consultation response*, 22 October 2020, p. 3.

46 Government Equalities Office (GEO), *Implementing Opposite-Sex Civil Partnerships: Next Steps*, July 2019.

The first hypothesis is certainly very interesting. It occurs after a Member State has intervened in its own regulations on marriage, allowing access to this institution for same-sex couples, who previously only had access to registered partnerships (expressly reserved for them). This sequencing of the development is not a general rule, of course, since there are Member States (e.g. Spain) that have introduced same-sex marriage without going through the previous step of registered partnership. But in case gradual legislative interventions are provided, couples who had previously entered into a registered partnership are very often given the possibility of upgrading their union to the status of "marriage." This is particularly the case when, at the same time as same-sex couples have gained access to marriage, they have no longer been allowed concluding registered partnerships[47].

It may occur that a Member State has maintained, on the contrary, the institute of registered partnership for same-sex couples and has subsequently extended it to heterosexual couples. It is possible for that State to allow heterosexual couples to downgrade their marriage to a registered partnership. So far it is only the case of Northern Ireland, analysed in the previous paragraph, where opposite-sex couples were given the possibility of opting for downgrading.

Such transversality, if it allows the parties to freely exercise an option, seems desirable. Even in case the upgrading from a registered partnership to a marriage or the downgrading from a marriage to a registered partnership have consequences with regard to the reciprocal obligations of the parties or the rules governing the dissolution of the bond, the conversion of the union does not seem to pose any particular problems, in case the parties are aware and free in their determination. Specific attention must be paid, if anything, to the possibility of a weaker and more vulnerable party. In fact, a downgrading from marriage to registered partnership could cause damage to this party. The formal expression of the will to convert the union, on par with the requirement of formality at the time of its constitution, should in any case be considered sufficient.

The hypothesis in which the downgrading from marriage to registered partnership operates *ope legis* is quite different. In this instance, there are possibilities of discriminatory treatment. In the Italian case examined, the Supreme Court of Cassation found no violation of the principle of equality (enshrined in Article 3 of the Italian Constitution) and found no conflict with Articles 8 and

47 Denmark, Finland, Germany, Ireland and Sweden prohibited the establishment of new registered partnerships, but the ones previously established are still valid, if the parties did not opt to convert them into marriage. Cf. Garetto R.: "Taxonomic variety of registered partnerships in the European Union", in Cazorla González, V., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property Relations of Cross-Border Couples in the European Union*, Napoli, 2020, p. 88.

14 of the ECHR[48]. We can maybe disregard the "suspicion" that cross-border couples married abroad who request the transcription of their marriage in Italy could be treated differently according to the composition of the couple itself (in other words: according to the sex and the sexual orientation of the parties). But it is objective that there is a disparity of treatment among (cross-border) same-sex couples themselves, depending on whether one of the parties is an Itlian national or not. In case the parties request the transcription of their marriage in Italy, if one of them is an Italian national, they suffer the downgrading of their marriage into a registered partnership. In case both the parties are not Italian nationals, their marriage is not formally downgraded (but it is transcribed in the register of partnerships and not in the register of marriages). It should also not be overlooked that in Italy the rules governing marriage and registered partnerships diverge, as already emphasised, on several points. A "forced" downgrading may thus have "worsening" consequences on the regulation of the relationship.

The conversion of the union by imposition of law does not therefore appear to be a desirable solution. On the contrary, leaving it up to the autonomy of the parties to decide whether to convert their union from marriage to registered partnership (or vice versa, from registered partnership to marriage, as occurs in many Member States since years) seems consistent with the right to respect for one's private and family life enshrined in Article 8 ECHR.

48 Cf. Cass. civ., sez. I, 14th May 2018 no. 11696, cit., at § 9.1.

BIBLIOGRAPHY

Biagioni, G.: "Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017", *Rivista di diritto internazionale*, 2017, no. 2, p. 498.

Boele-Woelki, K.: "The Legal Recognition of Same-Sex Relationships Within the European Union", *Tulane Law Review*, 2008, vol. 82, no. 5, p. 1967 ff.

Borgmann-Prebil, Y.: "The Rule of Reason in European Citizenship", *European Law Journal*, 2008, vol. 14, no. 3, p. 349.

D'Avout, L.: *Note*, *Journal du Droit International-Clunet,* 2008, no. 1, p. 187 ff.

Dagilyte, E.: "The Promised Land of Milk and Honey? From EU Citizens to Third-Country Nationals after Brexit", in S. Mantu, P. Minderhoud and E. Guild (ed.): *EU Citizenship and Free Movement Rights*, Leiden, 2020, pp. 351-352.

De Cristofaro: "Le «unioni civili» fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°-34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal D.lgs. 19 gennaio 2017, n. 5", *Le nuove leggi civili commentate,* 2017, no. 1, p. 118.

Deana, F.: *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)*, *Rivista di Diritti Comparati*, 2019, num. 1, pp. 153-183.

Dionisi-Peyrusse, A.: "Convention européenne des droits de l'homme (articles 8, 14, 6 et article 1er du protocole n° 1)", *Journal du Droit International-Clunet,* 2012, no. 1, p. 215.

Ferrando, G.: *Diritto di famiglia. Unioni civili e convivenze. Aggiornamento 2016*, Torino, 2016, p. 7.

Franzina, P.: "Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad", *Diritti umani e diritto internazionale*, 2011, vol. 5, p. 614 f.

Garetto R.: "Taxonomic variety of registered partnerships in the European Union", in Cazorla González, V. Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property Relations of Cross-Border Couples in the European Union*, Napoli, 2020, p. 88.

GARETTO, R.: "Civil Partnerships: the EU Framework for Cross-Border Couples and the Recent Legislative Reform in the UK", in *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings,* 2019, p. 66 f.

GARETTO, R.: "Opposite-sex registered partnerships and recognition issues", in KRAMBERGER ŠKERL, J., RUGGERI, L. and VITERBO, F.G. (ed.): *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper*, Camerino, 2019, pp. 89-90.

GATTUSO, M.: "*Matrimonio*, *Famiglia* e orientamento sessuale: la Cassazione recepisce la *doppia svolta* della Corte europea dei diritti dell'uomo", *Famiglia* e *diritto*, 2012, no. 7, pp. 665-691.

HAYWARD, A.: "Equal Civil Partnerships, Discrimination and the Indulgence of Time: R (on the application of Steinfeld and Keidan) v Secretary of State for International Development", *Modern Law Review,* 2019, vol. 82, p. 925.

HAYWARD, A.: "Relationships between adults: Marriage, Civil Partnerships, and Cohabitation", in LAMONT, R. (ed.): *Family Law*, Oxford, 2018, p. 50 f.

KINSCH, P.: *La non-conformité du jugement étranger à l'ordre public international mise au diapason de la Convention européenne des droits de l'homme*, *Revue critique de droit international privé*, 2011, vol. 100, no. 4, pp. 817-823.

LENTI, L.: "Prime note a margine del caso Oliari c. Italia", *Nuova Giurisprudenza Civile Commentata,* II, 2015, pp. 575-581.

MCCORMICK, C. and STEWART, T.: "The Legalisation of Same-Sex Marriage in Northern Ireland", *Northern Ireland Legal Quarterly*, 2020, vol. 71, no. 4, p. 565.

PACE, A.: *Problematica delle libertà costituzionali. Parte generale*, Padova, 2003, p. 20.

RUGGERI, L.: "Brexit and new European framework in family property regimes', in *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings*, 2019, pp. 59-64.

SALZBERG, D.A.G.: "Confirming (the illusion of) heterosexual marriage: Hamalainen v Finland", *Journal of International and Comparative Law*, 2015, vol. 2, num. 1, p. 176.

SCAFFIDI RUNCHELLA, L.: "Il riconoscimento e la trascrizione dei matrimoni same-sex conclusi all'estero alla luce delle recenti decisioni del Tribunale di Perugia e

della Corte europea dei diritti dell'uomo nel caso *Orlandi ed altri c. Italia*", *GenIUS*, 2018, vol. 1, p. 147.

Sesta, M.: "La disciplina dell'unione civile tra tutela dei diritti della persona e creazione di un nuovo modello familiare", *Diritto e Famiglia*, 2016, vol. 10, p. 886.

Tonolo, S.: "La tutela internazionale del diritto fondamentale alle relazioni interpersonali e l'introduzione nell'ordinamento italiano degli istituti delle unioni civili", in AA.VV.: *Diritto, economia e società. In ricordo di Luisa Cusina*, Trieste, 2018, p. 255.

Venuti, M.C.: "La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia", *Politica del diritto*, 2016, vol. 47, p. 95 ff..

Winkler, M.M.: "Il piombo e l'oro: riflessioni sul caso *Oliari c. Italia*", *GenIUS*, 2016, no. 2, pp. 46-61;

Winkler, M.M.: "Same-Sex Marriage and Italian Exceptionalism", *Vienna Journal on International Constitutional Law*, 2018, vol. 12, pp. 433-456;

JURISDICTION BY CONNECTION AND PROPER ADMINISTRATION OF JUSTICE UNDER EU REGULATIONS 1103/2016 AND 1104/2016

JURISDICCIÓN POR CONEXIÓN Y ADECUADA ADMINISTRACIÓN DE JUSTICIA EN LA UE A LA LUZ DE LOS REGLAMENTOS 1103/2016 Y 1104/2016

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 148-163

Maria PIA
GASPERINI

ARTÍCULO RECIBIDO: 16 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: El autor analiza las reglas de jurisdicción por conexión establecidas por los artículos 4 y 5 de los Reglamentos No. 1103 y 1104 de 2016 en materia de regímenes patrimoniales de parejas tranfronterizas, teniendo en cuenta el objetivo de una adecuada administración de justicia perseguido dentro de la cooperación judicial civil en la UE. Los Reglamentos mellizos proporcionan las herramientas procesales adecuadas para facilitar la concentración de competencias ante los tribunales del mismo Estado miembro, estableciendo un papel importante para el acuerdo de elección del tribunal, especialmente cuando surgen problemas de régimen económico en relación con la disolución de un matrimonio o de una unión. Mientras esperamos la implementación de estas reglas por parte de los tribunales nacionales y europeos, el autor también explora algunos posibles inconvenientes que pueden presentar.

KEY WORDS: Competencia; ley de familia; ley de sucesiones; regímenes económicos; acciones relacionadas.

RESUMEN: *The author analyses the rules of jurisdiction by connection set by Articles 4 and 5 of Regulations No. 1103 and 1104 of 2016 in matters of property regimes of transnational couples, taking into account the objective of proper administration of justice pursued within EU Civil judicial cooperation. The Twin Regulations provide for appropriate procedural tools to facilitate concentration of jurisdiction before the courts of the same Member State, establishing an important role for the choice-of-court agreement, especially where property regime issues arise in connection with a matrimonial case or a partnership dissolution case. As we wait for the implementation of these rules by national and European courts, the author also explores some possible drawbacks they may present.*

PALABRAS CLAVE: *Jurisdiction; family law; succession law; property regimes; related actions.*

I. PROPER ADMINISTRATION OF JUSTICE AND POSSIBLE IMPACT OF RULES OF JURISDICTION SET OUT IN THE TWIN REGULATIONS.

As restated by Regulation (UE) No. 1111/2019 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast of Regulation EC No. 2201/2003), the smooth and correct functioning of a Union area of justice is vital for the objective of creating, maintaining and developing an area of freedom, security and justice, in which the free movement of persons and access to justice are ensured[1].

Under Twin Regulations of 2016 in matters of property regimes of transnational couples, the aim of proper administration of justice is part of this general objective, and plays a central role as a specific objective of jurisdiction rules. Indeed, Recitals 32 state that to reflect the increasing mobility of couples and facilitate the proper administration of justice, the rules on jurisdiction set out in both Regulations should enable citizens to have their various related procedures handled by the courts of the same Member State. In this respect, it is appropriate to ask what "proper administration of justice" exactly means for protection of property rights of transnational couples, beyond the obvious goal of efficient protection of rights, as this administration could be seen from different points of view.

If we consider justice as service for citizens, "proper administration" should be intended, first of all, as facility of access for spouses or registered partners who want to settle all civil-law aspects of patrimonial regimes, such as the daily management of matrimonial property or property consequences of registered partnership as well as the liquidation of the regime, as a result of the death of one

1 Recital 3 of Reg. No. 1111/2019.

• Maria Pia Gasperini
Associate Professor of Civil Procedure Law, University of Camerino. E-mail: mariapia.gasperini@unicam.it

of the parties or the dissolution of the marriage or registered union[2]. Nevertheless, facility of access means both reasonable proximity between courts and parties, and certainty of criteria for identifying the court with jurisdiction, based on genuine connecting factors between the spouses or partners and the Member State where jurisdiction is exercised. It reduces the possibility of a creative interpretation by the courts, without prejudice for the autonomy of the single Member States[3].

On the other hand, if we consider justice as activity involving public resources, "proper administration" also means efficiency and economy in carrying out this activity, such that when a proceeding is pending before a court of a Member State for the succession of a spouse or partner, or for legal separation, divorce, annulment of marriage or registered partnership, all claims concerning property regimes should be submitted to a court of the same Member State. This would serve to avoid both duplications of actions by the different Member States involved and the generation of irreconcilable decisions, thus ensuring a "harmonious functioning of justice"[4].

For these reasons, Regulations of 2016 provided for specific rules of jurisdiction based on connection of patrimonial regime cases with *status* cases. Articles 4 of Regulations No. 1103/2016 and 1104/2016 establish a general rule of jurisdiction, stating that where a court of a Member State is seised in matters of succession of a spouse or partner pursuant to Regulation (UE) No. 650/2012, the courts of that State shall have jurisdiction on matters of the matrimonial property regime, or property consequences, arising in connection with that case or application. Articles 5 establish a similar rule when a matrimonial case or a registered union annulment case is pending before the court of a Member State, albeit with significant specifications and restrictions[5].

Currently, the rules on jurisdiction laid down in the Twin Regulations have yet to be implemented by national courts, and have not even been submitted to the interpretation of the European Court of Justice. As we wait for these actions, all we can do is to imagine the possible impact of these rules, testing their capacity to achieve the objectives set by the Regulations, and trying to identify some interpretation issues which may arise.

2 Recitals 18 of both Regulations.

3 Recitals 35 of the Twin Regulations. This aspect is the focus of Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè, Milan, 2019, p. 73 ff.

4 Recital 42 of Reg. No. 1103/2016; Recital 41 of Reg. No. 1104/2016. In this perspective, as we are going to see, the tools provided for by the Twin Regulations are similar, but non identical. Jurisdiction in matters of matrimonial or partnership property rights is differently ruled in the case of separation, divorce, annulment of marriage and partnership, or in the case of succession.

5 In this regard see Gasperini, M.P.: "Jurisdiction and Efficiency in Protection of Matrimonial Property Rights", *Zbornik znanstvenih razprav*, 2019, LXXIX, p. 23 ff.

II. JURISDICTION BY CONNECTION WITH MATRIMONIAL CASES AND REGISTERED UNION ANNULMENT CASES: THE ROLE OF AGREEMENT ON CHOICE-OF-COURT.

In the event of disputes on property regimes related to a matrimonial case (legal separation, divorce, marriage annulment) or a registered union annulment case, the goal of "proper administration of justice" should be served preferably through the agreement of parties on applicable law and the choice of court. This is particularly important in matters of property consequences of registered partnerships, where the agreement of parties is an essential condition in order for jurisdiction by connection to be applied[6].

Incidentally, the Twin Regulations seek to promote and increase the knowledge of European citizens so they can make an informed choice about the most appropriate tool among those available for managing property rights deriving from marriages or other kinds of partnerships. It is preferable to make such a choice in advance, given that once a marriage or registered union is in crisis, it may be quite difficult to reach agreement on any points. When a couple indicates the applicable law and their court of choice at the beginning of their marriage or union, it will be much easier, should divorce and litigation occur, for the chosen court to move without confusion or impediments to apply domestic law and issue its decision: this satisfies the need for legal certainty, predictability and efficiency in exercising jurisdiction[7].

Article 5, par. 1, of Regulation No. 1103 states that where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No. 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. However, this rule turns out to be considerably reduced in the following par. 2, which provides that, where the *status* proceeding is submitted to a court of a Member State based on individually listed

6 Article 5, par. 1, Reg. No. 1104/2016: "Where a court of a Member State is seised to rule on the dissolution or annulment of a registered partnership, the courts of that State shall have jurisdiction to rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, where the partners so agree".

7 Recital 36 of Reg. No. 1103/2016; Recital 37 of Reg. No. 1104/2016.

connecting factors[8] or in some particular situations[9], the assignment of jurisdiction in matters of property regimes shall be subject to an agreement of the parties. The *ratio* of this provision is related to the fact that, since Regulation No. 2201/2003 (currently Regulation No. 1111/2019) offers the claimant spouse a range of options in the choice of court, it was deemed appropriate to introduce some restrictions, in order to discourage unfair choices of a party in prejudice of the other one[10].

On the other hand, in Article 5 of Regulation No. 1104, the allocation of jurisdiction based on the connection of cases is always subject to the agreement of parties. In the lack of a common legislative instrument that provides for connecting factors of jurisdiction with regard to the *status* case, and allows a possible distinction between "strong" or "weak" connecting factors, it was considered appropriate to request the agreement of parties in any case; otherwise, the applicable connecting factors shall be those noted in Article 6[11].

Articles 7, providing for the agreement of parties to attribute to a Member State's court the exclusive jurisdiction to rule on property regime disputes, refer to an extra-judicial agreement that may be concluded by parties before starting a proceeding regarding property regime, with a view to possible forthcoming litigation[12]. However, it is important to note the limits set by the 2016 Regulations to the will of the parties and, consequently, the effective scope of such agreements:

- first, spouses or partners can agree to attribute exclusive jurisdiction on property regime disputes, pursuant to Articles 7, to a Member State's court of applicable law (the law chosen by the parties themselves, or the law of the State indicated in Articles 26 of both Regulations), or to the courts of the Member State

8 The reference is to the circumstances specified by indents a) and b) of mentioned article: the agreement of parties is requested where the court seised to rule on the *status* case "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, par. 1, of Regulation (EC) No 2201/2003" (indent a), or "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, par. 1 (a) of Regulation (EC) No 2201/2003" (indent b). The references to Article 3 of Regulation (EC) No. 2201/2003 shall be read, currently, as Article 3 of Regulation (UE) No. 1111/2019, broadly unchanged.

9 Conversion of legal separation into divorce pursuant to Article 5 of Regulation (EC) No. 2201/2003 (currently Article 5 of Regulation (UE) No. 1111/2019), or residual jurisdiction pursuant to Article 7 of Regulation No. 2201/2003 (currently Article 6 of Regulation (UE) No. 1111/2019).

10 Lagarde, P.: "Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Rivista di diritto internazionale privato e processuale*, 2016, 3, p. 679.

11 See Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", *Rivista di diritto internazionale privato e processuale*, 2018, 1, p. 42; Feraci, O.: "L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull'ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. Legge Cirinnà", *Osservatorio sulle fonti*, 2017, 2, p. 38 f.; Ruggeri L.: "Registered partnerships and property consequences", in AA.VV.: *Property relations of cross border couples in the European Union*, ESI, Naples, 2020, p. 61 f.

12 Pursuant to Article 7, par. 2, this kind of agreement must be expressed in writing, dated, and signed by the parties, with the added point that communication by electronic means that provide a durable record of the agreement is to be considered equivalent to typewritten or handwritten forms (see also the corresponding provisions of Regulations No. 650/2012, 1215/2012 and 4/2009).

of the conclusion of the marriage, or under whose law the registered partnership was created. In fact, it is a choice conditioned by a former choice (the choice of law), or directly by law[13];

- second, Articles 7 of both Regulations expressly refer to the "cases which are covered by Article 6", namely, residual cases in which the European legislator provided for some additional connecting factors in the absence of a proceeding in matters of dissolution of marriage or registered partnership (or succession)[14]. Thus, considering Articles 7, a choice-of-court agreement seems to be of insignificant importance, since the need to solve property regime disputes normally arises in the context of a dissolution of the matrimonial tie or partnership because of death, legal separation or divorce.

III. IF AGREEMENT IS NOT REACHED IN THE EVENT OF DISSOLUTION OF A REGISTERED PARTNERSHIP, SEPARATION, DIVORCE OR ANNULMENT OF A MARRIAGE: WHAT ABOUT JURISDICTION?

In the event of dissolution of a registered partnership, as noted above, the allocation of jurisdiction on property consequences to the court of pending *status* proceeding is always subject to the agreement of parties, pursuant Article 5 of Reg. No. 1104/2016. Then, if the parties fail to reach this agreement, the rule of jurisdiction by connection shall not apply, and residual connecting factors provided for in Article 6 shall be applicable[15]. However, with regard to dissolution or annulment of a registered partnership, there are no common provisions of connecting factors of jurisdiction, and the application of Article 6 would not ensure a concentration of jurisdiction before the court of the same Member State where the *status* proceeding might be pending[16]. In fact, the parties could end up with two courts, one with jurisdiction on property rights according to Article 6

13 The will of the European legislator clearly was to promote the union of *forum* and *ius,* so that the court of each Member State asked to rule on claims in matters of matrimonial or partnership property regimes can apply domestic law.

14 In other words, pursuant to Articles 7, the parties may conclude a choice-of-court agreement only for property regime disputes. However, if the property regime case is connected to a *status* case subsequently filed at another State's court, such an agreement cannot be taken into consideration in the proceedings (Bruno, P.: *I regolamenti europei*, cit., p. 102; Marino, S.: "Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships", *Cuadernos de Derecho Transnacional*, 2017, 9, p. 27.

15 Article 6 of Reg. No. 1104/2016: "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, or failing that, (d) of the partners' common nationality at the time the court is seised, or failing that, (e) under whose law the registered partnership was created".

16 Accordingly Viarengo I, "Effetti patrimoniali delle unioni civili transfrontaliere", cit., p. 42, observes that the concentration of proceedings before the same Court is not always ensured in matters of dissolution or annulment of a registered partnership, given that the dissolution of a registered union is covered by the

(e.g. court of the Member State of partners' habitual residence at the time the court is seised) and another court, seised for the dissolution or annulment of the registered partnership, whose jurisdiction continues to be regulated by national laws.

The concentration of proceedings before the same court, therefore, could be subsequently achieved under Article 18 of Reg. No. 1104, in matters of related actions. As we can see, however, some conditions may occur:

- first, the court second seised may (or may not) deem that the actions "are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings" (par. 3), and may consider in any case not to stay its proceeding; accordingly, the court seised to rule on partnership dissolution and the other one seised to rule on property consequences shall carry out separate proceedings towards separate decisions on the merits[17];

- second, where both proceedings are pending at first instance, the court second seised "may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof" (par. 2); here too, the consolidation is subject to various conditions (jurisdiction of the court first seised over the actions second brought; possibility of consolidation of proceedings under the procedural law of the Member State of the court second seised), provided that the lack of an agreement of parties shall make jurisdiction by connection pursuant Article 5 inapplicable.

On the other hand, in the event of separation, divorce or annulment of a marriage, the lack of agreement between the parties shall prevent the rule of jurisdiction by connection taking effect only when jurisdiction on the *status* case is based on "weak" connecting factors listed by Article 5, par. 2, Reg. No. 1103 (in these cases, accordingly, the court seised to rule on an application for divorce, legal separation or marriage annulment shall not be allowed to rule, due to the

common rules of Regulation No. 2201/2003 only when the union in question is a marriage, whereas the dissolution of a registered partnership continues to be subject to different domestic regulations.

17 It should be noted that the EU Court of Justice did not give a single interpretation of "related actions". On the one hand, in the judgement of 4 February 1988 (C-145/86, *Hoffmann vs. Krieg*), the Court stated that a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable with a national judgment pronouncing the divorce of the spouses, insofar as such judgments entail legal consequences that are mutually exclusive; on the other hand, the judgment of 6 December 1994 (C-406/92, *Tatry*) stated that in order to establish the necessary relationship between cases within the meaning of Art. 22 of the Brussels Convention it is sufficient that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences. In this regard see Frimston, R.: "Art. 4", in AA.VV.: *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 50 f., who hopes that the restricted interpretation shall not prevail.

connection of cases, on property regime issues between the spouses). But when jurisdiction on the *status* case is based on "strong" connecting factors (habitual residence of the spouses; last habitual residence of the spouses insofar as one of them still resides there; habitual residence of the respondent; habitual residence of either of the spouses in the event of a joint application), the rule of jurisdiction by connection shall apply regardless of the agreement of the parties, and the court seised to rule on the *status* case shall have jurisdiction also on property regime disputes[18].

In any case, it is possible that the mandatory character of rule of jurisdiction by connection set by Article 5, par. 1, Reg. No. 1103 would not ensure the concentration of *status* cases and related property regime cases before the courts of the same Member State whenever jurisdiction issues arise with regard to the *status* case. It may happen that transnational spouses submit applications for legal separation or divorce before courts of different Member States based on alternative connecting factors provided for by European Regulations (Article 3 of Reg. No. 2201/2003; currently, Article 3 of Reg. No. 1111/2019), thereby causing problems for the assessment of jurisdiction on related property issues. In fact, the jurisdiction by connection rule may work efficiently where only one *status* case is pending: otherwise, the attraction of jurisdiction may operate in many directions and the objective of concentration of proceedings might not be achieved[19].

In such situations, the resolution of problems depends on a correct application of the *lis pendens* rule, generally applied in the field of civil judicial cooperation with the specific goal of avoiding duplication of actions and preventing conflicting decisions, in order to ensure the "harmonious functioning of justice"[20]. Thus, in the event of a dispute involving a transnational couple which has resulted in separate (albeit identical) *status* cases before courts of different Member States, this rule, if properly applied, should require the court second seised to stay the

18 Accordingly, in these cases the spouses cannot agree to exclude jurisdiction by connection in advance by attributing exclusive jurisdiction on property regime issues to a Member State's court even if a *status* action is brought (and the related proceeding is pending) before a court of another Member State.

19 A similar issue (albeit not identical to one we are discussing) has been addressed by EU Court of Justice with regard to jurisdiction on maintenance obligations claims, where Article 3 of Reg. (CE) No. 4/2009 provides for a criterion of jurisdiction by connection in two separate situations, distinguishing cases where the claim in matters of maintenance is ancillary to proceedings concerning the status of a person, from cases where it is ancillary to proceedings concerning parental responsibility (indent d). The Italian Court of Cassation posed the situation of when a Member State's court is seised to rule on an application for legal separation or divorce between parents with minor children, while another Member State's court is requested to rule in matters of parental responsibility in relation to the same children, and asked whether the dispute on the maintenance of those children may be solved by both courts (based on a chronological criterion) since it is ancillary either to the case on legal separation/divorce or to the case in matters of parental responsibility. The EU Court of Justice (judgement of 16 July 2015, C-184/14, ECLI:EU:C:2015:479) stated that, in the perspective of a "proper administration of justice", the dispute in matters of maintenance of minor children must be deemed to be ancillary only to the case concerning parental responsibility, so that the court seised to rule on it is the court with exclusive jurisdiction on the dispute regarding the maintenance of the children.

20 Recital 42 of Reg. No. 1103/2016.

proceeding, and allow the court first seised to check its jurisdiction and continue the proceeding where jurisdiction is assessed. Once the court having juridiction on the *status* case has been identified, then related disputes in matters of matrimonial property regime shall be subject, by connection, to the same jurisdiction.

Where the *status* proceedings are not handled by the courts of the same Member State and the *lis pendens* rule is not correctly applied, problems may also arise for the identification of the court with jurisdiction on property regime isssues. It may actually happen that the court second seised decides not to stay its proceeding (e.g. divorce case) because it does not involve the same cause of an action (e.g. legal separation) first brought before the court of a different Member State. Moreover, a recent European Court of Justice judgement regarding the consequences of a breach of the *lis pendens* rule stated that when a court of a Member State second seised has issued a decision that has become final, even though it has done so in violation of this rule, the courts of the Member State of the court first seised cannot refuse recognition of this decision[21].

IV. JURISDICTION BY CONNECTION WITH A SUCCESSION CASE.

Articles 4 of the Twin Regulations state that where a court of a Member State is seised in matters of the succession of a spouse or partner pursuant to Regulation (EU) No. 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case. Since Articles 4 do not make the application of jurisdiction by connection subject to the agreement of the parties, it is possible to observe that the aim of proper administration of justice in this field is entrusted essentially to the application of jurisdiction by connection. Thus, when a proceeding in matters of succession pursuant to Regulation No. 650/2012 is pending before a court of a Member State, all claims on matrimonial or partnership property regime rising in connection with the succession case are subject only to this criterion, to the exclusion of any other potentially applicable ones[22].

21 See the EU Court of Justice judgement of 16 January 2019, C-367/17 (ECLI:EU:C:2019:24). European Court considered (pt. 56) that "the rules of lis pendens in Article 27 of Regulation No 44/2001 and Article 19 of Regulation No 2201/2003 must be interpreted as meaning that where, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the court second seised, in breach of those rules, delivers a judgment which becomes final, those articles preclude the courts of the Member State in which the court first seised is situated from refusing to recognise that judgment solely for that reason. In particular, that breach cannot, in itself, justify non-recognition of a judgment on the ground that it is manifestly contrary to public policy in that Member State".

22 This means that the interested parties cannot legitimately agree in advance to exclude the application of this criterion by concluding a choice-of-court agreement to give exclusive jurisdiction on property regime disputes to a Member State's court, regardless of whether a succession case is pending before a court of another Member State. Similarly, this criterion of connection of cases cannot be excluded when the surviving spouse or partner appears before the court of a Member State, seised to rule on issues related to property regime, and there is also a succession case pending in another Member State. Indeed, Articles 8 of Twin Regulations expressly exclude an attribution of jurisdiction based on the appearance of the defendant

It has been suggested that jurisdiction by connection might limit access to justice for the surviving spouse or partner, who may be involved in a succession case before a court other than the court of habitual residence. In fact, jurisdiction in matters of succession is generally allocated to the courts of the Member State where the deceased had the habitual residence at the time of death (Article 4 Reg. No. 650/2012), but this criterion could make it difficult for a surviving spouse or partner to submit a claim about the property regime before the same court seised by other heirs to rule on the succession[23]. Problems of access to justice for the surviving spouse or partner may also arise in the event of a difference between the nationality of the deceased and his habitual residence, where Article 6 (a) of Regulation No. 650/2012 may apply[24].

Despite these drawbacks, the choice of the Twin Regulations to concentrate succession cases and property regime cases before courts of the same Member State has to be considered favourably. It is reasonable that the courts of a Member State seised to rule on the whole succession of a spouse or partner may also rule on property rights related to the marriage or partnership. After all, surviving spouses or partners are also heirs, so it would not be very easy to keep rights deriving from liquidation of the matrimonial property regime separate from succession rights, given the close relationship between assessment of matrimonial property rights and inheritance rights[25].

V. POSSIBLE LACK OF CONDITIONS FOR APPLICATION OF ARTICLE 4 OF THE TWIN REGULATIONS.

The concentration of jurisdiction on property regime cases before the court seised to rule on succession, pursuant to Article 4 of the Regulations of 2016, is

"in cases covered by Article 4", so the appearance of the defendant could mean that the court seised in matters of succession could be deprived of jurisdiction to rule on related property regime issues.

23 Bruno, P.: *I regolamenti europei sui regimi patrimoniali*, cit., p. 80; Peiteado Mariscal, P.: "Competencia internacional por conexión en materia de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relación entre los Reglamentos UE 2201/2003, 650/2012, 11103/2016 y 1104/2016", *Cuadernos de Derecho Transnacional*, 2017, 9, p. 315.

24 According to this provision, if the deceased had previously chosen to have his succession governed by the law of the Member State whose nationality he possessed at the time of choice or the time of death (the Member State of chosen law), under Article 22 of Regulation No. 650/2012, and if instead a succession case has been brought before a court of the Member State of last habitual residence, different from that of his nationality, each party may ask this court to decline jurisdiction in favour of the Member State whose nationality the deceased possessed. However, a unilateral request put forth by a party in conflict with the surviving spouse or partner may also lead to the case related to property regime being heard before a court not easily accessible for the spouse or partner. In this case, the judge must carefully weigh the decision of whether to deny jurisdiction (by assessing wheter the courts of the Member State of the chosen law are better placed to rule on the succession) to counteract any possible "unfair" behaviour of the parties in the proceeding.

25 In the event of death of one of the spouses, for example, German law (Art. 1371, par. 1, BGB) provides for a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate. In this regard European Court of Justice stated that related issues fall within the scope of Reg. Successions (judgement of 1 March 2018, C-558/16, ECLI:EU:C:2018:138).

still subject to specific conditions, which may not occur. In that event, proceedings in matters of property regime and succession may be pending before courts of different Member States (or third States)[26]. The following situations may occur:

- first, an heir of the deceased (other than the surviving spouse or partner) might bring an action before a court of a Member State regarding succession rights to a single asset that the heir claims to be his or her inheritance, under the jurisdiction of the seised court, pursuant to Article 10, par. 2, Reg. No. 650/2012 (that is, jurisdiction of a court of the Member State where the estate assets are located, where no court in a Member State has jurisdiction on the whole succession pursuant to par. 1). Where the surviving spouse or partner subsequently brings a claim for assessment of property regime rights on the same asset, jurisdiction by connection shall not apply, so the court first seised cannot rule on property regime issues since there is not a "succession case" (that is, a case on the whole succession) in the sense of Article 4 of the Twin Regulations[27]. Therefore, in this event as well, the concentration of jurisdiction could be achieved under art. 18 in matters of related actions, as mentioned above;

- second, a proceeding could be pending between spouses or partners on issues related to patrimonial regime before a court of a Member State with jurisdiction under the Twin Regulations, and following the death of one spouse or partner a second proceeding could be brought by one or more heirs on the whole succession before the court of another Member State with jurisdiction pursuant to Regulation No. 650/2012. The court first seised will have jurisdiction pursuant Articles 6, or 7, or 8, of the Twin Regulations, as when the proceeding was brought, there was no pending case on the whole succession. We could ask whether jurisdiction may be removed from the court first seised for the property regime case, and consequently transferred to the second court seised to rule on the succession case, but it is thought that this may not occur[28]. It has to be excluded where the case regarding property regime has been brought first before an Italian court, since jurisdiction is determined with reference to the factual situation and law in force at the time of application (*perpetuatio iurisdictionis*) pursuant Article 5 of Italian Civil Procedure Code. In such an event, jurisdiction on property regime cases and succession cases cannot be concentrated before the courts of the same Member State.

26 Jurisdiction by connection cannot operate, indeed, if the succession case is pending before a State not belonging to the European Union, or belonging to the European Union but not participating in the enhanced cooperation that led to the adoption of the two Regulations (see Pérez Vallejo, A.M.: "Matrimonial property regimes with cross-border implications: Regulation (EU) 2016/1103", in AA.VV.: *Property relations of cross border couples in the European Union*, cit., p. 24.

27 Peiteado Mariscal, P.: *Competencia internacional*, cit., p. 317 f. See also Kunda, I.: Winkler S., "Jurisdiction and applicable law in succession matters", in AA.VV.: *Property relations of cross border couples in the European Union*, cit., p. 106 f.

28 Peiteado Mariscal, P.: *Competencia internacional*, cit., p. 325.

VI. CONCLUDING REMARKS.

With regard to jurisdiction rules, the Regulations of 2016 on property regimes adopted traditional regulatory solutions together with a criterion of jurisdiction by connection, to give jurisdiction on property regime cases to the court of a Member State seised to rule on succession, legal separation, divorce or dissolution of a registered partnership. It should be pointed out that European Legislator pursues the objective of concentrating *status* cases and property regime cases before the courts of the same Member State, without ensuring the concentration of these cases before the same court, which may occur only where provided for by procedural domestic laws.

On the one hand, the provision for jurisdiction by connection has to be favourably assessed. On the other hand, it can be said it is reasonable to assign a different role to choice-of-court agreement and to make jurisdiction by connection mandatory in matters of succession, given the complexity of such cases, which normally involve parties in different positions, such as a surviving spouse or partner and other heirs.

As considered above, the practical functioning of this criterion may present some problems, in the event of a succession case as well in matrimonial or partnership dissolution cases. However, these difficulties can be addressed by educating the parties so they can make well-informed decisions in the exercise of their private autonomy, where possible, through the choice of law and later, the choice of court.

Finally, in the field of jurisdiction, the Regulations of 2016 provide for appropriate procedural tools to facilitate concentration of jurisdiction on various related claims before courts of the same Member State in the majority of cases. In the other cases that may occur, the objective of proper administration of justice has to be one of the main interpretation guidelines for the implementation of the Twin Regulations by national and European courts.

BIBLIOGRAPHY

Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè, Milan, 2019, p. 73 ff..

Feraci, O.: "L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull'ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. Legge Cirinnà", *Osservatorio sulle fonti*, 2017, 2, p. 38 f.

Frimston, R.: "Art. 4", in AA.VV.: *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 50 f.

Gasperini, M.P.: "Jurisdiction and Efficiency in Protection of Matrimonial Property Rights", *Zbornik znanstvenih razprav*, 2019, LXXIX, p. 23 ff.

Lagarde, P.: "Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Rivista di diritto internazionale privato e processuale*, 2016, 3, p. 679.

Marino, S.: "Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships", *Cuadernos de Derecho Transnacional*, 2017, 9, p. 27.

Peiteado Mariscal, P.: "Competencia internacional por conexión en materia de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relación entre los Reglamentos UE 2201/2003, 650/2012, 11103/2016 y 1104/2016", *Cuadernos de Derecho Transnacional*, 2017, 9, p. 315.

Peiteado Mariscal, P.: *Competencia internacional*, cit., p. 317 f. See also Kunda, I.: Winkler S., "Jurisdiction and applicable law in succession matters", in AA.VV.: *Property relations of cross border couples in the European Union*, ESI, Naples, 2020, p. 106 f.

Pérez Vallejo, A.M.: "Matrimonial property regimes with cross-border implications: Regulation (EU) 2016/1103", in AA.VV.: *Property relations of cross border couples in the European Union*, ESI, Naples, 2020, p. 24.

Ruggeri L.: "Registered partnerships and property consequences", in AA.VV.: *Property relations of cross border couples in the European Union*, ESI, Naples, 2020, p. 61 f.

VIARENGO, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", *Rivista di diritto internazionale privato e processuale*, 2018, 1, p. 42.

ITALIAN ASSISTED NEGOTIATION: AN ADDITIONAL TOOL TO SETTLE MATRIMONIAL PROPERTY REGIME CASES

NEGOCIACIÓN ASISTIDA ITALIANA: UNA HERRAMIENTA ADICIONAL PARA RESOLVER CASOS DE RÉGIMEN ECONÓMICO-MATRIMONIAL

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 164-179

Manuela
GIOBBI

ARTÍCULO RECIBIDO: 22 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The assisted negotiation procedure highlighted the need to distinguish the various forms of justice in view to obtaining decisions that can effectively satisfy the interests of the family. In fact the agreements who discipline the family conflicts attributes a central role to the will of the couple in the collaborative search for suitable solutions for the management of the crisis of the emotional bond.

KEY WORDS: Assisted negotiation; prenuptial agreements; family conflicts; alternative dispute resolution.

RESUMEN: *El procedimiento de negociación asistida remarcó la necesidad de distinguir las distintas formas de justicia para obtener decisiones que efectivamente satisfagan los intereses de la familia. De hecho, los acuerdos que disciplinan los conflictos familiares atribuyen un papel central a la voluntad de la pareja en la búsqueda colaborativa de soluciones adecuadas para el manejo de la crisis del vínculo emocional.*

PALABRAS CLAVE: *Negociación asistida; acuerdos prematrimoniales; conflictos familiares; métodos alternativos de solución de conflictos.*

I. INTRODUCTION.

The difficulties encountered by cross-border couples in managing their property and choosing the applicable law brought about the need to harmonise the discipline on conflict of laws under a single instrument to guarantee legal certainty.

With the adoption of Regulations (EU) 2016/1103 and 2016/1104[1], the European Union introduced a regulatory framework containing provisions shared by the Member States, by virtue of enhanced cooperation, which concern the competence, the criteria of identification of the applicable law, the execution of decisions, and the recognition of public acts or court settlements.

Each Member State was therefore called upon to send the Commission a summary of internal procedures and competent authorities, as well as of the legislation in force on matrimonial property regimes, as required by Article 63 of Regulations 2016/1103 and 2016/1104. Based on the information provided by the Member States and as required by Article 65(1), the Commission drew up a list of "other authorities and legal professionals" referred to in Article 3(2), who were entrusted with the exercise of judicial functions[2]. In the communication sent by Italy to the Commission, lawyers were identified as "judicial authorities" when exercising their functions in the assisted negotiation regime (Article 6, Decree Law No. 132/2014), as were the civil state officers who exercise their functions in the

1 Council Regulation (EU) 2016/1103 of 24th 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 of 8 July 2016, OJ L 183/1 and Council Regulation (EU) 2016/1104 of 24th 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 of 8th July 2013, OJ L 183/30.

2 For the list of other authorities and legal professionals referred to in Article 3(2) relative to matrimonial property regimes, see *https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes-559-it.do and the property effects of registered partnerships,* see *https://e-justice.europa.eu/content_matters_of_the_property_consequences_of_registered_partnerships-560-it.do.*

• Manuela Giobbi
Research fellow, University of Camerino. E-mail: mangiobbi@gmail.com

context of a simplified procedure provided for by Article 12, Decree Law No. 132 of 2014[3].

Introduced in the family context by the internal legal system with Decree Law No.132/2014, assisted negotiation leaves the possibility of reaching an agreement to the autonomy of the parties so that more complex aspects of the crisis of the emotional bond can be regulated[4]. More generally, it represents an alternative method of handling disputes to the judicial system, in which procedures are usually slower and more expensive. Using the assisted negotiation procedure, the parties have the opportunity to reach an agreement and cooperate in good faith, which tends to mitigate the conflict and produce the effects of the judicial measure[5]. The possibility of reaching a consensual agreement in cases of personal separation, cessation of civil effects, dissolution of marriage[6] and modification of the conditions of separation or divorce is therefore entrusted to the private autonomy of the parties. This regulatory choice strives essentially to fully involve the couple in the decision-making dynamics, which aims at regulating the relationship after separation[7]. In this way, partners' self-determination is given priority in the regulation of property relationships connected to the crisis in marriage or registered partnership.

II. ASSISTED NEGOTIATION.

The assisted negotiation procedure foresees an invitation to enter into a "negotiation agreement" for the settlement of the dispute and the assistance of at least two lawyers[8]. A negotiation procedure with the presence of a single lawyer is not admissible, considering the overriding interest of the family.

3 Decree Law of 12th September 2014, no. 132, Urgent measures of de-jurisdictionalisation and other interventions for the definition of the backlog in civil proceedings, converted into law 10th November 2014, no. 162, *Official Gazette* 10 November 2014, no. 261, *Ordinary Supplement* no. 84.

4 On assisted negotiation, see Luiso, F.P.: "La negoziazione assistita (Article 6 and 12 of Decree Law 132/14)", *Nuove leggi civ. comm.*, 2015, pp. 649-654; Deplano, S.: "Sul rapporto tra convenzione di negoziazione assistita dagli avvocati e «accordo che compone la controversia»", *Giusto processo civile*, 2017, p. 1123; Giaimo, G: "Status coniugale e volontà delle parti nella crisi della famiglia. Brevi note comparatistiche in tema di negoziazione assistita", *Dir. fam. pers.*, 2016, pp. 1515-1530; Marino, S.: "Strengthening the European civil judicial cooperation: the patrimonial effects of family relationship", *Quadernos de Derecho Transnacional*, 2017, pp. 265-284.

5 This is a procedure that derives from so-called collaborative law, widespread in the United States, and from the French experience of the so-called *convention de procedure participative par advocat*. Collaborative law is a method of conflict resolution based on a collaborative attitude of the parties, aimed at seeking an agreement. In the event of failure to reach an agreement, the American procedure provides that the lawyers who participated in the agreement must undertake not to assist the parties in a subsequent legal action.

6 Article 3, paragraph 1, no. 2, lett. *b*, Law 898/1970, GU 3 December 1970, no. 306.

7 The *ratio* for this choice must be looked for in the need to ensure that the couple can reach a functional decision that will regulate the interests of the spouses or partners and children, thus avoiding decision-making by third parties.

8 On this subject see, Dalfino, D.: "La negoziazione assistita da uno o più avvocati", in Id. (ed.): *Misure urgenti per l'efficienza e la funzionalità della giustizia civile* , Torino, 2015.

The discipline differs depending on the presence of children in conditions of economic vulnerability, such as children with incapacity or severe disability who are under age or are of age. In this case, based on the provisions of Article 6(2) of Decree Law No. 132/2014, the agreement reached as a result of assisted negotiation must be sent to the Public Prosecutor at the competent court who will then grant approval if he or she finds it to be fully corresponding to the interests of the children and in general to the personal and property aspects of the family. If, on the other hand, the Public Prosecutor believes that the agreement reached by the spouses does not fully correspond to the interests of the family, he or she must refer it within five days to the President of the Court who will set the appearance of the parties within the next thirty days. In the absence of children, the agreement is in any case referred to the Public Prosecutor who, if there are no irregularities, grants approval. In the presence of minors in vulnerable conditions, therefore, the control is not merely a simple formality, but it also necessarily delves into the substance of the case itself. Following the granting of approval, the lawyer is obliged to transmit the agreement[9] to the civil registrar of the municipality in which the marriage was registered or transcribed.

The wide expansion of the assisted negotiation procedure has highlighted the need to distinguish between various forms of "justice" in view of obtaining decisions that can effectively satisfy the interests of the family in the phase following the breakdown of the emotional bond. The aim of the agreement does not usually concern inalienable rights, and an example is the maintenance of a spouse, which can be the subject of negotiations regarding the amount and methods of disbursement, but not regarding the right to alimony[10]. As already argued in theory, the inalienability of rights should be overcome regardless of any reference to formal qualification, and the interests and values involved should be more deeply considered instead[11]. However, any violation of internal mandatory rules or the opposition to public order would result in the nullity of the agreement[12]. More generally, the introduction of negotiation within the family realm responds to the need to strike a balance between the desire to reach consensual solutions and the interest in protecting individuals[13]. Still, the impact of negotiation agreements on the inalienable rights of spouses and children has created the need to subject the enforceability of the agreement to the control of authority. The procedure that takes place before the Public Prosecutor for granting approval in any case

9 Lawyers must include in the agreement information to the parties concerning the possibility of carrying out family mediation and of having tried to reconcile the parties.

10 On this subject, see Gorgoni, A.: "Accordi definitivi in funzione del divorzio: una nullità da ripensare", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Varese, 2018, pp. 292-314.

11 See Perlingieri, P: "La sfera di operatività della giustizia arbitrale, *Rass. dir. civ*, 2015, pp. 584-610.

12 Rovelli, L.; "Rilievi introduttivi", in AA.VV.: *Altri strumenti di soluzione delle controversie e istituti affini*, XIV, *Trattato di diritto dell'arbitrato* Mantucci, Napoli, 2020, p. 58.

13 Indraccolo, E.: "La negoziazione assistita", in AA.VV.: *Altri strumenti di soluzione delle controversie e istituti affini,* cit., p. 551 ff.

allows the opportunity to propose a preliminary investigation and request further documentation.

III. JUDICIAL AND OTHER AUTHORITIES, AND LEGAL PROFESSIONALS IN REGULATIONS 2016/1103 AND 2016/1104.

Assisted negotiation assigns a primary role to lawyers and gives the agreement enforceable effectiveness[14]. In fact, the agreement makes it possible to regulate those aspects of the crisis that would otherwise have to be subjected to judicial proceedings. Although the agreement is a decision by nature, formally it does not constitute a judicial ruling subject to possible appeals at various levels of justice provided for by the Italian legal system. Such agreements produce effects only if the spouses or partners do not bring legal action. A prerequisite for the functioning of the agreement, as an act of autonomy, is that it ought to be appropriate, suitable and legally capable of satisfying the interests of the family[15], which must be seen as superior to those of the individuals.

Lawyers participating in the negotiation process do not assume the status of judicial authority, even though they are required to fulfil formal obligations and the agreement is subject to formal control by the Public Prosecutor or even by the President of the Court and this, in any case, constitutes a legitimacy control rather than an examination based purely on the merits[16].

Article 3(2) provides that for the purposes of the Regulations 2016/1103 and 2016/1104, judicial authority means any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes who exercise judicial functions or act under its control. Furthermore, other authorities and legal professionals must offer guarantees regarding the impartiality and the right of all parties to be heard. Decisions taken by these authorities or professionals, pursuant to the law of the Member State in which they operate, must be subject to an appeal or review by a judicial authority, as well as be of equivalent force and effect as a decision of a judicial authority on the same matter.

The Twin Regulations give the definition of "judicial authority" a fairly broad meaning[17], which takes into account the regulatory diversity of property regimes

14 See Article 5, Decree Law 12 September 2014, no. 132, conv. in Law 10 November 2014, no. 162, in GU 10 November 2014, O.S. no. 84.

15 See Ruggeri, L.: "La transazione", in *Tratt. dir. civ. del Consiglio Nazionale del Notariato* directed by P. Perlingieri, Napoli, 2016, p. 14-25.

16 Montinaro, R.: "Accordi stragiudiziali sulla crisi coniugale e giustizia contrattuale", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, cit., p. 213.

17 In this regard, see Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019, p. 141, where there is a greater interpretative limitation of the notion of judicial authority in judicial proceedings concerning a dispute between the parties and, in any case, where there is a *lis pendens*.

in various Member States, and which distinguishes it from other "authorities and legal professionals" who exercise judicial functions relating to property regimes. Furthermore, Recital 29 clarifies that the term "court" does not include non-judicial authorities of a Member State empowered to deal with matters of matrimonial property regime when they are not exercising judicial functions.

Recital 39 of Regulation 2016/1103, like Recital 38 of Regulation 2016/1104, however, seems to offer a less restrictive interpretation of the definition of judicial authority, highlighting that the parties should not be prevented from settling the matrimonial property regime case in out-of-court proceedings, such as before a notary, if this is permitted by the law of the Member State.

It is therefore important to underline that jurisdiction can also be exercised by professionals or by authorities other than the judge. It follows that the notion of judicial authority should include all the authorities and professionals who have competence in the matters of marriage and registered partnerships and who perform judicial functions by virtue of delegation or under the direct control of competent authorities[18].

Jurisdiction in this sense no longer constitutes only an activity reserved for judges but it can also be exercised by professionals or other bodies, provided that impartiality and "dialogue" between the parties are respected. The resulting agreement is nonetheless a "decision" which the parties choose to abide by.

Lawyers do not exercise judicial functions, but they intervene in the assisted negotiation process by virtue of the "de-jurisdictionalisation" activity provided for by Decree Law No. 132/2014, and the resulting decisions are intended to govern the couple's future relationships, but also affect joint property. Consequently, the choice made by the Italian legal system does not seem to deviate much from the provisions of Article 3 of both of the Twin Regulations.

IV. "PRENUPTIAL AGREEMENTS" FOR MANAGING FAMILY CONFLICTS.

The promotion of agreements in the discipline of family conflicts attributes a central role to the will of the couple in the collaborative search for suitable solutions for the management of problems that may arise at the time of dissolution of marriage or registered partnership.

This leads to a reflection on the opportunity to enter into prenuptial agreements, before or during the marriage or registered partnership, in order to

18 See Ruggeri, L.: "Registered partnership and property consequences, III. Jurisdiction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property Relation of Cross-Border Couples in the European Union*, Napoli, 2020, p. 70 ff.

mitigate critical issues that may arise at the time of family relationship crisis[19]. These are known as preventive agreements[20] in which, however, legal professionals are called upon to play a fundamental role in the preparation of the contents relating to property and possibly non-property aspects.

The Italian legal system does not provide for the possibility of stipulating prenuptial agreements aimed at regulating personal and property relationships of the couple in anticipation of a possible crisis in the relationship which, on the other hand, are widely diffused in other regulatory systems and in particular in common-law ones.

Prenuptial agreements aimed at defining in advance the economic consequences of a possible end of a marital relationship are for example recognised in the USA, even if the degree of its binding effect is differently assessed by each individual State[21].

In England, prenuptial agreements were accepted following the leading case *Radmacher v. Granatino*[22]. In this case, the spouses rooted their married life in England, but before marriage they had entered into a prenuptial agreement in Germany with which Mr. Granatino, of French nationality, undertook to renounce, in the event of dissolution of the marital relationship, any economic claim on the assets of his wife, a rich German heiress. Following the decision of the English Supreme Court to take into account the agreement, also regarding the elements of internationality it presented, pre- or post-nuptial agreements became admissible and were aimed at regulating the economic aspects of the relationship resulting from the dissolution of marriage, without prejudice to the cases in which these might end up unfair[23]. In this way, couples were granted contractual autonomy necessary to settle the conflict both before and during marriage or partnership. The importance assumed by prenuptial agreements has also launched a reform

19 In this regard Oberto, G.: "Per un intervento normativo in tema di accordi preventivi sulla crisi della famiglia", Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, cit., p. 37 ff., notes that it would be preferable to abandon the term "prenuptial agreements" which appears to be limiting, as they can be stipulated both before and during marriage, or rather at a time preceding the crisis of the union and, therefore, it is preferable to opt for the "preventive agreements" formula.

20 In this regard, see Oberto, G.: "Per un intervento normativo in tema di accordi preventivi sulla crisi della famiglia", cit., 2018, p. 33-36.

21 Fusaro, A.: "La circolazione dei modelli giuridici nell'ambito dei patti in vista della crisi del matrimonio", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, cit., 2018, p. 8 ff.

22 Scherpe, J.M.: "Fairness, freedom and foreign elements, marital agreements in England and Wales after *Radmacher v Granatino*", *23 Child & Fam. L. Q. 513* (2011), p. 513; Scherpe, J.M.: "Pre-Nups, private autonomy and paternalism", *The Cambridge Law Journal*, vol. 69, no. 1, 2010, p. 35 ff.

23 Fusaro, A.: "La circolazione dei modelli giuridici nell'ambito dei patti in vista della crisi del matrimonio", cit., p. 17; Scherpe, J.M: "Rapporti patrimoniali tra coniugi e convenzioni prematrimoniali nel *common law*. Alcuni suggerimenti pratici", *Riv. dir. civ.*, 4, 2017, pp. 920-938.

process[24]. A favourable attitude to preventive agreements has also been found in Germany and other European legal systems.

According to the Italian legislation, prenuptial agreements must be considered null. However, less consolidated case law shows a greater acceptance of these agreements. In this regard, the Italian Supreme Court[25] considered valid the agreement by which the future spouse undertook to transfer to the other a property owned by him, as compensation for the expenses incurred for the renovation of their marital home. Furthermore, in another decision, it innovated previous case law[26] and assigned to the alimony a compensatory and equalising function, based on the assessment of joint choices made by partners during their marriage[27].

In a recent ruling[28], the Italian Supreme Court, however, showed renewed rigidity towards prenuptial agreements. The Supreme Court argued that in solving marital crises, even when the spouses had defined property relations during their separation, the judge had to necessarily qualify the nature of the agreement between the parties. In particular, the judge must assess whether the alimony determined by the partners in the agreement is unacceptable when examined against the mandatory discipline of relationships between spouses in family matters.

With reference to a previous decision[29], the Supreme Court reiterated that the agreements concluded by spouses during their separation, in view of future divorce, were subject to nullity on the grounds of inadmissibility of the case if these were stipulated contrary to the principle of inalienable rights in matrimonial matters. Furthermore, it specified that the agreements concluded during separation should not be taken into account even if they fully satisfied the needs of the couple, precisely because they were aimed at regulating future economic relationships between the parties in the phase following the termination of the civil effects of marriage.

The restrictive position of the Italian legislation on the nullity of prenuptial agreements presupposes a significant differentiation compared to other legal systems. This now compels it to adapt to the social reality, which is increasingly

24 See The Law Commission. Consultation Paper No 198. Marital Property Agreement, available at *www.lawcom.gov.uk*.

25 Cass., 21st December 2012, no. 23713. In this regard, see Oberto, G.: "Gli accordi prematrimoniali in Cassazione, ovvero quando il *distinguishing* finisce nella Haarspaltemachine", *Fam. dir.*, 2013, p. 321 ff.; Nazzaro, A.C.: "Il contenuto degli accordi pre-crisi. I limiti di negoziabilità", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, cit., pp. 87-95.

26 See Cass., 4th June 1992, no. 6857, where the validity of the prenuptial agreement with which the spouses fixed the amount of alimony was denied, as the welfare nature determined its inalienability.

27 Cass., Sez. Un., 11 July 2018, no. 18287, in *Foro it.*, 9, I, 2018, c. 2671.

28 Cass., 26th April 2021, no. 11012, *DeJure*.

29 Cass., 30th January 2017, no. 2224, in *Riv. not.*, 3, p. 503.

oriented towards the recognition of greater autonomy of partners in decisions concerning the economic aspects consequent to a possible family breakdown.

A recent Italian legislative proposal on the revision of the civil code[30] provided for a possibility for future and present spouses or partners in a civil partnership to enter into agreements, in compliance with mandatory internal rules, fundamental rights of persons, public order and morality, to regulate personal and property relationships, all in anticipation of a possible crisis in the relationship, as well as to establish the criteria for organising family life and the education of children. This is a legislative provision that allows, at least in general terms, the opportunity to overcome the nullity of prenuptial agreements provided for by the legal system and to introduce the possibility for partners to model the structure of relationships and possible problems resulting from the breakdown of the partnership or marriage. In this way, the validity of prenuptial agreements would be admitted as tools that allow different existential and property needs of the family community to be reconciled[31] and for a more private dimension of the family to be accepted.

V. ALTERNATIVE MANAGEMENT OF FAMILY DISPUTES. CONCLUSIONS.

The extension of private autonomy to the family sphere consolidates the use of consensual solutions, which are reached through Alternative Dispute Resolution procedures, and which ensure greater effectiveness of justice. The value of justice can be promoted by insisting on a more flexible system so that judicial power can also be exercised by bodies other than those provided for by the legal system[32], as already foreseen in the case of assisted negotiation or, for example, by mediation bodies, etc... Even if different European systems agree on the fact that the dissolution of marriage must be pursued through compliance with the formalities that must be ensured by judicial authorities, at the same time there is a growing number of legal systems that implement forms of "de-jurisdictionalisation" of separation and divorce procedures. The assisted negotiation agreement introduced by the Italian legal system, which allows couples to define family crisis without recourse to courts, fits well into this context, as does for example the French "*divorce par consentment mutuel*", which is carried out on the basis of an agreement between the parties, and is also signed by lawyers and implemented by a notarial deed[33]. Similar procedures are also present in numerous other legal systems and can be

30 Draft law, 19th March 2019, no. 1151, "Delega al Governo per la revision del codice civile", Senate of the Republic XVIII, available at *www.senato.it*.

31 Ruggeri, L.: "La transazione", cit., p. 24.

32 Perlingieri, P.: *Tutela e giurisdizione*, in Id.: *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, V, Napoli, 2020, p. 46 ff.

33 Oberto, G.: "Divorce in Europe", *Fam. dir.*, 1, 2021, p. 129 ff.; Hammje, P.: "Le divorce par consentment mutuel extrajudiciaire et le droit international privé", *Revue critique de droit international privé*, 2, 2017, pp. 143-158; Devers, A.: "Le divorce sans juge en droit international privé", *Droit de la Famille*, 1, 2017, p. 21 ff.

identified in the so-called "notarial divorce" or in the "administrative divorce"[34]. Anyhow, this is a matter of diversified forms of access to justice that are increasingly finding consensus in many legal systems in consideration of the need to make judicial activity more efficient.

The implementation of alternative dispute resolution systems in family law, through the assistance of organisations that operate at low cost and with simplified procedures, could favour agreements between couples and specifically those partnerships or marriages with transnational implications. More specifically, the alternative dispute management tools, in addition to being quick and cheap, overcome the diversity of regulations, precisely because they are implemented through a lens of relationship that is above all based on the collaboration of partners who seek to reach an agreement. These models tend to diverge from the prescribed legislation to leave more room for the will of the parties and for the respect of the individual[35].

The Twin Regulations leave the possibility of choosing the law applicable to the property regime to the autonomy of the parties, but despite the criteria introduced with the aim of standardising the discipline within the Member States, it often remains impossible to give couples of different citizenships an adequate response to their actual needs in resolving disputes.

In the dissolution of the emotional union of cross-border families, the greatest role is played by diversity of cultures, traditions, religions, economic disparities, and educational methods of children and this implies an emotional conflict and considerable difficulty in the management of crisis. In consideration of various factors that converge in the management of the crisis of couples with transnational implications, it is therefore of fundamental importance to favour a European system of alternative dispute resolution which, through coordinated and homogeneous rules, can contribute to the understanding of the opposing demands of the parties and, therefore, allow for adequate solutions to be achieved.

Working through qualified bodies, it is possible to reach an agreement that tends to guarantee the effective realisation of the interests of both parties and the minors, even where recourse to subsequent legal formalisation is necessary: an agreement that by all means ensures the protection of rights and takes into account the weaker part in the relationship.

34 The so-called *notarial divorce* procedures refer to the countries of the Baltic area, France and Spain, while the so-called *administrative divorce* refers to the Scandinavian countries and those of Eastern Europe; more specifically on this topic, see Oberto, G.: "Il divorzio in Europa", *Fam. dir.*, 1, 2021, p. 130; Aras Kramar, S.: "The transformation of divorce procedure in Europe", *Familia*, 3, 2018, p. 277.

35 Lipari, N.: "I rapporti familiari tra autonomia e autorità", *Riv. trim.*, 3, 2018, p. 928 ff.

In Recital 39 of Regulation 2016/1103, as well as in Recital 38, it is highlighted that there should be no impediments for the partners as to collaborative, or rather amicable, management of conflicts regarding the property regime. Furthermore, this trend seems to have been at least partially implemented in Regulation 2019/1111[36], also known as Brussels II *ter*, which in Article 65 expressly provides for the recognition of public acts and agreements on personal separation and divorce.

The growing importance given to the autonomy of the parties in the constitution of collaborative agreements in family law responds in fact to the need for standardisation of European legislation, albeit in a non-binding way[37]. In particular, it allows couples with elements of internationality to adopt cooperative behaviour when managing problems despite the differences in regulations. In balancing a multiplicity of interests, both international aspects and collaboration between different bodies and experiences must therefore be taken into consideration[38].

The valuation of the agreement thus becomes the function of reconciliation of interests of family community and a negotiating tool for a more careful evaluation of couples' interests[39]. In this sense, we are witnessing an evolution of family law which, deriving from the experience of a concrete case, allows us to elaborate the rules shared by the parties[40] and increases the effectiveness of the decision[41], as well as the fulfilment of obligations.

36 Council Regulation (EU) 2019/1111 of 25th June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2nd July 2019, OJ L 178/1.

37 In this sense, see Oberto, G.: "Il divorzio in Europa", cit., p. 138.

38 On this point, see Perlingieri, P.: "Diritto internazionale dei rapporti civili: una nuova rubrica, *Rass. dir. civ.*, 1, 2021, p. 3.

39 Ruggeri, L.: "La transazione", cit., p. 24.

40 On this subject, see Lipari, N.: "I rapporti familiari tra autonomia e autorità", cit., p. 927.

41 See Libertini, M.: "Le nuove declinazioni del principio di effettività", *Eur. dir. priv.*, 2018, p. 1071 ff., where it maintains that the principle of effectiveness, if correctly framed on a systematic level, cannot be limited to the exercise of rights, but must extend to the fulfilment of obligations.

BIBLIOGRAPHY

Aras Kramar, S.: "The transformation of divorce procedure in Europe", *Familia*, 3, 2018, p. 277.

Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019, p. 141.

Dalfino, D.: "La negoziazione assistita da uno o più avvocati", in Id. (ed.): *Misure urgenti per l'efficienza e la funzionalità della giustizia civile*, Torino, 2015.

Deplano, S.: "Sul rapporto tra convenzione di negoziazione assistita dagli avvocati e «accordo che compone la controversia»", *Giusto processo civile*, 2017, p. 1123.

Devers, A.: "Le divorce sans juge en droit international privé", *Droit de la Famille*, 1, 2017, p. 21 ff..

Fusaro, A.: "La circolazione dei modelli giuridici nell'ambito dei patti in vista della crisi del matrimonio", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari* , Varese, 2018, p. 8 ff.

Giaimo, G: "Status coniugale e volontà delle parti nella crisi della famiglia. Brevi note comparatistiche in tema di negoziazione assistita", *Dir. fam. pers.*, 2016, pp. 1515-1530.

Gorgoni, A.: "Accordi definitivi in funzione del divorzio: una nullità da ripensare", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari* , Varese, 2018, pp. 292-314.

Hammje, P.: "Le divorce par consentment mutuel extrajudiciaire et le droit international privé", *Revue critique de droit international privé*, 2, 2017, pp. 143-158.

Indraccolo, E.: "La negoziazione assistita", in AA.VV.: *Altri strumenti di soluzione delle controversie e istituti affini,* cit., p. 551 ff.

Lipari, N.: "I rapporti familiari tra autonomia e autorità", *Riv. trim.*, 3, 2018, p. 928 ff.

Luiso, F.P.: "La negoziazione assistita (Article 6 and 12 of Decree Law 132/14)", *Nuove leggi civ. comm.*, 2015, pp. 649-654.

Libertini, M.: "Le nuove declinazioni del principio di effettività", *Eur. dir. priv.*, 2018, p. 1071 ff.

Marino, S.: "Strengthening the European civil judicial cooperation: the patrimonial effects of family relationship", *Quadernos de Derecho Transnacional*, 2017, pp. 265-284.

Montinaro, R.: "Accordi stragiudiziali sulla crisi coniugale e giustizia contrattuale", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Varese, 2018, p. 213.

Nazzaro, A.C.: "Il contenuto degli accordi pre-crisi. I limiti di negoziabilità", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Varese, pp. 87-95.

Oberto, G.: "Divorce in Europe", *Fam. dir.*, 1, 2021, p. 129 ff.

Oberto, G.: "Gli accordi prematrimoniali in Cassazione, ovvero quando il *distinguishing* finisce nella Haarspaltemachine", *Fam. dir.*, 2013, p. 321 ff.

Oberto, G.: "Per un intervento normativo in tema di accordi preventivi sulla crisi della famiglia", Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Varese, p. 37 ff.

Perlingieri, P.: "Diritto internazionale dei rapporti civili: una nuova rubrica, *Rass. dir. civ.*, 1, 2021, p. 3.

Perlingieri, P: "La sfera di operatività della giustizia arbitrale, *Rass. dir. civ*, 2015, pp. 584-610.

Perlingieri, P.: *Tutela e giurisdizione*, in Id.: *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, V, Napoli, 2020, p. 46 ff.

Rovelli, L.; "Rilievi introduttivi", in AA.VV.: *Altri strumenti di soluzione delle controversie e istituti affini*, XIV, *Trattato di diritto dell'arbitrato* Mantucci, Napoli, 2020, p. 58.

Ruggeri, L.: "Registered partnership and property consequences, III. Jurisdiction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property Relation of Cross-Border Couples in the European Union*, Napoli, 2020, p. 70 ff.

Ruggeri, L.: "La transazione", in *Tratt. dir. civ. del Consiglio Nazionale del Notariato* directed by P. Perlingieri, Napoli, 2016, p. 14-25.

SCHERPE, J.M.: "Fairness, freedom and foreign elements, marital agreements in England and Wales after *Radmacher v Granatino*", *23 Child & Fam. L. Q. 513* (2011), p. 513.

SCHERPE, J.M.: "Pre-Nups, private autonomy and paternalism", *The Cambridge Law Journal*, vol. 69, no. 1, 2010, p. 35 ff.

SCHERPE, J.M: "Rapporti patrimoniali tra coniugi e convenzioni prematrimoniali nel *common law*. Alcuni suggerimenti pratici", *Riv. dir. civ.*, 4, 2017, pp. 920-938.

FINANCIAL ASSETS AND PATRIMONIAL ISSUES IN INTERNATIONAL FAMILIES

ACTIVOS FINANCIEROS Y CUESTIONES PATRIMONIALES EN FAMILIAS INTERNACIONALES

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 180-195

Sara LANDINI

ARTÍCULO RECIBIDO: 4 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The paper deals with patrimonial issues in International families and with the European Regulations 1103 and 1104/ 2016 together with regulation 650/2012. The paper particularly focuses on financial assets: Bank Account; Share of Investments Funds; Life Insurance; Virtual assets like criptovalutes; real estate wealth. This perspective implies the need to find the rule governing the succession or the families' patrimonial issues, also taking into account the different rules in the different states concerned of the contracts that govern the circulation of such goods.

KEY WORDS: International family law; financial assets; property.

RESUMEN: *El trabajo trata de cuestiones patrimoniales en familias internacionales y de los Reglamentos (UE) nº 1103/2016 y 1104/2016, junto con el Reglamento (UE) nº 650/2012. El trabajo se centra especialmente en los activos financieros: cuenta bancaria; participaciones en fondos de inversión; seguro de vida; activos virtuales como criptomonedas; riqueza inmobiliaria. Esta perspectiva implica la necesidad de encontrar la norma que rija la sucesión o los asuntos patrimoniales de las familias, teniendo en cuenta también las distintas normas existentes en los diversos Estados relativas a los contratos que rigen la circulación de dichos bienes.*

PALABRAS CLAVE: *Derecho de familia internacional; activos financieros; propiedad.*

TABLE OF CONTENTS: I. IMPROVING TRANSNATIONAL FAMILIES.- II. EU PROJECTS ON TRANSNATIONAL FAMILIES.- III. PATRIMONIAL ISSUES REGARDING FINANCIAL ASSETS.

I. IMPROVING TRANSNATIONAL FAMILIES.

Transnational family relationships and legal separation or divorce with cross-border implications have a very relevant quantitative dimension, that can be shown through precise collected data. In fact, according to the "Annual Report on Intra-EU Labour Mobility 2020", intra-EU mobility continued to grow in 2019, but at a slower pace than in previous years. In 2019, 17.9 million Europeans lived in another EU country, out of which 13 million of working age, while, according to the latest updated data of Eurostat (extracted in March 2019), 2.4 million immigrants from non-EU countries entered in 2017 the EU. Moreover, according to the most recent data available for all EU Member States some 1.9 million marriages and an estimated 0.8 million divorces took place in the EU. These figures may be expressed as 4.4 marriages for every 1 000 persons and 2 divorces for every 1 000 persons). Therefore, it is very important that European legal operators are adequately trained in order to deal with family law in a transnational and cross-border perspective. But, in view of the current pandemic situation, it will also be important that family lawyers, notaries involved in family litigation, judges and academics are adequately trained in the use of digital technology in family law cases which often involves vulnerable parties and will therefore need particular attention within the digitalisation of justice.

Nowadays, in times of ever-increasing migratory flows[1], problems arising in case of transnational family relationships, and the related issues regarding inheritance law, are a rather fertile ground in which it is possible to experience the importance of finding new ways in order to foster the coexistence between different cultures and legal statuses, also through the use of cultural mediation tools. The aim of European regulatory interventions is to overcome some of the social conflicts that may stir the development of forms of religious and political radicalization ending up with terrorist behaviours.

1 According to the last available statistics, in 2015 migrants to EU Member States were 4.7 million, while at least 2.8 million migrants have left an EU Member State; see: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics/it.

• Sara Landini
Full Professor of Business Law, Università degli Studi di Firenze. E-mail: sara.landini@unifi.it

Therefore, the subject of PFEFS' action is strictly related to many of the problems faced by migrant families today in Europe as well as to the issue of real integration that is actually at the basis for efficiently contributing to the European Agenda on Security in terms providing effective judicial responses to terrorism. PFEFS built important networking with other project cofinanced by EU commission like GoinEu and GoinEu Plus (www.goineu.eu), coordinated by UNIFI.

II. EU PROJECTS ON TRANSNATIONAL FAMILIES.

Integration is one of the most important challenges in Europe. Recently the European Commission has adopted an Action Plan on the integration of third-country nationals (7 June 2016). The Action Plan provides a comprehensive framework to support Member States' efforts in developing and strengthening their integration policies. It also describes concrete measures the Commission will adopt to this regard.

The Plan includes actions across all the policy areas that are crucial for integration:

- Pre-departure and pre-arrival measures, including actions to prepare migrants and the local communities for the integration process;

- Education, including actions to promote language training, participation of migrant children to Early Childhood Education and Care, teacher training and civic education;

- Employment and vocational training, including actions to promote early integration into the labour market and migrants' entrepreneurship;

- Access to basic services such as housing and healthcare;

- Active participation and social inclusion, including actions to support exchanges with the receiving society, migrants' participation to cultural life and fighting discrimination.

In the light of the current migratory challenges, and as announced in the Communication of 6 April 2016, the moment has now come to revisit and strengthen the common approach across policy areas and involve all relevant actors – including the EU, Member States, regional and local authorities as well as social partners and civil society organizations. This is also supported by the European Parliament in its Resolution of 12 April 2016, which calls inter alia for full participation and early integration of all third country nationals, including refugees.

GoinEu and GoinEu Plus aim at contributing to the reduction of social conflicts promoting an analysis of the impact of Migration to EU Family & Successions Law having particular regard to the application of the European Regulations 1103 and 1104 enacted in 2016 coordinated with the Regulation 650/2012. In these terms the cooperation with PFEFS was really important.

As well known the ways in which a person distributes his/her assets, either after death or during his/her life, could have social implication and the social values regarding family support, as well as government taxation policies and succession laws, have real implications for the way in which assets are transferred[2].

Social values are strictly related to the culture, which have mainly a national dimension, and also to the national law.

Thus in case of international family the identification of the national law needs to take in to account the needing of social cohesion.

The Regulation 1103 and 1104 together with the Regulation 650 try to find a solution to facilitate the principle of freedom of movement of European Citizens[3].

The EU Reg. 1103 - 1104/2016 aim particularly at implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

To provide married couples with legal certainty as to their property and offer them a degree of predictability, all the rules applicable to matrimonial property regimes should be covered in a single instrument. In order to allow the spouses to enjoy in another Member State the rights, which have been created or transferred to them because of the matrimonial property regime, this Regulation should provide for the adaptation.

On this point, it is important to consider the role of private autonomy in regulating the situations of power and duty related to *ius in rem* even in legal

2 See Bulcroft, K.: "A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics", *J.L. & Fam. Stud*., 2000, 2, p. 1 ff.

3 See Franzina, P. and Viarengo, I. (eds): *The EU Regulations on the Property Regimes of International Couples*, Cheltenham, 2020, p. 3 ff.; Marrese, C.: *Successioni transfrontaliere tra diritto interno e diritto internazionale*, Milano, 2019, p. 10 ff.
With particular regard to regulation 650 see Damascelli, A.: *Diritto internazionale privato delle successioni a causa di morte (dalla l. n.218/1995 al reg. UE n. 650/2012)*, Milano, 2013, p. 157; Davì, A. and Zanobetti, A.: *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, p. 308; Baldus, C.: "Erede e legatario secondo il regolamento europeo in materia di successioni", *Vita notarile*, 2015 pp. 561-570; Ballarini, T.: "Il nuovo regolamento europeo sulle successioni", *Riv. dir. int*., 2013, p. 1116; Battiloro, R.: "Le successioni transfrontaliere ai sensi del reg. UE n. 650/2012 tra residenza abituale e certificato successorio europeo", *Dir. fam. pers.,* 2015, p. 658; Bonomi, A. and Wautelet, P.: *Il regolamento europeo delle successioni commentario al reg. UE 650/2012 applicabile dal 17 agosto 2015*, Milano, 2015; Calò, E.: "La pianificazione successoria dei cittadini spagnoli e dei residenti in Spagna alla luce della disciplina europea delle successoni", *Riv. not*., 2018, p. 691.

systems, such as Italy, ordered on the principle of typicality of *iura in rem*. The parties could therefore regulate, in the agreement of choice of the applicable law, within the spaces left to their private autonomy, the adaptation of an unknown right in rem to the closest equivalent right under the law of that other Member State.

It is also necessary to consider the change in the concept of wealth currently most shifted towards financial instruments that can represent real systems for allocating family wealth.

Regulation 1103 concerns only matrimonial property regimes and it should not apply to other preliminary questions such as the existence, validity or recognition of a marriage, which continue to be covered by the national law of the Member States, including their rules of private international law.

Private autonomy plays a relevant role in the choice of the law governing the matrimonial property regime[4].

According to article 22 the spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, if the law is one of the following:

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

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

The Regulation 1104/2016 provides something similar 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

According to art. 22 of the Regulation 1104 the partners or future partners may agree to designate or to change the law applicable to the property consequences of their registered partnership, if that law attaches property consequences to the institution of the registered partnership and if the law is one of the following:

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

4 Feraci, O.: "L'autonomia della volontà nel diritto internazionale privato dell'Unione Europea", *Riv. dir. internaz.*, 2013, p. 424.

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

(c) the law of the State under whose law the registered partnership was created.

Only in case of absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be determined according to secondary criteria like: spouses' first common habitual residence after the conclusion of the marriage, and in case of partnership the law of the State under whose law the registered partnership was created.

Both with regard to marriage and to partnership it is provided that the 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.

Both these regulations are connected to the Regulation 650 as some succession rights raise from the property regime of the marriage or of the partnership.

These regulations make up a unified framework which requires a combined reading and which penetrates the national systems that find a renewal. These three Regulations are addressed to a specific goal of UE and they need to be read in unison even if they seem to cover different areas. The Union 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 Union 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.

The Regulation 650 shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

Some matters shall be excluded from the scope of this Regulation and particularly: 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. Regulation 1103 shall apply to matrimonial property regimes. 'Matrimonial property regime' means 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. It shall not apply, among the other matters, to the succession to the estate of a deceased spouse.

The Regulation 1104 shall apply to matters of the property consequences of registered partnerships.

'Registered partnership' means 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. It shall not apply, among the others matters, to the succession to the estate of a deceased partner.

The fact is that it is difficult to distinguish family property matters from inheritance matters, just think of agreements relating to the family balance sheet that may have effects mortis causa or agreements in view of the succession that also affect the ownership of assets in family relationships. These regulations must be read with the final objective of allowing the free movement of European citizens by avoiding constraints that can derive from the problems of applicable law with respect to two fundamental moments of the dimension of being a Person: family relationships and succession affairs[5].

From the realization of the training objectives of the project, application difficulties emerged. Results achieved with GoinEu e GoinEuPlus projects, aimed at contributing to develop and disseminate an innovative cross-professional EU law training programme, specifically focused on Migration and Cultural Mediation, underlined some criticalities: lack of acquaintance of the EU Regulation among professionals, necessity to communicate and disseminate their content to citizens, difficulties in the concrete cases to determine what is the scope of application of different EU regulations in Inheritance, patrimonial families' regime (650, 1103, 1104), the possible cross application of Regulations 2012/650 and 2016/679 in case of digital goods (see web profiles on social network), the use of EU certificates (EU Succession Certificate) to exercise rights in front of Bank, Insurers, investments funds. With regard to certificates we have to remember the recent entry in to force of EU Regulation 2016/1191 promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 which sets out a system for further simplification of administrative formalities for the circulation of certain public documents and their certified copies where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State.

The results achieved thus open up new trends that we are committed to seizing while keeping the research team active.

5 See Biavati, P.: "La realizzazione dello spazio giudiziario europeo di giustizia, libertà e sicurezza: stato attuale e tendenza evolutive alla luce del programma di Stoccolma", in *Riv. trim. dir. proc. civ.*, 2013, p. 185; Bucher, A: "La famille en droit international privé", *RCADI*, 2000, p. 39 ff.

III. PATRIMONIAL ISSUES REGARDING FINANCIAL ASSETS.

Properties in families' assets are more and more represented by financial assets: Bank Account; Share of Investments Funds; Life Insurance; Virtual assets like criptovalutes; real estate wealth. This implies the need to find the rule governing the succession or the families' patrimonial issues, also taking into account the different rules in the different states concerned of the contracts that govern the circulation of such goods.

With regard to a succession of criptovalutes it is important to find the rule governing the access to the wallet.

The most relevant digital assets with patrimonial content are cryptocurrencies or criptovalutes[6] (such as Bitcoin, Ethereum, Monero, Ripple, Stellar, Litecoin): virtual currencies without a value guaranteed by a third party and accessible through a cryptographic key, intended for investment, to the possession or use exactly like the legal tender currency, with the difference, however, that transactions can only be carried out through technological tools, ie through the blockchain[7]

The succession of digital wealth, is that of their detention that can be achieved:

a) through mutual funds, certificates, futures or other common financial instruments that have the value of the cryptocurrency as underlying.

In this case there is no cryptocurrency owned by the deceased as what matters is only the price of the financial instrument which reflects the value of the reference cryptocurrency;

b) through an account opened at a bank or other online intermediaries (so-called exchange). To carry out operations on the blockchain, the "exchange" always uses its own private key, which can only be traced back to its own wallet, and keeps track of the actual stock of each of its users within its own wallet.

6 Italian Courts try to give a definition of criptovalutes recalling the theory of goods and circulation of moveable assets: la criptovaluta può essere definita come una "digitalizzazione di valore", che viene utilizzata come mezzo di scambio per l'acquisto di beni e servizi, caratterizzandosi per non essere emessa da una banca centrale o altra pubblica autorità e per non essere necessariamente collegata ad una valuta avente corso legale, e, in quanto tale, può essere oggetto di operazioni speculative in ragione dell'estrema variabilità dei livelli di fluttuazione che la caratterizza.
La criptovaluta deve qualificarsi come "bene", e come tale può essere oggetto di acquisto, scambio e deposito, ed è caratterizzata dall'essere bene fungibile, trattandosi di rappresentazioni digitali espresse in unità patrimoniali di un medesimo valore: Trib. Firenze 19 dicembre 2018, in *Contratti*, 2019, p. 661. We have to recall the contrary opinion of scholars: Semeraro, M.: *Pagamento e forme di circolazione della moneta*, Napoli, 2008 and of some courts like Trib. Brescia, 18 luglio 2018, *Pluris online*.

7 Lehmann, M.: "Who Owns Bitcoin? Private Law Facing the Blockchain", www.papers.ssrn.com; Wright, A. and De Filippi, P.: "Decentralized Blockchain Technology and the Rise of Lex Cryptographia", www.papers.ssrn.com/abstract=2580664.

c) directly by the user. In this case, the private key is held directly by the user who can keep it through:

- the so-called "Paper wallet", that is a simple paper sheet (or a computer document) on which the complex private key is printed in alphanumeric characters or encoded through a QRcode;

- the so-called software wallet, or applications, accessible via password, which contain the private key;

- the hardware wallets (such as Ledger Wallet, Trezor), i.e. devices aesthetically similar to USB flash memories and connectable to a computer in the same way, containing both the private key and an interface for the signature system can be activated by means of a complex PIN [8].

If the cryptocurrency is used only as an index of a financial instrument, the acquisition of its possession, the object of the succession consists solely of the financial instrument.

If, on the other hand, the cryptocurrency is held directly by the deceased, it is necessary to distinguish:

- if the cryptocurrencies are held through a software wallet, in order to get hold of them, the problems to be overcome will be linked to access, on the one hand, to the device in which the private key custody software has been installed and, on the other hand, to the software itself which, in fact, is protected by a password;

- if, on the other hand, the cryptocurrencies are held through a hardware wallet, in addition to the difficulties in finding the hardware itself, it will be necessary to recover the password to access the private key or token functions.

If, on the other hand, the cryptocurrency is held by an exchange, the rules for accessing the deceased's account will apply, namely a) EU Regulation 679/2016 on the processing of personal data, b) Legislative Decree no. lgs. 196/2003, as modified by d. lgs. 101/2018, possibly in combination with each other.

8 See Pernice, C.: "Cryptocurrencies and International Succession Law", in Landini S. (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, 2020. She notes (p. 285) that "to overcome this problem (the problem of mortis causa circulation of virtual goods, there some services that aim to manage the inheritance of bitcoin with a "keep-alive" system that sends emails to the account owner and transfers the funds to another wallet (previously indicated) in case of no response within a given period.
Some are studying smart contracts that in case of the owner's death automatically transfer the keys to the bitcoin address to the designated heir. However, this mechanism risks colliding with the prohibition of agreements as to succession under Art. 458 c.c.".

The succession of assets in bank account or in a bank deposit account (i.e. shares of investment founds, financial assets) request documents regarding the successions, the position of heirs etc. What about in case of international successions? Is it possible to produce the European Certificate of Succession?

The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new program called 'The Hague Program: strengthening freedom, security and justice in the European Union'. That program underlines the need to adopt an instrument in matters of succession dealing, in particular, with the questions of conflict of laws, jurisdiction, mutual recognition and enforcement of decisions in the area of succession and a European Certificate of Succession.

In order to achieve those objectives, the Regulation 650/2012 should bring together provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession.

This certificate enables heirs, legatees, executors of wills and administrators of the estate to prove their status and exercise their rights in other EU countries[9].

Moreover Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promotes the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012

This certificate should be accepted by Bank but also by Insurers, line in case of a life insurance in favor of heirs.

Life insurance is a contract in which a policyholder pays regular premiums in exchange for a lump-sum death benefit paid to the policyholder's beneficiaries.

9 According to Regulation 650/2012, Article 62 on Creation of a European Certificate of Succession «1. This Regulation creates a European Certificate of Succession (hereinafter referred to as 'the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article 69.
2. The use of the Certificate shall not be mandatory.
3. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter».
According to Article 63 «1. The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate. 2. The Certificate may be used, in particular, to demonstrate one or more of the following: the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate; the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate; the powers of the person mentioned in the Certificate to execute the will or administer the estate».
The Certificate is issued in the Member State whose courts have jurisdiction. The issuing authority shall be: (a) a court as defined in Article 3(2); or (b) another authority which, under national law, has competence to deal with matters of succession.

The lump-sum benefit is paid when the policyholder either passes away or a specific amount of time has passed. Life insurance policies can provide financial security by replacing lost income and covering expenses.

There are different types of life insurance that can play important role in the mortis causa circulation of wealth.

Whole life insurance is the simplest form of cash value insurance that comprises a protection and investment component. Under whole life the policyholder's entire life is covered, and all death benefits are paid, and premiums recovered by the family upon the death of the policyholder, whenever that may be. Whole life insurance differs from universal life insurance with respect to premium payments. Under whole life insurance premiums are not flexible, and fixed payments are required to be made, whereas universal life insurance allows flexible premium payments. Another type is temporary life insurance is coverage that has an expiration date and is not guaranteed to last over an insured's entire life.

There are also life insurance contracts with an important financial component. The unit linked insurance plan, for instance, is offered as a further refinement of the universal life insurance such that the investment component is unitized i.e. units of fund are purchased from the premium attributable to investment. These policies also offer the policyholder the protection and investment option through one product. The premium can comprise of protection and investment components and the units of a suitable investment fund are purchased at the Net Asset Value (price per unit) with the premium amount attributable to the investment component. The return earned on the units of the fund is accumulated as the cash value of the policy. In unit-linked policies, the policyholder has the liberty to choose the fund to be purchased from the premium amount attributable to investment.

As said at point 71 in the premises of Regulation 650: «The Certificate should produce the same effects in all Member States. It should not be an enforceable title in its own right but should have an evidentiary effect and should be presumed to demonstrate accurately elements which 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. 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. Any person who makes payments or passes on succession property to a person indicated in the Certificate as being entitled to accept such payment or property as an heir or legatee should be afforded appropriate protection if he acted in good faith relying on the accuracy of the information certified in the Certificate. The same protection

should be afforded to any person who, relying on the accuracy of the information certified in the Certificate, buys or receives succession property from a person indicated in the Certificate as being entitled to dispose of such property. The protection should be ensured if certified copies which are still valid are presented. Whether or not such an acquisition of property by a third person is effective should not be determined by this Regulation».

In our opinion it doesn't matter the exclusions as in art. 1 of Regulations 650 regarding: property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point. In the case proposed the problem concerns only the use of the certificate.

With this regard the projects GoInEU and GoInEU Plus aimed at contributing to develop and disseminate an innovative cross-professional EU law training program, specifically focused on Migration and Cultural Mediation, underlined some criticalities and needs for improvement: lack of acquaintance of the EU Regulation among professionals; necessity to communicate and disseminate their content to citizens; difficulties in the concrete cases to determine which is the scope of application of each different EU instrument in situations of cross application family property regulations (e.g. in the case of prenuptial agreements) or of data protection regulations (e.g. in case of digital goods); and above all with regard to the use of certificates, in order to exercise rights in front of banks, insurers and investments funds (all data related to the needs emerged during the mentioned projects' implementation are available in the reports published on the projects' website www.goineu.eu).

For these reasons, it is important to diffuse the knowledges and to promote the debate on the EU Regulations in family and successions matters also among the operators of the financial market.

BIBLIOGRAPHY

Baldus, C.: "Erede e legatario secondo il regolamento europeo in materia di successioni", *Vita notarile*, 2015 pp. 561-570.

Ballarini, T.: "Il nuovo regolamento europeo sulle successioni", *Riv. dir. int.*, 2013, p. 1116.

Battiloro, R.: "Le successioni transfrontaliere ai sensi del reg. UE n. 650/2012 tra residenza abituale e certificato successorio europeo", *Dir. fam. pers.,* 2015, p. 658.

Biavati, P.: "La realizzazione dello spazio giudiziario europeo di giustizia, libertà e sicurezza: stato attuale e tendenza evolutive alla luce del programma di Stoccolma", *Riv. trim. dir. proc. civ.*, 2013, p. 185.

Bonomi, A. and Wautelet, P.: *Il regolamento europeo delle successioni commentario al reg. UE 650/2012 applicabile dal 17 agosto 2015*, Milano, 2015.

Bucher, A: "La famille en droit international privé", *RCADI*, 2000, p. 39 ff.

Bulcroft, K.: "A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics", *J.L. & Fam. Stud.*, 2000, 2, p. 1 ff.

Calò, E.: "La pianificazione successoria dei cittadini spagnoli e dei residenti in Spagna alla luce della disciplina europea delle successoni", *Riv. not.*, 2018, p. 691.

Damascelli, A.: *Diritto internazionale privato delle successioni a causa di morte (dalla l. n.218/1995 al reg. UE n. 650/2012)*, Milano, 2013, p. 157.

Davì, A. and Zanobetti, A.: *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, p. 308;.

Feraci, O.: "L'autonomia della volontà nel diritto internazionale privato dell'Unione Europea", *Riv. dir. internaz.*, 2013, p. 424.

Franzina, P. and Viarengo, I. (eds): *The EU Regulations on the Property Regimes of International Couples*, Cheltenham, 2020, p. 3 ff.

Lehmann, M.: "Who Owns Bitcoin? Private Law Facing the Blockchain", www.papers.ssrn.com.

Marrese, C.: *Successioni transfrontaliere tra diritto interno e diritto internazionale*, Milano, 2019, p. 10 ff.

PERNICE, C.: "Cryptocurrencies and International Succession Law", in LANDINI S. (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, 2020.

SEMERARO, M.: *Pagamento e forme di circolazione della moneta*, Napoli, 2008 and of some courts like Trib. Brescia, 18 luglio 2018, *Pluris online*.

WRIGHT, A. and DE FILIPPI, P.: "Decentralized Blockchain Technology and the Rise of Lex Cryptographia", www.papers.ssrn.com/abstract=2580664.

THE WORKING PARTNER IN FAMILY ENTERPRISE. EUROPEAN AND NATIONAL ISSUES

EL SOCIO DE TRABAJO EN LA EMPRESA FAMILIAR. CUESTIONES EUROPEAS Y NACIONALES

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 196-213

Federico
PASCUCCI

ARTÍCULO RECIBIDO: 24 de abril de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The essay focuses on the discipline of the work done by one partner in the company of the other in cross-border couples and on the problems involved in this case. More specifically the focus is on the hermeneutical problems that arise both at the level of European legislation and at the level of Italian national discipline which is applicable according to European conflict criteria, showing the ambiguities and wide areas of shadow left uncovered by the latter.

KEY WORDS: Worker; family; cross-border couple; registered partnership; de facto cohabitation.

RESUMEN: *El ensayo se centra en la disciplina del trabajo realizado por un socio en compañía del otro en parejas transfronterizas y en los problemas que conlleva este caso. Más concretamente, la atención se centra en los problemas hermenéuticos que surgen tanto a nivel de la legislación europea como a nivel de la disciplina nacional italiana que es aplicable según los criterios de conflicto europeos, mostrando las ambigüedades y amplias áreas de sombra dejadas al descubierto por esta última.*

PALABRAS CLAVE: *Trabajador; familia; pareja transfronteriza; sociedad registrada; convivencia de hecho.*

I. FAMILY WORK AND CROSS-BORDER COUPLES.

The increasing mobility of individuals within the territory of the European Union and beyond imposes the need of having a legal framework as clear and uniform as possible to apply in all cases where a relationship is characterized by elements of internationality (such as couples of different nationality living in the country of origin of one of the partners or in a third State, or couples of the same nationality living in a foreign country and so on). From this point of view the harmonization of private international law has become a primary objective of the Union, in order "to maintain and develop an area of freedom, security and justice in which the free movement of persons is ensured"[1]. A process, this one, which may be defined as "communitarisation" of conventional sources of private international law and was made possible by the powers conferred on the Union by Art. 81 TFEU[2].

In this respect the family work (*i.e.* that particular type of employment relationship in which the member of a family carries out his activity in favour of another member of the same family) shows, when occurring in couples marked by international elements, particularly critical profiles, as it stands on that thin line of border that divides family bonds from the working ones.

In fact family employment, and that of the partner *in primis*, seems to brand itself with speciality compared to the normal ideal of the working relationship. Speciality given by the particular bond that ties the employee to his/her employer, and that should take place in a climate of solidarity, mutual benevolence and community of interests[3], while the "normal" working relationship would highlight itself for the extraneousness, if not the opposition, of the interests pursued by the parties.

1 Signes De Mesa, J.I.: "Introduction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 6.

2 Orlandini, G.: "Il rapporto di lavoro con elementi di internazionalità", *Working Papers CSDLE "Massimo D'Antona"*, 2012, no. 137, p. 4.

3 Scognamiglio, R.: *Diritto del lavoro. Parte generale*, Bari, 1972, p. 198.

• Federico Pascucci
Research Fellow, School of Jurisprudence, University of Camerino. E-mail: federico.pascucci@unicam.it

This, in its turn, produces the risk of framing the working relationship of the partner in the services rendered *affectionis vel benevolentiae causa*, marked by the element of gratuity[4], and the risk to leave him/her in a position of extreme precariousness and weakness, practically abandoned to the will and generosity of the family's employer and without a real legal protection[5].

It is therefore necessary to figure out which, between the regulatory instruments for the harmonisation of private international law developed by the Union, would be applicable to this type of legal relationship for the protection of the working partner, that risks – for the particularity of the work carried out – to find himself in a doubly unfavourable situation, both as family member and as employee.

On the point the choice seems to be between the Regulation Rome I, no. 593/2008 of 17th June 2008 on the law applicable to contractual obligations, or the Regulations n. 2016/1103 and n. 2016/1104, respectively on matrimonial property regimes and registered partnerships' ones (so called Twin Regulations), with the consequence that, at first, it will be essential to see if the work is carried out for the benefit of the undertaking of the spouse, the one of the civil partner or the *de facto* partner's one.

II. THE *DE FACTO* COHABITING WORKER IN CROSS-BORDER COUPLES.

Reversing the order, the less controversial issue would appear to be the third one, that is the one of the work done by the *de facto* partner in the firm of his/her partner. Excluded definitely the application of Reg. 1103/2016 that concerns married couples, some doubt may arise over the notion of "registered partnership" provided by Reg. 1104/2016, *i.e.* "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".

It is in fact necessary to understand what the European legislator means by registration "of which is mandatory under" the law, given that in *de facto* cohabitation provided by law 20th May 2016, n. 76 (from now on Cirinnà law) the records registration seems not foreseen for the purpose of establishing the relationship, but only for purposes of evidence. On the issue it could help the Court of Justice case law, according to which priority should be given to the textual data[6], thus arguing for the exclusion of the *de facto* cohabiter from the scope of Reg. 1104/2016.

4 Amoroso, G.: *L'impresa familiare*, 1998, Padova, 1998, p. 5; Balestra, L.: *L'impresa familiare*, Milano, 1996, p. 9.

5 Cottrau, G.: *Il lavoro familiare*, Milano, 1984, p. 13; Balestra, L.: "Art. 230 *bis*", in Sesta, M. (ed.): *Codice della Famiglia*, 3rd ed., Milano 2015, p. 928.

6 Corte giust., 20th December 2017, c. 372/2016, Soha Sahyouni c. Raja Mamisch, *Foro it.*, 2018, IV, cc. 280-281, with note by Di Meo, R.: *Il diritto europeo e il divorzio privato islamico*.

However according to a part of the doctrine one should not only stop at the literal datum, but there should be an exegesis that takes into account the *ratio* of the norm. In other words, one should think that the registration must be created only in accordance with the legal rules required for its creation, with the consequent irrelevance of the constitutive or declarative function of the same. If to this fact one joints that the registration would also perform advertising functions, in order to make the union and the following effects recognisable to third parties, the thesis at hand assumes the *de facto* union that is based on a cohabitation contract, such as the one provided by Art. 1, paragraphs from 50 to 52, of law 76/2016, to fall under the scope of Reg. 1104/2016[7].

On the contrary, it has been suggested that accessing the *de facto* cohabitation the couple voices its will not to join in marriage nor civilly, with the consequence that the necessary bond with the wedlock or the registered partnership that is given by the registration seems to break[8].

Argument, this latter, which also seems strengthened by Art. 26 of Reg. 1104/2016, in the case of applicable law in the absence of choice of partners, that would be identified in the law of the State under whose law the registered partnership was created. In fact, if it's missing the registration as the instrument establishing the *de facto* cohabitation – which is indeed "*de facto*" and not "*de iure*" – you wonder what would be the law to apply in case the partners have not exercised their negotiating autonomy.

It therefore seems more correct including the employment relationship between *de facto* partners in the scope of Art. 8 of Rome I Regulation on contractual obligations, which covers every employment contract with international profiles.

In fact the "individual employment contract" pursuant to that Article should cover – according to the Court of Justice's teachings[9] - not only the standard employment contract, but also every relationship characterized by a personal performance, the subjection to the power of the other party and the payment in any form of compensation for the service rendered. Relationship in which what matters, rather than the legal subordination, are the economic dependence and the functional link between the worker's activity and the activity of the beneficiary that integrates the employee's performance in his/her organization. It follows, therefore, that the concept of "individual employment contract" includes also

7 Garetto, R., Giobbi, M., Viterbo, F.G. and Ruggeri, L.: "Registered partnerships and property consequences", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations*, cit., p. 49 f.

8 Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019, p. 29.

9 Cfr. *ex multis* Corte giust. CE, 31th May 1989, c. 344/87, Bettray, *Foro it.*, 1991, IV, c. 204.

employment relationships known as "parasubordinated"[10], in which can be counted even the work given by the *de facto* cohabiting in the company managed by his/her partner.

In this case, the main criterion for applying the Italian rules becomes the choice of the parties, as long as, in accordance with the principle of *favor laboratoris*, the very choice doesn't imply "the waiver of the protection granted by the mandatory rules of the law which would be applied without the choice"[11], namely in the order, the mandatory rules of the law of the country in which or, failing that, from which the employee habitually carries out his work, or in the alternative, the one of the country where the place of business through which the employee was engaged is situated or, at last, the law of the country with which, regarding the circumstances as a whole, the contract is more closely connected.

III. CROSS-BORDER COUPLES AND SPOUSE/CIVIL PARTNER WORKING IN THE PARTNER'S ENTERPRISE.

More complicated is instead – paradoxically – the case where the family employee is the spouse or the civil partner. In such an event there is a relationship that, even if falling within the working category of the parasubordination, presents nevertheless clear profiles of family bonds. In other words, it is necessary to verify whether the profiles of specialities regarding the employment relationship are prevalent – in which case you can enter the employment relationship carried out by the spouse or the civil partner within the scope of the Rome I Regulation -, or, on the contrary, the prevalence regards the family relationship, with the application of the Twin Regulations.

The risk of facing an interpretive *impasse* on the issue is great. And this because, whilst the case of family work is comparable to parasubordination, part of the doctrine highlights the text of Art. 1, para. 1, letters a) and b) of Rome I Regulation, that exempts from its scope obligations arising out of family relationships and of matrimonial property regimes, and removes – while placing the question in doubtful terms – the family work from Art. 8 of the very same Regulation[12]. It would necessarily follow the inclusion of spouse/civil partner's job performance in the scope of Twin Regulations, that in the exceptions – which, as exceptional circumstances, must be strictly interpreted[13] - include social security, but not the employment relationships between the partners.

10 Orlandini, G.: "Il rapporto", cit., p. 6; Gubboni, S.: *Diritto del lavoro europeo. Una introduzione critica*, Milano, 2017, p. 134.

11 Orlandini, G.: "Il rapporto", cit., p. 9.

12 Orlandini, G.: "Il rapporto", cit., p. 7.

13 Corte giust., 6th June 2019, c. 361/18, Ágnes Weil c. Géza Gulácsi, *Riv. dir. int. priv. proc.*, 2020, p. 197.

Moreover, this outcome does not seem to be entirely obvious.

In the first place this exclusion seems based on the belief that family work, because carried out within the family, must be free labour and so left out *per se* from Rome I Regulation[14]. But the presumption of family work as free one has been very reduced, at last in the Italian system, by the family law reforms of 1975 and 2016[15]. So today it appears incorrect to state that the job performance done inside the family is *per se* a free one.

Again, most of the labour law doctrine[16] and the case law of the Italian Supreme Court of Cassation firmly states that the family work – namely a relationship of personal, continuous and coordinated collaboration between the family members – is a form of parasubordination[17], reason why can be considered as "living law" the insertion of this situation in employment relationships rather than in family ones.

To reinforce this "living law" there is, last but not least, also the Court of Justice's jurisprudence[18], that considers as employee the worker which is – more than legally subordinated to – economically dependent on his/her employer. As already highlighted before, what matters is the personal job performance and the ongoing insertion of the person which gives this performance in the businesses organization of the one that receives it, because the European judges value the hetero-organization more than the hetero-direction, so that the employee is the worker which produces wealth in a continuous way and not simply occasional.

In the end, for the Court of Justice, European labour law – of which Art. 8 of Rome I Regulation is surely a part[19] - applies also to atypical and flexible forms of work, including the very same parasubordination.

So even the family employee (spouse or civil partner, it does not matter) generates wealth, due that his/her performance is ongoing and surely coordinated with the enterprise of family entrepreneur (unless we'd be in the different case of the self-employed person) and for this he/she must be considered "worker" according to European judge's interpretation.

14 Villani, U.: *La Convenzione di Roma sulla legge applicabile ai contratti*, 2nd ed., Bari, 2000, p. 151.

15 Amoroso, G.: *L'impresa familiare*, cit., p. 22, for which the presumption still acts outside the family law reforms.

16 Cottrau, G.: *Il lavoro familiare*, cit., p. 106; Papaleoni, M.: "Lavoro familiare", in *Enc. giur. Treccani*, XX, Roma, 1990, p. 18. For the jurisprudence see last Cass., 15th June 2020, no. 11553, *www.lavoroediritto.it. Contra* see Passalacqua, P.: "Profili lavoristici della l. n. 76 del 2016 su unioni civili e convivenze di fatto", *Working Papers CSDLE "Massimo D'Antona"*, 2017, no. 320, p. 24 f.

17 Cass., 8th April 2015, no. 7007, *Fam. dir.*, 2015, p. 1080, with note by Barillà, G.B.: *Partecipazione all'impresa familiare, sorte degli utili non ripartiti e prova della comunione*, and Cass., 15th June 2020, no. 11553, cit.

18 Corte giust. CE, 31th May 1989, c. 344/87, *Bettray*, cit.

19 Orlandini, G.: "Il rapporto", cit., p. 6.

And this is so true that, always according European case law, the fact that a person would be linked by marriage to the owner of the enterprise in which he/she works "does not preclude that person from being classified as a «worker»" within the meaning of EU labour law[20]. With the consequence that family work, more than being part of the obligations arising from the family relationship or the matrimonial property regime according to Art. 1, para. 1, letters a) and b) of Rome I Regulation, seems to flow into the "individual employment contract" provided by Art. 8 of the same Regulation.

Yet, we must never forget that the one of the family worker is a doubly weak position, having regard to the particular working environment and the ever-incumbent presumption of gratuitousness that goes with the *affectionis causae* relationships[21], and for this particularly at risk of exploitation.

It follows that a teleological and axiological interpretation[22] should favour the application, to family work with international profiles, of Rome I Regulation's Art. 8, which saves the principle of *favor laboratoris*, thanks to the rules of protection which cannot be derogated by private autonomy and the overriding mandatory provisions stated in the following Art. 9[23]. Twin Regulations instead do not seem to provide safeguard clauses of the same type.

IV. THE CASE OF ART. 230 *BIS* OF ITALIAN CIVIL CODE.

If, as a result of the Rome I Regulation's criteria, Italian law was to apply, the referenced standard, both for the spouse and the civil partner that works in favour of his/her partner, will be the one provided by the family law reform of 1975, namely Art. 230 *bis* of Italian civil code (from now on c.c.)[24].

According to its text, the family member, who provides, on a continuous basis, work in the family or the family enterprise, is entitled to maintenance and share in the profits of the enterprise according to the quantity and quality of the work done, provided that a different type of relationship was not configurable. The

20 Corte giust., 8th June 1999, c. 337/97, Meeusen c. Hoofddirectie van Informatie Beheer Groep, *Not. giurispr. lav.*, 1999, p. 572.

21 The presumption that family work performances are free of charge, because "normally given «*affectionis vel benevolentiae causae*»", has been recently reaffirmed by Cass. (ord.), 22th February 2018, no. 4345, ined. On the threat of gratuitousness' presumption, since it may result "much penalizing for the family member", that does not see economically valued his/her work, see Dogliotti, M. and Figone, A.: "L'impresa familiare", in Auletta, T. (ed.): *I rapporti patrimoniali fra i coniugi*, III, in *Tratt. dir. priv.*, directed by Bessone, Torino, 2011, p. 709.

22 Cfr. Perlingieri, P.: *Il diritto civile nella legalità costituzionale nel sistema italo-comunitario delle fonti*, 3rd ed., II, Napoli, 2006, p. 440 f., according to which it is necessary to exercise also on the family a control aimed at protecting the inalienable and fundamental rights of the person.

23 Orlandini, G.: "Il rapporto", cit., p. 9 ff.

24 Colussi, V.: "Impresa familiare", *Dig. disc. priv., Sez. comm.*, VII, Torino, 1992, p. 174.

family worker is also entitled to participate in the management of the enterprise on certain decisions provided for in the law (use of profits and increases, extraordinary management, production addresses and end of the enterprise) and finally has a pre-emptive right on the undertaking in case of its transferring or hereditary division.

Art. 230 *bis* identifies the only case that, in our legal system, can be really defined as "family work" in the proper sense, seen its residual nature stated precisely by the rule's *incipit*, in which can be read that the provisions it contains must be applied only if "a different type of relationship was not configurable"[25].

In other words, the work of a family member for the benefit of another family member's enterprise, where there was not a case of normal employment – having the kinship no relevance for the purposes of subordination –, of self-employment, or of any associative or corporate relationship, must necessarily merge in the special case provided by Art. 230 *bis.*

This, in turn, means that the rule in question is both special and imperative, at last *in peius*, since the possible discipline provided by the autonomy of the negotiations cannot be less favourable - for the family worker - of the one provided by Art. 230 *bis*[26].

In order to have family work it is therefore necessary that the spouse, a relative within the third grade or a kindred within the second would provide his or her working activity in favour of the entrepreneur. This working activity must be done directly inside an enterprise managed by another family member or can take the form of domestic work, as long as the enterprise itself would receive a benefit from it.

There will be no family work if the company is not an individual one[27] – it's impossible to have marriage, degree of kinship or affinity with an association or a society[28] – neither when the working activity isn't continuous, where "continuous"

25 Papaleoni, M.: "Lavoro familiare", cit., p. 18. About the residual nature of the case referred to in Art. 230 *bis* see Balestra, L.: *L'impresa familiare*, cit., p. 25; Amoroso, G.: *L'impresa familiare*, cit., p. 9; Nunin, R.: "Lavoro familiare e lavoro nell'impresa familiare", in Cester, C. (ed.): *Il rapporto di lavoro subordinato. Costituzione e svolgimento*, in *Comm. dir. lav.,* directed by Carinci, 2nd ed., II, Torino, 2007, p. 129 f.

26 Amoroso, G.: *L'impresa familiare*, cit., p. 9; Balestra, L.: *L'impresa familiare*, cit., p. 32 and Id., "Art. 230 *bis*", cit., p. 930; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 703 f.

27 Papaleoni, M.: "Lavoro familiare. Postilla di aggiornamento 2006", in *Enc. giur.* Treccani, XX, Roma, 1990, p. 2; Balestra, L.: "Art. 230 *bis*", cit., p. 930 f.; Nunin, R.: "Lavoro familiare", cit., p. 133; Oppo, G.: "Impresa familiare", in *Comm. dir. it. fam.*, directed by Cian, Oppo and Trabucchi, III, Padova, 1992, p. 487. *Contra* Cottrau, G.: *Il lavoro familiare*, cit., p. 39 and Amoroso, G.: *L'impresa familiare*, cit., p. 52 s. For jurisprudence see Corte cost., 10th December 1987, no. 476, *Foro it.*, 1989, I, c. 375 and Corte Cost., 25th November 1993, no. 419, *ivi*, 1994, I, c. 693; Cass., 18th January 2005, no. 874, *Giust. civ.*, 2005, I, p. 1811, but *contra* seems Cass., 23th September 2004, no. 19116, *ibidem*, p. 1244.

28 Colussi, V.: "Impresa familiare", cit., pp. 175 and 179.

means "regularity" and "constancy in time" – necessary is, in fact, the continuous working contribution, not the continuous presence in the company[29] -, nor, lastly, when there is a domestic work that configures a simple satisfaction of the duties provided by Artt. 143 and 147 c.c., without any further and effective contribution to the family undertaking[30].

Do not count neither the type of work – manual or intellectual work – done by the family member, nor the tasks performed, due that it is undisputable that he or she can perform for the entrepreneur the same task provided by an employee, or – difficult but not impossible – a self-employed. What matters is the fact that there is a collaboration in the enterprise and not a co-management of it[31].

Once established the presence of a "family enterprise" and of the "family work", the family worker will be entitled *in primis* to the patrimonial rights of maintenance and share in the profits and increases. Moreover, these rights do not configure an actual remuneration and to the family work cannot be applied Art. 36, para. 1, of Italian Constitution[32].

The right of maintenance represents the fixed and periodic part, disconnected from the company's performance – and so claimable even in the event of loss by the family company – which ensures the life needs of the entitled person. Life needs must not be intended as mere subsistence, but as a free and dignified existence[33], in clear subrogating function of what is provided for the retribution just by Art. 36 of Constitution.

Despite not being remuneration in the technical-legal sense[34], maintenance can anyway constitute a compensation – and be of a remuneration nature in the broad sense – of the work done[35], and for this reason it has not the care requirement which is instead proper of the maintenance claims. In fact maintenance is neither linked to the state of need, nor Art. 2751, no. 4, c.c. is applicable to it[36].

Still, precisely because it is released from the economic trend of the enterprise, this right must be linked to the "economic condition of the family", namely the

29 Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 720.

30 Amoroso, G.: *L'impresa familiare*, cit., p. 59 s.; Colussi, V.: "Impresa familiare", cit., p. 178. *Contra* seems Oppo, G.: "Impresa familiare", cit., p. 474 f. For the jurisprudence see above all Cass., Sez. un., 4th January 1995, no. 89, *Foro it.*, 1995, I, c. 105.

31 Colussi, V.: "Impresa familiare", cit., p. 178.

32 Dogliotti, M. and Figone, A.:"L'impresa familiare", cit., p. 725; Cottrau, G.: *Il lavoro familiare*, cit., p. 82.

33 Balestra, L.: *L'impresa familiare*, cit., p. 242; Amoroso, G.: *L'impresa familiare*, cit., p. 87 ff.

34 Cass., 18th December 1992, no. 13390, *Nuova giur. civ. comm.*, 1993, I, p. 609, with note by Bontempi, P.: *Impresa familiare e retribuzione*.

35 Papaleoni, M.: "Lavoro familiare", cit., p. 17.

36 Amoroso, G.: *L'impresa familiare*, cit., p. 88.

patrimonial conditions of the "entrepreneur's family", even if, naturally, the trend of the company hardly will not affect these patrimonial conditions[37]. It also follows that the contractor could fulfil his/her maintenance obligation even with different incomes from the ones obtained by the undertaking[38].

It's the opposite story for the second patrimonial right payable to the family worker, *i.e.* the right to participate in profits (including the goods purchased with them) and increases (also with regard to start-up). This right is in fact variable – because directly linked to the performed work's "quantity and quality" – and possible, because strictly tied to the presence of profits and/or increases as results of enterprise's trend[39].

Furthermore, the terms "quantity and quality of the work" must not make one thinks that Art. 230 *bis* spreads the proportionality principle stated by Art. 36 of Constitution even to family work. For, as it has been noted, from one hand, the words "in proportions" used by this article in the civil code cannot have the meaning of "equivalence", cause there is always the risk of the missing or limited production of profits[40], while, on the other hand, performed work's quantity and quality set up only simple allocation parameters of these profits, although in the constitutional provision these elements represent "the value of the service in absolute", so much so that they are completely unbound from the trend of the employer's activity[41].

Not all profits and increases must be divided, due that other factors, additional and different from family work, contribute to their formation. Accordingly, family worker must be entitled only to those profits and/or increases directly linked to his/her job performance.

On the issue a part of the doctrine considered to use as measures both the normal payment which would be paid to an employee performing the same tasks, and the global valour of the enterprise[42]. Against this opinion seems the case law of the Supreme Court of Cassation, according to which the amount of remuneration paid to the employee for the same tasks cannot be considered as parameter, because the ontological difference between the participation to profits

37 Balestra, L.: *L'impresa familiare*, cit., p. 242.

38 Cass., 23th June 2008, no. 17057, *Fam. dir.*, no. 3, 2009, p. 229, with note by Delmonte, C.: *Sulla maturazione del diritto agli utili nell'impresa familiare: la discutibile soluzione della suprema corte*.

39 Colussi, V.: "Impresa familiare", cit., p. 180.

40 Papaleoni, M.: "Lavoro familiare", cit., p. 17; Oppo, G.: "Impresa familiare", cit., p. 481.

41 Balestra, L.: *L'impresa familiare*, cit., p. 249.

42 Colussi, V.: "Impresa familiare", cit., p. 180 s.; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 725.

and increases and the retribution, which is – this last one – not linked to the results of employer's activity[43].

Then right to profits and increases should arise, as rule, only at the time of undertaking's end or of the end of the job performance by the family member, unless otherwise decided by the parties[44].

The other part of rights provided in favour of family worker by Art. 230 *bis* is the one of participation to the enterprise's management. However, this participation does not concern the ordinary management, which is sole of the one that assumes businesses risk – practically the family contractor -, but only the strict cases provided by the rule, *i.e.* the decisions on the use of profits and increases and the ones about acts of extraordinary administration and/or related to the end of the undertaking. In any case these decisions – made by a majority of the voters – will affect only the internal relationships between the family entrepreneur/employer and his/her family workers. They will not be enforceable against third parties, nor could be imposed on the family entrepreneur which will not decide to fulfil them. Anyway, this last conduct will be considered as defaulting on the obligations to his/her family workers and will require, in the absence of a just cause, to compensate for any damage caused[45].

V. FAMILY WORK AND *DE FACTO* FAMILIES.

The first of the subjects protected by the regulation of family work is the spouse. Moreover, even if on paper the discipline seems free from problems, in practice it proves not so simply to apply.

In fact, excluded the cases of divorce or nullity of marriage, which imply the loss of the spouse *status* and so automatically cause the end of family work[46], doubts could arise regarding the legal separation. On the issue it should be noted that with the legal separation the family relationships loosen, but do not dissolve themselves. For this reason it is considered that legal separation do not cause the end of spouse's family work[47].

43 Cass., 29th July 2008, no. 20574, *Mass. Foro it.*, 2008, 1137.

44 Colussi, V.: "Impresa familiare", cit., p. 181 f.; Oppo, G.: "Impresa familiare", cit., p. 482. *Contra* Balestra, L.: *L'impresa familiare*, cit., p. 253. For jurisprudence see Cass., 29th July 2008, no. 20574, cit.

45 Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 729.

46 Colussi V.: "Impresa familiare", cit., p. 179.

47 Balestra, L.: "Art. 230 *bis*", cit., p. 939; Amoroso, G.: *L'impresa familiare*, cit., p. 74; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 708. About jurisprudence cfr. Cass., 22th May 1991, no. 5741, *Foro it.*, 1993, I, c. 942.

The case that is considered the most difficult to solve in the application of Italian law is however the one of *more uxorio* cohabitation and, more generally, of the *de facto* family.

On the problem an important detail must be made. If before 2016 the issue concerned the opposite sex couples that decided not to get married – namely *more uxorio* cohabitants properly said – and same sex couples, which were legally incapacitated to access to marriage, with the entry into force of Cirinnà law, a part of the problems appears to be resolved. In fact, same sex partners can now access to civil union, *i.e.* a legal institution that, due to the recall operated by Art. 1, para. 20, of law 76/2016, equalises – apart from some exceptions – for all legal purposes the civil partner to the spouse and, most of all, states at Art. 1, para. 13, the enforcement of the rule provided for the family enterprise – and so for the family work – in favour of the civil partnerships.

And yet we still have unresolved problems on the issue. First, Cirinnà law has not recalled the rules about affinity relationships – namely the tie which according Art. 78 c.c. exists between the spouse and the relatives of the other one – regarding the civil partner[48], with the consequence that this one does not seem to become a kindred of his/her partner's relatives. So a doubt remains on the issue if the civil partner could or could not benefit, through the affinity relationship, of protection provided by Art. 230 *bis*.

To solve this problem one must start from the speciality of Art. 230 *bis*. If in fact this article identifies a special type of work relationship, different from the normal employment, then the list of persons that it contains should be considered as exhaustive, with the inability of its analogic extent to different subjects[49].

Others instead have decided to do an extensive/analogical interpretation of Art. 230 *bis* and considering its *ratio*, aimed to the protection of the work provided by especially weak subjects and to avoid situations of abuse and/or exploitation inside the family, have opted to spread the recipient subjects of this protection, including even *more uxorio* cohabitants and in general *de facto* family's members[50].

Acceding to this last theory should mean the extent of Art. 230 *bis* to the civil partner when the family enterprise is managed by a relative of his/her partner. In

48 Ghidoni, L.: "Unione civile e impresa familiare: la disarmonia di una mera estensione normativa", *Fam. dir.*, 2017, p. 701.

49 Cottrau, G., *Il lavoro familiare*, cit., p. 64 ff.; Colussi, V.: "Impresa familiare", cit., p. 179; Oppo G., "Impresa familiare", cit., p. 466 ff. For case law see Cass., 2th May 1994, no. 4204, *Foro it.*, 1995, I, c. 1935.

50 Balestra, L.: *L'impresa familiare*, cit., p. 205; Amoroso, G.: *L'impresa familiare*, cit., p. 82; Nunin, R: "Lavoro familiare", cit., p. 136; Dogliotti, M. and Figone, A.: "L'impresa familiare", cit., p. 709. For case law see Cass., 15th March 2006, no. 5632, *Fam. pers. e succ.*, 2006, p. 995, with note by Stoppioni, L.: *Rapporto d'impresa familiare e convivenza more uxorio*.

fact, from one hand, the missing of the recall to Art. 78 c.c. inside Cirinnà law seems mainly a mere slip[51], while, on the other hand, it should be quite the protection scheme provided by Art. 230 *bis*, identified in the risk of exploitation inside the relationship of "family closeness" following the marriage, to play in favour of the family work discipline's extension to the civil partner, because this "closeness" and the resultant risk arise inside the civil union too[52].

More critical aspects are instead providing by the rules about family work in the *de facto* cohabitation. On the point, Cirinnà law inserted a new article in civil code, the 230 *ter*, which provides to *de facto* cohabitant that works in favour of his/her partner the right to participate to profits and increases, commensurate with the work done, unless there is a company or employment relationship between them. So this article spreads only a part of the protection offered by Art. 230 *bis* – and only the variable one of the participation to profits and increases on the basis of work done, not the minimum one of maintenance, let alone the rights of enterprise's management – to the *de facto* cohabitant that works inside his/her partner's undertaking, leaving outside the rule even the work done inside the family, but in favour of the enterprise.

It follows a discipline missing and difficult to read, that leaves the interpreter whit more questions than answers and that does not seem at all having composed the *querelle* about the spread of Art. 230 *bis* protection to the *de facto* couples[53], but only having switch the borders of the issue[54].

First, it doesn't appear that the lexical differences between the two articles, as far as possible cause for ambiguity, should represent also differences of concepts[55].

But the fact remains that the new rule, while applying to *de facto* cohabitants – same or opposites sex it doesn't matter -, provides both a really minimal protective discipline in front of the very same needs of protection from exploitation which could arise from family relationship, and that in the case of marriage or civil union find the far more substantial protection of Art. 230 *bis*, and leaves completely uncovered numerous other scenarios. Most of all the one in which the stable

51 Cipriani, N.: "La disciplina delle unioni civili: un punto d'arrivo o un punto di partenza?", *Foro it.*, 2017, I, c. 2174.

52 Ghidoni, L.: "Unione civile", cit., p. 704.

53 Ricci, G.: "Il lavoro associato (associazione in partecipazione; lavoro nell'impresa familiare; lavoro nelle cooperative)", in Amoroso, G., Di Cerbo, V. and Maresca, A. (ed.): *Diritto del lavoro. La Costituzione, il Codice Civile e le leggi speciali*, 5th ed., I, Milano, 2017, p. 1884; Quadri, G.: "Le prestazioni di lavoro del convivente alla luce del nuovo art. 230 *ter* c.c.", *Nuove leggi civ. comm.*, 2017, p. 590.

54 Albanese, A.: "La partecipazione all'impresa familiare", in Id. (ed.): *Le nuove famiglie*, Pisa, 2019, p. 702.

55 Butturini, P.: "L'art. 230-ter c.c. e i diritti del convivente che collabora nell'impresa", in Ferrando, G., Fortino, M. and Ruscello, F. (ed.): *Legami di coppia e modelli familiari*, I, Milano, 2019, p. 208; Albanese, A.: "La partecipazione", cit., p. 698; Bona, C.: "La disciplina delle convivenze nella l. 20 maggio 2016 n. 76", *Foro it.*, 2016, I, c. 2097.

cohabitation is missing, or the *de facto* partner doesn't work inside the enterprise, but inside the family, even if this work will be in favour of the very same undertaking.

The doctrine is very divided on the point. In response of which, although already stating the impossibility to extend Art. 230 *bis*, thinks – perhaps not too consistently – to give anyway an extensive reading to Art. 230 *ter*[56], there are those who instead consider that in the cases not covered by the reform of 2016 the use of the "living law" will be needed, and so the rules provided by Art. 230 *bis* will be extended whenever there will be a cohabitation which is outside the provision of Cirinnà law[57].

Lastly, there is also those which seem to have excluded the application of both Artt. 230 *bis* and *ter* to the *more uxorio* cohabitant not falling inside law 76 of 2016. This last one would, therefore, remain with no protection at all, other than the normal rules of restitutory type, with all the problems on the level of constitutional legality about Art. 230 *ter*, that from this theory would follow[58].

VI. SHORT CONCLUSIONS.

The need to protect the work of the partner in favour of the other one does not yet seem perfectly fulfilled.

If the couple presents cross-border elements, there is firstly the problem to consider the obligations coming from family work as obligations arising from family relationships or from employment ones, with the following choice if applying the rules provided by Twin Regulations or the ones stated in the Rome I Regulation. This last one seems however to be preferred because it shows a more protecting system of worker's position.

Other than this, once the main hermeneutical doubt – namely the one on the European harmonisation instrument to be applied in the specific case - is dissolved, will always remain the doubts and, most of all, the numerous gaps that Italian law – eventually identified in accordance with the conflict rules of Rome I Regulation – shows in governing the specific case of the work done by the partner in favour of the other one.

56 Quadri, G.: "Le prestazioni", cit., p. 604.

57 Balestra, L.: "La convivenza di fatto. Nozione, presupposti, costituzione e cessazione", *Fam. dir.*, 2016, p. 924; Romeo, F.: "Dal diritto vivente al diritto vigente: la nuova disciplina delle convivenze. Prime riflessioni a margine della l. 20 maggio 2016 n. 76", *Nuove leggi civ. comm.*, 2016, p. 682; Butturini, P.: "L'art. 230-ter", cit., p. 207 f.

58 Albanese, A.: "La partecipazione", cit., p. 703.

But the fact remains that the needs of work protection in all its forms – a protection that inspires both national and European law and which takes the form of *favor laboratoris* principle -, should suggest to the interpreter, also on the basis of the lessons of both the Court of Justice and the Court of Cassation, the implementation – if in doubt – of the law most favourable to the worker that, inside a cross-border couple, decides to give up other professional opportunities to fully dedicate his/her working energies to the partner's business.

BIBLIOGRAPHY

Albanese, A., "La partecipazione all'impresa familiare", in Id. (ed.): *Le nuove famiglie*, Pisa, 2019, p. 702.

Amoroso, G.: *L'impresa familiare*, 1998, Padova, 1998, p. 5.

Balestra, L.: "Art. 230 *bis*", in Sesta, M. (ed.): *Codice della Famiglia*, 3rd ed., Milano 2015, p. 928.

Balestra, L.: "La convivenza di fatto. Nozione, presupposti, costituzione e cessazione", *Fam. dir.*, 2016, p. 924.

Balestra, L.: *L'impresa familiare*, Milano, 1996, p. 9.

Bona, C.: "La disciplina delle convivenze nella l. 20 maggio 2016 n. 76", *Foro it.*, 2016, I, c. 2097,

Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019, p. 29.

Butturini, P.: "L'art. 230-ter c.c. e i diritti del convivente che collabora nell'impresa", in Ferrando, G., Fortino, M. and Ruscello, F. (ed.): *Legami di coppia e modelli familiari*, I, Milano, 2019, p. 208.

Cipriani, N.: "La disciplina delle unioni civili: un punto d'arrivo o un punto di partenza?", *Foro it.*, 2017, I, c. 2174.

Colussi, V.: "Impresa familiare", *Dig. disc. priv., Sez. comm.*, VII, Torino, 1992, p. 174.

Cottrau, G.: *Il lavoro familiare*, Milano, 1984, p. 13.

Dogliotti, M. and Figone, A.: "L'impresa familiare", in Auletta, T. (ed.): *I rapporti patrimoniali fra i coniugi*, III, in *Tratt. dir. priv.*, directed by Bessone, Torino, 2011, p. 709.

Garetto, R., Giobbi, M., Viterbo, F.G. and Ruggeri, L.: "Registered partnerships and property consequences", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, 49 f.

Ghidoni, L.: "Unione civile e impresa familiare: la disarmonia di una mera estensione normativa", *Fam. dir.*, 2017, p. 701.

Gubboni, S.: *Diritto del lavoro europeo. Una introduzione critica*, Milano, 2017, p. 134.

Nunin, R.: "Lavoro familiare e lavoro nell'impresa familiare", in Cester, C. (ed.): *Il rapporto di lavoro subordinato. Costituzione e svolgimento*, in *Comm. dir. lav.,* directed by Carinci, 2nd ed., II, Torino, 2007, p. 129 f.

Oppo, G.: "Impresa familiare", in *Comm. dir. it. fam.*, directed by Cian, Oppo and Trabucchi, III, Padova, 1992, p. 487.

Orlandini, G.: "Il rapporto di lavoro con elementi di internazionalità", *Working Papers CSDLE "Massimo D'Antona"*, 2012, no. 137, p. 4.

Papaleoni, M.: "Lavoro familiare. Postilla di aggiornamento 2006", in *Enc. giur.* Treccani, XX, Roma, 1990, p. 2.

Papaleoni, M.: "Lavoro familiare", in *Enc. giur. Treccani*, XX, Roma, 1990, p. 18;

Passalacqua, P.: "Profili lavoristici della l. n. 76 del 2016 su unioni civili e convivenze di fatto", *Working Papers CSDLE "Massimo D'Antona"*, 2017, no. 320, p. 24 f.

Perlingieri, P.: *Il diritto civile nella legalità costituzionale nel sistema italo-comunitario delle fonti*, 3rd ed., II, Napoli, 2006, p. 440 f.

Quadri, G.: "Le prestazioni di lavoro del convivente alla luce del nuovo art. 230 *ter* c.c.", *Nuove leggi civ. comm.*, 2017, p. 590.

Ricci, G.: "Il lavoro associato (associazione in partecipazione; lavoro nell'impresa familiare; lavoro nelle cooperative)", in Amoroso, G., Di Cerbo, V. and Maresca, A. (ed.): *Diritto del lavoro. La Costituzione, il Codice Civile e le leggi speciali*, 5th ed., I, Milano, 2017, p. 1884.

Romeo, F.: "Dal diritto vivente al diritto vigente: la nuova disciplina delle convivenze. Prime riflessioni a margine della l. 20 maggio 2016 n. 76", *Nuove leggi civ. comm.*, 2016, p. 682.

Scognamiglio, R.: *Diritto del lavoro. Parte generale*, Bari, 1972, p. 198.

Signes De Mesa, J.I.: "Introduction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 6.

Villani, U.: *La Convenzione di Roma sulla legge applicabile ai contratti*, 2nd ed., Bari, 2000, p. 151.

WHY REG. (EU) NO. 1103/2016 AND 1104/2016 IMPACT ON THE EUROPEAN CITIZENS DAILY LIFE?

¿POR QUÉ LOS REGLAMENTOS (UE) Nº 1103/2016 Y 1104/2016 TIENEN IMPACTO EN LA VIDA COTIDIANA DE LOS CIUDADANOS EUROPEOS?

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 214-221

Carlo RIMINI

ARTÍCULO RECIBIDO: 7 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: Why families do need the tools and instruments implemented by PSEFS Project? Why this is not an issue for lawyers, judges and University professors only. The answer to this question is that Reg. (EU) no. 1103/2016 and no. 1104/2016 impact on the European citizens daily life. We follow the problems of a young couple in order to have a better understanding and an evidence of this statement.

KEY WORDS: Matrimonial property regime; applicable law; habitual residence; divorce.

RESUMEN: *¿Por qué las familias necesitan las herramientas e instrumentos implementados por el Proyecto PSEFS? ¿Por qué esto no es un problema exclusivo para abogados, jueces y profesores universitarios? La respuesta a estos interrogantes es que los Reglamentos (UE) nº 1103/2016 y nº 1104/2016 tienen impacto en la vida diaria de los ciudadanos europeos. Exponemos los problemas de una pareja joven para tener una mejor comprensión y evidencia de esta afirmación.*

PALABRAS CLAVE: *Régimen económico-matrimonial; ley aplicable; residencia habitual; divorcio.*

TABLE OF CONTENTS: I. INTRODUCTION. – II. AN "ERASMUS GENERATION" FAMILY LAW CASE. – III. A LITTLE MAGIC BOTTLE. – IV. CONCLUSION.

I. INTRODUCTION.

The number of the transnational families in Europe is quite large and it is constantly increasing due to globalization and the ever greater mobility that characterizes the modern society.

When dealing with legal issues appearing as parts of their "everyday life", all cross-borders families have to face similar problems. It is on this basis and in order to provide these families with tools for raising and increasing their awareness of the new legislative instruments that the PSEFS Project works.

But why families do need these tools? Why this is not an issue for lawyers, judges and University professors only?

In order to find an answer for the above mentioned questions, let's follow a young couple (Alice and Bob) in their life, meaning before, during and after their marriage.

II. AN "ERASMUS GENERATION" FAMILY LAW CASE.

Alice and Bob are both Italian citizens and they are the best representative of the so called "Erasmus generation". As a matter of fact, Alice and Bob feel in love during high school. After high school they decided to have an international experience moving to Munich where they studied theoretical physic at the Max Plank Institute. After their PHD, they got a postdoc for further two years but, in the meantime, they got married in Trieste (Italy), their common hometown.

We could say that Alice and Bob are lucky enough: they come from the same nation and from the same city and they work abroad but they live together: romantic relationships can be much more difficult for the Erasmus generation!

The day before the marriage, while preparing the ceremony, the priest asks them: "Tomorrow do you want to choose separation of assets regime or community of assets regime?"

• Carlo Rimini
Ordinario di Diritto Privato, Università degli Studi di Milano. E-mail: carlo.rimini@carlorimini.com

This unexpected question collapses them into our universe (the universe of law) from the faraway universe of their experience made by numbers, math and physics experiments.

Alice looks at Bob into his eyes and, after hesitating, she answers: "Well, I think, we think, separation of assets regime".

Why Alice gave that answer? Only because in Italy, separation of assets regime is the most common choice.

The day after, they tied the knot and they made the choice of the separation of assets regime that has been annotated in the margin of the marriage certificate. Alice and Bob completely forget this issue and their choice for separation of assets regime, while they keep on living in Germany for another couple of years when they decided to move back to Italy.

Alice became an "A type" researcher at the University of Trieste (she works for the International Centre for Theoretical Physics and she can see the sea outside her window) while Bob started working for a company in Milan specialised in nano materials. Bob has purchased a little house in Sesto San Giovanni using all his savings (he is happy enough because the house is near the underground station!).

At the time of signing the deed, the Notary asked Bob about the matrimonial property regime governing the marriage with Alice. Bob answered that this is the separation of assets regime. The Notary Public made a check within the public records and confirmed Bob's declaration within the deed.

Bob's hope at the time of the purchase of the house is that Alice applies to become associate professor at the University of Milan so that he can stop commuting from Milan to Trieste every weekend. Unfortunately, Alice never applies for moving to the University of Milan because she hates Sesto San Giovanni.

Alice keeps on living in a rented flat in Trieste; she has no savings and she cannot obtain a mortgage because her incomes are too low. After a short time, Bob stops commuting from Sesto San Giovanni to Trieste because the journey was too tiring for him.

Due to their estrangement, one year after moving back to Italy, they decide to separate/divorce.

In this situation, during the crisis of the marriage, Alice decides to ask for an opinion from a lawyer.

After having heard from Alice the most relevant facts of the marriage, the lawyer explains her that the case is an international family law case. Moreover, Alice's lawyer reaches the conclusion that Bob, after the legal separation, has a debt towards his wife equal to half of the value of the Sesto San Giovanni flat.

Alice is quite doubtful: she doesn't think that her case is an international case since the spouses both live in Italy and they are both Italian citizens. All their assets are in Italy too. Why does her case have international family law profiles?

III. A "LITTLE MAGIC BOTTLE".

Why the situation is different from that it seems at a first glance?

If Alice and Bob would have used *Taxonomy* and *Atlas* from www.euro-family.eu immediately before the marriage (or the Notary Public who drafted the deed transferring to Bob the flat in Sesto San Giovanni would have used the same tools) they would have learned the answer of her doubts.

Luckily for Alice, "the little magic bottle had now had its full effect": her lawyer is a real fan of *Taxonomy* and *Atlas* from www.euro-family.eu and he is really well oriented in international family law!

Let's go one step at a time.

Reg. (EU) n. 1103/2016[1] implements enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. The regulation applies to procedures started after 21 January 2019 and, with regard to the provisions on the determination of the applicable law, only with respect to spouses who married after that date[2].

Chapter III of the regulation deals with the law applicable to matrimonial property regime.

According to Art. 22 of the Regulation, the spouses (or future spouses) may agree to designate the law applicable to their matrimonial property regime, provided that that law is one of the following:

1 The full text of the Reg. (UE) n. 1103/2016 (OJ L. 183, 8 July 2016) is available in the multilingual version on https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32016R1103. Together with this regulation, Reg. (UE) n. 1104/2016 (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) has been issued.

2 According to Art. 69.

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

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

The choice is not definitive since the parties may change it both for the future and for the past (in the last case, in respect with the rights of third parties).

If the spouses do not choose the law applicable to their property relationships, the criteria for the determination of the law applicable are indicated in Art. 26 of Reg. (EU) n. 1103/2016. The criteria are mentioned in a hierarchical order, meaning that the following ones operate only where the previous ones cannot be applied.

As a matter of facts, according to Art. 26 of Reg. (EU) n. 1103/2016, in the absence of a choice of law agreement pursuant to the above mentioned Art. 22, the law applicable to the matrimonial property regime shall be the law of the State:

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

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

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

Alice and Bob never choose the applicable law to their marriage. This means that Art. 26 applies to their case.

Even if Alice and Bob are both Italian nationals, the criterion of the law of the common citizenship as the law applicable to their marriage (Italian law) cannot be applied since it works only in case the spouses do not have a common habitual residence after the marriage.

It is undisputed that Alice and Bob have lived in Germany for a long time during their relationship but, above all, it is undisputed that they resided in Germany together immediately after marriage celebration. This means that the law applicable to the matrimonial property regime is the German law as the law of their first habitual residence as spouses (Art. 26, lett. a).

According to German law, the default or statutory family property regime is the community of accrued gains, the so called *Zugewinngemeinschaft*, according to §§1363-1390 of the BGB.

If the spouses live under the statutory regime, neither the husband's nor the wife's assets purchased before the marriage become the spouses' joint property. The same applies to the assets that a spouse acquires after the celebration of the marriage. However, the accrued gains (meaning the increase in the spouses' assets) that occurs during the course of the marriage are equalized (meaning divided equally) once the property regime ends, in particular when the crisis of the marriage (legal separation or divorce) occurs (§ 1363, paragraph 2 of the BGB).

According to the rules above mentioned, the value of the flat in Sesto San Giovanni – which is the only asset accrued by the spouses (in particular by Bob) over the course of the marriage – has to be equally shared within the spouses.

What about the choice of the matrimonial property regime – in particular, the choice of the separation of assets regime – that the parties made before the priest (as a public officer according to Italian law) at the time of the celebration of the marriage? Maybe that declaration should have effect also under German law being considered as a choice of a "different regime", meaning different from the *Zugewinngemeinschaft* regime?

In order to answer to this question, let's consider Art. 25 of the Reg. (EU) n. 1103/2016. According to Art. 25 of the Regulation, matrimonial property agreements shall be expressed in writing, dated and signed by both spouses. However, if the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply. Moreover, if the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements shall apply.

IV. CONCLUSION.

The election of the separation of assets regime as the regime applicable to their marriage was made by Alice and Bob in writing, it was dated and also signed. Nevertheless, since Germany was the State where both the spouses had their habitual residence at the time of the Italian agreement of separation of assets regime, the formal validity of the agreement depends on German law.

According to § 1411 of the BGB, the marriage contract must be recorded by a notary, and both parties must be present. This requirement is far away from Italian law where the presence of the Notary is mandatory only in case the agreement is not entered during the marriage cerimony.

Since both spouses had their habitual residence in Germany at the time when the separation of assets agreement was concluded and the law applicable to matrimonial property regime is German law, the additional formal requirement provided for by German law shall apply.

Since Italian agreement was not signed in front of a Notary Public as required per German law, the separation of assets agreement is void. The German default matrimonial property regime shall apply to the marriage of Alice and Bob. *Zugewinngemeinschaft* regime applies to the marriage and Bob has to share the value of the flat in Sesto San Giovanni.

PUBLIC POLICY IN FAMILIES AND SUCCESSIONS REGULATIONS: THE CASE OF "TALAQ"

EL ORDEN PÚBLICO EN LOS REGLAMENTOS DE FAMILIA Y SUCESIONES: EL CASO DEL "TALAQ"

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 222-241

Marco RIZZUTI

ARTÍCULO RECIBIDO: 16 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: According to EU Regulations on transnational families and successions, a foreign rule remains without effect if it is deemed contrary to the so-called public policy (ordre public) of the forum's legal system. As a consequence, judges have to evaluate whether the application of foreign law is incompatible with fundamental principles of the domestic law, especially whether it would constitute a violation against human rights. An outstanding controversial issue is today represented by Islamic repudiation (talaq): two contrasting Italian judicial decisions of August 2020 may illustrate how difficult it could be to determine what public policy is.

P KEY WORDS: Public policy; migration; human rights; talaq.

RESUMEN: *De acuerdo con la normativa europea sobre familias y sucesiones trasnacionales, un precepto extranjero permanece sin efecto si se considera contrario al orden público del sistema legal del foro de aplicación. Como consecuencia, los jueces deben evaluar si la aplicación de la regla extranjera es incompatible con los principios fundamentales del foro, especialmente si constituiría una violación de los derechos humanos. Un controvertido ejemplo muy destacado es la repudiación islámica (talaq): Dos sentencias italianas contrapuestas de agosto de 2020 pueden ilustrar hasta qué punto puede ser complicado determinar qué es el orden público.*

ALABRAS CLAVE: *Orden público; migración; derechos humanos; talaq.*

TABLE OF CONTENTS: I. THE LEGAL CHALLENGES OF MIGRATION.- II. PUBLIC POLICY AND HUMAN RIGHTS.- III. OLD AND NEW PUBLIC POLICY. IV. THE HARD CASE OF REPUDIATION.

I. THE LEGAL CHALLENGES OF MIGRATION.

In the last decades, within a general framework of social and economic globalization, the growth of migratory flows in and to Europe has been very relevant[1]. For some countries, such as France or the United Kingdom, this is just the continuation of older trends, dating back to colonial times and to the connected longer migration history, but for other countries that in the recent past were more accustomed to mainly intra-European migratory flows, such as Germany, or were countries of emigration, such as Spain, Italy or Greece, all this sounds quite new. Mass immigration raises new legal challenges, for both the European Union and the Member States. One of them is to balance the respect for an immigrant's cultural and religious identity with the domestic system of values in family and successions law.

In fact, many of the new immigrants come from countries of Africa or Western and Southern Asia, that are governed by Islamic law (*Sharia*) in its different variations[2]. According to the private international law rules, once migrants have established habitual residence in the country of destination, jurisdiction in matters of civil law generally lies with the courts of the State of residence, but the law applicable to the merits of a given legal dispute with a transnational element is determined by the rules on conflict of laws. And, in many instances, nationality is used (or can be used, after an act or an agreement of choice of law) as a connecting factor to determine the law applicable to personal status, encompassing, amongst others, a natural person's legal capacity as well as the person's family relations and marital status as a spouse.

1 According to the 2019 Annual Report on Intra-EU Labour Mobility - Final Report January 2020, intra-European mobility continued to grow and in 2018 there were 17.6 million EU-28 movers within the EU, while, according to the latest updated data of Eurostat (extracted in March 2019), 2.4 million immigrants entered in 2017 the Union from non-EU countries. Of course, mobility and migration have then been affected by the pandemic-related restrictions but is going to recover soon.

2 In fact, according to the data of the United Nations High Commissioner for Refugees, the top four nationalities of unauthorized entrants into the European Union during the so-called refugee crisis were: Syrian, Afghan, Iraqi, and Eritrean.

• Marco Rizzuti
Researcher of Private Law, University of Florence. E-mail: marco.rizzuti@unifi.it

In any case, the application of the law of nationality may be regarded as a token of recognition of the person's cultural identity but can also provoke tensions and fragmentations, given that it contrasts with one of the cornerstones of the Western paradigm of modern State: the principle of territoriality of the law, that guarantees the paramount value of formal equality among all persons and, at the same time, ensures the monopolistic control of the State over the legal system as a whole.

II. PUBLIC POLICY AND HUMAN RIGHTS.

When, in consequence, European courts increasingly have to apply Islamic family and successions law, tensions with the domestic scale of values are imminent. Problematic cases arise in particular because of issues of gender inequality, with regard, for instance, to polygamy, underage marriages, repudiation and dower. Here, both religious and legal beliefs intertwine and possibly collide.

Private international law is pervaded by tolerance for foreign law and by international comity, but the application of the law of another State has its limits[3]. A foreign rule remains without effect if it is deemed contrary to the so-called public policy *(ordre public)* of the forum's legal system: such a formula is often used by both domestic legislation[4] and EU Regulations[5]. Accordingly, judges have to

3 See, also for further references: Rademacher, L.: "Die Abwehr anstößigen Familien- und Erbrechts: Zwischen Toleranz und Geschlechter-gleichstellung", in Rupp, C.S., Antomo, J., Duden, K., Kramme, M., Lutzi, T., Melcher, M., Montana, M.T., Segger-Piening, S., Pförtner, F. and Walter, S. (ed.): *IPR zwischen Tradition und Innovation*, Tübingen, 2019, pp. 121–140; Rizzuti, M.: "Ordine pubblico costituzionale e rapporti familiari: i casi della poligamia e del ripudio", *Actualidad Jurídica Iberoamericana*, 2019, pp. 604-627; Rizzuti, M.: "Transnational divorces and «public policy»", in Gallardo Rodríguez, A., Estancona Pérez, A.A. and Berti De Marinis, G. (ed.): *Los nuevos retos del derecho de familia*, Valencia, 2020, pp. 703-716.

4 See in Italian legal literature: Badiali, G.: *Ordine pubblico e diritto straniero*, Milano, 1963; Paladin, L.: "Ordine pubblico", *Noviss. dig. it.*, XII, Torino, 1965, p. 130 ff.; Barile, G.: *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (l'ordine pubblico internazionale)*, Padova, 1969; Ferri, G.B.: *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970; Guarneri, A.: *L'ordine pubblico e il sistema delle fonti nel diritto civile*, Padova, 1974; Palaia, N.: *L'ordine pubblico internazionale*, Padova, 1974; Benvenuti, P.: *Comunità statale, comunità internazionale e ordine pubblico internazionale*, Milano, 1977; Panza, G.: "Ordine pubblico, Teoria generale", *Enc. giur.* Treccani, Roma, 1990, p. 1 ff..; Lonardo, L.: *Ordine pubblico e illiceità del contratto*, Napoli, 1993; Mosconi, F.: "Qualche considerazione sugli effetti dell'eccezione di ordine pubblico", *Riv. dir. int. priv. proc.*, 1994, pp. 5-14; Emanuele, C.F.: "Prime riflessioni sul concetto di ordine pubblico nella legge di riforma del diritto internazionale privato italiano", *Dir. fam. pers.*, 1996, p. 326 ff..; Angelini, F.: *Ordine pubblico e integrazione costituzionale europea*, Padova, 2007; Barba, V.: "L'ordine pubblico internazionale", in Perlingieri, G. and D'Ambrosio, M. (ed.): *Fonti, metodo e interpretazione*, Napoli, 2017, p. 409 ff.; Perlingieri, P.: "Libertà religiosa, principio di differenziazione e ordine pubblico", in AA.VV.: *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di G. Furgiuele*, Mantova, 2017, I, p. 355 ff.; Salerno, F.: "La costituzionalizzazione dell'ordine pubblico internazionale", *Riv. dir. int. priv. proc.*, 2018, p. 259-291; Perlingieri, G. and Zarra, G.: *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019; Tescaro, M.: "L'ordine pubblico internazionale nella giurisprudenza italiana in tema di risarcimento punitivo e di maternità surrogata", *Nuovo diritto civile*, 2020, pp. 23-55.

5 For a general overview about public policy (*ordre public*) in the EU law see Feraci, O.: *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012. With specific reference to the field of families and successions law we have to consider: Article 35 of EU Regulation 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; Article 31 of EU Regulation 1103/2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the

determine whether the application of foreign law is incompatible with fundamental principles of the domestic law, especially whether it would constitute a violation against human rights.

In a recent decision, the European Court of Human Rights, dealing with a peculiar Greek case, not connected with migration but arising from a sort of relic of the premodern Ottoman *millet* system of personal law, has opined that the application of *Sharia*'s inheritance rules is not in itself unacceptable, provided that it takes place on a voluntary basis[6]. The same principles have to be considered when *Sharia* plays the role of a foreign law, applicable to migrant families because of the mentioned mechanisms of international private law, but also in merely internal situations, where an application of *Sharia* could be determined because of phenomena of private ordering within migrant communities, as in the case of the so-called Muslim arbitration tribunal and *Sharia* councils in the United Kingdom[7]. Some commentators have therefore critically remarked that the European Court of Human Rights' judgment could have opened the door to the application of *Sharia*

recognition and enforcement of decisions in matters of matrimonial property regimes; Article 31 of EU Regulation 1104/2016, 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.

6 We refer to the ECHR decision of 19th December, 2018, Appl. no. 20452/2014, the case of *Molla Sali v. Greece*, addressing the issue with regard to the peculiar situation of an historical Muslim minority in Greece, that for historical reasons was authorized to apply *Sharia* instead of the Civil Code in family and successions matters: see Tsaoussi, A. and Zervogianni, E.: "Multiculturalism and Family Law: The Case of Greek Muslims", in Boele-Woelki, K. and Sverdrup, T. (ed.): *European Challenges in Contemporary Family Law*, Antwerp-Oxford, 2008, pp. 209-239. In fact, a widow, who lost three quarters of her husband's inheritance because of *Sharia* rules, resorted to ECHR, so that Greece was condemned for the breach of her fundamental rights to free self-identification and to non-discrimination. The justices opined that, if a State created a special status for the members of a community to protect them, it must also recognize to the individuals a right to opt for the application of ordinary law. For some comments about the decision see: Tsavousoglou, İ.: "The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR", *https://strasbourgobservers.com.*, 2019; Koumoutzis, N. and Papastylianos, C.: "Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace", *Religions*, 30th April 2019; McGoldrick, D.: "Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights", *Oxford Journal of Law and Religion*, 2019, pp. 517–566; Jayme, E. and Nordmeier, C.F.: "Testierfreiheit als europäische Menschenrecht? – Kritische Betrachtungen zur Westthrazien-Entscheidung des Europäischen Gerichtshofs für Menschenrechte", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2019, p. 200-202; Rizzuti, M.: "The Strange Case of Ms. Molla Sali v. Greece: Individual Rights and Group Rights in a Multicultural Order", in Landini, S. (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, 2020, pp. 387-413.

7 In the United Kingdom many *Sharia* councils provide services of family mediation and, when mediation fails, dissolve Islamic marriages. *Sharia* councils try to elaborate solutions that could be recognizable both by English law and by the laws of the involved migrants' countries of origin. Therefore, they have developed a legal order without a State, whose concrete contents derive from *Sharia* but are also strongly influenced by English law: the so-called *Angrezi Shariat*. See at these regards: Pearl, D. and Menski, W.F.: *Muslim Family Law*, London, 1998, pp. 277 ff.; Menski, W.F.: "Muslim Law in Britain", *Journal of Asian and African Studies*, 2001, pp. 127-163; Yilmaz, I.: "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England", *Journal of Ethnic and Migration Studies*, 2002, pp. 343-354; Menski, W.F.: "Angrezi Shariat: Glocalised Plural Arrangements by Migrants in Britain", *Law Vision*, 2008, pp. 10-12; Keshavjee, M.M.: *Islam, Sharia & Alternative Dispute Resolution. Mechanisms for Legal Redress in the Muslim Community*, London, 2013; Parolari, P.: "Sharia e corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali", *Mat. st. cult. giur.*, 2017, pp. 157-191; Parolari, P.: *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, Torino, 2020; Rinella, A.: *La shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, Bologna, 2021.

in Europe on a voluntary basis[8]. Such forms of migrants' private ordering may, in fact, play an important role in family matters, helping the integration of different communities in the context of the so-called multi-conjugalism (*i.e.* multiculturalism applied to conjugal relationships)[9], but the States have to ensure in any case an effective right of opting out for the individuals, especially for the most vulnerable ones[10].

III. OLD AND NEW PUBLIC POLICY.

Nobody could know what public policy exactly means: in every field of the law general clauses are indeed useful precisely because they are not previously bound within strict limits, thus allowing jurists to deal with unprecedented issues. Moreover, public policy does not imply a control on the abstract content of the foreign law, but on its concrete effects. The question is how to give a concrete content to such a clause, and this is a very complex and uncertain evaluation, also because the European model of family is deeply changed, developing from the traditional one towards pluralism and gender equality.

A few decades ago, in fact, it could be probably easier to determine the content of public policy, identifying it with the defence of the only possible legally recognized family model, the traditional, or allegedly natural, one: *i.e.* the heterosexual, patriarchal, monogamous and indissoluble marriage. Today such a model has quite evidently lost its primacy even in our domestic laws, and it would be very difficult to use it as a benchmark in order to evaluate the foreign ones. In fact, throughout Europe the current state of legislation and case-law endorses a pluralistic approach towards family[11], but a paramount value is represented by

8 We refer to Puppinck, G.: "Charia: ce que révèle la décision de la CEDH", *FigaroVox*, 26th December 2018, who critically highlighted that "la Cour européenne a condamné cette application forcée de la charia… mais pas la charia en elle-même" and "S'agissant du point essentiel du contenu de la charia, la Cour ne porte pas de jugement". Therefore, "acceptant le principe même de l'applicabilité de la charia en Europe, fut-ce de façon limitée, cet arrêt permet aux partis politiques qui en veulent l'application, de prétendre agir '«dans le respect des droits de l'homme'»" so that "Ce qui risque d'arriver, et apparaît déjà dans cette affaire, c'est l'introduction de la charia, par la volonté individuelle, dans les droits de l'homme: c'est le droit à la charia'".

9 This is how some American scholars have described the trend towards the private and social ordering of a family law that is increasingly shaped not only by States but also by other players, such as the religious communities. See at these regards Nichols, J.A. (ed.): *Marriage and Divorce in a Multicultural Context. Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge MA, 2012, that analyses not only the debates about Islamic arbitration but also the more consolidated case of Jewish arbitration administered by the Beth Din in the U.S.A. and especially in New York.

10 Kymlicka, W.: "The Rights of Minority Cultures: Reply to Kukathas", *Political Theory*, 1992, pp. 140-146, and Id.: *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1995, p. 152 ff., emphasized the importance of the right of the individual to a free exit from the community, somehow anticipating the solution of the mentioned European Court's judgement. Moreover, it is worth to remind that the Italian Constitutional Court, with its decision of 30th July 1984, no. 239, declared unconstitutional Article 4 of r.d. no. 1731 of 1930, providing for an automatic belonging of all Italian Jews to the established Israelite Communities, because such a provision was in violation of Article 18 of the Constitution, that protects the freedom of association also in its "negative" side, *i.e.* the freedom not to associate.

11 Such a liberal pluralism may open the way to the recognition of very different ways of life and choices of values: at these regards see Joppke, C.: "Multiculturalism by Liberal Law. The Empowerment of Gays and

equality, and more specifically gender equality[12]. Thus, old solutions in the matter of public policy have to be revised, in order to change the outcomes or at least their motivations and argumentations. To sum up, we need to reshape the concept of public policy also at the European level.

Let's consider the paradigmatic example of polygamy. For the said reasons, it is not enough to say that polygamy contrasts with "our traditional model of family", but it could be still correct to consider Islamic polygyny as contrasting with the "new public policy" too, because the institution is inherently imbalanced in favour of the husband[13]. However, if we follow this new rationale, we cannot invoke such an argument against the women themselves. Therefore, with regard to the succession of a deceased migrant polygamist who has left some estate located in Europe, it would be not justifiable to invoke public policy in order to deny the application of a foreign inheritance rule that entitles all surviving spouses to inherit simultaneously: otherwise, precisely the women would be unjustly harmed by the denial of their rights to an inheritance share[14]. Moreover, we have to consider that not all polygamies are the same: going besides Islamic polygyny, we can find also other models that are not necessarily gender unbalanced and could therefore be considered as non-contrasting with the European public policy[15].

Muslims", *European Journal of Sociology*, 2017, 1, pp. 1–32.

12 The principle of gender equality is enshrined in many of the twentieth century's Constitutions: see Article 119 of the German Constitution of 1919 (the so-called Constitution of Weimar); Article 43 of the Spanish Republican Constitution of 1931; Article 3 of the Italian Republican Constitution of 1948; Article 3 of the German Basic Law of 1949; Article 32 of the Spanish Constitution of 1978. At the international level we have to mention at least Article 16 of the Universal Declaration of Human Rights of 1948, stating that spouses «are entitled to equal rights as to marriage, during marriage and at its dissolution», and Article 5 of the 7th Additional Protocol of 1984 to the European Convention on Human Rights, stating that spouses "shall enjoy equal rights and responsibilities of private law character between them and in their relations with their children as to marriage, during marriage and in the event of its dissolution".

13 In fact, according to the *Quran*, 4.3, a man may marry up to four wives, but a woman can never marry more than one husband.

14 Such an approach has been accepted in the case-law throughout Europe and beyond. In some countries, such as France or Great Britain, it is a quite old solution because of previous colonial experiences: see, respectively, Court of Appeal of Alger, 9th February 1910, *Revue critique de droit international privé*, 1913, p. 103, and High Court of Justice, *In Estate of Abdul Majid Belshah*, *Law Quarterly Review*, 1926, p. 348. We can also mention an American decision for its interesting motivation: according to California Court of Appeal, *In re Dalip Singh Bir's Estate*, (1948), 188 P.2d 499, 502: "'Public policy' would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties". In other countries, such as Spain or Italy, the issue of polygamy represents a quite new problem: see, respectively, Cass., 2nd March 1999, no. 1739, *Giust. civ.*, 1999, 10, p. 2695, and Spanish Supreme Tribunal, 24th January 2018, no. 84, *Familia*, 2018, p. 325. For further references see also: Shah, P.: "Attitudes to Polygamy in English Law", *International and Comparative Law Quarterly*, 2002, p. 359-400; Rohe, M.: "Application of Sharī'a Rules in Europe: Scope and Limits", *Die Welt des Islams*, 2004, p. 323-350; Gaullier, P.: "La décohabitation et le relogement des familles polygames. Un malaise politique émaillé d'injonctions contradictoires", *Recherches et Prévisions*, 2008, p. 59-69; Pousson-Petit, J. (ed.): *Les droits maghrebins des personnes et de la famille à l'épreuve du droit français*, Paris, 2009; Labaca Zabala, M.L.: "El matrimonio polígamo islámico y su repercussion en el derecho español", *Revista Jurìdica de Castilla y León*, 2009, pp. 261-331; Rizzuti, M.: *Il problema dei rapporti familiari poligamici. Precedenti storici e attualità della questione*, Napoli, 2016.

15 Probably, the equalitarian agreements of polyamorous (different-sex and/or same-sex) cohabitation, practiced in Brazil and Colombia, and statutorily recognized in Massachusetts during the 2020 pandemic, are not against our new concept of public policy: see, also for further references, Grande, E. and Pes, L. (ed.): *Più cuori e una capanna. Il poliamore come istituzione*, Torino, 2018. We can even meet a so-called

IV. THE HARD CASE OF REPUDIATION.

Another very controversial issue is the dissolution of marriage by unilateral marital repudiation (*talaq*), admitted in the countries of origin of many migrants under Shariatic law[16].

We have to consider that today also in many European countries it is possible to perform an uncontested divorce through a private act. Indeed, after the end of the ancient Roman general freedom of divorce[17] that lasted until the Christianization of the Empire[18], in Western legal traditions divorce, or legal separation when divorce was not admitted at all[19], for centuries had been regarded as an exceptional sanction against the most severe breaches of family duties[20]. Only in quite recent times the focus shifted from the binding force of the act of marriage, and the related necessity to sanction its breach, to the consideration of the relationship among spouses, so that divorce was reshaped as a remedy for the no-fault disintegration of family relationships, that the judge has to apply when there is no possibility to

"matriarchal polygamy", or polyandry: the Interamerican Court of Human Rights, in its judgement of 4th December 1991, in the case of *Aloeboetoe*, dealing with the reparations due to the families of tribal peoples killed by Surinamese soldiers, noted that the involved tribe displayed such a family model, and accordingly recognised those marriages in the division of the compensations. For a general overview about such family structures see also Starkweather, K.E. and Hames, R.: "A Survey of Non-Classical Polyandry", *Human Nature*, 2012, pp. 149-172.

16 Pursuant to classical Islamic law, in accordance also with the more ancient Jewish tradition (see *Deuteronomy*, 24,1-4), the husband is free to repudiate the wife without any need for motivation or judicial control. The repudiation is performed just with the triple pronunciation of the word "*talaq*".

17 Classical Roman law *matrimonium* was not a formal binding contractual agreement but a legally relevant *de facto* situation of marital cohabitation, that could be freely interrupted in any moment. See, also for other references, Giunti, P.: *Consors vitae. Matrimonio e ripudio in Roma antica*, Milano, 2004.

18 The first attempt to limit freedom to divorce was made by emperor Constantine I, even if it is not clear if it depended on Christian inspiration or on other reasons (see Castello, C.: "Assenza d'ispirazione cristiana in C.Th.3.16.1", in Bravasa, E., Emeri, C. and Seurin, J.L. (ed.): *Religion, société et politique. Mélanges en hommage à J. Ellul*, Paris, 1983, p. 203-212). After that, the ancient freedom was reintroduced by emperor Julian "the Apostate", and then limited again by emperors Honorius of the Western part and Theodosius II of the Eastern one, both surely Christian, in 421 (*C.Th.3.16.2*). See, also for further references, Agnati, U.: *Profili giuridici del repudium nei secoli IV e V*, Napoli, 2017.

19 According to the Catholic Church, dissolution of a sacramental marriage among two baptized persons is almost impossible (with the exception of unconsummated marriage), because, as stated in the Gospels: "What therefore God has joined together, let not man put asunder", while separation is possible in cases of severe breach of conjugal duties. On the other hand, Orthodox and Protestant Churches consider divorce possible in some cases of severe breach of conjugal duties, given that also in the Gospel of St. Matthew an exception to indissolubility is provided for the case of "*Πορνεία*" (19.9), but in practical terms it is probably easier to obtain a Catholic declaration of marriage nullity than an Orthodox divorce. Due to the strong Catholic influence, Italy was among the last European countries to (re)introduce divorce in 1970, while the attempts to obtain the recognition of foreign so-called "bootleg divorces" through international private law were quite common, especially when, soon after World War I, some peculiar circumstances offered the possibility to take advantage of the liberal legislation in force in the short-lived Free State of Fiume, (see Rizzuti, M.: "Diritto di famiglia e Costituzione nella vicenda di Fiume", in Orrù, R., Gallo, F. and Sciannella, L. [ed.]: *Tra storia e diritto: dall'impero austro-ungarico al Nation Building del primo dopoguerra*, Napoli, 2020, pp. 283-297).

20 We can remind that also in the secular Napoleonic Code of 1804 a unilateral demand of divorce was admissible only for severe breaches of conjugal duties, even if a relevant innovation was represented by the introduction of divorce by mutual consent. See, also for further references, Solimano, S.: *Amori in causa. Strategie matrimoniali nel Regno d'Italia napoleonico (1806-1814)*, Torino, 2017, and Mastrolia, P.: *L'ombra lunga della tradizione. Cultura giuridica e prassi matrimoniale nel Regno di Napoli (1809-1815)*, Torino, 2018.

reconcile them[21]. Even more recently, divorce has been transformed again into a free choice that each one of the spouses has always the right to make[22], and that accordingly does not necessarily need the intervention of a judge[23].

Therefore, we can argue that the admissibility at the domestic level of divorce as an extrajudicial private act must change also the definition of public policy for the purposes of the evaluation of transnational divorces. In the recent past divorce in itself, or at least extrajudicial divorce as such, could be considered as contrasting with public policy in each and every case. Accordingly, in Italian case-law the negative solution was the same both for Soviet divorce, with an equal power of each spouse to repudiate the other "by postcard"[24], and for Islamic *talaq*, with the repudiation as a privilege of the husband[25]. But today the evaluation must be different, given that according to the current legislation[26] a judicial intervention in divorce cannot be deemed, in itself, as a public policy issue.

In any case, we still have to say that Islamic repudiation, being a unilateral power of the husband, is different from a domestic uncontested divorce and may

21 The main Western European legal systems introduced such reform in the same period: Great Britain with the Divorce Reform Act 1969 introducing divorce for "irretrievable breakdown"; Italy with law no. 898 of 1970, introducing divorce for breach of the "*comunione spirituale* e *materiale tra i coniugi*"; France with Act no. 617 of 1975 introducing divorce for "*rupture de la vie commune*"; Germany with the reform of 1976 introducing the "*Zerrüttungsprinzip*".

22 Among Western legal systems, a turning point was marked by the Swedish reform of 1973 introducing divorce on demand, that was probably influenced also by the Soviet model (see Phillips, R.: *Putting Asunder. A History of Divorce in Western Society*, New York, 1988; Antokolskaia, M.: *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia*, Antwerp-Oxford, 2006, p. 315-342; Oberto, G.: "Il divorzio in Europa", *Fam. dir.*, 2021, 1, p. 112 ff.). The generalization of this evolutive process has been, of course, determined by the transformation of family law from the pre-eminence of the family as institution to the primacy of individual autonomy (see Furgiuele, G.: *Libertà* e *famiglia*, Milano, 1979), but was also accelerated by the growing competition among different legal systems, with "divorce tourists" who utilize forum shopping in order to avail of the shorter and cheaper procedures offered by the States that have already introduced "easy divorce", while the other States are compelled by supranational legal mechanisms to recognize effects to such divorces. Therefore, in order to avoid a general "divorce flight" to other jurisdictions, at the end even the most reluctant States and legal orders think better to reform their domestic law, introducing shorter and cheaper procedure in turn. Interestingly, soon after the introduction of extrajudicial divorce in Italy in 2014, even the Catholic Church, with the pontifical *Motu proprio "Mitis Judex Dominus Jesus"*, of 15th August 2015, reformed its procedures for the declaration of marriage nullity, and in the media such reform has been known also as the "short annulment".

23 E.g., among the EU Member States, private divorces by mutual consent without necessary judicial interventions are provided in: Belgium, Estonia, France, Italy, Latvia, Portugal, Romania, Spain. Moreover, the pandemic crisis of 2020 has accelerated the transition towards online divorce, so that private divorce is probably going to become the "new normal".

24 Italian Court of Cassation, with its judgment of 17th March, 1955, no. 789, *Giust. civ.*, 1955, I, p. 1654, declared Soviet repudiation contrasting with Italian public policy.

25 Trib. Milano, 21st September, 1967, *Riv. dir. int. priv. proc.*, 1968, p. 403, stated that a repudiated Iranian woman had not the right to marry again because of the contrast of repudiation with Italian public policy.

26 Pursuant to the law decree no. 132 of 2014, uncontested divorce can be performed through an agreement of the spouses to be registered at the municipality or negotiated with the assistance of lawyers. Moreover, pursuant to the law no. 76 of 2016, with regard to the so-called contracts of cohabitation also a unilateral extrajudicial dissolution is possible. See, also for other references, Patti, S.: "The privatization of the divorce in Italy", *Familia*, 2017, 2, p. 155 ff.; Montinaro, R.: "Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective", *The Italian Law Journal*, 2017, pp. 75-90; Mazzariol, R.: *Convivenze di fatto e autonomia privata: il contratto di convivenza*, Napoli, 2018, p. 237 ff.; Bugetti, M.N.: "Il divorzio tra intervento giudiziale e autonomia dei coniugi", *Fam. dir.*, 2021, 1, p. 34 ff.

contrast with public policy from the viewpoint of the gender equality principle. But, also in this case, such a new motivation may change the possible concrete outcomes and solutions. Indeed, if we deny effects to repudiations just in order to protect the repudiated wife, then we should recognize her the power to avail of the repudiation itself, in order, first of all, to be free to marry again[27].

Moreover, the repudiated wife should also be able to avail of the repudiation itself in order to claim for the payments that may be due as a consequence of divorce, such as alimony or maintenance, or the dower stipulated as a typically Islamic *mahr*. In fact, pursuant to Islamic nuptial contracts, *mahr* is a sum of money that has to be paid in two phases, the first one at the time of wedding and the second one at the time of marriage dissolution, so that this second payment, usually the most economically relevant, compensates the traditional absence of provisions on post-divorce maintenance in such a legal context. Maybe, from a Western point of view, this ancient legal institution could be compared with post-modern marital contracts and could therefore play a relevant role in the contractual governance of family relationships, as a sort of culturally connotated prenuptial agreement[28].

On the other hand, we can never accept that a woman's freedom to divorce could be limited by the discriminatory law of her country of origin. Therefore,

27 As said, in a not so remote past such a possibility was denied to an Iranian repudiated wife by the Italian judges (Trib. Milano, 21st September 1967, cit.), but we opine that today, in accordance with the new concept of public policy, this position would be untenable. In fact, the Spanish Supreme Tribunal, 21st April 1998, stated that repudiation can be recognized when the repudiated woman is who asks for the recognition. According to a similar rationale, Article 57 of the Belgian Code of Private International Law of 16th July 2004, provides that repudiation can be recognized when the woman has accepted it, and, as explained also in the parliamentary preparatory works, such acceptance has to be first of all inferred from a judicial claim of the woman herself asking for alimony or for the right to a new marriage, precisely in order to avoid a «double victimization» of the repudiated wife (see the minutes of the Belgian Senate's session of 4th March 2004).

28 See at these regards: Diago Diago, M.: "La dot islamique à l'épreuve du conflit de civilisations, sous l'angle du droit international privé espagnole", *Annales Droit Louvain*, 2001, p. 407 ff.; Mehdi, R.: "Danish Law and the Practice of Mahr among Muslim Pakistanis in Denmark", *International Journal of the Sociology of Law*, 2003, p. 115-129; Jindani, M.: "The Concept of Mahr (Dower) in Islamic Law: The Need of Statutory Recognition by English Law", *Yearbook of Islamic and Middle Eastern Law Online*, 2004, pp. 219-227; Wurmnest, W.: "Die Brautgabe im Bürgerlichen Recht", *Familienrecht Zeitung*, 2005, pp. 1878-1885; Id..: "Die Mär von der mahr - Zur Qualifikation von Ansprüchen aus Brautgabevereinbarungen", *Rabels Zeitschrif für ausländisches und internationales Privatrecht*, 2007, p. 527-558; Sayed, M.: "The Muslim Dower (Mahr) in Europe - With Special Reference to Sweden", in Boele-Woelki, K. and Sverdrup, T. (ed.): *European Challenges in Contemporary Family Law*, cit., p. 187 ff.; Jones-Pauly, C.: "Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law", in Quraishi, A. and Vogel, F.E. (ed.): *The Islamic Marriage Contract. Case Studies in Islamic Family Law*, Cambridge MA, 2008, pp. 299-330; Fournier, P.: "Flirting with God in Western Secular Courts: Mahr in the West", *International Journal of Law, Policy and the Family*, 2010, p. 67–94; Fournier, P.: *Muslim Marriage in Western Courts. Lost in Transplantation*, Farnham UK, 2010; Yassari, N.: "Die islamische Brautgabe im deutschen Kollisions - und Sachrecht", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, p. 63 ff.; Büchler, A.: *Islamic Law in Europe? Legal Pluralism and Its Limits in European Family Laws*, London, 2011, p. 67 ff.; Spencer, K.: "Mahr as Contract: Internal Pluralism and External Perspectives", *Oñati Socio-Legal Series*, 2011, 1, no. 2; Sportel, I.: "Because it's an Islamic Marriage. Conditions upon Marriage and after Divorce in Transnational Dutch-Moroccan and Dutch-Egyptian marriages", *Oñati Socio-Legal Series*, 2013, 3, no. 6; Yassari, N.: *Die Brautgabe im Familienvermögensrecht*, Tübingen, 2014; Günther, U., Herzog, M. and Müssig, S.: "Researching Mahr in Germany: A Multidisciplinary Approach", *Review of Middle East Studies*, 2015, p. 23-37; Rizzuti, M.: "Patti prematrimoniali, divorzi privati e multi-coniugalismo", in Palazzo, M. and Landini, S. (ed.): *Accordi in vista della crisi dei rapporti familiari*, *Biblioteca della Fondazione Italiana del Notariato*, 2018, 1, pp. 337-354.

provisions that, only with regard to the wife, exclude the right to get divorced or make the dissolution of marriage possible only after the payment of a price[29], will be surely against public policy. In such cases the migrant wife must have the right to access internal procedures of divorce, notwithstanding the constraints posed by the law of her country of origin.

The main issue is whether to consider the repudiation as concretely contrasting with the new public policy when its recognition is asked by the repudiating husband, or possibly by his relatives for inheritance purposes. Different judicial solutions have been proposed. A very criticized decision stated that *talaq* is not against public policy, as the Islamic wife can access divorce too, through *khola*: the judgement is not convincing because the latter proceeding is much more burdensome than *talaq*[30]. Other jurists argued that, if the wife accepts *talaq*, then it becomes quite similar to a domestic uncontested divorce and does not contrast with public policy[31]. However, it is indeed quite questionable how really free could be such an acceptance in certain social and familiar contexts.

Two contrasting judicial decisions of the same Italian Supreme Court, both issued in August 2020, may illustrate how difficult it could be to solve the problem. According to the first one, the husband can never get the recognition of the repudiation, because of its contrast with public policy from the viewpoint of

29 In classical Islamic law one of the few possibilities for a woman to get divorced was paying back the part of *mahr* (whose Arab etymology is, in fact, related to "price") received at the time of wedding, in order to ransom herself (for references about *mahr* see above). With regard to the religious limits against women's freedom of divorce in many legal orders see also Deogratias, B.: *Trapped in a Religious Marriage. A Human Rights Perspective on the Phenomenon of Marital Captivity*, Cambridge UK, 2020.

30 We are referring to App. Cagliari, 16th May 2008, in *Riv. dir. int. priv. proc.*, 2009, p. 647, regarding an Egyptian case. As said, the motivation is wrong, but we have also to consider that in the concrete case none of the spouses was contesting the repudiation, whose recognition was indeed challenged only by the public prosecutor, and that, moreover, the repudiated wife had already married another man: therefore, it is not surprising that the judges have managed to find a way to grant the recognition.

31 The case of *S. Sahyouni v. R. Mamisch*, regarding such an issue with reference to a German-Syrian divorce, is arrived at the attention of the Court of Justice of the European Union: however, the judgment of 20th December 2017, C-372/16, did not go into the substance, but just stated that private divorces fell outside of the scope of the EU Regulation no. 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, and that therefore the Court had no jurisdiction at these regards. So, unfortunately, the decision did not solve the problem of how to deal with Islamic *talaq* but raised doubts about the European regime of circulation of the extrajudicial divorces provided, as said, by many Member States (see Silvestri, C.: "La circolazione nello spazio giudiziario europeo degli accordi di negoziazione assistita in materia di separazione dei coniugi e cessazione degli effetti civili del matrimonio", *Riv. trim.*, 2016, 4, pp. 1287-1308; Bernasconi, S.: "La circolazione degli accordi di negoziazione assistita e di altre forme di divorzio stragiudiziale in Europa", *Fam. dir.*, 2019, p. 335 ff.; D'Alessandro, E.: "The Impact of Private Divorces on EU International Private Law", in Scherpe, J.M. and Bargelli, E. [ed.]: *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change*, Cambridge, 2021, p. 59 ff.). As a consequence, these doubts have been brought also to the attention of the same E.U. Court by the *Bundesgerichtshof*'s decision of 28th October 2020, no. 187, with regard to the recognition of an Italian uncontested divorce in Germany, a country whose internal legislation does not provide for extrajudicial divorce. But meanwhile the new EU Regulation no. 1111/2019, that recasts EC Regulation 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and will apply since 1st August 2022, has opened the way to their free circulation (see Honorati, C. and Bernasconi, S.: "L'efficacia cross-border degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter", *Freedom, Security & Justice: European Legal Studies*, 2020, 2, pp. 22-50).

gender equality[32]. According to the other one, the evaluation has not to focus on the abstract, and of course gender-unbalanced, structure of *talaq* in the country of origin, but on its concrete effects, that consist in the dissolution of the marital bond: therefore, if the family life of the concerned couple is already objectively disintegrated, there is no reason to deny the recognition also of its legal dissolution[33].

Probably the question will have to be, as soon as possible, re-examined by the Joint Sections, *i.e.* by the special panel of the Supreme Court precisely charged to solve such conflicts of interpretation, but, in any case, we opine that the second view should be considered more coherent with the already discussed function of public policy in the legal order[34]. Therefore, the evaluation should focus on the specific concrete effects: in a situation of already disintegrated family life after *talaq*, the effect of a legal termination of marriage should be recognized, while other effects of the foreign regulation of divorce-related matters, such as maintenance or child custody, should not be recognized if they turn out to be contrasting with gender equality or with the concerned child's best interests.

32 Cass., 7th August 2020, no. 16804, in *Dir. fam. pers.*, 2020, 4, I, p. 1386, with regard to a Palestinian divorce. See also the comments by Virgadamo, P.: "Ripudio islamico e contrarietà all'ordine pubblico tra unitarietà del limite e corretta individuazione dei principi", *Dir. fam. pers.*, 2017, pp. 347-364 (with regard to the previous decision of the App. Roma, 12th December 2016, on the same Palestinian divorce); Di Mauro, E.W.: "Il ripudio islamico tra riconoscimento e contrarietà all'ordine pubblico", *Diritto delle successioni e della famiglia*, 2020, 3, p. 1086 ff, and Tuo, C.E.: "Divorzio-ripudio islamico, riconoscimento automatico e ordine pubblico", *Corr. giur.*, 2021, 4, p. 481 ff.

33 Cass., 14th August 2020, no. 17170, *Giur. it.*, 2021, 2, p. 344, with regard to an Iranian divorce. See also the comment by Vanin, O.: "Divorzio iraniano e controllo «in concreto» di compatibilità con l'ordine pubblico del provvedimento straniero", *Fam. dir.*, 2021, 5, p. 507 ff.

34 See also the critical remarks of Pesce, F.: "La corte di cassazione ritorna sul tema del riconoscimento del ripudio islamico", *Cuadernos de Derecho Transnacional*, 2021, 1, pp. 552-573.

BIBLIOGRAPHY

Agnati, U.: *Profili giuridici del repudium nei secoli IV e V*, Napoli, 2017.

Angelini, F.: *Ordine pubblico e integrazione costituzionale europea*, Padova, 2007.

Antokolskaia, M.: *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia*, Antwerp-Oxford, 2006, p. 315-342.

Badiali, G.: *Ordine pubblico e diritto straniero*, Milano, 1963; Paladin, L.: "Ordine pubblico", *Noviss. dig. it.*, XII, Torino, 1965, p. 130 ff.

Barba, V.: "L'ordine pubblico internazionale", in Perlingieri, G. and D'Ambrosio, M. (ed.): *Fonti, metodo e interpretazione*, Napoli, 2017, p. 409 ff.

Barile, G.: *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (l'ordine pubblico internazionale)*, Padova, 1969.

Benvenuti, P.: *Comunità statale, comunità internazionale e ordine pubblico internazionale*, Milano, 1977.

Bernasconi, S.: "La circolazione degli accordi di negoziazione assistita e di altre forme di divorzio stragiudiziale in Europa", *Fam. dir.*, 2019, p. 335 ff.

Büchler, A.: *Islamic Law in Europe? Legal Pluralism and Its Limits in European Family Laws*, London, 2011, p. 67 ff.

Bugetti, M.N.: "Il divorzio tra intervento giudiziale e autonomia dei coniugi", *Fam. dir.*, 2021, 1, p. 34 ff.

Castello, C.: "Assenza d'ispirazione cristiana in C.Th.3.16.1", in Bravasa, E., Emeri, C. and Seurin, J.L. (ed.): *Religion, société et politique. Mélanges en hommage à J. Ellul*, Paris, 1983, pp. 203-212.

D'Alessandro, E.: "The Impact of Private Divorces on EU International Private Law", in Scherpe, J.M. and Bargelli, E. [ed.], *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change*, Cambridge, 2021, p. 59 ff.

Deogratias, B.: *Trapped in a Religious Marriage. A Human Rights Perspective on the Phenomenon of Marital Captivity*, Cambridge UK, 2020.

Di Mauro, E.W.: "Il ripudio islamico tra riconoscimento e contrarietà all'ordine pubblico", *Diritto delle successioni e della famiglia*, 2020, 3, p. 1086 ff.

Diago Diago, M.: "La dot islamique à l'épreuve du conflit de civilisations, sous l'angle du droit international privé espagnole", *Annales Droit Louvain*, 2001, p. 407 ff.

Emanuele, C.F.: "Prime riflessioni sul concetto di ordine pubblico nella legge di riforma del diritto internazionale privato italiano", *Dir. fam. pers.,* 1996, p. 326 ff.

Ferri, G.B.: *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970.

Fournier, P.: "Flirting with God in Western Secular Courts: Mahr in the West", *International Journal of Law, Policy and the Family*, 2010, pp. 67–94.

Fournier, P.: *Muslim Marriage in Western Courts. Lost in Transplantation*, Farnham UK, 2010.

Furgiuele, G.: *Libertà e famiglia*, Milano, 1979.

Gaullier, P.: "La décohabitation et le relogement des familles polygames. Un malaise politique émaillé d'injonctions contradictoires", *Recherches et Prévisions*, 2008, pp. 59-69.

Giunti, P.: *Consors vitae. Matrimonio e ripudio in Roma antica*, Milano, 2004;

Grande, E. and Pes, L. (ed.): *Più cuori e una capanna. Il poliamore come istituzione*, Torino, 2018.

Guarneri, A.: *L'ordine pubblico e il sistema delle fonti nel diritto civile*, Padova, 1974.

Günther, U., Herzog, M. and Müssig, S.: "Researching Mahr in Germany: A Multidisciplinary Approach", *Review of Middle East Studies*, 2015, pp. 23-37.

Honorati, C. and Bernasconi, S.: "L'efficacia cross-border degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter", *Freedom, Security & Justice: European Legal Studies*, 2020, 2, pp. 22-50.

Jayme, E. and Nordmeier, C.F.: "Testierfreiheit als europäische Menschenrecht? – Kritische Betrachtungen zur Westthrazien-Entscheidung des Europäischen Gerichtshofs für Menschenrechte", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2019, pp. 200-202.

Jindani, M.: "The Concept of Mahr (Dower) in Islamic Law: The Need of Statutory Recognition by English Law", *Yearbook of Islamic and Middle Eastern Law Online*, 2004, pp. 219-227.

Jones-Pauly, C.: "Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law", in Quraishi, A. and Vogel, F.E. (ed.), *The Islamic Marriage Contract. Case Studies in Islamic Family Law*, Cambridge MA, 2008, pp. 299-330.

Joppke, C.: "Multiculturalism by Liberal Law. The Empowerment of Gays and Muslims", *European Journal of Sociology*, 2017, 1, pp. 1–32.

Keshavjee, M.M.: *Islam, Sharia & Alternative Dispute Resolution. Mechanisms for Legal Redress in the Muslim Community*, London, 2013.

Koumoutzis, N. and Papastylianos, C.: "Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace", *Religions*, 30th April 2019.

Kymlicka, W: *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1995, p. 152 ff.;

Kymlicka, W.: "The Rights of Minority Cultures: Reply to Kukathas", *Political Theory*, 1992, pp. 140-146.

Labaca Zabala, M.L.: "El matrimonio polígamo islámico y su repercussion en el derecho español", *Revista Jurìdica de Castilla y León*, 2009, pp. 261-331.

Lonardo, L.: *Ordine pubblico e illiceità del contratto*, Napoli, 1993.

Mazzariol, R.: *Convivenze di fatto e autonomia privata: il contratto di convivenza*, Napoli, 2018, p. 237 ff.;

McGoldrick, D.: "Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights", *Oxford Journal of Law and Religion*, 2019, p. 517–566.

Mehdi, R.: "Danish Law and the Practice of Mahr among Muslim Pakistanis in Denmark", *International Journal of the Sociology of Law*, 2003, pp. 115-129.

Menski, W.F.: "Angrezi Shariat: Glocalised Plural Arrangements by Migrants in Britain", *Law Vision*, 2008, pp. 10-12.

Menski, W.F.: "Muslim Law in Britain", *Journal of Asian and African Studies*, 2001, pp. 127-163.

Montinaro, R.: "Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective", *The Italian Law Journal*, 2017, pp. 75-90.

Mosconi, F.: "Qualche considerazione sugli effetti dell'eccezione di ordine pubblico", *Riv. dir. int. priv. proc.*, 1994, pp. 5-14.

Nichols, J.A. (ed.): *Marriage and Divorce in a Multicultural Context. Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge MA, 2012.

Oberto, G.: "Il divorzio in Europa", *Fam. dir.*, 2021, 1, p. 112 ff.

Palaia, N.: *L'ordine pubblico internazionale*, Padova, 1974.

Panza, G.: "Ordine pubblico, Teoria generale", *Enc. giur.* Treccani, Roma, 1990, p. 1 ff.

Parolari, P.: "Sharia e corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali", *Mat. st. cult. giur.*, 2017, pp. 157-191.

Parolari, P.: *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, Torino, 2020.

Patti, S.: "The privatization of the divorce in Italy", *Familia*, 2017, 2, p. 155 ff.

Pearl, D. and Menski, W.F.: *Muslim Family Law*, London, 1998, p. 277 ff.

Perlingieri, G. and Zarra, G.: *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019.

Perlingieri, P.: "Libertà religiosa, principio di differenziazione e ordine pubblico", in Aa. Vv. *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di G. Furgiuele*, Mantova, 2017, I, p. 355 ff.

Pesce, F.: "La corte di cassazione ritorna sul tema del riconoscimento del ripudio islamico", *Cuadernos de Derecho Transnacional*, 2021, 1, pp. 552-573.

Phillips, R.: *Putting Asunder. A History of Divorce in Western Society*, New York, 1988.

Pousson-Petit, J. (ed.): *Les droits maghrebins des personnes et de la famille à l'épreuve du droit français*, Paris, 2009.

Rademacher, L.: "Die Abwehr anstößigen Familien- und Erbrechts: Zwischen Toleranz und Geschlechter-gleichstellung", in Rupp, C.S., Antomo, J., Duden, K., Kramme, M., Lutzi, T., Melcher, M., Montana, M.T., Segger-Piening, S., Pförtner,

F. and Walter, S. (ed.): *IPR zwischen Tradition und Innovation*, Tübingen, 2019, pp. 121–140.

Rinella, A.: *La shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, Bologna, 2021.

Rizzuti, M.: "Diritto di famiglia e Costituzione nella vicenda di Fiume", in Orrù, R., Gallo, F. and Sciannella, L. (ed.): *Tra storia e diritto: dall'impero austro-ungarico al Nation Building del primo dopoguerra*, Napoli, 2020, pp. 283-297.

Rizzuti, M.: "Ordine pubblico costituzionale e rapporti familiari: i casi della poligamia e del ripudio", *Actualidad Jurídica Iberoamericana*, 2019, pp. 604-627.

Rizzuti, M.: "Patti prematrimoniali, divorzi privati e multi-coniugalismo", in Palazzo, M. and Landini, S. (ed.): *Accordi in vista della crisi dei rapporti familiari*, *Biblioteca della Fondazione Italiana del Notariato*, 2018, 1, p. 337.

Rizzuti, M.: "The Strange Case of Ms. Molla Sali v. Greece: Individual Rights and Group Rights in a Multicultural Order", in Landini, S. (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, 2020, pp. 387-413.

Rizzuti, M.: "Transnational divorces and «public policy»", in Gallardo Rodríguez, A., Estancona Pérez, A.A. and Berti De Marinis, G. (ed.): *Los nuevos retos del derecho de familia*, Valencia, 2020, p. 703-716.

Rizzuti, M.: *Il problema dei rapporti familiari poligamici. Precedenti storici e attualità della questione*, Napoli, 2016.

Rohe, M.: "Application of Sharī'a Rules in Europe: Scope and Limits", *Die Welt des Islams*, 2004, pp. 323-350.

Salerno, F.: "La costituzionalizzazione dell'ordine pubblico internazionale", *Riv. dir. int. priv. proc.*, 2018, pp. 259-291.

Sayed, M.: "The Muslim Dower (Mahr) in Europe - With Special Reference to Sweden", in Boele-Woelki, K. and Sverdrup, T. (ed.): *European Challenges in Contemporary Family Law*, cit., p. 187 ff.

Shah, P.: "Attitudes to Polygamy in English Law", *International and Comparative Law Quarterly*, 2002, pp. 359-400.

Silvestri, C.: "La circolazione nello spazio giudiziario europeo degli accordi di negoziazione assistita in materia di separazione dei coniugi e cessazione degli effetti civili del matrimonio", *Riv. trim.*, 2016, 4, pp. 1287-1308.

Solimano, S.: *Amori in causa. Strategie matrimoniali nel Regno d'Italia napoleonico (1806-1814)*, Torino, 2017, and Mastrolia, P.: *L'ombra lunga della tradizione. Cultura giuridica e prassi matrimoniale nel Regno di Napoli (1809-1815)*, Torino, 2018.

Spencer, K.: "Mahr as Contract: Internal Pluralism and External Perspectives", *Oñati Socio-Legal Series*, 2011, 1, no. 2.

Sportel, I.: "Because it's an Islamic Marriage. Conditions upon Marriage and after Divorce in Transnational Dutch-Moroccan and Dutch-Egyptian marriages", *Oñati Socio-Legal Series*, 2013, 3, no. 6.

Starkweather, K.E. and Hames, R.: "A Survey of Non-Classical Polyandry", *Human Nature*, 2012, pp. 149-172.

Tescaro, M.: "L'ordine pubblico internazionale nella giurisprudenza italiana in tema di risarcimento punitivo e di maternità surrogata", *Nuovo diritto civile*, 2020, p. 23-55.

Tsaoussi, A. and Zervogianni, E.: "Multiculturalism and Family Law: The Case of Greek Muslims", in Boele-Woelki, K. and Sverdrup, T. (ed.): *European Challenges in Contemporary Family Law*, Antwerp-Oxford, 2008, pp. 209-239.

Tsavousoglou, İ.: "The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR", *https://strasbourgobservers.com.*, 2019.

Tuo, C.E.: "Divorzio-ripudio islamico, riconoscimento automatico e ordine pubblico", *Corr. giur.*, 2021, 4, p. 481 ff.

Vanin, O.: "Divorzio iraniano e controllo «in concreto» di compatibilità con l'ordine pubblico del provvedimento straniero", *Fam. dir.*, 2021, 5, p. 507 ff.

Virgadamo, P.: "Ripudio islamico e contrarietà all'ordine pubblico tra unitarietà del limite e corretta individuazione dei principi", *Dir. fam. pers.*, 2017, pp. 347-364.

Wurmnest, W.: "Die Brautgabe im Bürgerlichen Recht", *Familienrecht Zeitung*, 2005, pp. 1878-1885.

Wurmnest, W.: "Die Mär von der mahr - Zur Qualifikation von Ansprüchen aus Brautgabevereinbarungen", *Rabels Zeitschrif für ausländisches und internationales Privatrecht*, 2007, pp. 527-558.

YASSARI, N.: "Die islamische Brautgabe im deutschen Kollisions - und Sachrecht", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, p. 63 ff.

YASSARI, N.: *Die Brautgabe im Familienvermögensrecht*, Tübingen, 2014.

YILMAZ, I.: "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England", *Journal of Ethnic and Migration Studies*, 2002, pp. 343-354.

THE ROLE OF THE AGREEMENT AS A TOOL FOR MANAGEMENT OF PROPERTY RELATIONS IN CASES OF CROSS BORDER MARRIAGES AND CIVIL UNIONS/PARTNERSHIPS REGISTERED UNDER THE EU REGULATIONS NR. 1103 AND 1104/2016.

EL PAPEL DEL ACUERDO COMO HERRAMIENTA PARA GESTIONAR RELACIONES DE PROPIEDAD EN CASOS DE MATRIMONIOS Y UNIONES CIVILES REGISTRADAS TRASFRONTERIZAS BAJO LOS REGLAMENTOS UE 1103 Y 1104/2016.

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 242-251

Maria Gabriella
ROSSI

ARTÍCULO RECIBIDO: 11 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The essay examines the role of the agreement as a tool for managing property relationships in cross-border marriages and registered partnerships, in light of EU Regulations 1103 and 1104 of 2016, on the property regimes of international married or registered couples. The main prerogative of such acts is the recognition of the parties' freedom to choose the court and the applicable law.

The law governing the matrimonial property regimes, or the property consequences of registered partnerships, has universal scope. This agreement in the form envisaged, which is backed by the need for legal certainty and predictability of the applicable rules, means that the spouses, in family problems which have cross-border implications, are faced with a uniform system of rules on "conflict" which can resolve them. Therefore, with reference to the "applicable law", Regulation 1103 provides ample scope for contractual autonomy, both explicitly and implicitly. Thus, the contractual autonomy in this provision appears to be the first point of connection between the different systems, the hard base on which the contractual structure provided for in the Regulation is built, which strengthens the objectives of both civil law systems, which open the way to a moderate interpretation of general clauses by the courts, and of common law systems which give effect to a moderate interpretation of the will of the courts. Go away.

KEY WORDS: Cross-border marriages and registered partnerships; the court and the applicable law; uniform system; contractual autonomy.

RESUMEN: *El presente artículo examina el papel que ejerce el acuerdo como herramienta para gestionar las relaciones de propiedad en casos de matrimonios y uniones civiles registradas trasfronterizas, a la luz del Reglamento UE 1103 y 1104/2016, sobre regímenes económicos de parejas y matrimonios internacionales. La principal prerrogativa de dichas normas es el reconocimiento de la libertad de las partes para escoger el foro y la ley aplicable.*

La ley que rige el régimen económico-matrimonial, o las consecuencias de propiedad de parejas registradas, tiene alcance universal. Este acuerdo en la forma prevista, el cual está respaldado por la necesidad de certeza legal y previsibilidad de las reglas aplicables, lo que significa que los esposos, en aquellos problemas que tienen implicaciones transfronterizas, se enfrentan con un sistema uniforme de reglas de "conflicto" que pueden resolverlas. Por lo tanto, con referencia a la "ley aplicable", el Reglamento 1103 proporciona un amplio alcance para la autonomía contractual, tanto explícita como implícita. Esto es, la autonomía contractual se configura como el primer punto de conexión entre los diferentes sistemas, la base dura sobre la cual se construye la estructura contractual prevista en el Reglamento, lo que refuerza los objetivos tanto de los sistemas de derecho civil, y abre la puerta a una moderada interpretación de las cláusulas generales por los juzgados, como también de "common law" al dar efecto a una moderada interpretación de la voluntad del foro. Adelante.

PALABRAS CLAVE: *Matrimonios y parejas registradas trasfronterizas; foro y ley aplicable; sistema uniforme; autonomía contractual.*

TABLE OF CONTENTS: I. PREMISE.- II. THE OBJECTIVE OF ENHANCED COOPERATION AND THE MAIN ISSUES TO BE RESOLVED IN ORDER TO ACHIEVE THE OBJECTIVE. - III. MARGINS RECOGNISED IN THE SECTOR TO CONTRACTUAL AUTONOMY.- IV. THE NATURE OF THE AGREEMENTS BETWEEN THE SPOUSES.- V. CONCLUSIONS.

I. PREMISE.

The new discipline set out by EU Regulations 1103 and 1104 in 2016, regarding the Premarital Agreements of international married or registered couples[1], regulates the competence, the law applied, the recognition and the execution of public decisions and acts. The main prerogatives of such acts and the recognition regarding freedom of choice of the competent judicial body and of the laws to apply. It should be established that, in conforming with other EU Private International Law, no procedure is necessary for recognition of decisions.

The law that regulates the patrimonial regimes of spouses and the patrimonial effects of the registered unions is far-reaching[2]; it is determined, based on corresponding regulations, and it is applied even if it is not a member state of enhanced cooperation or of the European Union, thus strengthening this universal value.

II. THE OBJECTIVE OF ENHANCED COOPERATION AND THE MAIN.

The necessity of legal certainty[3] and predictability of applicable rules requires that, in cases of family questions with cross border implications, the spouses be confronted with a Uniform System of "conflict" rules to solve the same problems.

1 Damascelli, D.: "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*, 2017; Carrión García De Parada, P.: "Nuevos reglamentos europeos sobre regímenes matrimoniales y sobre efectos patrimoniales de las uniones registradas", *Revista El Notario del Siglo XXI*, 2019; Joubert, N.: "La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés", *Revue critique de droit int.* Privé, 2017; Cazorla González, M.J.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio tras la entrada en vigor del Reglamento UE 2016/1104", *International Journal of Doctrine and Jurisprudence*, 2019; Lagarde, V.P. : "Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Rivista di diritto internazionale privato e processuale*, 2016.

2 Baruffi, M.C. : "I nuovi Regolamenti UE sui regimi patrimoniali delle coppie internazionali sposate o registrate", *Quotidiano giuridico*, 2016.

3 With regard to principle of *certezza del diritto* cfr. Perlingieri G.: *Profili applicativi della ragionevolezza nel diritto civile*, Napoli, 2015, p. 123 ss.; Perlingieri, P. e Femia, P.: *Nozioni introduttive e principi fondamentali del*

• Maria Gabriella Rossi
Contract Professor of Civil law, University of Salento.

The Recital 43 of the Regulation 1103/2016, in fact, provides for the creation of regulations standardised on conflicts of law in order to avoid contradictory results.

The above regulation aims to establish an enhanced cooperation based on the three known issues:

1) Establishment of a competent judicial body

2) Establishment of applicable laws

3) Recognition and enforcement of judgements in connection with matrimonial property regimes.

The enhanced cooperation is a procedure that deals with jurisdiction, applicable laws and recognition of the sentences and public acts regarding the patrimonial relations of married couples and of registered unions; it was authorized by the EU Council with decision 2016/954 of the 9th June 2016.

III. MARGINS RECOGNISED IN THE SECTOR TO CONTRACTUAL AUTONOMY.

What needs to be highlighted is that the Regulation 1103 provides a great margin to contractual autonomy[4] in an explicit and implicit way.

The contractual autonomy, therefore, represents in this measure the first connecting point among the different systems, the cornerstone on which the contractual structure provided for in the Regulation stands.

As stated by Professor Ana María Pérez Vallejo and widely accepted[5] , "… the big novelty of the Regulation 1103 is that it provides the married couples with the opportunity to regulate their own patrimonial relations and applies a law which is different from that of their nationality. The European legislator guarantees future spouses a wide margin of contractual autonomy. On one hand, it shall encourage the conclusion of pacts, agreements or transactions; on the other hand,

diritto civile, Napoli 2004.

4 With regard to contractual autonomy cfr. Perlingieri, P.: *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Edizioni Scientifiche Italiane, Napoli, 2006; Fusaro, A.: *Tendenze del diritto privato in prospettiva comparatistica*, Torino, 2017; Grieco, C: "The role of party autonomy under the regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations and other relevant instruments of European Private International Law", *Cuadernos de Derecho Transnacional*, 2018; Nuzzo, M.: *Utilità sociale e autonomia privata,* Milano, 1974.

5 Pérez Vallejo, M.: "Notas sobre la comunidad de bienes: reglas básicas y algunas cuestiones litigiosas", *Revista: Derecho PUCP*, 2018; Id., *Matrimonial Property Regimes. On Property Relations of Cross-Border Couple in the European Union,* ESI, Napoli, 2020.

it allows spouses to identify a law that is applicable to the content of the economic consequences of marriage (agreement on the choice of the law). What has been established by this agreement with reference to the choice of the law becomes, therefore, the main connecting factor".

In Article 3(1)(b) of the Regulation 1103 Marital Agreements are defined as…

"any agreement between the spouses or engaged couples through which they establish their property regime" [6]. These are agreements which provide rules that allow the couple "an informed choice" on the applicable law to the content of economic consequences of marriage; a "predictable" law, therefore, that ensures the certainty of legal rules to be applied under the Recital 43 of the Regulation in question.

According to Art. 22 of the Regulation 1103, with reference to the section of the contractual freedom reserved to the spouses in the choice of the law to be applied, there's one only restriction which consists in two possibilities of choice:

a) Law of the country where one or both spouses or engaged couples have the habitual residence;

b) Law of the country where one of the spouses / engaged couple has the citizenship.

Furthermore, other rules are established with regard to the formal and substantive validity of such conventions in order to facilitate the acceptance of spouses' property rights which will result from them under the Recital 47 of the Regulation.

It should be noted that formal requirements demanded, have the sole objective to draw the spouses' attention on what they choose, in order to make them more aware of the consequences of their choice.

IV. THE NATURE OF THE AGREEMENTS BETWEEN THE SPOUSES.

There are questions with reference to the legal nature of these conventions compared to the better-known "Premarital agreements" foreseen in almost all EU legislations; in fact, despite formal differences, in an acceptable way, the doctrine recognizes a sufficient equivalence between the two acts.

6 Almeida, J.G.: "Breves considerações sobre o conceito de Estado-Membro nos regulamentos em matéria de regimes matrimoniais e de efeitos patrimoniais das parcerias registadas", *Revista do Centro de Estudos Judiciários*, 2016.

This institution is frequently used in Common Law countries, but it is also known in the system of Civil Law in Continental Europe.

The conclusion of premarital agreements is legally or judicially admitted today and the content of these agreements can be various, also covering subjects excluded by the regulations.

So, Regulation 1103 does not expressly mention premarital pacts, as an anticipation of the regulations of family relations in the event of a separation or divorce, but aims, however, to cover as many subjects as possible; such regulation encourages the couple "to agree on the legal choice" on the economic regime as an informed choice, so that they are both aware of the law to be applied regarding the economic consequences of the marriage.

This is in order to ensure that the matrimonial property regime is governed by a "predictable law" with which it has close links; the aim is to protect also the weakest and least informed.

V. CONCLUSIONS.

To conclude, by the very short exegesis of the above-mentioned laws, what can be drawn from the reading of the two regulations is that a new and important step has been taken by the Union. It seems that a unification of private international family law is actually taking shape in full respect of the principle of contractual autonomy[7].

This is a tool utilized by the European legislator not to impose rules to be observed passively, but to involve spouses as much as possible and provide them guarantees and safeguards.

In this way the wishes of both parties is privileged: the future partners, the couples and the future spouses can together plan or modify the applicable law, but there must always be a connection with the chosen law.

Therefore, the applicable law will always regulate everything included in the patrimonial regime of the spouses and for the registered civil partnerships.

It should be pointed out that in spite of the great differences that exist in Family Law, Civil Law and Common Law, both lead to the same destination, which is the reciprocal protection of the Patrimonial Laws of the couple and equal division property if the union should fail.

7 Almeida, J.G.: "Breves considerações", cit.

The field that has been examined, despite setting off from two different sets of rules[8] are intertwined to reach a common goal.

There are evident structural differences between the two systems examined: in Civil Law, the regulation is rigorously applied and its interpretation, reserved for the judge, does not allow for deviation.

However, by reason of a pretorial development, the system of general clauses is elevated, and therefore, in the system of Common Law the exaltation of contractual autonomy does not permit the judge to intervene in any significant way.

At the same time, the system of remedies, which is expanded in Civil Law, is extremely dynamic in Common Law, what in our system we call "Laws of Invalidity and Laws regarding responsibility.

These are important differences considering that in Systems of Common Law there are no anticipated rules, but the regulation rigorously follows what is written in the contract.

In conclusion, we are confronted by a convergence of objectives, on one side the Civil Law Systems which open up to a temperate interpretation of the general rules taken by the judge, and on the other side, the Systems of Common Law that demonstrate a moderate interpretation of the wishes of the parties.

This is therefore the result of the two EU Regulations examined here.

8 Mattei, U.: "*Il modello di Common Law*", Torino, 2004; cfr. Deakin, S.: *Contract Law and the institutional preconditions*, in *Eur. Rev. Cont. L.*, 2006; Gambaro, A. and Sacco, A.: *Sistemi giuridici comparati*, in *Trattato di Diritto Comparato*, Utet, Milano, 2018.

BIBLIOGRAPHY

Almeida, J.G.: "Breves considerações sobre o conceito de Estado-Membro nos regulamentos em matéria de regimes matrimoniais e de efeitos patrimoniais das parcerias registadas", *Revista do Centro de Estudos Judiciários*, 2016.

Baruffi, M.C.: "I nuovi Regolamenti UE sui regimi patrimoniali delle coppie internazionali sposate o registrate", *Quotidiano giuridico*, 2016.

Carrión García De Parada, P.: "Nuevos reglamentos europeos sobre regímenes matrimoniales y sobre efectos patrimoniales de las uniones registradas", *Revista El Notario del Siglo XXI*, 2019.

Cazorla González, M.J.: "Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio tras la entrada en vigor del Reglamento UE 2016/1104", *International Journal of Doctrine and Jurisprudence*, 2019.

Damascelli, D.: "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*, 2017.

Fusaro, A.: *Tendenze del diritto privato in prospettiva comparatistica*, Torino, 2017.

Gambaro, A. Sacco, A.: *Sistemi giuridici comparati*, in *Trattato di Diritto Comparato*, Utet, Milano, 2018.

Grieco, C: "The role of party autonomy under the regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations and other relevant instruments of European Private International Law", *Cuadernos de Derecho Transnacional*, 2018.

Joubert, N.: "La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés", *Revue critique de droit int.* Privé, 2017.

Lagarde, V.P.: "Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Rivista di diritto internazionale privato e processuale*, 2016.

Mattei, U.: "*Il modello di Common Law*", Torino, 2004.

Nuzzo, M.: *Utilità sociale e autonomia privata,* Milano, 1974, p. 28.

PÉREZ VALLEJO, M.: *Matrimonial Property Regimes. On Property Relations of Cross-Border Couple in the European Union,* ESI, Napoli, 2020.

PÉREZ VALLEJO, M.: "Notas sobre la comunidad de bienes: reglas básicas y algunas cuestiones litigiosas", *Revista: Derecho PUCP*, 2018.

PERLINGIERI G.: *Profili applicativi della ragionevolezza nel diritto civile*, Napoli, 2015, p. 123 ss.

PERLINGIERI, G.: *Profili applicativi della ragionevolezza nel diritto civile*, Napoli, 2015, p. 123 ss.

PERLINGIERI, P. e FEMIA, P.: *Nozioni introduttive e principi fondamentali del diritto civile*, Napoli 2004.

PERLINGIERI, P.: *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Edizioni Scientifiche Italiane, Napoli, 2006.

PROPERTY AND CROSS-BORDER COUPLES FROM THE PERSPECTIVE OF EUROPEAN REGULATION

RÉGIMEN ECONÓMICO Y PAREJAS TRANSFRONTERIZAS DESDE LA PERSPECTIVA DE LA REGULACIÓN EUROPEA

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 252-273

Lucia RUGGERI

ARTÍCULO RECIBIDO: 18 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The family property regimes constitute a relevant sector of the EU regulatory framework strongly connected with fundamental rights policies. Family property offers specific issues which need to balance individual rights with general interests, especially in matter of real estate property. The fragmentation of the discipline in EU Family law, the diversity of the domestic rules regarding rights in rem requires a large use of flexibility from EU legislator and EU legal professionals. The discipline provides by EU Regulations 1103 and 1104/2016 could be an interesting example to manage cross-border couple's interests: the principles of universality and unity have to be used appropriately and, in some case, the best solution is "retraction" and "adaptation" of domestic legal framework.

KEY WORDS: Property; family; property regimes; cross-border couples.

RESUMEN: *Los regímenes económico-matrimoniales constituyen un sector relevante de la regulación de la Unión Europea conectado fuertemente con los derechos fundamentales. El régimen económico-matrimonial presenta problemas específicos que necesitan equilibrar derechos individuales con intereses generales, especialmente en materia de propiedad inmobiliaria. La fragmentación de la disciplina en Derecho de Familia de la UE y la diversidad de las reglas nacionales en relación con los derechos reales, requiere una gran flexibilidad por parte del legislador de la UE y los profesionales de la UE. La regulación proporcionada por los Reglamentos UE 1103 y 1104/2016 pueden ser un ejemplo interesante de cómo gestionar los intereses de parejas transfronterizas: Los principios de universalidad y unidad deben ser utilizados de forma apropiada y, en ciertos casos, la mejor solución es "retracción" y "adaptación" del sistema legal nacional.*

PALABRAS CLAVE: *Propiedad; familia; régimen económico; parejas transfronterizas.*

I. PROPERTY AND FAMILY BETWEEN "RETRACTION" AND ADAPTATION.

The topic of immovable property becomes extremely intricate when studied in the light of the European regulatory framework devoted to cross-border couples. The international nature of the legal relationship, determined by the existence of different nationalities, or of habitual residence in a State other than the one of origin, complicates the determination of the extent to which couples can choose the applicable law as opposed to rules whose application is mandatory. The criteria for identifying the applicable law come into play, which, within the European territory, increasingly tend to become more uniform, pushing those that have to interpret them to identify harmonised notions of categories belonging to private international law, such as residence[1], citizenship[2] or public policy (*ordre public*)[3]. In such an environment, the concept of property combined with that of family seems to interact in a peculiar manner, determining a sort of "retraction"[4] by the European legislation, and, at the same time, a necessary adaptation by the

1 On this subject, cf. Giobbi, M.: "The concept of «habitual residence»", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 75 ff.

2 On this topic see, among others, Salerno, F.: "I criteri di giurisdizione comunitari in materia matrimoniale", *Riv. dir. int. priv. proc.*, 2007, p. 63.

3 The discussion on the role of public policy is very broad. Regarding the need to link this institute with the principles of fair trial, see, among others, Trocker, N.: *La formazione del diritto processuale europeo*, Torino, 2011, p. 77; Boschiero, N.: "L'ordine pubblico processuale comunitario ed "europeo", in De Cesari, P. and Frigessi di Rattalma, M. (ed.): *La tutela transnazionale del credito*, Torino, 2007, p. 163 ff.; De Cristofaro, M.: "Ordine pubblico "processuale" ed enucleazione dei principi fondamentali del diritto processuale "europeo", in Colesanti, V., Consolo, C. and Gaja, G. (ed.): *Il diritto processuale civile nell'avvicinamento giuridico internazionale. Omaggio ad Aldo Attardi*, II, Padova, 2009, p. 893; Normand, J.: "Le rapprochement des procédures civiles à l'intérieur de l'Union européenne et le respect des droits de la défense", in Perrot, R.: *Nouveaux juges, nouveaux pouvoirs?: Mélanges en l'honneur de Roger Perrot*, Paris, 1996, p. 337; Rouhette, G.: "Sur l'harmonisation du droit du procès civil au sein de l'Union Européenne", *Justice*, 1995, no. 2, p. 365.

4 Property is not affected just by the cultural tradition of an individual State, but it is often considered as a value that is independent of legal recognition, assuming its own value and immanence. Consider, in this regard, the discussion that arose in Italy on the topic of "recognition" of private property provided for

• Lucia Ruggeri
Full Professor, Private Law, School of Jurisprudence, University of Camerino. E-mail: lucia.ruggeri@unicam.it

national legal system: property[5] and family[6] are, in fact, affected by the legal culture in which they operate, generating regulatory peculiarities.

Family matters, which are sensitive to the culture and tradition of individual Member States, are expressly considered in Article 81 of the Treaty on the Functioning of the European Union, which provides that rules in this context are adopted on the basis of unanimously taken decisions[7]. Unanimity guarantees common ground for the adoption of rules that every Member State would see as conforming to its own legal tradition, but, at the same time, it constitutes a certain obstacle to the adoption of legislation, as demonstrated in the case of Regulation Rome III concerning divorce. In fact, according to Article 81.3 TFEU, if it is not possible to achieve unanimity on a proposal for a regulation relating to family matters, a "*passerelle*" clause can be activated, which means a mechanism that allows for the adoption of a regulation by majority, provided that this step is unanimously accepted. As is well known, the vetoes imposed by States that did not provide for divorce, or that, on the contrary, feared having to adopt rules on divorce in their courts, which were too stringent compared to the national ones[8], prevented adoption by majority and for the first time forced the use of the enhanced cooperation procedure in a family context[9].

Another obstacle to the application of the "*passerelle*" clause is the difficulty in qualifying a given matter as undoubtedly and exclusively family related. An example is the Regulation on the creation of a European Certificate of Succession which has been excluded from the scope of Article 81.3, and brought back to Article 81.2, as if succession matters were completely extraneous and separate from family

in Article 42 of the Constitution. On this subject, see Perlingieri, P.: *Introduzione alla problematica della «proprietà»*, Napoli, 1971, p. 9.

5 For more on property in the light of the European Convention of Human Rights, and the Community regulation currently in force, see Fragola, M.: *Limitazioni e contenuto minimo della proprietà nel sistema italo-europeo*, Napoli, 2002, pp. 139-155. On this subject, see also Perlingieri, P.: "La funzione sociale della proprietà nel sistema italo-europeo", *Corti salernitane*, 2016, p. 175.

6 The topic of family taxonomy discrepancies is analysed in Garetto, R. (ed.): *Report on Collecting Data. Methodological and Taxonomical Analysis*, Torino, 2019, pp. I-III and 1-29.

7 On the basis of Article 81.3, subparagraph 1 of the Treaty on the Functioning of the European Union "measures concerning family law with cross-border implications shall be established by the Council acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament". The impossibility of reaching unanimity could lead to the use of the "*passerelle*" clause provided for by Article 81.3, subparagraph 2. So far, only failures have been recorded in using the passerelle clause, which was attempted on the occasion of the adoption of regulations on the right to maintenance and on matrimonial property regimes. On this subject, cfr. Fiorini, A.: "Which legal basis for family law? The way forward", in *European Parliament, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs*, 2012, p. 12 ff.

8 On this point, see Fiorini, A.: "Harmonizing the law applicable to divorce and legal separation— Enhanced cooperation as the way forward?", *The International and Comparative Law Quarterly*, 2010, no. 4, pp. 1143-1158.

9 Peers, S.: "Divorce, European style: The first authorization of enhanced cooperation", *European Constitutional Law Review*, 2010, no. 3, pp. 339–358. Fifteen States applied the enhanced procedure: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and, after 2012, Lithuania.

matters[10]. The regulatory process, which was initiated late compared to the one adopted in commercial matters, has achieved quite an amount of success, including the launch of regulations such as that on maintenance obligations[11] and those on decisions in matrimonial matters and in matters of paternal responsibility and international child abduction[12]. However, the emergence of sovereignty, growing mistrust in the European Union experienced as an obstacle to the development of individual countries, ended up affecting family legislative policies, leading, on the one hand to the withdrawal of the UK from the European Union, and, on the other hand, to a balancing of interpretations to allow a specific matter to be qualified as not necessarily a family matter. In this regard, for example, Regulation 650/2012 in matters of succession was adopted through an ordinary procedure[13] because it was considered not to be relevant to family law. The choice of procedure made according to the Regulation in matters of succession highlights a problem that deserves to be further explored: the adoption procedures provided by the Treaty on the Functioning of the European Union are based on rigid taxonomies that are difficult to use in a specific case. In reality, the partition between civil, family and succession law constitutes a theoretical classification that forces subsumption with unsatisfactory results, and which seems to be obsolete[14] given that the Stockholm programme itself places succession and succession issues and those of family property regimes in the macro-area of civil law[15]. The latter matter addressed by Regulations 1103 and 1104 of 2016, as highlighted by the legal theory[16], is used for the resolution of existential situations that individuals achieve through a communion of life and affections. This introduces a peculiarity in the legal system of property relations and justifies the adoption of rules at EU level that can be

10 On this subject, cf. Barrière Brousse, I.: "Le Traité de Lisbonne et le droit international privé", *Journal du Droit International*, 2010, no. 1, p. 33.

11 Reference is made to Council Regulation (EC) no. 4/2009 of 18th December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p. 1).

12 Reference is made to Regulation (EU) 2019/1111 of 25th June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters of paternal responsibility, and on international child abduction, repealing, from 1st August 2022 Council Regulation (EC) no. 2201/2003, also adopted through a special procedure.

13 The adoption of the ordinary procedure was possible using the *passerelle* clause provided for by Article 81.3. On this subject, see p. 31, which mentions the project elaborated by the so-called Heidelberg Group.

14 It should be noted that an initial draft regulation concerned both family and succession matters, both of which certainly refer to the broader field of civil law. On this point, see Borrás, A.: "Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters", in *Official Journal C 221, 16/07/1998 P. 0027 - 0064*, § 7, which mentions the project carried out by the so-called "Heidelberg Group", which actually included family, property and succession profiles.

15 See the Stockholm Programme – An open and secure Europe serving and protecting citizens (2010/C 115/01), 4th May 2010, OJ C 115/13, sub 3.1.2.

16 On this subject, see Perlingieri, P.: *Profili del diritto civile*, Napoli, 1994, p. 232. With regard to the specific topic of property regimes, see Ruggeri, L.: "I Regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border", in Landini S. (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, 2020, pp. 117-136.

implemented with a view to removing the obstacles preventing the full protection of the rights of cross-border couples.

The mix of property and existential profiles is the basis of the long and troubled path of adoption of Regulations 1103 and 1104 of 2016 (hereinafter: Twin Regulations). In fact, as they are devoted respectively to family property regimes and the property consequences of registered partnerships, they were not adopted by using the procedures provided for in Article 81, but, as was the case for the Rome III Regulation, by using the enhanced cooperation procedure which involved 18 States[17]. The enhanced procedure undoubtedly produces a good result[18] when no agreement is conceivable under other instruments, but its application in the matter of matrimonial regimes raises many qualms[19] due to the multiple fragmentation of the legislation determined to be used in an area for which unanimity should be the privileged path.

Among the elements that prevented unanimous adoption, we cannot fail to mention that they inevitably involve very delicate profiles of the property relationship since they must in some way establish the rules concerning the circulation of the decisions among States. This implies the consequent need to avoid the situation where the regulation in question could, to a certain extent, interfere with the national choices regarding the type and the content of rights in rem, or with the nature of disclosure in the public registers of legal events relating to property for which there is an obligation of registration under national law, or, again, with the methods of disclosure of the adopted family regimes. Indeed, when the subject of a right is immovable property, the general criteria for identifying the applicable law and the competent jurisdiction cannot always be established by adopting additional *ad hoc* rules. One example is provided by the provisions of Regulation 44/2001 (now replaced by Regulation 1215/2012) in the matter of rights in rem regarding immovable property and property rental contracts: for this type of dispute, the jurisdiction is attributed to the court in the place where the property is located, causing a deviation[20] from the general rules which, in contractual matters, base jurisdiction on the respondent's domicile. The notion of a dispute concerning rights in rem is conceived as an autonomous

17 The States that have joined this procedure are: Belgium, Bulgaria, Czech Republic, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. On this subject, see Bruno, P.: *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*, Milano, 2019, pp. 9-12.

18 V. Craig, P.: *The Lisbon Treaty: Law, politics and treaty reform*, OUP: Oxford, 2010, p. 449, according to which the enhanced cooperation procedure is based on the "hope that it will then be a catalyst and that other Member States will subscribe to such initiatives".

19 For some critical remarks about the adoption of the enhanced cooperation procedure in family matters, see Fiorini, A.: "Which legal basis for family law? The way forward", cit., p. 14 ff.

20 On the restrictive reading of this provision as exceptional with respect to the criteria of freedom of choice of the applicable law, see CJEU, 18th May 2006, ČEZ, C-343/04, ECLI:EU:C:2006:330, § 26 and 27.

notion[21] which was elaborated by the very Court of Justice through a reading and analysis procedure originating in the Brussels Convention. In an interesting decision[22], the Court of Justice was able to recognise the basis of the application of the *forum rei sitae* in the proximity of the court to the property which was the object of the dispute. This proximity makes rules, customs, and, more generally, the state of affairs on the basis of which a decision must be rendered better known, and, for this reason, in the case in question, the Court ruled that the sale of a share of a property located in Spain and encumbered by usufruct could be better considered by a Spanish judge than by a judge in Finland, the co-owners' country of origin. Disputes concerning immovable property within the jurisdiction of the court of the country where the property is located are those that have as their object the ownership or possession of immovable property or the existence of other rights in rem and which ensure the protection of prerogatives deriving from their title to the holders of these rights[23]. This is a widely shared notion: for example, in Anglo-Saxon jurisprudence regarding matters involving the actions of a bankruptcy trustee against a bankruptcy debtor, these actions are excluded from the jurisdiction of the court in the place where the property is located due to their personal nature[24]. The retraction and adaptation process, on the other hand, is less relevant regarding a debt relationship and relates to moveable property: in such a case, it is the *lex causae* chosen by the parties or identified pursuant to Article 26 of the Regulation that governs the dispute, and the judge can refer to it in rendering a decision.

II. FAMILY PROPERTY REGIMES AND RELEVANCE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: REASONS AND EFFECTS OF THE EXPLICIT REFERENCE INCLUDED IN RECITAL 73.

A further element that complicates this matter is the nature of the property which, in the European dimension, becomes a fundamental right expressly guaranteed by the Charter of Fundamental Rights. As highlighted in Recital 73, the provisions of the Twin Regulations must be interpreted and applied in compliance with the EU Charter, having specific regard to Article 17. In this context, the right to enjoy a property, to use it and to dispose of it, as well as to bequeath it, is

21 As established by CJEU, 3rd April 2014, Weber, C-438/12, ECLI:EU:C:2014:212, § 40. For a comment, see Debernardi, G.: "Reg. (CE) no. 44/2001: competenza giurisdizionale esclusiva e litispendenza", *Giur. it.*, 2014, p.1379 ff.; Pogorelćnik Vogrinc, N.: "Spememba Bruseljske uredbe", *Pravosodni bilten*, 2017, no. 1, pp. 207-221.

22 This refers to CJEU, 17th December 2015, Case C605/14, Komu and others, ECLI:EU:C:2015:833, § 25. See comment by Idot, L.: "Compétence exclusive en matière de droits réels immobiliers", *Europe*, 2016, no. 2, p. 41.

23 In these terms, see CJEU, ČEZ, C343/04, cit., § 29.

24 See Court of Appeal, 21th November 2000, Unanimous Opinion by Lord Parker - Pollard & Anor. v. Ashurst, *Int'l lis* 2002, 3(4), p. 135, with comment by Chizzini, A.: *Trusts fallimentari, forum rei sitae e Convenzione di Bruxelles*.

protected to such an extent that it is necessary to adopt a multiplicity of rules within the Twin Regulations to make the provisions comply with the Charter by adapting it to the need of protection provided therein[25]. The members of a cross-border couple must, in fact, face bureaucratic problems and difficulties given that their daily life takes place in countries other than those of origin[26]: in this sense, internationality determines a vulnerability that is not of an economic, but of a social and cultural nature. The knowledge of the law becomes more difficult, there is lesser understanding of the procedure, and a reduced opportunity to interact with offices and public administration; the gap in knowledge and interactions introduces the necessity to precisely identify those rights and those principles which, more than others, could be infringed in an international context.

The choice of the European legislator to include the right to property among these rights constitutes a significant novelty determined by two main factors: on the one hand, the relevance of the legal property situation in family property regimes, and, on the other hand, the necessity to comply with the Charter of Fundamental Rights even regarding the rules resulting from enhanced cooperation. As we have seen, European legislation in this matter has not been adopted unanimously, but through the new instrument provided for by the Lisbon Treaty, that is, through the enhanced cooperation procedure that involved 18 States. In this context, the reference to the protection of rights in rem has a dual purpose: a general legislative policy function, consisting of encouraging the implementation of the Charter in every area and procedure, and a more specific function, consisting of avoiding the situation where European family law fails to respect rights in rem. Moreover, at the supranational level, the European Convention for the Protection of Human Rights and Fundamental Freedoms already categorises this right among fundamental rights: for instance, Article 8 of the European Convention on Human Rights and Article 1 of the Additional Protocol of 1952[27]. Recital 73 is placed in a perspective that is only apparently different from the Italian cultural tradition that has placed the protection of property among economic relations and not among fundamental principles. Indeed, through the systematic reading of the articles of the Constitution, there are evident links between the category of having and that of being[28]: where property is working towards the realisation

25 Gambaro, A.: "Il *trust* simulato", *Trusts*, 2020, no. 5, p. 490 identifies "principles of legality and certainty of property situations enshrined in the 1st Protocol to the ECHR, and by Article 17 of the Charter of Fundamental Rights from which derogations and updates are not allowed".

26 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Bringing legal clarity to property rights for international couples" COM (2011) 125 final of 16th March 2011, OJ 140/11.

27 Reference is made to the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms, signed in Paris on 20th March 1952.

28 This delineates so-called personal property, understood as property aimed at realising a person's dignity, Perlingieri, P.: *Introduzione*, cit., p. 6. On this topic, see Marinelli, F.: "Funzione sociale della proprietà e natura delle cose dall'«avere» all'«essere»", in Tamponi, M. and Gabrielli, E. (ed.): *I rapporti patrimoniali nella giurisprudenza costituzionale*, Napoli, 2006, p. 32.

of private or family life, it becomes the recipient of specific rules that allow, by protecting and encouraging it, for the better realisation of that communion of life and affections which integrates the founding nucleus of the couple. However, it is clear that European family law cannot fail but face different traditions and cultures, and that family and property constitute two institutes that are largely affected by the particular vision of each State. It can be derived from all this how useful it is to analyse the rules devoted to the topic of property while having particular regard to real estate in an area such as that of international family relationships, which are characterised by a tendency to eradicate the regulations from the couple's country of origin. However, immovable property, with its inherent immovability, constitutes a challenge for private international law; taking up this challenge to prepare optimal solutions for cross-border families is an inescapable duty. The mitigation of the vulnerabilities of cross-border couples is an objective for all, not just for the legislator, but also for the interpreter of this legislation, and, more generally, for every subject that comes into contact with these couples (legal professionals and administrative officers).

III. THE RELEVANCE OF INDIVIDUAL RIGHTS WITH REGARD TO FAMILY PROPERTY REGIMES: REAL ESTATE DISCLOSURE *VERSUS* PROTECTION OF CONFIDENTIALITY.

The Charter of Fundamental Rights constitutes an important instrument for the modulation of public policy (*ordre public*)[29] which the Twin Regulations attempt to elaborate both from the point of view of content, and from a functional point of view, with an approach that invites those who interpret these provisions to apply them "case by case". The operational modalities of public policy are actually laid out in Recital 54 of Regulation 1103 and the corresponding Recital 53 of Regulation 1104, which prevent judicial authorities from invoking a violation of public policy to set aside the law of another State, or to refuse to recognise, accept or execute a decision, an authentic instrument or a court settlement issued in another Member State if doing so would be contrary to the Charter of Fundamental Rights of the European Union. Particular significance in this context is gained by the principle of non-discrimination under Article 21 of the Charter, which is intended to prevail over any other principles that would lead to blocking the application of the foreign rules or decision[30]. The property relations of spouses or registered partners give rise to a re-reading of the content of the domestic public policy: only in exceptional circumstances, where there are reasons of public interest,

29 See Silvestri, C.: "Il contrat de mariage in Francia e la circolazione Ue degli accordi prematrimoniali", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Milano, 2018, p. 498 f.

30 For an outline of the principle of non-discrimination as a counter-limit to internal public policy, see Marino, S.: *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'unione europea*, Milano, 2019, p. 221.

can this lead to the non-application of the applicable foreign law or to the non-acceptance of a decision or an act coming from abroad. National courts have developed guidelines that prevent the entry of foreign rules when, for example, the succession rules discriminate between illegitimate and legitimate children[31] or when a particular purchase was subject to clauses that impose religious or personal choices[32]. However, not all national choices include a strict understanding of public policy: for example, foreign rules that do not recognise the concept of rightful share have not always been included in the field of public policy[33].

In this context, the national judicial authorities are called upon to restrict themselves to the use of internal public policy and, at the same time, to apply balancing techniques to reshape its content. In fact, if an internal principle was actually violating the principles contained in the Charter of Fundamental Rights, the judge should allow the entry of the foreign law or decision. Thus, a new sensitivity to public policy is established that does not limit itself to the matter of property relations, but which can also be found in other areas of family law[34]. For instance, the decision made by the Italian Supreme Court of Cassation (*Corte di Cassazione*)[35], which established that the control of public policy must be carried out in practice and, at the same time, it is not exhausted with a judgment based on foreign law, but requires an analysis of the effects that the recognition of that decision can have. In the case examined by the Supreme Court, it was not the merit of the Iranian decision regarding divorce that had to be reviewed, but whether the Iranian judicial procedure respected the rights of defence as laid out in the Constitution, the Charter of Fundamental Rights, and the overall rules of international law suitable to integrating that system of values constituted by public policy. Repudiation, which is regulated in Iran, is a mechanism of peculiar connotations, which, only following the introduction of some reforms, has progressively attributed rights to the wife. The role of the Italian judge was to

31 The equal treatment of children integrates a European value recognised by the Charter of Fundamental Rights, which has also been widely developed by the European Court of Human Rights. Thus, among others, the European Court of Human Rights, Marckx v. Belgium, cit. and the European Court of Human Rights, 29 November 1991, Vermeire v. Belgium, App. no. 12849/87. On this subject, see Contaldi, G. and Grieco, C.: "Article 35 – Public Policy (ordre public)" in Calvo Caravaca, A.L., Davì, A. and Mansel, H.P.: *The EU Succession Regulation: A commentary*, Cambridge, 2016, p. 515.

32 Cass. civ., 1ere, 21 novembre 2012, in *Recueil Dalloz*, 2013, p. 880.

33 On this point, see Marino, S.: *I rapporti patrimoniali*, cit., p. 220.

34 What is interesting is the decision rendered by the Tallinn Circuit Court (Tallinna Ringkonnakohus), Case No. 3-15-2355/24, 24th November 2016. The Lithuanian judge allowed a Lithuanian citizen who had concluded a same-sex marriage in Sweden to record this marriage as her family status. The decision is significant because it is the expression of a restrictive reading of domestic public policy. Although same-sex marriages are not recognised in Lithuania, the judge considered that such recording was compatible with public policy because it was not contrary to any general public interest nor did it affect the protection of other fundamental rights. This decision was reported on p. 23 of the Report "Making EU citizens' rights a reality: national courts enforcing freedom of movement and related rights", drawn up by the European Union Agency for Fundamental Rights FRA, 2018 and available at *https://fra.europa.eu/en/publication/2018/making-eu-citizens-rights-reality-national-courts-enforcing-freedom-movement-and* (last visited 01/06/2021).

35 See Cass., ord., 14th August 2020, no. 17170, with a note by Vanin, O.: "Divorzio iraniano e controllo «in concreto» di compatibilità con l'ordine pubblico del provvedimento straniero", *Fam. dir.*, 2021, pp.507-515.

verify whether the principles governing European and Italian due process, which constitute an unsurmountable barrier even for decisions rendered by States that are not members of the European Union, had been implemented within the Iranian procedure. The impact of the Charter of Fundamental Rights is not limited to Member States but is also an indispensable parameter of public policy for foreign laws, decisions and acts. In this sense, Recitals 54 and 53 of the Twin Regulations must, in turn, also be subject to systematic and axiological interpretation, allowing the judge to assess each time whether or not the values common to the European Union are respected, protecting them both in relations between judges of the Union and in relations with non-EU jurisdictions.

An example of this hermeneutic can be seen in a recent decision by the European Court of Human Rights regarding a violation of the right to freely dispose of property and the right to confidentiality[36]. The case concerns a divorce agreement between two Austrian spouses. During the divorce, the husband transferred a share of an immovable property and requested that his transfer be recorded in the competent public land register. The public register did not accept partial documents that reproduced only part of the agreement concerning the property transfer between the two ex-spouses. The amicable divorce concerned not only real property profiles, but also other types of relationships and included agreements relating to the maintenance and education of the couple's two minor children. Hence, the husband's interest lay in protecting areas of private and family life whose disclosure was not strictly necessary to meet the needs of real property disclosure. Through a strictly literal interpretation of Article 87 of the Austrian law on land registers, an extract of the divorce agreement could not fulfil the obligation to record the entire and original document expressly required by the law. This type of hermeneutics is, however, wholly unhinged by the need to respect the principles laid out in the European Convention for the Protection of Human Rights: without an adequate reconciliation of the need for disclosure with the need for individual protection, this ends up affecting the exercise of the powers of the owner who is also subject to protection pursuant to Article 1 of Protocol 1 of the Convention[37]. By continually following the case law of the European Court of Human Rights, any data concerning the assets that establish an imposable tax base[38] or concerning current bank accounts[39] is worthy of the protection provided by Article 8 of the Convention. This decision clarifies that States have the duty to

36 Reference is made to the European Court of Human Rights, 6th April 2021, Case of Liebscher v. Austria.

37 While not examining the merits of the violation of the right to freely dispose of property, the Court significantly notes that in the case in hand, the Austrian government also violated Article 1 of Protocol 1 of the Convention. See in this matter § 74 of the above quoted judgment.

38 Thus the European Court of Human Rights, 27th June 2017, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland App no. 931/13, § 138.

39 Thus the European Court of Human Rights, 22th December 2015, M.N. and Others v. San Marino (App no. 28005/12, § 51, 7th July 2015) and G.S.B. v. Switzerland, App no. 28601/11, § 51.

prepare real property disclosure systems that guarantee the maximum protection of data concerning finances, income and the ownership of property or of the residence of a family unit with minor children.[40] This decision is also relevant for cross-border couples: the disclosure requirements related to immovable property regimes must, also in this area, respect the right to confidentiality, and systems cannot be organised without striking a balance between the interest to make data concerning property public and accessible without, at the same time, protecting personal data related to the situation of the couple or of the family with children. Consequently, whenever property relationships of couples end up in public registers (civil registers, cadastral or public land registers)[41], for these registrations, whatever the law applicable in practice, it will also be necessary to verify the respect of confidentiality and of the free exercise of ownership rights[42]. The impact of the respect for private and family life on the domestic law is a sensitive topic, also subject to intervention by national courts in an articulated dialogue with European courts. An example of this is the position taken by the Maltese Civil Court[43] in the field of constitutional review, which excludes the applicability of the Charter of Fundamental Rights whenever the matter is under national competence. Such national competence is recognised whenever it is a question of applying publicly relevant laws, removed from European competence. The Maltese court had to review the compliance with the protection of personal and family life of the Maltese legislation which requires that in the case of registration of sales deeds the marital status of the selling party must be stated when this party is a woman, indicating whether she is single, married or a widow. In this specific case, the seller who was divorced, lodged an appeal for violation of the respect of private and family life, of property law, and of the prohibition of discrimination on grounds of gender. The Maltese court, albeit excluding the application of the Charter, nevertheless upheld the appeal for the violation of the Maltese constitutional principles and

40 See European Court of Human Rights, 6th April 2021, Liebscher v. Austria, § 68.

41 In Italy, this topic was elaborated in the Code of Conduct on the Processing of Personal Data for Commercial Information Purposes, adopted by resolution on 12th June 2019, which allows access, for commercial purposes, to public sources or public registers, directories, acts or documents knowable by anyone on the basis of the referent legislation in force, within the limits and with the modalities established therein for the knowledge, usability and disclosure of the data contained therein. Among the data included in public sources, the following examples are listed: real estate deeds, detrimental and mortgage acts (for example, registration or cancellation of mortgages, transcripts and cancellations of foreclosures, or judicial documents and related annotations). These are "documents kept in the registries managed by the Revenues Agency (which include the former Land Registry Offices and the Cadastral Office), in the Public Motoring Register, and in the Resident Population Register" (see Article 4, point 2, letter a) subparagraph 2).

42 This is quite a sensitive topic since the retention of data extracted from property deeds is frequently abused. For example, a sanction of EUR 14.5 million was imposed on the real estate group Deutsche Wohnen SE in October 2019 by the Berlin Commissioner for Data Protection and Freedom of Information for an infringement of the GDPR. The press release referring to the imposed sanction is available at: *https://www.datenschutz-berlin.de/fileadmin/user_upload/pdf/pressemitteilungen/2019/20191105-PR-Translation-Fine_DW.pdf*.

43 Civil Court, Constitutional Jurisdiction / 52/2016/LSO, 28th March 2017, Marie Therese Cuschieri v. Attorney General.

of the European Convention for the Protection of Human Rights, which is an international regulatory instrument that is, unlike the Charter, always applicable.

IV. THE PRINCIPLES OF UNIVERSALITY AND UNITY: A NEW PERIMETER FOR THE *LEX FORI*.

Family property regimes are also affected by the need to modulate rules arising from the application of the principles of universality, which also allows the identification as applicable law of the law of a State that is not a member of the Union. In the case of enhanced cooperation, as is the case in matters concerning family property regimes, a Member State that does not participate in the enhanced cooperation procedure is also deemed to be a third State. At this point, it can be understood how the binomial of universality and restrictive interpretation of public policy can give way to new legal solutions which are all anchored in the "hard-core" principles of the Charter of Fundamental Rights, interpreted also on the basis of the European Convention for the Protection of Human Rights.

A first application has been provided, for example, from the admissibility of prenuptial and pre-partnership agreements[44]: pursuant to Article 22, the Regulations allow a choice of law applicable to property relations even before the registration of the marriage or partnership. In this context, the provision of Article 22 makes it necessary for the Italian judge to consider whether a prenuptial agreement is contrary to public policy. The answer, in the light of the restrictive interpretations emerging from cross-border relations, could be negative with an evident inequality of treatment between domestic couples, deprived of the possibility to make choices before the marriage or registration of the partnership, and cross-border couples that, on the other hand, could benefit from foreign rules that allow such an exercise of negotiating autonomy. There remains, in fact, in the jurisprudence of the Italian Supreme Court of Cassation[45], a closure in admitting forms of negotiating autonomy due to the unavailable nature of the rights and obligations derived from marriage or registered partnership. The novelty introduced by the Twin Regulations consists in having explicitly referred to the Charter of Fundamental Rights, thus imposing even on judges that are less

44 Oberto, G.: "I patti prematrimoniali nel quadro del diritto europeo", *Corr. giur.*, 2020, no. 6, p. 794. On this subject, see also Velletti, M. and Calò, E.: "La disciplina europea del divorzio", *Corr. giur.*, 2011, no. 5, p. 733; Pulvirenti, G.M.: "Patti prematrimoniali e trust - I parte", *Trust*, 2021, no. 2, p. 140.

45 Regarding settlements in the case of divorce, see Cass., 2224/2017 according to which "the agreements by which the spouses in the field of divorce agree upon the legal property regime in the case of a future and potential divorce are invalid due to the illegality of the cause, since they were stipulated in violation of the principle of radical non-derogability from rights in matrimonial matters referred to in Article 160 of the Civil Code". Finally, see also Cass., ord. 11012/2021 where a "lifelong" allowance agreement was examined requesting the appellate judge to identify the cause of the allowance by verifying its nature and compatibility with mandatory legislation. There is no shortage of isolated opening rulings. On this subject, see Oberto, G: "Gli accordi prematrimoniali in Cassazione, ovvero quando il distinguishing finisce nella Haarspaltemaschine", note to Cass. 21th December 2012, no. 23713, *Fam. dir.*, 2013, p. 323.

sensitive to an EU interpretation a balancing act that always reconciles the effects on the principles and fundamental rights of the rejection of a foreign decision or act. In the economy of the Regulations, the competent judge will have to apply a foreign law, and only in exceptional cases will he or she be able to invoke domestic public policy as a barrier to the foreign legislation. In this context, the public policy exception must be based on a clear and manifest incompatibility between the *lex fori* and the foreign applicable law, and there must be reasons of public interest to allow for the foreign law to be set aside. This concept of public policy is accorded even greater significance by the principle of unity of applicable law, introduced by Article 21, according to which the law applicable to the property regime shall apply to all assets, regardless of where these assets are located. The judicial authority is prompted to a change of mindset: the attraction of the law exercised by the place in which the property is located is, in fact, basically eliminated by the application of the principle. This is very peculiar regulatory rigidity in the international context if compared with the broad admission of *dépeçage* in matters concerning contractual obligations; it is justified by the need to avoid family property regimes being adversely affected by the type of assets and the nature of the property rights exercised by the couple. The principle of unity of applicable legislation has also actually been adopted in succession matters by Regulation 650/2012 and, on its basis, the case law of the Court of Justice has carried out important extensive interpretation of its scope, for example in the Mahnkopf case[46] where it established that the rights of the surviving spouse concerning the estate are to be classified under European succession legislation.

The principle of unity of applicable legislation produces its effects not only on couples' relationships, but also in the relationships that third parties may have with the couple. This double impact of the principle is enshrined in Article 28 which, by subverting the traditional rule according to which a contract does not produce effects beyond those between the parties[47], extends the enforceability[48] of the law chosen by the parties to all those third parties that were able to gain knowledge of the choice made by the couple. In other words, Article 28 attributes relevance[49] to the law chosen by the parties by virtue of an agreement concluded between them and, at the same time, identifies rules that could ensure legal certainty by resolving conflicts. These rules delimit the enforceability of the choice made by

46 This refers to CJEU, 1st March 2018, Case C-558/16, Mahnkopf. For a comment, see Barrière Brousse, I.: "Conflit de lois", *Journal du droit international*, 2018, no. 4, pp. 1218-1227. On this subject, see also Signes de Mesa, J.I.: "Introduction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, pp. 6-13.

47 See De Nova, G.: *Il contratto ha forza di legge*, Milano, 1993, p. 7.

48 The topic of the effects produced by a contract on third parties is strictly connected to the application or non-application of the principle of consensus. On this subject, see Vettori, G.: "Voce Opponibilità", in *Enc. giur.* Treccani, Roma, 2000, pp. 1-16; Franzoni, M.: "Degli effetti del contratto," in *Cod. civ. Commentario* Schlesinger, Milano, 1998, p. 110 ff.

49 V. Falzea A.: "voce Rilevanza giuridica", in *Enc. dir.*, Milano, 1989, XL, p. 901.

the couple: the European legislator assesses through them when the law chosen by the parties should also become the law applicable to the relationship between a spouse or a partner and third parties. Article 27 makes enforceable against third parties the law chosen by the parties by establishing that the relationship with third parties is subject to it. It is the role of Article 28 to balance the position of the third party by subordinating this enforceability to the knowledge possessed by the third party of the choice of law made by the couple. The legislator relies on a system of presumptions that highlights the peculiar relevance and significance of immovable property. It is presumed that the third party has knowledge of the law chosen by the couple if the relationship connecting him or her to the spouses or partners concerns immovable assets, and if the law applicable to the property relationship is that of the State in which these assets are located.

The consequences of the *lex causae* on third parties occur not only when the third party has effective knowledge of the chosen law, but also when he or she should have known it through the exercise of due diligence[50]. The perimeter of the efficacy of the choice made by the parties is extendable on the basis of circumstances that require an analysis of the specific case: among these circumstances, a "subjective" element has great relevance, and this is constituted by the behaviour of the third party. This scenario is invaded by subjectively understood good faith, such as "innocent ignorance": a mechanism tested in possessional relations and applicable here in relationships between the couple and third parties who are owners of subjective situations that can be activated against the couple.

If the third party finds himself or herself in a subjective state of "innocent ignorance", this again gives rise to a peculiar treatment of the property concerning immovable assets. The effects of the property regime between spouses or registered partners and a third party are subject to the *lex rei sitae*, or, in the case of registered movable assets or rights subject to registration, to the *lex registri*. Pursuant to Article 28 paragraph 3 letter b), there are two possible applicable laws in the case of "innocent ignorance" of the *lex causae* by the third party: the *lex rei sitae* and the *lex registri*. The principle of unity of applicable legislation does not apply to this hypothesis, and the relationship with the third party will be subject to the law of the place where the immovable property is located or in which the immovable property or movable asset or the related right has been registered.

V. THE *VIS ATTRACTIVA* OF IMMOVABLE PROPERTY IN IDENTIFYING THE APPLICABLE LAW.

If the assets of the couple or of one of its members consists of a plurality of immovable property or registered movable assets, this will consequently

50 The topic of knowledge of the law assumes peculiar relevance in cross-border cases. On this argument, see among others Ivaldi, P.: "In tema di applicazione giudiziale del diritto straniero", *Riv. dir. int. priv. proc.*, 2010.

imply a multiplicity of applicable laws. The Twin Regulations do not regulate the disclosure regimes of assets that are the object of family property: this exclusion is caused by difficulties in harmonising legislative systems[51] that provide for different understandings of property, different reconstructions of rights in rem, and which, in general, consider disclosure as a matter reserved for the States.

For this reason, immovable property or property having as its object registered movable assets or registrable rights constitutes a *vulnus* in the regulatory framework of family property regimes and emphasises the difficulties and inconveniences caused to cross-border couples by contributing to the reduction of the degree of effectiveness of the right to free movement of persons laid down in Article 21 TFEU. The harmonisation difficulties are magnified by the combination of the theme of property with that of family. If there is an area where harmonisation cannot be carried out without interfering in the sphere of national cultural traditions, this is precisely the area of family taxonomy. This arises from a simple reading of the Twin Regulations where it is made clear that the recognition and the execution of a decision in property matters does not implicate in any way the recognition of the marriage or registered partnership on which this property regime is founded. Therefore, the impermeability of the property regime operates both with respect to the negotiating acts from which these regimes arise and with respect to the land registers in which they are recorded. A recent case filed with the United Sections of the Italian Supreme Court of Cassation is the best example of the peculiarity of immovable property. After the death, which occurred in Italy, of a UK citizen who owned immovable property in Tuscany, a complex dispute was initiated between the heirs, leading to an interlocutory order aimed at prompting the clarification by the United Sections regarding the application of UK rules. A dividing system is in force in the British legal system pursuant to which movable assets are subject to the law of the *de cuius* State (the law of the country of the deceased), whereas immovable assets are subject to the *lex rei sitae*; this system is contrary to Italian succession legislation, which, on the other hand, in international cases, follows the principles of unity and universality of applicable laws. In this specific case, however, we are faced with the creation of two distinct masses subject to different laws[52], which, for immovable property, are represented by the Italian law. Indeed, the UK law refers to the *lex rei sitae*, while the Italian system adopts the national law of the deceased, with consequent convergence on the application of Italian law. This case was not resolved pursuant to Regulation 650/2012, but constitutes an important

51 There are some pilot projects in the European Union that aim to experiment with data sharing and registration methods. Reference is made to the following projects: European Land Information Service (EULIS), and Land Registers Interconnections (LRI).

52 The creation of masses regulated by laws of different States is frequent. For example, this can be generated by spouses or partners changing their choice of applicable law. On this subject, see p. 118, which describes the fictitious dissolution of the property regime in force pursuant to a previous law with a contextual establishment of a new regime, along the lines of the solutions adopted by the French case law (Cass civ., 1ère, 12 April 2012, in *Recueil Dalloz*, 2012, p. 1125).

example of the relevance assumed by immovable property in constitutive or transactional events in a cross-border family context.

What makes this topic increasingly complex is the further fragmentation of legislation constituted by the value attributable to disclosure regarding property regimes between spouses or registered partners, and their rights regarding the assets that make up this property regime. For example, in Italy, a country where the registration of a marriage agreement at the Revenue Agency (former Land Registry Office) assumes the value of public disclosure, while an annotation in the Civil Registers within municipalities makes the registered act and the right described therein enforceable against third parties.

Not all countries have a similar system or attribute the same effect to the act of recording in public registers, just as not all States attribute the same content to property. This emphasises the need to modulate the European legislation, imprinting it with maximum respect for national legal categories. For this reason, rights in rem are among the matters excluded from the scope of the Twin Regulations (Article 1, letter g). Once the law applicable to the property regime based on this law has been identified, the powers that each spouse or registered partner can exercise on the assets with the following adoption of the rules of the State of the chosen or applicable law are outlined pursuant to Article 26. Rights in rem constitute a non-uniform category, which is also an expression of the culture and tradition of each State. Therefore, even in this aspect, private international law withdraws by adopting strategies that reduce the bureaucratic obstacles and difficulties faced by cross-border couples. The adopted strategy is complex: couples can create or transfer rights on assets on the basis of the law applicable to the property regime, but, at the same time, they permit themselves not to recognise a specific right in rem if this is not contemplated by the law of the State in which the asset is located. The *vis attractiva* exercised by the *lex rei sitae* with regard to the typology of rights in rem is evident. As highlighted by Recital 24, the Regulations should not affect the *numerus clausus* of rights in rem as established in different States. To overcome an impasse caused by the absence of a specific right in the State where the asset is located, a mechanism already tested by Regulation 650/2010 is introduced, which is an adaptation of the right in rem. The judicial authority is authorised to apply the rules of the right in rem that can be considered "the closest" under the law of the State because it is equivalent to the one contemplated by the *lex causae*. Looking at the aims and the interests pursued by the right in rem provided for by the foreign law, and referring to interests subject to protection, the judicial authority can use a domestic right in rem with a view to allowing the recognition of the efficiency of the right in rem created or transferred by the spouses or registered partners.

Adaptation requires a fine comparison between the mechanisms present in different regulations that can only be favoured by cooperation between professionals supported by a well-organised information exchange network. Knowledge of foreign law constitutes one of the major obstacles to the implementation of rules for the recognition of foreign decisions and acts, and the adaptation instrument constitutes a tool for a flexible and ductile regulatory framework catering for the needs of cross-border individuals and families. Adaptation thus becomes the main tool for managing transnationality in the presence of categories with a strong national connotation, which are not "uniform". Even the kind of *downgrading* carried out by the Italian legislation concerning the recognition of same-sex marriages concluded abroad by Italians which establishes that "a marriage concluded abroad by Italian citizens with persons of the same sex produces the effects of registered partnership regulated by the Italian law" (Article 132-bis L. 218/1995) can also find anchorage in this. As highlighted by case law[53], the provision does not require this kind of downgrading for marriages concluded abroad by two foreign citizens, which, due to their total extraneousness to the Italian legal system, can be recognised. On the other hand, when the couple is composed of Italians or is "mixed", an adaptation is made that determines the effects of the registered partnership being attributed to the marriage contracted abroad, the only scheme that Italian same-sex couples can use in a reading that the Supreme Court of Cassation founded primarily on the necessity to avoid conflicts regarding the form and effects of the transcription of the marriage deed, and to avoid unequal treatment with respect to those Italians who have had only the typical model of registered partnership available to seal their communion of life and affections[54].

Therefore, case law and legal theory are called upon to deal with the adaptation strategies adopted in cases characterised by transnationality with interesting results. One example is the well-known decision by the Court of Justice regarding the purchase of immovable property under succession[55]. The issue concerned the possibility for German judicial authorities to reject the recognition of a legacy by vindication, which is allowed under Polish law. The discrepancies between the two legal systems regarding the purchase of property resulting from a legacy cannot prevent the recognition of the right in rem on the property located on German soil

53 See Cass., 14th May 2018, no. 11696 which, among other things, has rejected the issue of constitutionality related to the unequal treatment between foreign couples, mixed couples and Italian couples. For a comment of this decision, see Winkler, M.: "A case with peculiarities: Mixed same-sex marriages before the Supreme Court", *The Italian Law Journal*, 2018, no. 1, pp. 273-288.

54 For some critical remarks concerning the grounds for the exclusion of marriages concluded abroad by "mixed" same-sex couples, see Miri, V.: "Matrimonio same-sex celebrato all'estero e *downgrading* in unione civile: una prima lettura di Cass. 14 maggio 2018, n. 11696", *Rivista di diritti comparat*i, 2018, available at *https://www.dirittocomparati.it/matrimonio-sex-celebrato-allestero-e-downgrading-unione-civile-una-prima-lettura-di-cass-14-maggio-2018-n-11696*.

55 Reference is made to CJEU, 12 October 2017, Case C-218/16, *Kubicka*. For a comment, see, among others, Idot, L.: "Domaines respectifs de la loi successorale et de la loi réelle", *Europe*, 2017, no. 12, pp. 46-47; Achille, D.: "Lex successionis e compatibilità con gli ordinamenti degli Stati membri nel reg. UE no. 650/2012", *Nuova giur. civ. comm.*, 2018, pp. 697-707.

since there is no difference in the content of the right subject to the legacy such as to prevent its recognition[56]. In this sense, the principle of adaptation experiences an important delimitation: in order be applied, a diversity of contents and effects should not exist. If such diversity exists, the person interpreting this principle must make a judgment on equivalence that can lead to the avoidance of non-recognition, an occurrence that goes against the principles of the free movement of persons.

VI. CONCLUDING REMARKS.

The examination of European legislation concerning cross-border couples and property highlights a pressing need to review the regulatory approach based on matters such as those laid out in Article 81 TFEU. The procedures that can be introduced for the adoption of EU rules are based on categorisations and taxonomies that are difficult to implement in practice. Tracing a theme or an issue to a family matter is not always certain, as family matters are closely connected with property and succession issues. Consequently, greater dialogue with the legal culture at national level would be appropriate, which has led to hermeneutical approaches increasingly oriented to the analysis of the case in hand and less and less based on categorisations and procedures of the subsumption of concrete cases to abstract cases. It is also necessary to further develop the impact of fundamental rights on national laws which, in the matter in question, often consists of the *lex rei sitae* and/or the *lex registri*. The rules introduced by Regulations 1103 and 1104 keep these domestic laws from within its scope on the basis of assessments of opportunity and greater proximity whenever this relates to immovable property or on the basis of reasons of public interest when it is necessary to proceed with the registration of rights in rem or other rights. The fact that these areas are not subject to the rules for identifying the applicable law and jurisdiction does not exclude the fact that European principles concerning fundamental human rights also apply in these areas. This issue is primarily dealt with by national courts or by the European Court of Human Rights, but we need to ask, regardless of whether or not a matter can be attributed to European Union law, if even in this matter the national legislation must in any case comply with and respect the principles expressed by the Charter of Fundamental Rights and the European constitutional tradition. In this regard, even in the presence of the decisions of the Court of Justice that point in this direction, it can be said that property and family in the European dimension constitute another arduous challenge for the effective implementation of fundamental rights.

56 See in particular § 63 of the decision.

BIBLIOGRAPHY

Barrière Brousse, I.: "Conflit de lois", *Journal du droit international*, 2018, no. 4, pp. 1218-1227.

Borrás, A.: "Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters", *Official Journal C 221, 16/07/1998 P. 0027 - 0064*, § 7.

Boschiero, N.: "L'ordine pubblico processuale comunitario ed europeo", in De Cesari, P. and Frigessi di Rattalma, M. (ed.): *La tutela transnazionale del credito*, Torino, 2007, p. 163 ff..

Bruno, P.: *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*, Milano, 2019, pp. 9-12.

Contaldi, G. and Grieco, C.: "Article 35 – Public Policy (ordre public)" in Calvo Caravaca, A.L., Davì, A. and Mansel, H.P.: *The EU Succession Regulation: A commentary*, Cambridge, 2016, p. 515.

Craig, P.: *The Lisbon Treaty: Law, politics and treaty reform*, OUP: Oxford, 2010, p. 449.

De Cristofaro, M.: "Ordine pubblico *processuale* ed enucleazione dei principi fondamentali del diritto processuale *europeo*", in Colesanti, V., Consolo, C. and Gaja, G. (ed.): *Il diritto processuale civile nell'avvicinamento giuridico internazionale. Omaggio ad Aldo Attardi*, II, Padova, 2009, p. 893.

De Nova, G.: *Il contratto ha forza di legge*, Milano, 1993, p. 7.

Falzea A.: "voce Rilevanza giuridica", in *Enc. dir.*, Milano, 1989, XL, p. 901.

Fiorini, A.: "Harmonizing the law applicable to divorce and legal separation—Enhanced cooperation as the way forward?", *The International and Comparative Law Quarterly*, 2010, no. 4, pp. 1143-1158.

Fiorini, A.: "Which legal basis for family law? The way forward", in *European Parliament, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs*, 2012, p. 12 ff.

Fragola, M.: *Limitazioni e contenuto minimo della proprietà nel sistema italo-europeo*, Napoli, 2002, pp. 139-155.

FRANZONI, M.: "Degli effetti del contratto," in *Cod. civ. Commentario* Schlesinger, Milano, 1998, p. 110 ff.

GAMBARO, A.: "Il *trust* simulato", *Trusts*, 2020, no. 5, p. 490.

GARETTO, R. (ed.): *Report on Collecting Data. Methodological and Taxonomical Analysis*, Torino, 2019, pp. I-III and 1-29.

GIOBBI, M.: "The concept of «habitual residence»", in CAZORLA GONZÁLEZ, M.J., GIOBBI, M., KRAMBERGER ŠKERL, J., RUGGERI, L. and WINKLER, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 75 ff.

IDOT, L.: "Compétence exclusive en matière de droits réels immobiliers", in *Europe*, 2016.

IVALDI, P.: "In tema di applicazione giudiziale del diritto straniero", *Riv. dir. int. priv. proc.*, 2010

MARINELLI, F.: "Funzione sociale della proprietà e natura delle cose dall'«avere» all'«essere»", in TAMPONI, M. and GABRIELLI, E. (ed.): *I rapporti patrimoniali nella giurisprudenza costituzionale*, Napoli, 2006, p. 32.

MARINO, S.: *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'unione europea*, Milano, 2019, p. 221.

MIRI, V.: "Matrimonio same-sex celebrato all'estero e *downgrading* in unione civile: una prima lettura di Cass. 14 maggio 2018, n. 11696", *Rivista di diritti comparati*, 2018.

NORMAND, J.: "Le rapprochement des procédures civiles à l'intérieur de l'Union européenne et le respect des droits de la défense", in PERROT, R.: *Nouveaux juges, nouveaux pouvoirs?: Mélanges en l'honneur de Roger Perrot*, Paris, 1996, p. 337.

OBERTO, G: "Gli accordi prematrimoniali in Cassazione, ovvero quando il distinguishing finisce nella Haarspaltemaschine", note to Cass. 21th December 2012, no. 23713, *Fam. dir.*, 2013, p. 323.

OBERTO, G.: "I patti prematrimoniali nel quadro del diritto europeo", *Corr. giur.*, 2020, no. 6, p. 794.

PEERS, S.: "Divorce, European style: The first authorization of enhanced cooperation", *European Constitutional Law Review*, 2010, no. 3, pp. 339–358.

Perlingieri, P.: "La funzione sociale della proprietà nel sistema italo-europeo", *Corti salernitane*, 2016, p. 175.

Perlingieri, P.: *Introduzione alla problematica della «proprietà»*, Napoli, 1971, p. 9.

Perlingieri, P.: *Profili del diritto civile*, Napoli, 1994, p. 232.

Pulvirenti, G.M.: "Patti prematrimoniali e trust - I parte", *Trust*, 2021, no. 2, p. 140.

Rouhette, G.: "Sur l'harmonisation du droit du procès civil au sein de l'Union Européenne", *Justice*, 1995, no. 2, p. 365.

Ruggeri, L.: "I Regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border", in Landini S. (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, 2020, pp. 117-136.

Salerno, F.: "I criteri di giurisdizione comunitari in materia matrimoniale", *Riv. dir. int. priv. proc.*, 2007, p. 63.

Signes de Mesa, J.I.: "Introduction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, pp. 6-13.

Silvestri, C.: "Il contrat de mariage in Francia e la circolazione Ue degli accordi prematrimoniali", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Milano, 2018, p. 498 f.

Trocker, N.: *La formazione del diritto processuale europeo*, Torino, 2011, p. 77.

Velletti, M. and Calò, E.: "La disciplina europea del divorzio", *Corr. giur.*, 2011, no. 5, p. 733.

Vettori, G., "Voce Opponibilità", in *Enc. giur.* Treccani, Roma, 2000, pp. 1-16.

Winkler, M.: "A case with peculiarities: Mixed same-sex marriages before the Supreme Court", *The Italian Law Journal*, 2018, no. 1, pp. 273-288.

PARTY AUTONOMY REGARDING JURISDICTION UNDER THE PROPERTY REGIMES REGULATIONS

AUTONOMÍA DE PARTE RESPECTO A LA JURISDICCIÓN BAJO EL REGLAMENTO DE RÉGIMEN ECONÓMICO MATRIMONIAL

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 274-291

Jerca
KRAMBERGER
ŠKERL

ARTÍCULO RECIBIDO: 21 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: The main accomplishment of the Property Regimes Regulations lies in their bringing more coherence into the cross-border family law adjudication. In the field of international jurisdiction, they strive to align the competence in couples' patrimony disputes to that in succession and in separation proceedings, or else to align the competence of the courts to the applicable law. These tendencies are clearly visible in the Regulations' provisions on choice of court agreements. Namely, the Regulations allow for such agreements, but severely limit parties' choice and the possible effects of these clauses. When succession or separation proceedings are pending, it is often only possible to institute patrimonial disputes at the same court as the said proceedings. When proceedings concerning matrimonial or registered partners' property are initiated without previously pending succession or divorce proceedings, or else when the necessary consent to the joinder is not given, parties can avail themselves of a fairly limited list of options to choose a court from.

The Regulations leave several questions regarding choice of court agreements unanswered. Often, analogy with other EU regulations and the CJEU case-law can be of help. The critical eye of the doctrine is, however, mainly cast on the unpredictable fate of the choice of court agreements under the Regulations. The paper analyses the complex regulation of the choice-of-court agreements in the Property Regimes Regulations, draws attention to open questions and provides possible answers.

KEY WORDS: Choice-of-court agreement; jurisdiction; matrimonial property; registered couples' property; Regulation 1103/2016; Regulation 1104/2016; party autonomy.

RESUMEN: *El principal logro del Reglamento de Régimen Económico Matrimonial descansa en traer más coherencia dentro de la aplicación de derecho de familia transfronterizo. En el campo de la jurisdicción internacional, se pugna por alinear la competencia en disputas patrimoniales, como en procesos sucesorios o de separación, o también alinear la competencia del foro con el derecho aplicable. Estas tendencias son claramente visibles en las previsiones del Reglamento sobre acuerdos de elección del foro. Es decir, el Reglamento permite tales acuerdos, pero limita severamente la elección de las partes y los posibles efectos de tales cláusulas. Cuando un procedimiento sucesorio o de separación pende, a menudo es solo posible iniciar disputas patrimoniales en el mismo juzgado. Cuando se inician procedimientos relativos a régimen económico de matrimonios o parejas registradas sin un procedimiento sucesorio o de divorcio pendiente, o también cuando el necesario consentimiento del litisconsorcio no se presta, las partes pueden hacer valer una lista muy limitada de opciones para elegir juzgado.*

Los Reglamentos dejan una serie de cuestiones relativas a la elección del foro sin respuesta. Muchas veces, hacer analogía con otras regulaciones de la UE y del TJUE puede ayudar. Sin embargo, el ojo crítico de la doctrina se centra principalmente en el destino impredecible de los acuerdos de elección de tribunales en virtud del Reglamento. Este artículo analiza la compleja regulación de los acuerdos de elección de foro en los Reglamentos de Régimen Económico Matrimonial, presta atención a cuestiones abiertas y proporciona posibles respuestas.

PALABRAS CLAVE: *Acuerdo de elección del foro, jurisdicción, régimen económico-matrimonial, régimen de parejas registradas, Reglamento 1103/2016, Reglamento 1104/2016, autonomía de parte.*

I. INTRODUCTION.

The Matrimonial Property Regimes Regulation (hereinafter: the MPR Regulation)[1] and the Property Consequences of Registered Partnerships Regulation (hereinafter: the PCRP Regulation)[2] (the two hereinafter also referred to as the Property Regimes Regulations) were adopted in 2016 and entered into force in 2019. They are currently the newest additions to the EU regulation of cross-border family relations. Together with the Succession Regulation[3], they comprehensively regulate the private international law issues regarding the applicable law, the international jurisdiction and the recognition and enforcement of judgments relating to property issues of international couples. They represent a step forward in the unification of European private international law and bring further foreseeability and legal certainty in resolving cross-border family disputes[4]. The new regulations are a part of the so-called European Family (Private International) Law, which also encompasses the Brussels II bis Regulation[5], regulating procedural aspects of

1 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced co-operation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8 July 2016.

2 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced co-operation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183/30 of 8 July 2016.

3 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 201/107 of 27 July 2012.

4 For an illustration of the issues that could arise regarding property regimes disputes before the unification of the rules, and which still arise when proceedings are instituted in Member States not participating in the enhanced co-operation, see: Cerasela Dariescu, N., Dariescu, C.: "The Difficulties in Solving Litigation Concerning the Patrimonial Effects of a Marriage between an Italian Citizen and a Romanian Citizen", *Journal of Private International Law*, Vol. 4, no. 1, 2008, pp. 107-119. For a detailed description of the process of adopting the Property Regimes Regulations, see eg Pogorelčnik Vogrinc, N.: "Applicable law in matrimonial property regime disputes", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 2019, vol. 40, no. 3, pp. 1076, 1077.

5 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) 1347/2000, OJ L 338 of 23 December 2003. The Recast Brussels II bis Regulation (Council

• Jerca Kramberger Škerl
Associate Professor, Vice-Dean for Economic Affairs, Faculty of Law, University of Ljubljana, Slovenia. E-mail: jerca.kramberger@pf.uni-lj.si

divorce and parental responsibility, the Maintenance Regulation[6], and the Rome III Regulation[7] determining the applicable law in divorce and legal separation.

The European Family Law regulations, however, do not all share the same territorial scope of application, as some were adopted under the "regular" legislative scheme (where Ireland, Denmark and formerly the UK enjoy the so-called opt-in privilege)[8], whereas the Rome III and the Property Regimes Regulations were adopted within the so-called enhanced co-operation mechanism including a different number of Member States: 17 for the Rome III Regulation and 18[9] for the Property Regimes Regulations[10]. For purposes of clarity, this limitation in the territorial scope of application will not be repeated throughout the paper, and the term Member States will be used to describe the participating States.

As to the temporal scope of application, the Property Regimes Regulations are applicable as of January 2019. The application *ratione temporis* has several specifics regarding the applicable law and the recognition and enforcement of judgments, but the jurisdictional rules of the regulations apply to all proceedings started on or after 29 January 2019 (Article 69 of the Property Regimes Regulations)[11].Regarding the substantial (material) scope of application, Article 1 of the Property Regimes Regulations states that the regulations apply to "matrimonial property regimes" and to "matters of the property consequences of registered partnerships". The definition of the notion "registered partnership" is also provided by Article 3 of the PCRP Regulation: "'registered partnership' means the regime governing the

Regulation (EU) 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 (recast), OJ L 178 of 2 July 2019) will enter into application on 1st August 2022.

6 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations, OJ L 7 of 10 January 2009.

7 Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation, OJ L 343 of 29 December 2010.

8 In the Area of freedom, security and justice, these states can opt-in on a case-by-case basis. Thus, Denmark and Ireland do not participate at the Succession Regulation, and Denmark does not participate at the Brussels II bis Regulation. United Kingdom did not participate at the Succession Regulation, but participated at the Brussels II bis Regulation.

9 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden. The 18 Member States that joined the enhanced co-operation make up 70% of the EU population and represent the majority of international couples who live in the European Union. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_681.

10 The most prominent reason for Member States not to participate at the enhanced co-operation was (is) their unease regarding the legal status of same-sex couples. For more information on State-by-State basis, see Ruggeri, L., Kunda, I., Winkler, S., *Family Property and Succession in EU Member States, National Reports on the Collected Data*, Rijeka, 2019, https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf.

11 For an interesting case study highlighting the consequences of the different application *ratione temporis* of the conflict of law rules and the rules on jurisdiction, see Dougan, F.: "Matrimonial property and succession – The interplay of the matrimonial property regimes regulation and succession regulation", in Kramberger Škerl, J., Ruggeri, L., Viterbo, F. G.: *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law, Working Paper*, Camerino, 2019, pp. 75-82, https://www.euro-family.eu/news-126-case_studies_and_best_practices_analysis_to_enhance_eu_family_and_succession_law_working_paper.

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". Regarding the term "marriage", however, Recital 17 of the MPR Regulation refers to the definitions in national laws of the Member States. No autonomous interpretation of "marriage" is therefore available[12]. None of the Property Regimes Regulations apply to non-registered civil unions (Recital 16 of the PCRP Regulation), though relatively common in some Member States[13]. Lastly, it is important to emphasise that the Property Regimes Regulations only apply to cross-border situations. The bases for this assumption are, first, Article 81/3 of the Treaty on the Functioning of the EU[14], and, second, in the opinion of several authors, Article 2 of the Property Regimes Regulations[15]. The necessary cross-border implication is also clearly emphasised in Recitals 1 and 14 of the Regulations[16].

For a simpler and coherent application of the Property Regimes Regulations, especially in the first years of their application when doctrine and case-law is still scarce, it is important to note that they are largely based on the Succession Regulation, applicable since 2015. Case-law of national courts and the CJEU, as well as doctrine, based on the Succession Regulation, can thus often be of help in the interpretation of the new(er) regulations. Since Succession Regulation is itself based on previous EU legislation in private international law (especially on the Brussels I Regulation of 2000)[17], it also important that all regulations in this field are applied in a coherent manner and that the same notions are interpreted, as far as possible, in the same manner. Specifically for the interpretation of the choice

12 In the case *Coman and others* (no. C-673/16 of 5 June 2018) the CJEU included same-sex marriage into the notion of marriage, but that interpretation is, for the time being, limited to the interpretation of the so-called Free Movement Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States […], *OJ L 158, 30 April 2004*.

13 For example in Slovenia, where national legislation provides non-registered civil unions with the same legal status as the marriages (Article 4 of Slovenian Family Code of 2017). Thus, the Appellate Court in Maribor wrongly stated that it would apply the MPR Regulation if it was already applicable, which was not the case, since the proceedings were instituted before its entry into force, whereas the dispute concerned the property of a non-registered civil union: no. I Cp 653/2017 of 5 September 2017. One could, however, wonder whether in cases where non-registered unions have a clear legal status in a Member State and provide partners with rights and obligations deriving from such union, an exception should be made in the Regulation. Namely, the exclusion of the non-registered partnerships from the scope of application of the PCRP Regulation is based on the assumption that "only registered partnerships have an effect on legal status" (Rodríguez Benot, A.: "Article 1", in Viarengo, I., Franzina, P. (ed): *The EU Regulations on Property Regimes of International Couples*, Cheltenham, 2020, f. 20), which is not the case in all Member States.

14 TFEU, consolidated version (2012), OJ C 326 of 26 October 2012.

15 Marino, S.: "Article 2", in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., pp. 29-30, and multiple authors cited there.

16 For the interpretation of the required cross-border element, see Rodriguez Benot, A., in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., pp. 20-21.

17 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001.

of court agreements, the case-law regarding the Brussels I bis Regulation[18] and its predecessors will be useful.

The Property Regimes Regulations regulate, among other issues, the international jurisdiction, ie the question in which of the Member States, participating in the enhanced co-operation, the proceedings, falling into the scope of application of the Regulations, will be conducted. By contrast, national rules on territorial jurisdiction will determine the exact place in that country where proceedings are conducted. It is thus possible that succession or separation proceedings will be decided by a different court or authority than the property regimes dispute, both within the same Member State. National rules also define the competent authority, be it a court or, in case of delegation of jurisdictional powers, another authority or legal profession, typically a notary. The information on these national rules can easily be found on the European E-Justice website[19], provided that the Member States made such information available and up-dated it if necessary. When the dispute falls into the scope of application of the Regulations, national rules of Member States on international jurisdiction no longer apply[20].

The Property Regimes Regulations primarily align the international jurisdiction regarding the couple's property to the international jurisdiction regarding the situation at the origin of the need to adjudicate on such property. Most commonly, this will be the separation of the couple or else the death of one of the spouses or partners. By aligning the rules on international jurisdiction to such underlying proceedings, the new Regulations eliminate the potential need for the couples or the heirs to seize a court in another country than that of separation or succession proceedings, to regulate the questions regarding couple's property, eg which property is common to the spouses and which is the sole property of one of them. Said alignment also eliminates the positive conflict of jurisdiction (ie the jurisdiction of courts in two or more Member States), however, such conflict might still exist with the courts of non-participating Member States and third States[21].

The questions concerning property relations between spouses or registered partners must, however, sometimes also be resolved outside of the two mentioned situations, ie without underlying separation or succession proceedings. Such case arises, for example, if the creditors of one of the spouses demand the division of the common property in order to seize the debtor's assets. Also, the spouses may

18 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, OJ L 351 of 20 December 2012.

19 See the European Judicial Atlas in Civil Matters: https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do.

20 For nuance, see Bonomi, A.: "Chapter II. Jurisdiction", in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., p. 47.

21 Bonomi, A.: "Chapter II. Jurisdiction", cit., p. 49.

want to attain the division of their common property with the aim, for example, of changing their matrimonial property regime for the future. Therefore, the Property Regimes Regulations also provide for the international jurisdiction of courts in these "independent" cases.

The role of party autonomy is eminent in EU private international law, both regarding the choice of law as regarding the choice of court. European legislators provided a place for parties' choice in such matters, which were traditionally, and still are in most national legislations, reserved to mandatory rules, such as: consumer, insurance and employment disputes, divorce, and succession. Therefore, it is no surprise that also the Property Regimes Regulations enable the couples to choose both the law, as well as the competent court. This paper will focus on the choice of court agreements and examine the specific rules that apply to such agreements under the Regulations, as well as the rules from other EU regulations and CJEU case-law which can be applied to the couples' property relations in analogous manner.

II. GENERAL REMARKS.

As already mentioned in the Introduction, the main goal of the Regulation is the alignment of jurisdiction in property disputes to the jurisdiction in divorce or succession proceedings. This aim has an important influence on the regulation of the choice of court agreements in that the parties' choice will sometimes be ignored when divorce or succession proceedings are pending. Another important goal is detectable in the Regulations, namely the wish to align the jurisdiction and the applicable law, so that the competent court will apply their domestic law (the so called *Gleichlauf*). Thus, the parties have a very limited choice of competent courts. A third tendency, also confirmed by the limited choice of the parties and by the sometimes prevailing joinder to the divorce or succession proceedings, is the emphasised importance of the connection between the dispute and the competent court. Unlike, for example, in the Brussels I bis Regulation, the parties will not be able to choose a court in a Member State with no connection whatsoever with the litigious relationship. From the available choice, it is also possible to deduce the legislator's wish to simplify the proceedings, rather than to promote the parties' liberty to choose.

The parties can reach the agreement on the competent court(s) at any time until the beginning of the court proceedings, when *perpetuatio fori* kicks in. Andrae cites the conclusion of a prenuptial contract and a divorce agreement as typical occasions for also choosing the applicable law, as well as the competent court

for any future disputes regarding the couple's property[22]. In our opinion, it is not necessary that the choice of court was made after the entry into force of the Regulations; however, once the proceedings are instituted, such agreement will be examined under the rules of the Regulations[23].

The Regulations are only applicable to the choice, by the parties, of the competent courts of one of the participating EU Member States. If the parties additionally chose the venue, ie the competent court within the designated state, such choice is examined under the national procedural rules[24]. Thus, if, for example, the parties agree that the court in Ljubljana will be competent for their dispute, the validity of the choice of Slovenian courts will be examined pursuant to the Regulations; if such validity is confirmed, the choice of the Ljubljana court will further be assessed under the Slovenian procedural legislation.

The Regulations are also only applicable to judicial resolution of the parties' dispute and not to extra-judicial settlements. As is stated in Recital 39 of the MPR Regulation, the "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".

III. LIMITED CHOICE OF COMPETENT COURT(S).

1. Choice of court in "autonomous" proceedings.

Article 7(1) of the Regulations provides that in cases where no separation or succession proceedings are pending, the parties may agree that the courts of the Member State whose law is applicable (either on the basis of a choice of law agreement or on the basis of other rules of the Regulations), or the courts of the Member State of the conclusion of the marriage (or registration of partnership) have exclusive jurisdiction to rule on matters of their matrimonial property regime (or on the property consequences of their registered partnership). Recital 36 of the MPR Regulation and Recital 37 of the PCRP Regulation explain that such choice is given, "in order to increase legal certainty, predictability and the autonomy of the parties".

22 Andrae, M.: *Internationales Familienrecht*, 4th ed., Nomos, 2019, p. 275.

23 *Contra* Andrae who deems that the agreement must be concluded after the entry into force of the Regulations. Andrae, M.: *Internationales*, cit., p. 277.

24 Cf. Bonomi, A.: "Chapter II. Jurisdiction", cit., p. 47.

It is important, however, to emphasise that only the choice of courts of one of the currently 18 EU Member States participating in the enhanced cooperation is examined under the Property Regimes Regulations. Thus, if the parties chose the law of a non-participating state to be applicable to their dispute (which they are allowed to do, under the conditions of Article 22) or if such law is applicable under Article 26, the option of choosing the courts of the state whose law is applicable, is not available under the Regulations. Frimston warns that parties might decide to choose the law of one of the participating Member States only to be able to also choose the courts of that Member State[25].

A) Choice of court of the Member State whose law is applicable to the dispute.

Within the possibility of choosing the court of the Member State whose law is applicable to the dispute, one has to examine which law can be applied to the property relations of spouses/partners. This can be, first, the law chosen by the parties, and second, the law applicable in the absence of parties' choice. It is thus possible that the parties choose both the applicable law and the competent courts, as well as that the parties only choose competent courts and the applicable law is determined pursuant to Article 26 of the Regulations.

Under Article 22(1) of the Regulations, the spouses/partners may choose: (a) the law of the State where the spouses/partners or future spouses/partners, or one of them, is habitually resident at the time the agreement is concluded; or (b) the law of a State of nationality of either spouse/partner or future spouse/partner at the time the agreement is concluded. Registered partners can also choose the law of the State under whose law the registered partnership was created. When examining the effects of a choice of court agreement, the court must first resolve the preliminary issue, namely if the parties concluded a choice of law agreement in favour of a Member State and if such agreement is effective[26]. Only if such agreement is valid and effective, will the court be able to base its jurisdiction on the correspondent choice of court. Even a perfectly valid choice of court will thus be disregarded if the choice of law is found invalid.

Pursuant to the rule on the universal application of the conflict of law section of the Regulations (Article 20), the parties may agree on the application of the law of a State which does not participate in the enhanced cooperation, ie of a non-participating EU Member State or of a third State. If such was their choice, Article 7 does not apply. Namely, the Regulations do not regulate the jurisdiction in such

25 Frimston, R:: "Article 7: Choice of Court", in Bergquist, U., *et al.*: *The EU Regulations on Matrimonial and Patrimonial Property,* Oxford, 2109, p. 63.

26 Andrae, M.: *Internationales*, cit., pp. 276-277. Andrae is critical regarding the dependence of the choice of court agreement of the validity of the choice of law agreement; she deems it would have been better if the European legislature followed the example of Article 4 of the Maintenance Regulation: Andrae, M., *Internationales*, cit., p. 277.

States and therefore use the term "States" when speaking about the applicable law, and "Member States" when speaking of the jurisdiction. The question, however, arises, whether the courts in the participating Member States must respect the choice of court agreement in favour of a third State and thus decline their jurisdiction, even if the Regulations provide for their jurisdiction in case there was no (effective) choice of court. Similar issues already arose under other EU legislation, such as the Brussels I bis Regulation. We deem that such agreements must be examined under national laws of the participating Member States and respected, if their laws so permit[27].

Under Article 22(2), parties can also change their original choice of law. In such a case, the question arises, what happens with the choice of court agreement, which was aligned to the original choice, if the parties did not also change such agreement. Being that the *ratio* of the limited choice of court is the alignment with the law which will actually be applied to the dispute, we deem that a choice of courts in a country, the law of which will finally not be applied to the dispute, is not to be followed by the courts. The conditions from Article 7 must be fulfilled at the time of the proceedings, otherwise the choice cannot be effective.

If the spouses did not choose the applicable law, such law is determined under Article 26 of the MPR Regulation, which provides for the application of the law: "(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances'. Article 26 of the PCRP Regulation provides that in the absence of parties' choice, "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 view of all these options, numerous possible applicable laws and, consequently, competent forums can be available, the exact number depending on the circumstances of each individual case, ie on the habitual residence of the spouses at different times, of their nationality, and, lastly, on their close connection with a certain country. It must, however, be emphasised that parties might have several options when determining the applicable law, however, the choice of court must always follow the applicable law, be it on the basis of a choice of law agreement or on the basis of the Regulations. The courts of only one State are thus available under this option.

27 *Contra*: Frimston who deems that in case parties chose the law of a non-participating state, they cannot derogate from the rules of jurisdiction of Article 6. Frimston, R:: "Article 7: Choice of Court", cit., p. 63.

As mentioned, the jurisdiction of the courts of the Member State, whose law is applicable to the substance of the dispute, results in the so-called *Gleichlauf*, the always desirable application of the domestic law of the forum, which enables the judge to apply the law they know best and avoids the inconveniences linked to the application of foreign law (seeking of information on foreign law, translations, delays in proceedings, higher costs, and, maybe most importantly, a possible erroneous application of the foreign law). This alignment does not, however, in itself guarantee a strong connection of the dispute with the competent courts[28].

B) Choice of court of the Member State of the conclusion of the marriage/registration of the partnership.

The option of choosing the jurisdiction of the courts in the country where the marriage was concluded/the partnership was registered is more directly linked to the wishes of the parties: there is usually a close connection of the couple with the state where they got married or registered their partnership and they might want to fix the jurisdiction of the courts of that state, with no regard to their future changes of habitual residence[29]. But also this second choice will often lead to *Gleichlauf*: pursuant to Article 26(1), the first connecting factor for the law applicable in absence of choice by the parties is the spouses' first common habitual residence after the conclusion of the marriage. We can speculate that this will often be the same State where they got married or registered their partnership.

Recital 37 of the MPR Regulation very helpfully provides the interpretation of "the Member State of the conclusion of the marriage" as "the Member State before whose authorities the marriage is concluded". Thus, if the marriage is concluded for example by a consular agent of the state A in the territory of the state B, the Member State of the conclusion of the marriage will be the state A. The PCRP Regulation does not provide a similar explication, but an analogy with the MPR Regulation should not be problematic.

2. Choice of court when the property proceedings are joined to succession or divorce proceedings.

Under the Property Regimes Regulations, the choice of court is disregarded, if the proceedings have to be joined to the already pending succession or divorce proceedings. This is always the case with succession proceedings, while in divorce proceedings, this sometimes depends on the consent of the spouses. When proceedings for a dissolution of a registered partnership are pending, the partners' consent is always needed for the joinder of the property proceedings.

28 Andrae, M.: *Internationales*, cit., p. 277.

29 *Contra* Andrae, who questions the sense of this provision, in that the connection of the spouses with the state of the marriage is often coincidental. Andrae, M.: *Internationales*, cit., p. 276.

A) Obligatory joinder to succession proceedings and, in some cases, divorce proceedings.

If the divorce proceedings fall under Article 5(1) of the MPR Regulation, then the joinder of the connected property proceedings is obligatory, with no regard to any prior agreements on jurisdiction. The said article refers to proceedings where the court competent to rule on divorce, legal separation or marriage annulment has jurisdiction on the basis of the Brussels II bis Regulation, however, not on the basis of any rule of that Regulation (for exceptions, where joinder is not obligatory, see the next subchapter).

The doctrine denounces this lack of legal certainty of the parties who conclude a choice of court agreement, since its effectiveness depends on the circumstances in which the property regime dispute will be resolved[30]. Most often, the parties will namely choose both the law and the competent court before knowing if and when there will be court proceedings concerning their property. They cannot predict whether their choice of court will be effective, since this will depend on whether succession or divorce proceedings will be pending at the time of the institution of proceedings concerning matrimonial or partners' property. What is more, Andrae warns that such obligatory joinder enables a party to unilaterally avoid the choice of court agreement regarding property issues, by instituting divorce proceedings in the country falling into the scope of Article 5(1) of the Regulations[31].

Walker is also critical of the fact that the rules on choice of court of the Property Regimes Regulations do not promote the common choice of the parties, made on the basis of the circumstances of the dispute, and deems that a choice of court should only be possible when dispute has already arisen, same as under Article 12 of the Brussels II bis Regulation[32]. Bonomi, on the other hand, draws attention to the fact that the mentioned rule of the Brussels II bis Regulation sometimes undermines the choice of court agreement previously concluded in relation to property relations and to maintenance[33].

There is no obligatory joinder to the proceedings for the dissolution or annulment of the registered partnership. This is understandable, since the rules for such proceedings are not unified on the EU level (the Brussels II bis Regulation does not apply to registered partnerships).

30 Pogorelčnik Vogrinc, N.: "Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema", *Podjetje in delo*, no. 1, 2020, p. 197.

31 Andrae, M.: *Internationales*, cit., p. 279.

32 Walker, L.: "Party Autonomy, Inconsistency and the Specific Characteristics of Family Law in the EU", *Journal of Private International Law*, Vol. 14, no. 2, 2018, pp. 260-261.

33 Bonomi, A.: "Article 5", in Viarengo, I., Franzina, P. (ed.): *The EU Regulations*, cit., p. 76.

B) Joinder following the spouses'/partners' consent.

The spouses' consent is needed for the joinder, if the divorce, separation or marriage annulment proceedings are resolved by a court competent pursuant to the Brussels II bis Regulation on the basis of the applicant's habitual residence (at least 1 year) or of the applicants' nationality and habitual residence (at least 6 months), or else because of the conversion of legal separation into divorce, or, lastly, in cases of residual jurisdiction (Article 5(2) of the MPR Regulation).

Pursuant to Article 5 of the PCRP Regulation, partners' consent is always needed for the joinder of property proceedings to those for the dissolution or annulment of the registered partnership.

If spouses'/partners' consent is needed for the joinder to happen, such consent prevails over a choice of court agreement in favour of another Member State. If, however, there is a choice of court agreement in favour of the Member State in which the divorce proceedings are pending, such agreement will be interpreted as the consent needed for the joinder[34]. If the choice of court is concluded in favour of another Member State and the defendant does not consent to the joinder, the choice of court agreement takes full effect and the proceedings in property relations will be conducted in the chosen Member State.

IV. APPEARANCE OF THE DEFENDANT (*SUBMISSIO*).

A "silent" choice of court agreement (*prorogatio tacita, submissio*) is possible only if the proceedings are instituted before a court of a Member State whose law is applicable pursuant to the Regulations. Interestingly, the "choice" is thus even more limited in the cases of the silent acceptance of the defendant, contrary to a more usual situation in EU and national private international law where the possibilities of *submissio* are aligned with those of the express choice of court agreement. Furthermore, the acceptance of jurisdiction is not possible in cases of obligatory joinder with succession or divorce proceedings.

The Regulations further emphasise the common understanding of the entrance of appearance for the purposes of accepting the jurisdiction: the defendant must, namely, appear in order to argue the case on the merits and not only (or primarily) to contest jurisdiction. Naturally, if the defendant does not "appear", ie they do not react to the claim, a silent choice of court cannot be construed under the Regulations[35].

34 Andrae, M.: *Internationales*, cit., p. 279.

35 Cf. Frimston, "Article 7: Choice of Court", cit., p. 68.

In has often been emphasised that the defendant should accept jurisdiction consciously and not because of ignorance of the possibility to contest it. These concerns were raised, for example, in the process of recasting the Brussels I Regulation and resulted in the obligation of the court to inform (or to verify if they were informed by the serving authority) the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer and the employee of the possibility of objection (Article 26 of the Brussels I bis Regulation). This rule was, however, not stretched outside of the circle of defendants who are the protected weaker parties. It is most welcome that the Property Regimes Regulations include such duty of the court in Article 8(2). In practice, it is not an excessive burden for the court or other authority or legal profession entrusted with the service of the claim to include the information for the defendant of their right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

V. MATERIAL AND FORMAL VALIDITY.

Under Article 7(2), the choice of court agreement must "be expressed in writing and 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". This fairly laconic rule is further explained in Recital 47 of the MPR Regulation: "

rules on the material and formal validity of an agreement on the choice of applicable law should be set up so that the informed choice of the spouses is facilitated and their consent is respected with a view to ensuring legal certainty as well as better access to justice. As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal rules, those rules should be complied with. If, at the time the agreement is concluded, the spouses are habitually resident in different Member States which lay down different formal rules, compliance with the formal rules of one of these States should suffice. If, at the time the agreement is concluded, only one of the spouses is habitually resident in a Member State which lays down additional formal rules, those rules should be complied with". Frimston warns that the wording of the Regulations regarding electronic means of communication does not exclude the obligation of signature in such cases, and proposes as a safe option, when concluding the agreement via e-mail, that the parties send a signed document[36].

36 Frimston, "Article 7: Choice of Court", cit., pp. 65-66.

Contrary to, for example, the Brussels I bis Regulation [Article 25(1)][37], the Property Regimes Regulations do not provide for a conflict of law rule regarding the material validity of the choice of court agreement. This might be surprising, since the Regulations do provide for such a rule regarding the choice of law agreements (Article 24). Also, the Rome I Regulation[38] excludes choice of court agreements from its scope of application (Article 1(2)e)), while it could be applied to the choice of law agreements in the absence of a special rule. Furthermore, it is questionable whether any analogy can be made between the choice of law rule and a choice of court under the Regulations. A much better option seems to be the analogous application of the said Article of the Brussels I bis Regulation[39]. Analogy to the Brussels I bis Regulation can also be used regarding the autonomous interpretation of whether consent was reached[40].

The choice of court is deemed to be exclusive, which means that all other courts which would be competent under other rules of the Regulations, lose their jurisdiction. Thus, unlike some other EU regulations, such as the Brussels I bis Regulation or the Maintenance Regulation, the Property Regimes Regulations do not permit a non-exclusive choice of court agreement, ie a choice of an "additionally" competent court[41]. However, like in other EU Regulations, a later appearance of the defendant in a court other than the chosen court, prevails over an earlier explicit choice of court[42].

A choice of court agreement can be entered into regarding all property disputes between spouses, or else only regarding a specific dispute[43]. Andrae deems that the wording of Article 7 allows for a third party to participate in the agreement, beside the spouses (or registered partners); such agreement with a third person can only concern a specific dispute[44]. In this regard, Frimston rightfully draws attention to the fact that the notion of "a party" from Article 7 can be very difficult to define especially when couples' property disputes are decided upon in non-contentious proceedings[45], where that notion can be flexible and encompass all persons whose legal situation will be affected by the proceedings.

37 Under Brussels I bis Regulation the law applicable to the material validity of the choice of court agreement is the law of the chosen forum.

38 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4 July 2008.

39 For such solution also Andrae, M.: *Internationales*, cit., p. 278, and, in substance, Frimston: "Article 7: Choice of Court", cit., p. 65.

40 See eg CJEU, *Estasis Salotti*, no. 24/76 of 14 December 1976. Cf Andrae: *Internationales*, cit., p. 278, and other authors cited there.

41 Cf. Frimston, "Article 7: Choice of Court", cit., p. 62.

42 CJEU, *Elefanten Schuh*, no. 150/80 of 24 June 1981.

43 Cf. Andrae: M.: *Internationales*, cit., p. 276.

44 Andrae, M.: *Internationales*, cit., p. 276.

45 Frimston: "Article 7: Choice of Court", in Bergquist, U., *et al.*: *The Regulations*, cit., pp. 63, 64.

But since the said article also refers to "their" matrimonial property regime, the same author deems that the parties to the agreement are only the parties to the marriage, "and, presumably, the heirs or administrators of the estate of a deceased spouse"[46]. A third party can also be bound by a choice of court agreement if they are a legal successor of one of the original parties of the agreement[47].

VI. CONCLUSION.

The adoption of the Property Regimes Regulation is a welcome step ahead in the protection of European cross-border families and an important additional part in the mosaic of European Family Law. Because of the limited scopes of application of different regulations and the introduction of enhanced co-operation, this mosaic is more and more complex, but also more and more complete.

The main accomplishment of the Property Regimes Regulations lies in their bringing more coherence into the cross-border family law adjudication. In the field of international jurisdiction, they strive to align the competence in couples' patrimony disputes to that in succession and in separation proceedings. Another way of the Regulations' achieving more coherence are their efforts to align the competence of the courts to the applicable law (the so called *Gleichlauf*).

These tendencies are clearly visible in the Regulations' provisions on choice of court agreements. Namely, the Regulations allow for such agreements, but severely limit parties' choice and the possible effects of these clauses. When succession or separation proceedings are pending, it is mostly only possible to institute patrimonial disputes at the same court as the said proceedings. The joinder is namely obligatory, with no regard to a possibly existing choice of court agreements, every time there is a pending succession procedure, and most of the times when there is a pending divorce procedure. In some divorce cases and in all separation of registered couples cases, the joinder is optional and subject to parties' consent, which then prevails over a prior choice of court agreement.

When proceedings concerning matrimonial or registered partners' property are initiated without previously pending succession or divorce proceedings, or else when the necessary consent to the joinder is not given, parties can avail themselves of a fairly limited list of options to choose a court from. Namely, they can choose courts of a participating EU Member State, whose law is applicable to the substance of the dispute, or else the law of the participating EU Member State where the marriage was concluded or the partnership registered.

46 Frimston: "Article 7: Choice of Court", in Bergquist, U., *et al.*: *The Regulations*, cit., p. 64.

47 Andrae, M.: *Internationales*, cit., p. 276.

The Regulations leave several questions regarding choice of court agreements unanswered. Often, analogy with other EU regulations and the CJEU case-law can be of help. The critical eye of the doctrine is, however, mainly cast on the unpredictable fate of the choice of court agreements under the Regulations. Being that the aim of such agreements, proclaimed also in the preamble of the Regulation, is achieving more predictability and legal certainty, the probability that the jurisdiction will finally not be based on such agreement, is surprisingly high. First, there is the possibility of the obligatory joinder with succession and divorce proceedings. And second, when the chosen court is that of the Member State of the chosen law, an invalid choice of law undermines also the choice of court. It is also problematic that the complicated rules and the very limited choice might incite the parties to adopt questionable manoeuvres to attain the wished jurisdiction.

It will certainly be very interesting to observe and analyse the application of the rules on the choice of court from the Property Regimes Regulations in national courts and the future interpretations of the CJEU. Also, it will be important to examine whether the parties are using the possibility of autonomy in the field of jurisdiction in their contracts, seeing the limited choice and the uncertain effectiveness of the agreements.

It goes without saying that the success of the Property Regimes Regulations, and thus also of their rules on jurisdictional party autonomy, also depends on their territorial scope of application. We can only hope that other Member States will soon join the enhanced cooperation in this field, as well as regarding the Rome III Regulation, and thus ensure a common and truly European progress in cross-border family law.

BIBLIOGRAPHY

ANDRAE, M.: *Internationales Familienrecht*, 4th ed., Nomos, 2019, p. 275.

BONOMI, A.: Chapter II. Jurisdiction", in VIARENGO, I., FRANZINA, P. (ed.): *The EU Regulations on Property Regimes of International Couples*, Chatelham, 2020, p. 49.

CERASELA DARIESCU, N., DARIESCU, C.: "The Difficulties in Solving Litigation Concerning the Patrimonial Effects of a Marriage between an Italian Citizen and a Romanian Citizen", *Journal of Private International Law*, Vol. 4, no. 1, 2008, pp. 107-119.

DOUGAN, F.: "Matrimonial property and succession – The interplay of the matrimonial property regimes regulation and succession regulation", in KRAMBERGER ŠKERL, J., RUGGERI, L., VITERBO, F. G.: *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law, Working Paper*, Camerino, 2019, pp. 75-82.

FRIMSTON: "Article 7: Choice of Court", in BERGQUIST, U., et al.: *The Regulations on Matrimonial and Patrimonial Property*, Oxford, 2019, p. 63.

MARINO, S.: "Article 2", in VIARENGO, I., FRANZINA, P. (ed.): *The EU Regulations on Property Regimes of International Couples*, Chatelham, 2020, pp. 29-30.

POGORELČNIK VOGRINC, N.: "Applicable law in matrimonial property regime disputes", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 2019, vol. 40, no. 3, pp. 1076, 1077.

POGORELČNIK VOGRINC, N.: "Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema", *Podjetje in delo*, no. 1, 2020, p. 197.

RODRIGUEZ BENOT, A.: "Article 1", in VIARENGO, I., FRANZINA, P. (ed.): *The EU Regulations on Property Regimes of International Couples*, Chatelham, 2020, pp. 20-21.

WALKER, L.: "Party Autonomy, Inconsistency and the Specific Characteristics of Family Law in the EU", *Journal of Private International Law*, Vol. 14, no. 2, 2018, pp. 260-261.

AGREEMENT ON THE CHOICE OF NON-APPLICABLE LAW OR LAW NOT IN ACCORDANCE WITH ARTICLE 22(1) OF THE TWIN REGULATIONS: WHAT CONSEQUENCES FOR THE COUPLE'S PROPERTY REGIME?

ACUERDO SOBRE LA ELECCIÓN DE UNA LEY NO APLICABLE O NO CONFORME CON EL ARTÍCULO 22.1 DE LOS "REGLAMENTOS GEMELOS": ¿QUÉ CONSECUENCIAS TIENE PARA EL RÉGIMEN PATRIMONIAL DE LA PAREJA?

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 292-307

Francesco
GIACOMO
VITERBO

ARTÍCULO RECIBIDO: 9 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: Council Regulations (EU) 2016/1103 and 2016/1104 authorize cross-border couples to choose the law applicable to their property relationships based on one of the criteria listed in Article 22(1). However, the choice-of-law agreement may have a different content than that outlined in the wording of Article 22 of the Twin Regulations. The purpose of the analysis is to illustrate that it would be incorrect to argue that such agreements are a priori invalid or not permitted to party autonomy. This issue requires an assessment of the concrete purpose of the parties' agreement and should at least be open to scrutiny by the competent court.

KEY WORDS: Party autonomy; choice-of-law agreement; applicable law; positive/negative choice; implicit/indirect choice; informed choice; legal advice; formal and material validity; interpretation.

RESUMEN: *Los Reglamentos (UE) 2016/1103 y 2016/1104 del Consejo autorizan a las parejas transfronterizas a elegir la ley aplicable a sus relaciones patrimoniales sobre la base de uno de los criterios enumerados en el artículo 22.1. Sin embargo, el acuerdo de elección de la ley puede tener un contenido diferente al señalado en la redacción del artículo 22 de los "Reglamentos Gemelos". El objetivo del análisis es ilustrar que sería incorrecto sostener que tales acuerdos son, a priori, inválidos o no permiten la autonomía de la voluntad. Esta cuestión requiere una evaluación de la finalidad concreta del acuerdo de las partes y debería, al menos, estar abierta al examen del tribunal competente.*

PALABRAS CLAVE: *Autonomía de las partes; acuerdo de elección de ley; ley aplicable; elección positiva/negativa; elección implícita/indirecta; elección informada; asesoramiento jurídico; validez formal y material; interpretación.*

I. INTRODUCTION.

The adoption of the Matrimonial Property Regulation[1] and the Regulation on Property Consequences of Registered Partnerships[2] (hereinafter represented as – the Twin Regulations) has strengthened the value of private autonomy and freedom of contract as connecting factors for the determination of the applicable law within the EU cross-border families[3]. Such regulations enable the spouses or partners to conclude an agreement in order to choose the law applicable to the matrimonial property regime or the property consequences of the registered partnership[4]. Furthermore, "this choice may be made at any moment": the spouses, "before the marriage, at the time of conclusion of the marriage or during the course of the marriage"; the partners, "before the registration of the partnership, at the time of the registration of the partnership or during the course of the registered partnership"[5].

1 Council Regulation (EU) 2016/1103 of 24th 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. OJ L 183/1 [2016].

2 Council Regulation (EU) 2016/1104 of 24th 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. OJ L 183/30 [2016].

3 On the role of private autonomy in national family laws, see the national reports in Scherpe, J.M (ed.): *Marital Agreements and Private Autonomy in Comparative Perspective,* Oxford, 2012. On the evolution of the role of private autonomy in private international family law in the Union, see Gray, J.: *Party Autonomy in EU Private International Law. Choice of Court and Choice of Law in Family Matters and Succession*, Cambridge, 2021, p. 15 ff.; Kinsch, P.: "Les fondements de l'autonomie de la volonté en droit national et en droit européen", in Panet, A., Fulchiron, H. and Wautelet, P. (ed.).: *L'autonomie de la volonté dans les relations familiales internationals*, Bruxelles, 2017, pp. 17–22; Henrich, D.: "Zur Parteiautonomie im europäisierten internationalen Familienrecht", in Verbeke, A., Scherpe, J.M., Declerck, C., Helms, T. and Senaeve, P. (ed.): *Confronting the frontiers of family and succession law: liber amicorum Walter Pintens*, I, Antwerp, 2012, pp. 701–714; Gannagé, P.: "La Pénétration de l'autonomie de la volonté dans le droit international privé de la famille", *Revue critique de droit international privé*, 1992, pp. 425–439.

4 See Recital 45 of the Matrimonial Property Regulation and Recital 44 of the Regulation on Property Consequences of Registered Partnerships.

5 *Ibidem*.

• Francesco Giacomo Viterbo
Associate Professor of Private Law, School of Law, University of Salento. E-mail: francesco.viterbo@unisalento.it

When drafting the Twin Regulations, the European legislator primarily had couples in mind who at some point in their marriage or partnership changed their personal circumstances in an aspect which was relevant to the Regulations, *i.e.* by changing their citizenship or, more commonly, relocating their habitual residence to another state. The main advantage of the choice of applicable law as provided for under Article 22 is to secure a stability and foreseeability with respect to the applicable law. If the parties have concluded upon such an agreement, the chosen law remains applicable despite any changes in their personal situations, and regardless of the authority seized in the event of a dispute. In particular, the change of the couple's habitual residence does not cause a change of the applicable law, unlike in the case of an absence of choice under Article 26 of the Twin Regulations.

The Twin Regulations do not define the notion of 'choice-of-law agreement'. However, they do set out both the requirements for the "formal validity of the agreement" under Article 23 and the law - or, where appropriate, laws - to be applied in assessing its "material validity" under Article 24[6].

The Twin Regulations also identify the minimum content of the agreement. The parties may choose the law applicable to their property relationships on the basis of one of the criteria listed in Article 22(1). In particular, the spouses or future spouses may choose between the law of the State of their habitual residence and the law of a State of which one of them has the nationality or is habitually resident; registered partners or future partners may choose between the law of the state of their habitual residence, the law of a state of which one of them has the nationality or is habitually resident and the law of the State in which the registered partnership was created. In all these cases, reference must be made to the time at which the agreement is concluded.

The parties are in a position to make an optimal choice that is best suited to their concrete situation; to adjust their conduct and foresee the associated legal consequences. Nevertheless, the content of the agreement may deviate from what is provided for in the Twin Regulations.

Two issues will be analysed in this article. The first one concerns the case where the parties, instead of choosing the law applicable to their relationship, simply exclude the application of the law of one or more States. The second concerns the problem where the parties' choice has been made on the law of a State that does not correspond to any of those that can be chosen under the criteria of Article 22(1).

6 For a comment of these articles see Kohler, C.: "Choice of the Applicable Law", in Franzina, P. and Viarengo, I. (ed.): *The EU Regulations on the Property Regimes of International Couples. A Commentary*, Cheltenham, 2020, pp. 212-231.

II. AGREEMENT ON THE CHOICE OF NON-APPLICABLE LAW(S).

We begin our analysis with the question of the consequences of an agreement on the choice of non-applicable law. This is the case where the parties, instead of choosing the law applicable to their matrimonial property regime or to the property consequences of their registered partnership, simply exclude the application of the law of one or more States.

It is necessary to focus on the two following possible scenarios.

1. First scenario.

In the first scenario, the parties exclude the law of one or more of the States that are applicable on the basis of Article 26(1) of the Matrimonial Property Regulation or Article 26(1) and (2) of the Regulation on Property Consequences of Registered Partnerships. Consider a couple of Greek nationals who marry in Italy in 2020 and transfer their habitual residence there, but they conclude an agreement in which they exclude the application of Italian law to their matrimonial property relationships; after a few years they move to Spain where they will live for a long time. In this case, if the parties had not concluded any agreement, Italian law would apply since the law applicable to the matrimonial property regime under Article 26(1)(a) is the law of the State of the spouses' first common habitual residence after the conclusion of the marriage. The question arises as to whether or not the agreement on the choice of non-applicable law is valid with the result that, if it is valid, then Article 26(1)(b) or (c) of the Matrimonial Property Regulation will apply.

In this first scenario, the agreement on the choice of non-applicable law does not appear to be one of the agreements covered by Article 22(1) of the Twin Regulations.

However, where Article 22(1) and (2) of the Twin Regulations refers to the parties' freedom to "change the applicable law", it is currently interpreted as covering the change of the law applicable under Article 26. If the law applicable to the matrimonial property regime or the property consequences of a registered partnership is designated by the couple during the course of the relationship, e.g. some years after the conclusion of the marriage or registered partnership, the choice-of-law agreed upon by the parties has the purpose to "change" the law applicable to their property relations. Indeed, until the conclusion of the agreement, property relationships are governed by the law designated under Article 26 of the Twin Regulations. Nevertheless, such a "change" could also be interpreted as the possibility for the parties to opt for the exclusion of the law applicable under Article 26(1)(a), *i.e.* the law of a State to be applied according to

the first of the legal criteria listed in that article. Such a negative choice may be based on the autonomous concept of "parties' autonomy" in the Twin Regulations[7] and in national law. In this light, Articles 23 and 24 would apply to the parties' agreement to the extent of a reasonableness test[8]. In particular, the agreement on the choice of non-applicable law should at least be expressed in writing, dated and signed by both parties pursuant to Article 23(1); the existence and validity of such an agreement should be determined by the law which would govern it if the agreement or term were valid, in accordance with Article 24(1).

The proper recognition of the importance of party autonomy may therefore lead to the conclusion that agreements entered into as a corrective measure to the criteria laid down in Article 26 are also valid as they can find their legal ground in Article 22(1) and (2). Thus, in the above case, if the requirements for the validity of the agreement are met, the applicable law is that of the State of the spouses' common nationality at the time of the conclusion of the marriage, *i.e.* Greek law, in accordance with Articles 22(1)(b) and 26(1)(b) of the Matrimonial Property Regulation. The validity of the agreement should be assessed on the basis of this applicable law. On the other hand, the rule laid down in Article 23(2) should not apply[9].

2. Second scenario.

In the second scenario, the parties exclude the law of one or more of the States that are eligible for choice under Article 22(1).

Consider a Greek national and an Italian national who marry in France in 2020, where they live for a few years; then they move to Spain where they transfer their habitual residence and live for a long time. Suppose that in the latter period they enter into one of the following two agreements:

a) they conclude an agreement in which they exclude the application of the Spanish law to their matrimonial property regime;

7 See Recitals 36, 38, 45, 46 and 47 of the Matrimonial Property Regulation; and Recitals 36, 37, 44, 45 and 46 of the Regulation on Property Consequences of Registered Partnerships. In these Recitals, the autonomy of the parties is envisaged as an autonomous concept and its function and boundaries are specified.

8 "The legislation applicable to a specific case is always the result of the joint evaluation of principles and rules; reasonableness is the means for evaluating and assessing the applicability of a rule, as well as for solving systematic aporias and antinomies, which cannot otherwise be solved by means of interpretation": Perlingieri, G.: "Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court", *The Italian Law Journal*, 2018, no. 2, p. 408 f.

9 Article 23(2) states that any additional formal requirements for matrimonial property agreements laid down by the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded shall apply to the agreement. However, since the couple have excluded the application of that law, those requirements should not apply.

b) they conclude an agreement in which they exclude the application of both Italian and Greek laws to their matrimonial property regime.

In this instance, the range of laws that may be chosen by the parties under Article 22(1) of the Matrimonial Property Regulation includes Italian, Greek and Spanish laws. The question arises as to whether or not the agreements illustrated are valid so as it is possible for the parties to agree on the applicable law by means of a negative choice, *i.e.* by excluding the laws of one or more eligible States for choice.

The agreement illustrated in hypothesis (a) does not appear to be valid. The parties do not make a choice of applicable law within the meaning of Article 22. Such a choice cannot be inferred indirectly because the parties exclude only one of the three admissible options. Moreover, the agreement is not able to influence the legal criteria for determining the applicable law under Article 26. Thus, the content of the agreement concluded by the parties is neither determined nor determinable. In the light of both the notion of "agreement" envisaged by the Twin Regulations and the applicable (national) law, the agreement will be invalid[10].

Whether the agreement illustrated in hypothesis (b) may be valid is a matter of uncertainty. The question arises as to whether or not the parties may designate the applicable law indirectly or implicitly, *i.e.* by designating as non-applicable the laws of the other States eligible for choice under Article 22(1). In the above example, the parties could agree on the choice of one of the laws of Greece, Italy or Spain. Instead, they agreed to exclude the application of the Greek and Italian laws. Can it be said that the parties have implicitly designated Spanish law as the law applicable to their matrimonial property regime? To answer this question, it is necessary to examine whether an implicit or tacit choice-of-law agreement can be admitted under the Twin Regulations. This issue will be analysed in the following section.

III. THE QUESTION OF WHETHER AN IMPLICIT OR TACIT CHOICE OF APPLICABLE LAW IS ADMITTED.

It has been pointed out that the question of whether the designation of the applicable law has to be explicit or may also be implicit has to be given a uniform answer, on the basis of an "autonomous interpretation" of the concept of "agreement" under Article 22(1) of the Twin Regulations[11]. Thus, the choice of the applicable law should be made "expressly or clearly demonstrated by the

10 In most civil codes of the EU Member States, if the content of the contractual agreement is neither determined nor determinable, the contract is invalid. See Articles 1128 of the French civil code and 1346 of the Italian civil code.

11 Kohler, C.: "Choice of the Applicable Law", cit., p. 201 f.

terms of the contract or the circumstances of the case"[12]. However, some risks are associated with this view.

Consider the case of two Italian citizens who live in Germany and arrange their marriage in Italy. After the marriage, they continue to live in Germany for a number of years and finally decide to settle in Italy. In this respect, the following two scenarios must be taken into account.

Scenario A.

At the time of the marriage, they concluded a marital agreement before an Italian notary designating the "separation of assets" according to Article 215 *et seq.* of the Italian Civil Code as their matrimonial property regime. It might be argued that the choice of Italian law as the applicable law under Article 22(1) of the Matrimonial Property Regulation should be clearly demonstrated by the terms of that agreement[13].

Scenario B.

After the marriage, the parties concluded a choice-of-law agreement before a German notary designating the Italian law as the law applicable to divorce and legal separation pursuant to Article 5(1) of the Rome III Regulation.

In scenario A, the parties have previously concluded a matrimonial property agreement or a partnership property agreement under the law of a state in which they did not have their "first common habitual residence". The question arises as to whether or not these circumstances suffice to demonstrate that Italian law is the law the parties have chosen to apply to their relationships, including the matrimonial property regime.

In scenario B, the couple has previously concluded an agreement on the law applicable to separation and divorce in accordance with the provisions of the Rome III Regulation[14], but after the entry into force of the Twin Regulations has not concluded any further agreements. The question arises whether, in such a case, the law designated by the couple in contemplation of separation and divorce can be considered applicable also to the property consequences of the marriage or registered partnership. This means clarifying whether it can be assumed that

12 *Ibid.*, p. 202. The author justifies this interpretative solution with a reference to Article 3(1) of the Rome I Regulation, where the same issue arises. In his view, "there is no plausible reason why a choice which is clearly demonstrated by the terms of an agreement between the parties or the circumstances which surround it should not be admitted under Article 22(1)".

13 *Ibid.*

14 Council Regulation (EU) No 1259/2010 of 20th December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. OJ L 343/10 [2010].

the parties have made an implicit and nonetheless acceptable choice to this effect, even in the absence of their express request.

In both scenarios, it should be noted that the "terms of the agreement" and the "circumstances" indicated in each example do not appear sufficient to answer the question of whether they amount to an implicit agreement on the choice of law applicable to the matrimonial property regime in accordance with Article 22(1) of the Matrimonial Property Regulation. The definition of what is a choice-of-law agreement under Article 22(1) is a point to be assessed on the basis of the criteria and requirements set out in Articles 22 to 24 and the relevant Recitals of the Twin Regulations, as well as those left to the national law. In the light of this approach, Recital 47 of the Matrimonial Property Regulation and Recital 46 of the Regulation on the Property Consequences of Registered Partnerships deserve special attention. These Recitals point out that the rules on the material and formal validity of a choice-of-law agreement laid down in the Twin Regulations are intended to facilitate the "informed choice"[15] of the spouses or partners and to ensure that they "are aware of the implications of their choice"[16].

Having pointed that out, can one be sure that in the two examples given above the spouses made a genuinely informed choice of the law applicable to the matrimonial property regime? No, but this requirement is very unlikely to be met in scenario B, whereas it is only possible in scenario A. In both scenarios, the information that the parties received from the notary before or at the time they concluded the agreement has to be ascertained in the light of the concrete context surrounding their choice. The spouses should be properly informed by the notary not only of the possibility of choosing between German and Italian law, but also of the implications of this choice in view of the matrimonial property regimes under those laws[17].

Thus, an implicit agreement by the couple on the law applicable to the matrimonial property regime or the property consequences of registered partnership can only be admitted if evidence is provided that the parties had the opportunity to make a genuinely informed choice about the range of options and their implications, on the basis of appropriate legal advice. Therefore, in scenario A, if this information was not provided to the parties, their marital property

15 This wording is used in both Recitals.

16 This wording is used in both Recitals.

17 In view of these arguments and the fact that Article 23 of the Twin Regulations lays down specific rules on the formal validity of the agreement, as a rule the choice or change of applicable law may not be tacit. On this point see Bruno, P.: *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*, Milano, 2019, p. 183; Zabrodina, K.: "The law applicable to property regimes and agreements on the choice of court according to Regulations (EU) 1103 and 1104 of 2016", in Kramberger Škerl, J., Ruggeri, L. and Viterbo, F.G. (ed.): *Case studies and best practices analysis to enhance EU Family and Succession Law. Working Paper*, Camerino, 2019, p. 199 f.

agreement cannot be interpreted as a choice-of-law agreement. It follows that if a few years later the parties choose to apply Italian law to their matrimonial property regime without an express agreement on its retrospective effect, then German law will apply to their matrimonial property regime prior to the change of applicable law.

Let us return to the second scenario outlined in section II.2. An agreement by which the parties have excluded the application of laws eligible for choice under Article 22(1) at the time of its conclusion, except that of only one State, will be acceptable if evidence is provided that the parties made a genuinely informed choice. This means that the legal professional (e.g. notary, lawyer) on whom the parties relied must have explained to them not only the reasons for excluding the application of the laws of one or more States, but also the implications of their agreement. It is important that the parties have been informed of the law that will apply to their matrimonial property regime as well as that they have been aware of the consequences and risks of their agreement. However, this particular scenario is very unlikely.

The major role given to private autonomy makes it necessary to rigorously verify the presence of a clear and express agreement reached by the parties on the applicable law[18].

IV. CHOICE OF LAW OF A STATE NOT IN ACCORDANCE WITH ARTICLE 22(1) OF THE TWIN REGULATIONS: WHAT CONSEQUENCES FOR SUCH AN AGREEMENT?

In accordance with Article 22(1) of the Twin Regulations, the point in time at which the agreement is concluded determines the object of the choice available to the couple, *i.e.* the range of laws eligible for choice. Consider a couple of Greek nationals who marry in Italy in 2020 and transfer their habitual residence there; after a few years they move to Spain where they live for a long time and finally decide to settle in Portugal. If they were to agree on the applicable law in the "Italian period", the choice would be limited to between Greek and Italian law, and in each case it would have to be verified that the agreement met the formal requirements of validity laid down by Italian law. If, on the other hand, they were to conclude the agreement in the "Portuguese period", the range of options would no longer include Italian law (that is the applicable law until the parties make a choice), but Greek and Portuguese law, and in each case it would have to be

18 Ruggeri, L.: "Jurisdiction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J. and Ruggeri, L. (ed.): *Property Relations of Cross-Border Couples in the European Union*, Napoli, 2020, p. 66. This is confirmed by the case law of the CJEU: see Case C-387/98, *Coreck Maritime GmbH c. Handelsveem BV and others*, ECLI:EU:C:2000:606, point 13; Case C-543/10, *Refcomp Refcomp SpA c. Axa Corporate Solutions Assurance SA*, ECLI:EU:C:2013:62, points 27-28.

verified that the agreement met the formal requirements of validity laid down by Portuguese law.

With agreeing on the choice of applicable law, the parties envisage the way in which their property relationships are to be treated under a range of possible laws and finally opt for the one that best serves their common interests[19]. Here, proper legal advice is essential to enable the couple to make a choice that should be directed towards the most equitable law and property regime in relation to the organisation of their matrimonial life or registered partnership.

On the contrary, inadequate legal advice can bring the parties many risks. In the example above, assume that, in the "Portuguese period", the parties concluded an agreement to choose Spanish law as the law applicable to their matrimonial property regime. Spanish law does not meet any of the criteria listed in Article 22 of the Matrimonial Property Regulation and is not "the applicable law in the absence of choice by the parties" under Article 26. The question arises as to whether or not an agreement by which the parties have chosen the law of a State which is not among those laws eligible for choice under Article 22(1) is valid. A uniform answer should also be given to this question, on the basis of an "autonomous interpretation" of the concept of "agreement" under Article 22(1) of the Twin Regulations[20]. The wording of this article would lead to the conclusion that the parties cannot enter into such an agreement because it would violate its provisions. Moreover, under national law, the agreement might be invalid because its content would not be possible. However, a closer analysis of the Twin Regulations may lead to a different conclusion.

Indeed, the Twin Regulations make it possible for spouses and registered partners to choose "among the laws with which they have close links because of habitual residence or their nationality", according to Recital 45 of the Matrimonial Property Regulation and Recital 44 of the Regulation on the Property Consequences of Registered Partnerships. Let us return to the above case. The couple of Greek nationals lived for a long time in Spain during their married life, although they did not establish their first habitual residence there after marriage, nor did they have their habitual residence there at the time of the conclusion of the agreement. Nevertheless, it can be said that Spanish law is among the laws that have a close link with the couple by reason of habitual residence, albeit in a broader sense than that covered by the criteria of Article 22(1). Therefore, the agreement concluded by the Greek couple on the choice of Spanish law could be valid. This solution appears consistent with the principle of preservation of

19 This is an important purpose of the choice-of-law agreement: see Sbordone, F.: "Potere di scelta della legge applicabile al contratto e funzione delle norme di diritto internazionale privato", in AA.VV.: *Il diritto civile oggi. Compiti scientifici e didattici del civilista*, Napoli, 2006, p. 215 ff.

20 Kohler, C.: "Choice of the Applicable Law", cit., p. 201 f.

the act of private autonomy which is a constant in European legislation[21]. In this perspective, the validity of the choice-of-law agreement should at least be open to scrutiny by the competent court.

V. CONCLUDING REMARKS.

The issues that have been analysed concern the possibility that choice-of-law agreements under the Matrimonial Property Regulation or the Regulation on Property Consequences of Registered Partnerships have a content other than that outlined in the wording of Article 22.

The purpose of the analysis is to illustrate that it would be incorrect to argue that such agreements are *a priori* invalid or not permitted to parties' autonomy. A choice-of-law agreement is invalid if it is not possible to infer a precise choice of the parties from its content. However, the Twin Regulations have strengthened party autonomy as connecting factor for determining the applicable law in EU cross-border families. In this light, Article 22 does not appear to prevent the parties from agreeing that the law of the State of their first common habitual residence after the conclusion of the marriage or registered partnership is not applicable to their property relationships. The purpose of their agreement would be to change the order of application of the criteria listed in Article 26(1). This may be an agreement between the parties to change the law applicable to the matrimonial property regime or the property consequences of the registered partnership in accordance with Article 22(1) and (2).

In addition, the parties' agreement on the choice of one or more non-applicable laws may result in an indirect or implicit choice of the law of a State under Article 22(1). However, evidence should be provided that the parties have been informed of the range of laws eligible for choice and their consequences and risks, on the basis of appropriate legal advice.

It follows that it is up to the notary or the other legal professional assisting the parties in concluding the choice-of-law agreement to guide them in choosing the law that best serves their common interests in relation to the needs and expectations they have. Familiarity with the Twin Regulations is essential in this regard. However, inadequate legal advice may reflect on the content of the agreement and cause undue risk to the parties.

21 In the context of the Twin Regulations, the principle of preservation of the act of private autonomy is invoked by Ruggeri, L.: "Jurisdiction", cit., p. 67.

Beyond the possible actual scenarios, in the aforementioned doubtful cases, it is up to the national courts to request a preliminary ruling from the Court of Justice on the correct interpretation of the Regulations[22].

22 On the importance of constitutional and community judicial control in a spirit of loyal cooperation, see Perlingieri, P.: *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale*, Napoli, 2008, p. 18 ff.

BIBLIOGRAPHY

Bruno, P.: *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*, Milano, 2019, p. 183.

Gannagé, P.: "La Pénétration de l'autonomie de la volonté dans le droit international privé de la famille", *Revue critique de droit international privé*, 1992, pp. 425-439.

Gray, J.: *Party Autonomy in EU Private International Law. Choice of Court and Choice of Law in Family Matters and Succession*, Cambridge, 2021, p. 15 ff.

Henrich, D.: "Zur Parteiautonomie im europäisierten internationalen Familienrecht", in Verbeke, A., Scherpe, J.M., Declerck, C., Helms, T. and Senaeve, P. (ed.): *Confronting the frontiers of family and succession law: liber amicorum Walter Pintens*, I, Antwerp 2012, pp. 701–714.

Kinsch, P.: "Les fondements de l'autonomie de la volonté en droit national et en droit européen", in Panet, A., Fulchiron, H. and Wautelet, P. (ed.).: *L'autonomie de la volonté dans les relations familiales internationals*, Bruxelles, 2017, pp. 17-22.

Kohler, C.: "Choice of the Applicable Law", in Franzina, P. and Viarengo, I. (ed.): *The EU Regulations on the Property Regimes of International Couples. A Commentary*, Cheltenham, 2020, pp. 212-231.

Perlingieri, G.: "Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court", *The Italian Law Journal*, 2018, no. 2, p. 408 f.

Perlingieri, P.: *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale*, Napoli, 2008, p. 18 ff.

Ruggeri, L.: "Jurisdiction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J. and Ruggeri, L. (ed.): *Property Relations of Cross-Border Couples in the European Union*, Napoli, 2020, p. 66.

Sbordone, F.: "Potere di scelta della legge applicabile al contratto e funzione delle norme di diritto internazionale privato", in AA.VV.: *Il diritto civile oggi. Compiti scientifici e didattici del civilista*, Napoli, 2006, p. 215 ff.

Scherpe, J.M (ed.): *Marital Agreements and Private Autonomy in Comparative Perspective,* Oxford, 2012.

ZABRODINA, K.: "The law applicable to property regimes and agreements on the choice of court according to Regulations (EU) 1103 and 1104 of 2016", in KRAMBERGER ŠKERL, J., RUGGERI, L. and VITERBO, F.G. (ed.): *Case studies and best practices analysis to enhance EU Family and Succession Law. Working Paper,* Camerino, 2019, p. 199 f.

PUBLIC POLICY AS GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT UNDER REGULATION 2016/1103 AND REGULATION 2016/1104*

EL ORDEN PÚBLICO COMO MOTIVO DE DENEGACIÓN DE RECONOCIMIENTO Y EJECUCIÓN EN VIRTUD DE LOS REGLAMENTOS 2016/1103 Y 2016/1104

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 308-323

* This publication is a deliverable of the project "E-training on EU Family Property Regimes" (EU-FamPro; no. 101008404-JUST-AG2020/JUST-JTR- AG-2020), which is co-funded by the European Union's Justice Programme (2014-2020). The content of this paper only represents the views of the authors and is their sole responsibility. The European Commission does not accept any responsibility for using the information it contains.

Neža
POGORELČNIK
VOGRINC

ARTÍCULO RECIBIDO: 22 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: Public policy is one of the most well-known and important institutions of private international law. It can be found as grounds for refusal for recognition and enforcement in several European Regulations, among others also in the 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 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, together named as Twin Regulations. They namely both determine that a decision shall not be recognised if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought. The article studies the features of grounds of public policy and emphasises the related problems that are specific in the context of the Twin Regulations.

KEY WORDS: Procedural public policy; public policy, Regulation 2016/1103, Regulation 2016/1104, substantive public policy, twin Regulations.

RESUMEN: *El orden público es una de las instituciones más conocidas e importantes del Derecho internacional privado. Puede encontrarse como motivo de denegación de reconocimiento y ejecución en varios Reglamentos europeos, entre otros en el Reglamento (UE) 2016/1103 del Consejo, de 24 de junio de 2016, por el que se establece una cooperación reforzada en el ámbito de la competencia, la ley aplicable y el reconocimiento y la ejecución de las resoluciones en materia de regímenes económico matrimoniales, y en el Reglamento (UE) 2016/1104 del Consejo, de 24 de junio de 2016, por el que se establece una cooperación reforzada en el ámbito de la competencia, la ley aplicable y el reconocimiento y la ejecución de las resoluciones en materia de efectos patrimoniales de las uniones registradas, denominados conjuntamente "Reglamentos Gemelos". En concreto, ambos determinan que no se reconocerá una resolución si dicho reconocimiento es manifiestamente contrario al orden público del Estado miembro en el que se solicita el reconocimiento. El artículo estudia las características de los motivos de orden público y hace hincapié en los problemas relacionados que son específicos en el contexto de los "Reglamentos Gemelos".*

PALABRAS CLAVE: *Proceso de orden público; orden público; Reglamento 2016/1103, Reglamento 2016/1104; orden público sustantivo, Reglamentos Gemelos.*

I. BACKGROUND.

Public policy is one of the most well-known and important institutions of private international law. Such was and still is a way for individual countries to safeguard their own values, principles, and rules that comprise the foundations of their legal system. With the adoption of international and European legal documents on the recognition and enforcement of foreign court decisions, countries are exposed to the possible invasion of unknown foreign values that are different than their own. The cross-border flow of foreign decisions is generally possible, however not unrestrained. Public policy offers suitable protection and is historically and traditionally grounds for the refusal of recognition and enforcement in national private international rules. Nowadays, it can be found as grounds for refusal also in European regulations providing for the recognition and enforcement of foreign court decisions. The only attempt to remove such an obstructing rule was at the time of the drafting of the recast of Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Regulation 44/2001)[1]. Reviewing public policy (at least the substantive part thereof) when dealing with foreign decisions was not deemed to be in line with the European process of integration[2]. There was the idea that public policy as grounds for non-recognition and non-enforcement should be narrowed to only procedural public policy[3]. It was deemed to be a perfect opportunity to do that. It was the recast of a regulation that was well known by that time and often used in the Member States of the European Union (hereinafter: the EU). Additionally, the EU Member States already had (and still have) in some fields legal regulations that are partially unified and harmonised with the EU legal sources, as well as otherwise similar substantive law arrangements, and finally also have a similar historical and geographical background. It is possible to conclude that because of all these circumstances, the substantive public policies of these states are more or less similar if not the same.

1 OJ L 12, 16th January 2001.

2 Keresteš, T.: "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow", *Lexonomica*, 2016, 8, no. 2, p. 82.

3 Kramberger Škerl, J.: "Predlog spremembe uredbe Bruselj I", *Pravna praksa*, 2011, no. 4, p. 17.

• Neža Pogorelčnik Vogrinc
Assist Prof., Faculty of Law, University of Ljubljana. E-mail: neza.pogorelcnik@pf.uni-lj.si

This can be seen also in the small number of court decisions in which the courts of the EU Member States have refused the recognition or enforcement of a foreign court decision when using Regulation 44/2001 due to the public policy exception. An opportunity to narrow this exception was therefore appropriate, however the European Commission did not succeed with such a proposal[4].

The public policy exception therefore also appears in European regulations adopted subsequently[5]. Among these are also Council Regulation (EU) 2016/1103 of 24th 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[6] (hereinafter: Regulation 2016/1103) 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[7] (hereinafter: Regulation 2016/1104), which are together referred to as the Twin Regulations. These two regulations provide for literally the same grounds for refusal of recognition[8] and enforcement as Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[9] (hereinafter: Recognition 1215/2012), on one hand, and other regulations in the field of family law, on the other. See Council Regulation (EC) no. 2201/2003 of 27th 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 (hereinafter: Regulation 2201/2003)[10], its recast Council Regulation (EU) 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 (hereinafter: Regulation 2019/1111)[11], and finally also Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable

4 EU Member States opposed such a proposal and the *exequatur* procedure was instead removed.

5 It is different in EU regulations that provide for special instruments and different manners of their cross-border lives. See, for example, Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21th April 2004 creating a European enforcement order for uncontested claims [2004] OJ of the European Union L 143, Regulation (EC) no. 861/2007 of the European Parliament and of the Council of 11th July 2007 establishing a European Small Claims Procedure [2007] OJ of the European Union L 1991/1, and Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12th December 2006 creating a European order for payment procedure [2006] OJ of the European Union L 399/1.

6 OJ L 183, 8th July 2016.

7 OJ L 183, 8th July 2016.

8 Hereinafter, I will only use the term grounds for refusal of recognition. The names of the Twin Regulations include the term "enforcement", while the text thereof provides for the procedure for the declaration of enforceability. When contesting such a declaration, the party can use the same grounds that are otherwise provided for refusal of recognition (see Articles 51 and 37 of the Twin Regulations).

9 OJ L 351, 20th December 2012.

10 OJ L 338, 23th December 2003.

11 OJ L 178, 2th July 2019.

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[12]. Regardless of the fact that the concept of public policy has not changed since the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[13] (hereinafter: the Brussels Convention)[14], it is possible to conclude that the term has at least a slightly different meaning in the Twin Regulations.

II. CONTENT OF PUBLIC POLICY.

Article 37 of both Regulation 2016/1103 and Regulation 2016/1104 regarding public policy are the same: "A decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought"[15]. Compared to the leading EU regulations on civil and commercial law, the provisions in the Twin Regulations are stylistically the same as in Regulation 44/2001 (Article 34) and its predecessor, the Brussels Convention (Article 34). The main difference[16] is the use of the term "judgment" in Regulation 44/2001 and the Brussels Convention and the different use of the term "decision" in the Twin Regulations. The reason for such divergence is clear. The Twin Regulations can namely also apply to decisions by other bodies (for example, notaries public), not just courts.

As can be seen, the Twin Regulations, the same as other European regulations, do not provide a definition of public policy, also referred to as international public policy. They do not regulate the content thereof and the manner of its application. The EU therefore leaves it up to the Member State to apply it on their own. Consequently, the Member States interpret and apply the term determined in EU legal sources in the same manner as they do within their national legal systems. However, also national legislation generally does not provide for a definition of public policy. Broad interpretations of the term have only therefore been formed in legal theory and case law. A general explanation could be that public policy

12 OJ L 201/107, 27th July 2012.

13 OJ L 299, 31th December 1972.

14 Magnus, U., Mankowski, P.: *European Commentaries on Private International Law, ECPIL, Commentary, Brussels I bis Regulation, Volume I*, Cologne, 2016, p. 878. The only visible difference in the relevant provision of Regulation 44/2001 compared to the Brussels Convention is the addition of the adjective "manifestly". From then on, all of the relevant EU regulations require effects that are manifestly contrary to public policy. The change was aimed at narrowing the exception and lowering the possibilities for refusal of recognition and enforcement; however it did not have an evident effect in practise. For more on this, see Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 881 and Cuniberti, G.: "Article 37 Grounds of non-recognition", in Viarengo, I. and Franzina, P. (ed.): *The Regulations on the Property Regimes of International Couples*, Edward Elgar Publishing, Cheltenham, 2020, p. 347.

15 The wording of the provision is completely the same also in Article 40 of Regulation 655/2012.

16 Another insignificant difference is the use of the term *ordre public* in the English version of the text. It is the French term for "public policy". Such an additional name for the same term was not used in Regulation 44/2001, but appears in all subsequent regulations.

is "a set of values on which the legal, social and cultural order of an individual state is based and which must (also) be respected in so-called relations with an international element"[17]. Not all national mandatory rules are considered to be part of public policy[18], but only the most important ones, regarding which it is sensible that they are used in international matters[19]. The principles and rules protected by public policy are the ones that are more fundamental than those that are protected with overriding mandatory provisions[20]. Due to its ambiguity, doubt exists regarding the moral principles as a part of public policy[21]. This dilemma can be attributed mostly to the openness and indefinableness of the term morality itself. However, a general instruction of the CJEU for the Member States regarding public policy is to consider whether the recognition of a foreign decision "would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle" and that "the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order"[22].

Public policy is therefore a national thing and depends on the national law. The term can therefore differ from country to country, with each of them protecting their fundamental rules, principles, and values. It evolves over time and necessarily also with the social and legal changes in an individual country. Its content is not clear and definite all the time, but is determined only in concrete cases – when considering whether a specific foreign decision (or the recognition thereof) is contrary to public policy. Due to the uncertainties accompanying this mental process, proposals to make it more predictable can be found in legal theory. Gössl proposes that a way of determining whether or how the public policy exception applies in a specific case should be more coherent among the EU Member States[23]. As an advantage of such a harmonised approach, she sees a higher level of certainty for the parties that are involved in a specific case. While this could certainly be a positive outcome, in my opinion it does not outweigh the challenges and obstacles

17 Kramberger Škerl, J.: "Evropeizacija javnega reda v mednarodnem zasebnem pravu", *Pravni letopis*, 2008, p. 349.

18 The Slovenian Supreme Court has confirmed this several times when deciding on the recognition of foreign court decisions, using a different legal rule regarding statutory interest than that which applies in Slovenia. The Slovenian provision regarding statutory interest is *ius cogens*. Not all violations of *ius cogens* legal rules are also violations of public policy. A provision regarding statutory interest is *ius cogens* within the country; however, it is not so fundamental and essential that its violation would lead to the refusal of recognition. See Cpg 7/2016, 15th July 2016, and Cp 1/2016, 11th February 2016.

19 Keresteš, T.: "Public Policy", cit., p. 79.

20 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford, 2019, p. 153.

21 Keresteš, T.: "Public Policy", cit., p. 79.

22 Case C302/13, flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautisk□ lidosta R□ga VAS, Air Baltic Corporation AS, ECLI:EU:C:2014:2319, para. 49.

23 Gössl, S. L.: "The public policy exception in the European civil justice system", *The European Legal Forum*, 2016, no. 4, p. 92.

that would come about with the attempt to design criteria as regards how to consider and decide on the public policy exception.

While the EU has let Member States autonomously interpret and apply the public policy exception, as is determined in EU regulations, they are nevertheless not completely free. Beside the "national" part of public policy, national judges must also consider another aspect. Countries that are Member States of the EU or the Council of Europe are obliged to respect the values thereof[24]. These represent the so-called European part of public policy, or European public policy[25]. This part of public policy should not be interpreted freely by individual countries. Countries are bound to the interpretations of the Court of Justice of the European Union (hereinafter: the CJEU) and the European Court of Human Rights (hereinafter: the ECtHR). Because of that, it is not to be expected that there will be divergences in the understanding and interpretation of European public policy among different Member States. The CJEU has indirectly confirmed in its case law that within the public policy exception national law and Community law are equivalent[26]. The court of recognition must therefore inspect also whether the recognition of a specific decision would be contrary to the fundamental principles and rights of EU law[27].

The application of the public policy exception of the Twin Regulations therefore derives from the national concept of the public policy; however, it is mandatory to respect the limits set by the CJEU in its decisions[28]. For a national court to be able to apply the public policy exception it is necessary to provide extensive argumentation on why certain values constitute a (national) public policy. If confronted with a specific case, the CJEU inspects whether such arguments are true, which contributes to the Europeanization of the public policy exception[29].

As in other European regulations, also the Twin Regulations enable the public policy exception only in cases of manifest contrariety to public policy. This entails that "normal" and "average" contrarieties are not enough for the exception under Article 37(a) of the Twin Regulations to be used. This is deemed to hold when the public policy of the Member State of recognition would be violated "to an

24 Member States are therefore obliged to respect fundamental principles of the EU. However, it is not possible to say that European public policy includes all European legal sources, despite the fact that EU law is hierarchically above the national. Kramberger Škerl, J.: "Javni red pri priznanju in izvršitvi tujih sodnih odločb", *Zbornik znanstvenih razprav*, 2005, pp. 5-6.

25 Kramberger Škerl, J., "Evropeizacija javnega", cit., p. 352, distinguishes between two parts of European public policy. These are Community public policy, which includes European Union values, and Convention public policy, which includes the values of the Council of Europe.

26 Case C-38/98, Renault SA v Maxicar SpA and Orazio Formento, ECLI:EU:C:2000:225. See Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 886-887.

27 C-681/13, Diageo Brands BV v Simiramida-04 EOOD, ECLI:EU:C:2015:471, paras. 50–51.

28 Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 878.

29 Gössl, S. L.: "The public policy", cit., pp. 87, 89.

unacceptable degree"[30]. Only violations of certain severity are relevant. The court may refuse recognition in the case of violations that cannot be tolerated under any circumstances[31]. However, some opine that such a requirement would entail the need for a thorough investigation of a specific decision and the procedure for its issuance, which is not appropriate[32]. According to legal theory, consideration of such gravity depends on the existence of a close and significant link between the specific case and the Member State addressed[33]. Such a link can, for example, be the nationality or citizenship of one of the parties in the relevant Member State. The closer the link, the easier and more often the recognition of a foreign decision might violate the public policy[34]. The application of such a link undoubtedly leads to different outcomes of the decision on refusal in different Member States even if identical content as to the term public policy is applied in all of them[35]. While national jurisdictions often require and apply such a link[36], neither the Twin Regulations nor any other European regulations regulating recognition and enforcement explicitly mention it. It is possible to conclude that it is therefore not relevant when applying the public policy exception within these regulations[37].

As public policy as a ground for non-recognition and non-enforcement has found a place in several European regulations, in the past the CJEU has decided to interpret this term in many cases. Because the same term is also used in Regulation 2016/1103 and Regulation 2016/1104, CJEU decisions can and should be used reasonably also when interpreting Article 37(a) of the Twin Regulations[38]. However, subsidiary and reasonable application of the CJEU decision regarding substantive public policy to the Twin Regulations will not always be appropriate.

30 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B: *The EU Regulations*, cit., p. 153.

31 Pamboukis, H. P.: *EU Succession Regulation No 650/2012: A Commentary*, Oxford, 2017, p. 455.

32 Cuniberti, G.: "Article 37 Grounds of non-recognition", in Viarengo, I. and Franzina, P. (ed.): *The Regulations on the Property Regimes of International Couples,* Cheltenham, 2020, p. 347.

33 Cuniberti, G.: "Article 37", cit., p. 348; Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 882; Gössl, S. L.: "The public policy", cit., p. 90.

34 Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 882. Gössl, S. L.: "The public policy", cit., p. 90, emphasises that when a "right of a considerable interest" is involved, the link between the case and the court is less important. Gössl, S. L., "The public policy", cit., p. 90, emphasises that in cases of unequal treatment between men and women, the opinion exists that a link between the court and the specific case is not mandatory.

35 Gössl, S. L.: "The public policy", cit., p. 90. She emphasises that nevertheless it is not to be expected that the courts will refuse the application of a public policy exception due to the non-existence of a link to the case. A minimum link can namely be established with the acceptance of the jurisdiction of the court, which already requires a certain link to the forum.

36 See Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations,* cit., p. 153; Gössl, S. L.: "The public policy", cit., p. 90.

37 Cuniberti, G.: "Article 37", cit., p. 348.

38 Cuniberti, G., "Article 37", cit., p. 346.

1. Substantive public policy.

The Twin Regulations regulate a specific field of law that is in many aspects different than traditional civil and commercial matters. A substantive public policy exception as grounds for refusal of recognition and enforcement was not really used in case law under the Brussels Convention, Regulation 44/2001, and Regulation 1215/2012[39]. The reason is that substantive national legislation in the field of civil and commercial law is partially harmonised and unified, and public policy related to these fields is more or less the same in different EU Member States. However, this is not also true for the field of family law. Furthermore, it is a very sensitive matter. Due to the different cultures, religions, and the development of societies, even European countries (let alone third countries) have different regulations regarding the institutions of marriage and registered partnership. Therefore, there is a greater chance of finding a national rule, the result of which would be considered to be contrary to public policy in the Member State of recognition (e.g. favouring a male spouse or a partner above his female spouse or partner when dividing their property). This is especially true due to the particularly sensitive questions that accompany these matters (e.g. the status of same-sex couples, same-sex marriage, and the registration of a heterosexual partnership). However, when a specific court ponders arguments regarding the manifest contrariety of a foreign decision to the public policy of *lex fori*, it may under no circumstances review a decision[40] as to its substance (Article 40 of Regulation 2016/1103 and Regulation 2016/1104). This rule severely limits a court's possibility to consider the effects of the recognition of a decision and the contradiction thereof with the substantive public policy[41]. Every Member State must therefore assume the standpoint that EU Member States correctly apply in the specific case the applicable national law and EU law. The opposite option would ruin mutual trust, which is the foundation of the successful regime of the cross-border recognition of foreign decisions.

The court, therefore, must not audit either the findings of facts or the application of substantive law[42]. The wrong application of a substantive law is not a reason for the application of the public policy exception[43]. Neither is the belief that the court (of recognition) would have reached a different decision on the

39 When a public policy exception was applied, it was mostly due to procedural violations.

40 Article 36 of Regulation 44/2001 and Article 52 of Regulation 1215/2012 contain a similar provision. Interestingly, these regulations regarding the cross-border enforcement of decisions in the field of civil and commercial law prohibit a merely substantive review of the *judgment*, but not the *certificate*. Consequently, the information in the certificate may be subject to a review in the state in which recognition is sought. Pamboukis, H. P.: *EU Succession Regulation*, cit., p. 465, and Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 177.

41 Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 883.

42 In Decision Cpg 8/2019, 24th September 2019, the Supreme Court of the Republic of Slovenia confirmed that the (possible) wrong application of national, EU, or international law when issuing a specific court decision is not a ground for refusing recognition.

43 Case C-38/98, Renault SA v Maxicar SpA and Orazio Formento, ECLI:EU:C:2000:225, para. 29

merits if it had decided on the specific case on its own[44]. Additionally, the fact that in the specific case the applied substantive law is different than the *lex fori* is not a reason to apply the public policy exception[45]. When deciding on the public policy exception, the court therefore only needs to take into account the effects that would result from the recognition of a specific foreign decision. The only relevant question is therefore whether such effects would be (manifestly) contrary to public policy in the Member State in which recognition is sought.

The chances of a substantive public policy exception applying in a specific case are rather low also due to the impact of the provision of Article 31 of the Twin Regulations (in the English version) named "Public policy (*ordre public*)". This is a provision in the chapter on applicable law that determines that the application of a provision of the law of any state specified by the Twin Regulations may be refused if such application is manifestly incompatible with the public policy of the forum[46]. The court of origin can therefore refuse the application of a foreign legal provision if the effects of the application of such are contrary to public policy. This weighing differs from the one determined in Article 37 (a) of the Twin Regulations. While the court of origin decides whether the application of a specific provision would be contrary to public policy, the court of recognition examines only whether the effects of the recognition of a specific foreign decision (and not its content) would be contrary to public policy. Regarding the latter, it is not relevant even if an applied foreign law itself is contrary to public policy. What is decisive is only what the effects of the recognition of such foreign decision are. Bergquist and Cuniberti give the example of polygamous marriages[47]. While a Member State would not apply a foreign law allowing such a marriage due to it contradicting public policy, the same Member State might recognise a foreign court decision using such a law, because its effects (the division of assets) are not contrary to the public policy[48]. This is the so-called "attenuated" effect of public policy (in French, *effet atténué*, in German, *abgeschwächte Wirkung des ordre public*), which protects the already acquired rights of the parties[49].

44 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 205.

45 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 153-154. The CJEU ruled in C-7/98, Dieter Krombach v André Bamberski, ECLI:EU:C:2000:164, para. 36, that the difference in legislation is not a violation of the public policy of the Member State of recognition and enforcement.

46 The provision is not an exception. It can also be found in other EU regulations. See, for example, Article 35 of Regulation 655/2012.

47 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 154, and Cuniberti, G.: "Article 37", cit., p. 347–348.

48 The same principle can be found in the Slovenian Supreme Court case II Ips 462/2009, 28th January 2000. The Slovenian court was deciding on the recognition of a court decision issued in the USA, regarding the adoption of a child by a same-sex couple. The court decided that the recognition of such decision is not contrary to public policy and therefore recognised it, even if Slovenian substantive law would not allow for such adoption. For more, see Kramberger Škerl, J.: "Nerazumevanje pridržka javnega reda in posvojitev s strani istospolnih partnerjev", *Pravna Praksa*, 2010, nos. 29-30, p. 26 ff.

49 For more on this, see Kramberger Škerl, J., "Javni red", cit., p. 5-6.

Both provisions that include the institution of public policy use the same level of seriousness. Article 31 of the Twin Regulations requires a manifest incompatibility and Article 37(a) of the Twin Regulations requires manifest contrariety. Despite the impression that the level of gravity is the same, legal theory emphasises that public order as an exception to recognition must be applied more strictly[50]. Consequently, it is easier to refuse the application of a foreign legal rule than to refuse recognition of a foreign decision. Such a first review of the possible violations of the public policy of the Member State of origin at the stage of the application of a foreign law lowers the chance that the recognition of a foreign decision would subsequently have manifestly contrary effects on the public policy of the Member State of recognition.

2. Procedural public policy.

Besides substantive public policy, there is also procedural public policy, which together form general public policy under Article 37(a) of the Twin Regulations. It includes "those fundamental principles and institutes of civil procedure without which there can be no democratic court procedure or rule of law."[51] However, national legislation is not the only source of procedural rules. It is necessary to also respect the ECHR (especially Article 6) and the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) (especially Article 47). The right to a fair trial therefore binds several countries and is a foundation for all EU Member States. Consequently, it is unquestionably a part of procedural public policy, which the Member States participating in the enhanced cooperation need to take into account when considering refusing recognition due to the public policy exception.

However, not all of the procedural mistakes made in the procedure for issuing the decision are enough to apply the public policy exception. Only fundamental ones can have such a serious result. The court of recognition must consider the entire proceedings for issuing the specific decision.

Regardless of the fact that all European countries (and also some others) are bound by the ECHR and the Charter and are therefore obliged to respect them in national court procedures, a not insignificant extent of case law on refusals due to procedural public policy exceptions exists. When applying the Brussels Convention and Regulation 44/2001, the CJEU has already dealt with cases in which recognition was established to have effects contrary to public policy. These

50 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 153. Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B., *The EU Regulations*, cit., p. 156, attribute this to the fact that public policy in Article 31 of Regulation 2016/1103 and Regulation 2016/1104 consists of only substantive public policy, while Article 37 (a) of Regulation 2016/1103 and Regulation 2016/1104 also include procedural public policy.

51 Kramberger Škerl, J., "Javni red", cit., pp. 255.

include: a case[52] in which the defendant was prohibited from defending himself due to the fact that he did not physically appear at the court; a case[53] involving the exclusion of the defendant from the proceedings because he had not respected a certain order of the court; and a case[54] involving a judgment issued in default of appearance without giving either the reasoning of its merits or an assessment of the subject matter. The existence of violations of procedural fundamental rights that are serious enough to have effects contrary to public policy can lead to two conclusions. Either the countries disrespect the fundamental procedural rights in the national procedures despite their obligation to do so, or there are different interpretations in different countries of what the right to a fair trial means.

When talking about refusing recognition of a foreign decision due to a breach of procedural principles, the first thing to think about would not be the public policy exception. It would most likely be grounds to refuse recognition due to a decision issued in default of appearance (Article 37 (b) of the Twin Regulations). This can be the case if the defendant was not served the document that instituted the proceedings or an equivalent document in sufficient time and in such a manner so as to enable him or her to arrange for his or her defence[55]. However, such a rule cannot be applied if the defendant failed to commence proceedings to challenge the decision when it was possible for him or her to do so. This is a narrower ground compared to public policy and is of a strictly procedural nature. If in a specific case a party's procedural rights were violated, indent (b) is considered first. Indent (a) is considered only if such an exception cannot be applied[56]. The different grounds for refusal do not overlap[57]. Public policy therefore does not cover various violations that are covered by other indents of Article 37 of the Twin Regulations. The public policy exception is therefore a safety net for catching violations that do not entail other grounds for non-recognition but are contrary to public policy.

52 C-7/98, Dieter Krombach v André Bamberski, ECLI:EU:C:2000:164.

53 C-394/07, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company, ECLI:EU:C:2009:219.

54 C619/10, Trade Agency Ltd v Seramico Investments Ltd, ECLI:EU:C:2012:531.

55 Kramberger Škerl, J.,"The Recognition and Enforcement of Foreign Judgments in Slovenia; National Law and the Brussels I (Recast) Regulation", *Yearbook of Private International Law*, 2018/2019, 20, p. 294, emphasises that the principle of contradiction is regulated as a special ground for non-recognition (and not as a part of public policy), "to emphasise its importance and eliminate every possible doubt that its violation could be the reason for the refusal of recognition and enforcement."

56 The CJEU stressed the subsidiary nature of the public policy exception in case 145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61, para. 21. Magnus, U. and Mankowski, P., *European Commentaries*, cit., p. 882, emphasises that this is an application of the principle *lex specialis derogate generalis*.

57 Magnus, U. and Mankowski, P.: *European Commentaries*, cit., p. 882.

Generally, it is necessary to interpret the public policy exception strictly[58], rigidly, and narrowly[59]. The mere fact that the national procedural law of the Member State of recognition is different than the national procedural law that was used when issuing a court decision is not a sufficient reason to apply the public policy exception[60]. The court of recognition must also not review the correctness of the application of the provisions on international jurisdiction under Regulation 2016/1103 and Regulation 2016/1104[61]. This is clearly determined in Article 39/II of the Twin Regulations, whereas the provisions are slightly different. While both exclude a review of international jurisdiction under Articles 4–11, Regulation 2016/1104 additionally excludes international jurisdiction for counterclaims under Article 12. An explanation for such a differentiation cannot be found in the possibly different legal arrangements of both regulations. The only option is therefore that the described difference is unintentional. Courts of recognition shall therefore not review the correctness of the application of any provisions of the Twin Regulations on international jurisdiction.

III. THE SPECIFICS OF PUBLIC POLICY IN THE TWIN REGULATIONS.

As already mentioned, public policy has survived in more or less the same form since the Brussels Convention. Nevertheless, it is possible to conclude that the term has a slightly different value in the Twin Regulations. The principle of universal application (Article 20 of Twin Regulations) determines that a law designated as applicable by the rules of either of the Twin Regulations shall be applied whether or not it is the law of an EU Member State taking part in the enhanced cooperation. It is possible that the law of other EU Member States or of third countries is applied when issuing a specific decision. It is therefore realistic to expect that in some cases a legal system with completely different values (such as Sharia law) is applied[62]. Recognition of such a decision, although issued in one of the EU Member States that are bound by the Twin Regulations, can therefore cause a violation of the fundamental principles, values, or concepts of the Member State of recognition. In order to ensure better protection of the sensitive field that is the focus of the Twin Regulations, they explicitly require the observance of fundamental rights and principles.

58 The CJEU emphasised in case 145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61, that the public policy exception should only be applied in exceptional cases.

59 Dougan, F.: "Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov", in GALIČ, A. and Kramberger Škerl, J. (ed.): *Liber amicorum Dragica Wedam Lukić*, Ljubljana, 2019, p. 245.

60 Gössl, S. L.: "The public policy", cit., p. 88.

61 The CJEU stated similar in the case C-7/98, Dieter Krombach v André Bamberski, ECLI:EU:C:2000:164, para. 32.

62 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 153.

This is the first time that a European regulation includes the obligation to respect the Charter in the text itself. In other regulations, such a rule can only be found among the Recitals (see, for example, Regulation 2201/2003 and Regulation 2019/1111). When deciding on grounds for refusal of recognition, the courts and other competent authorities of the Member States shall therefore observe the fundamental rights and principles recognised in the Charter (Article 38 of the Twin Regulations). These are, for example, equality before the law (Article 20 of the Charter), equality between women and men (Article 23 of the Charter) and the right to property (Article 17 of the Charter). Among those, the Twin Regulations explicitly underline the principle of non-discrimination (Article 21 of the Charter), which reads "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

The subject matter of the Twin Regulations is the property consequences of marriage and registered partnerships. These include, *inter alia*, also matters involving the partition, distribution, or liquidation of the property, giving powers and rights regarding the property to each of the individuals in the couple, and the classification of the property of either or both of them into different categories. When dealing with these questions, there are numerous possibilities to discriminate against one spouse or partner based on any of the personal features mentioned in Article 21 of the Charter. While all of them are important, in my opinion two stand out in the Twin Regulations and have a greater possibility of being applied.

The first such personal feature is an individual's sex. Taking into account the historical background and what is still a tradition in some societies, the tendency might exist to favour a male spouse or partner when deciding on property questions. *Sharia* law, for example, provides that 2/3 of spouses' total assets go to the (ex-)husband and 1/3 to the (ex)wife[63]. If a Member State faces a court decision on dividing spouses' assets using such a rule, it can refuse its recognition due to it contravening its public policy.

The second personal feature that is very likely to be grounds for discrimination considering the topic of the Twin Regulations is sexual orientation. It is not a secret that the Twin Regulations were adopted using a mechanism of enhanced cooperation due to the fear of some EU Member States that a foreign decision would acknowledge various forms of same-sex institutions. Depending on the national regulations, the Twin Regulations are also used for same-sex marriages

63 Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations*, cit., p. 221.

and same-sex registered partnerships. Even if it is true that in such cases both individuals in the couple are the same sex and therefore discrimination between them on the basis of sexual orientation might not be a problem, the general principle of non-discrimination on the basis of sexual orientation is an important value in the Twin Regulations.

While the required observance of fundamental rights applies to all grounds for refusal listed in Article 37 of the Twin Regulations, it is evident that it is especially important for the public policy exception. Other grounds are regulated in more detail and the Twin Regulations themselves precisely determine when individual grounds exist. On the contrary, the ground of public policy is open and its content is not obvious only by reading the provision of Article 37 of the Twin Regulations. The help provided in the instructions in Article 38 is therefore welcome.

IV. INSTEAD OF A CONCLUSION.

The declaration of the enforceability of decisions is automatic within the Twin Regulations (*ipso iure*) (Article 47). Therefore, there is no phase in which the court would consider any of the four grounds for non-recognition on its own motion. The party that opposes such automatic recognition must apply appropriate legal remedies, in which he or she must claim and prove the existence of a specific ground. Then an adversarial procedure begins (Article 49 of the Twin Regulations). When searching for possible grounds for refusal, a party and the competent court are limited to those listed in Article 37 of the Twin Regulations. The national legislation of Member States cannot provide for any other additional grounds for refusal[64]. If a court establishes that the effects of recognition would be contrary to public policy, it does not have discretion, but is obliged to refuse recognition. This is the so-called negative function of the public policy exception[65].

Despite several academic articles on public policy in private international law, the court in each specific case is the one to decide on the content of such legal standard in the specific case. It has to interpret it strictly and with the acknowledgement that the (foreign) decision has already given specific rights and legal status to the party and therefore the refusal of the recognition and enforcement of such decision is a serious limitation and interference with his or her legal position.

64 Cazorla González, M. J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 136.

65 Gössl, S. L.: "The public policy", cit., p. 86.

BIBLIOGRAPHY

Bergquist, U., Damascelli, D., Frimston, R., Lagarde, P. and Reinhartz, B.: *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford, 2019, p. 153.

Cazorla González, M. J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 136.

Cuniberti, G.: "Article 37 Grounds of non-recognition", in Viarengo, I. and Franzina, P. (ed.): *The Regulations on the Property Regimes of International Couples*, Cheltenham, 2020, p. 347.

Dougan, F.: "Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov", in GALIČ, A. and Kramberger Škerl, J. (ed.): *Liber amicorum Dragica Wedam Lukić*, Ljubljana, 2019, p. 245.

Gössl, S. L.: "The public policy exception in the European civil justice system", *The European Legal Forum*, 2016, no. 4, p. 92.

Keresteš, T.: "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow", *Lexonomica*, 2016, 8, no. 2, p. 82.

Kramberger Škerl, J., "Javni red pri priznanju in izvršitvi tujih sodnih odločb", *Zbornik znanstvenih razprav*, 2005, pp. 5-6.

Kramberger Škerl, J.: "Evropeizacija javnega reda v mednarodnem zasebnem pravu", *Pravni letopis*, 2008, p. 349.

Kramberger Škerl, J.: "Predlog spremembe uredbe Bruselj I", *Pravna praksa*, 2011, no. 4, p. 17.

Magnus, U., Mankowski, P.: *European Commentaries on Private International Law, ECPIL, Commentary, Brussels I bis Regulation, Volume I*, Cologne, 2016, p. 878.

Mankowski, P.: *European Commentaries on Private International Law, ECPIL, Commentary, Brussels I bis Regulation, Volume I*, Cologne, 2016, p. 886-887.

Pamboukis, H. P.: *EU Succession Regulation No 650/2012: A Commentary*, Oxford, 2017, p. 455.

LAW AND MORALS IN THE APPLICATION OF THE PUBLIC POLICY EXCEPTION UNDER THE TWIN REGULATIONS 1103 AND 1104 OF 2016

DERECHO Y MORAL EN LA APLICACIÓN DE LA EXCEPCIÓN DE ORDEN PÚBLICO EN VIRTUD DE LOS REGLAMENTOS 2016/1103 Y 2016/1104

Actualidad Jurídica Iberoamericana Nº 15, agosto 2021, ISSN: 2386-4567, pp. 324-349

Giovanni
ZARRA

ARTÍCULO RECIBIDO: 7 de mayo de 2021
ARTÍCULO APROBADO: 1 de julio de 2021

ABSTRACT: This paper discusses the interactions between fundamental principles of domestic legal systems and non-legal standards in the application of the public policy Generalklausel within the context of the twin Regulations 1103 and 1104 of 2016. In particular, this paper argues that public policy is composed of legal principles only and that there is no space for extra legal standards when the circulation of foreign deeds, decisions and laws is in discussion. This consideration has two consequences. Firstly, the role of good morals within contemporary private international law is extremely reduced. Secondly, there is no space for the direct application of soft-law standards when public policy is at stake.

KEY WORDS: Morals; Public Policy; Generalklauseln; Overriding Mandatory Rules; Good Morals; Soft Law.

RESUMEN: *En este trabajo se analizan las interacciones entre los principios fundamentales de los sistemas jurídicos nacionales y las normas no jurídicas en la aplicación del orden público Generalklausel en el contexto de los Reglamentos 2016/1103 y 2016/1104. En particular, este trabajo sostiene que el orden público se compone únicamente de principios jurídicos y que no hay espacio para normas extrajurídicas cuando se discute la circulación de escrituras, decisiones y leyes extranjeras. Esta consideración tiene dos consecuencias. En primer lugar, el papel de las buenas costumbres dentro del Derecho internacional privado contemporáneo es extremadamente reducido. En segundo lugar, no hay espacio para la aplicación directa de normas de soft-law cuando está en juego el orden público.*

PALABRAS CLAVE: *Derecho; Moral; Orden público; Generalklauseln; Anulación de las reglas obligatorias; Buena fe; Soft Law.*

TABLE OF CONTENTS: I. THE ROLE OF PUBLIC POLICY WITHIN THE TWIN REGULATIONS 1103 AND 1104 OF 2016 AND THE ISSUE CONCERNING THE APPLICABILITY OF NON LEGAL STANDARDS AS PART OF THIS GENERALKLAUSEL.- II. THE ROLE OF MORALS IN THE JUDICIAL APPLICATION OF PUBLIC POLICY.- III. THE INTERPLAY BETWEEN PUBLIC POLICY AND GOOD MORALS.- IV. THE ROLE OF SOFT-LAW IN DETERMINING THE CONTENT OF PUBLIC POLICY.

I. THE ROLE OF PUBLIC POLICY WITHIN THE TWIN REGULATIONS 1103 AND 1104 OF 2016 AND THE ISSUE CONCERNING TH APPLICABILITY OF NON LEGAL STANDARDS AS PART OF THIS *GENERALKLAUSEL*.

The twins EU Regulations 1103 and 1104 of 24 June 2016 (in force since 29 January 2019) – implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of (*i*) matrimonial property regimes and (*ii*) registered partnerships (respectively) – constitute an important step within the process of uniformization of family law matters in the context of the European Union's private international law[1]. However, this process shall necessarily *take its time* because, in order to ensure that the harmony between EU legal system in family matters is gradually reached without sacrificing the domestic identities[2], it is first of all necessary to wait for more *cultural* homogeneity in family matters between EU Member States. Uniformity is important, but not at all costs; and, as we will see, Regulations 1103 and 1104 of 2016[3] seem to be a good point of balance in the tension between uniformity and protection of domestic traditions.

The EU legislator, in light of the socially and culturally fragmented scenario concerning family law, has never had the intention of providing a complete

1 This is the necessary completion of the trend started with the already mentioned Regulation 2201 of 2003, as well as Regulations 4 of 2009 (on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations), 1259 of 2010 (so called "Rome III Regulation", implementing enhanced cooperation in the area of the law applicable to divorce and legal separation) and 650 of 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).

2 On this subject, see, more generally Perlingieri, P.: "Il rispetto dell'identità nazionale nel sistema italo europeo", *Foro. Nap.*, 2014, p. 449 ff.

3 Please note that, unless in the exceptional cases where there is a significant difference between the Regulations, we will only refer to the provisions of Regulation 1103 (which find also equal place, *mutatis mutandis*, in regulation 1104).

• Giovanni Zarra
Adjunct Professor of International Law and International Litigation, Federico II – University of Naples. E-mail: giovanni.zarra@unina.it

primary law system for EU family law. Instead, it is trying to achieve the objective of harmonization in Europe through private international law (i.e. providing for uniform criteria for jurisdiction, applicable law and circulation of judgments). Should the circumstances allow to do so, and only in a second moment, the EU legislator will perhaps try to issue an embryonic form of EU primary legislation in matters of family[4].

Among the rationales inspiring the twins Regulations 1103 and 1104[5], uniformity and legal certainty surely play essential roles.

Uniformity is expressed, first of all, by the ideas of universal application and unity of applicable law[6], which respectively set forth that (*i*) "the law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State" (art. 20); and (*ii*) "[t]he law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located" (Art. 21, which applies save as for the application of the *lex rei sitae* to real estates). Secondly, uniformity is ensured by the autonomous definition[7] that the EU legislator has given of "matrimonial property regime"[8], which, according to article 3 of the Regulation 1103, means "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"[9]. Uniformity, however, as already stressed above, should not be pursued at any cost. The Regulations do not even try to offer a single definition of the concepts of marriage (which continue to be defined and regulated, sometimes very differently,

4 Ricci, C.: *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giudiziario europeo*, Padova, 2020, p. 32.

5 For a general analysis concerning the Regulations see Damascelli, D.: "Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law", *Trusts*, 2018, p. 1 ff.

6 See Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", *Riv. dir. int. priv. e proc.*, 2018, p. 44 ff.

7 This is a general tendency of EU law. See Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniug» del regolamento UE 2016/1103 e i modelli nazionali", *Nuove Leggi Civili Commentate*, 2019, p. 1538 ff. According to CJEU, judgment of 6 October 1982, Case C-283/81, *Srl CILFIT e Lanificio di Gavardo SpA v. Ministero della Sanità*, para. 19, Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Therefore (para. 20) "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

8 Or, in Regulation 1104, of "property consequences of registered partnerships".

9 Similarly, art. 3 of Regulation 1104 states that "'property consequences of a registered partnership' means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution". This definition derived from the decision of the CJEU, 27 March 1979, *Jacques de Cavel v. Louise de Cavel*, Case C-143/78, para. 7. In this regard, Las Casas, A.: "La nozione autonoma", cit., p. 1540, correctly noted that the notion of "patrimonial regime" is extended to the regulation also to relationships with third parties, thus creating a notion which is broader than its usual meaning.

by domestic systems of law)[10] and give adequate relevance to imperative norms of domestic systems, either expressed by principles (public policy) or more specific rules (overriding mandatory rules).

Strictly related is the need for *legal certainty*, which inspires the entire EU system of private international law: a party should be able to know in advance where it may start legal proceedings, which law will be applied and under what conditions a judgment may be recognized. In matters of applicable law, this is clearly expressed by Recital 43 of the Regulations, according to which "[i]n order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable spouses to know in advance which law will apply to their matrimonial property regime. Harmonised conflict-of-law rules should therefore be introduced in order to avoid contradictory results". With regard to the enforcement of foreign judgments concerning matrimonial relationships, legal certainty requires that, in general, these judgments are enforced throughout the legal systems participating to the enhanced cooperation and, in predetermined exceptional cases, such a circulation of judgments may be limited.

Relatedly, Member States which have taken part in this enhanced cooperation have been inspired by a *favor* for the circulation of judgments which enforce patrimonial regimes arising from marriages or registered partnerships[11]. In this regard, it is significant that the Regulations contain a rule, namely art. 9, which has been enacted with the precise purpose of avoiding the circulation of decisions denying the recognition of patrimonial regimes arising from marriages or registered partnership. Indeed, according to this rule, if a court of the Member State that has jurisdiction pursuant to the Regulations "holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction". This provision clearly expresses the idea that is better to decline jurisdiction than to have a judgment against the recognition of patrimonial relationships between spouses or members

10 Similarly, Art. 3 of Regulation 1104, concerning registered partnerships, states that "'registered partnership' means 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". At closer look, this is not a substantive definition of registered partnership and the provision merely identify the formal requirement of registration. On the coordination of this definition with the one provided by the Italian law n. 76 of 2016 (so-called "Cirinnà law") see Ricci, C.: *Giurisdizione*, cit., p. 72 ff.

11 This favor is expressed by the limited number of causes which may justify non-recognition according to the Regulations. Indeed, according to article 37, "[a] decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought; (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so; (c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought; (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought".

of a registered partnership, considering that, as a matter of principle, that judgment should circulate throughout Europe.

In light of these guiding principles – moving between European uniformity and the safeguard of domestic fundamental principles – it will be possible to understand why the Regulations give also relevance to domestic imperative norms in the private international law system concerning patrimonial regimes in the EU even if, as all EU private international law regulations, they try to limitate at most the recourse to these "safety valves". In this regard, Article 31 (titled "Public policy [*ordre public*]") provides 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", while article 30 (titled "Overriding mandatory provisions") states that "1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". The reference respectively applies to those fundamental principles and rules which are considered so important as to require their application without exception also to transnational cases.

The two provisions find some clarification in Recitals 53 and 54, which affirm that both public policy and mandatory rules shall be applied in "exceptional circumstances" and on the basis of "considerations of public interest". In this regard, while it is today acknowledged that public policy is a *Generalklausel* composed by the fundamental principles of a State which are considered so essential as to require application in all cases (including those with a foreign element)[12] where the concrete application of foreign law generates a result which is incompatible with such principles, overriding mandatory rules ("*lois de police*" or "*norme di applicazione necessaria*")[13] are those domestic rules which claim to be applied in any case and regardless of the functioning of private international law rules[14].

Considerations of public interest are central in the definition of public policy contained in Regulations 1103 and 1104. These considerations allow the application of national fundamental principles of the forum to a case concerning the transnational regulation of patrimonial regimes between couples and could lead to the non-application of foreign law and to the non-recognition of foreign judgments (in accordance with article 37). This is an essential safeguard which, again, mediates between the needs to allow the international circulation of values

12 This is the reason why we usually talk about "international public policy". See Perlingieri, G. and Zarra, G.: *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, p. 48 ff.

13 Bonomi, A.: "Le norme di applicazione necessaria nel regolamento «Roma I»", in Boschiero, N. (ed.): *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Torino, 2009, pp. 173-189.

14 See, *inter alia*, Francescakis, P.: "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois", *Revue critique de droit international privé*, 1966, pp. 1-18.

and that of safeguarding national identities. However, as the case law reveals, it is not easy to understand what menaning to give to the concept of public interest.

In *Renusagar Power Co Ltd v. General Electric Co*[15] a distinguished arbitral Tribunal noted that [p]ublic policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what is injurious or harmful to the public good or public interest has varied from time to time.

As to the ascertainment of which considerations of public interest may justify the recourse to public policy, the Regulations offer to us limited guidance. However, article 38 of the Regulations, titled "Fundamental Rights", provides that "[a]rticle 37 of this Regulation [providing for the grounds for non recognition of foreign judgments] shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination". This is a significant provision from two perspectives. First of all, it clarifies – even if it was pleonastic – that the EU Charter of Fundamental Rights constitutes an example of EU public policy, i.e. the general principles which represent the real core of the legal system of the EU and that shall be applied by domestic judges jointly with the international public policy of their countries[16]. Secondly, the provision officially recognizes the relevance of human rights within the context of private international law[17], and, from this angle, this can both mean that a foreign decision violating fundamental human rights (protected by domestic and EU law) shall not be recognized and that the respect for human rights may dictate the recognition of a certain decision in a specific case. However, no other clarifications to the concept of public interest are offered by the Regulations.

Given these premises, this article will try to understand a crucial issue concerning the application of public policy (and the concept of public interest), i.e. whether this *Generalklausel* may be filled in with the relevant legal principles *only*, or also with moral considerations, as the reading of many definition of the concept seems to assume. This is a primary question when dealing with matters concerning family law, considering that this area of the law, more than others, is affected by the cultural differences in the various national legal orders. Indeed, decisions rapplying public policy in private international law, mainly coming from the common law world, very often relate this concept to non-legal values. Indeed, according to the Supreme Court of Texas, Texas Courts will not enforce a foreign law that violates

15 [1995] XX Yearbook on Commercial Arbitration 681, para. 24.

16 See Feraci, O.: *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012, *passim*.

17 See, *ex multis*, Kinsch, P.: "Droits de l'homme, droit fondamentaux et droit international privé", *Recueil des cours*, vol. 195, p. 1 ff.

good morals, natural justice or is prejudicial to the general interests of our own citizens[18].

Even more confusingly, in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company*[19] the High Court of London stated that in order to evaluate a foreign decision as violating peremptory norms of the *lex fori* [i]t has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

These definitions do not help in understanding whether "the public interest" has to be identified with the general principles of the legal system or with some other non-legal parameters, identified in murky concepts such as "good morals" and "natural justice"[20]. In the following lines, we will try to argue in favour of the former interpretation.

II. THE ROLE OF MORALS IN THE JUDICIAL APPLICATION OF PUBLIC POLICY.

This Section is aimed at understanding the role of morals in the application of public policy by domestic judges. In this regard, it is to be noted that very often, in the evaluation of what composes the public policy *Generalklausel*, interpreters may risk making application of their own conception of morality[21].

Moral "lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark"[22]. In this regard, it is worth pointing out that by referring to "morals" in this context we also mean social, political and religious considerations which may affect the application of the law. It is quite obvious to assume that all the legal principles and rules that are perceived so important as to be considered "imperative" have – to a different extent – a moral foundation. What has to be

18 *Gutierrez v. Collins* [1979] 583 SW 2d 312, 321.

19 [1987] 2 Lloyd's Rep 246, 254.

20 Similarly, another US Court discussed of public policy as the sum of the "forum state's most basic notions of morality and justice", without even referring to the fundamental principles of the legal system. See US Court of Appeals, Second Circuit, *Parsons & Whitemore Overseas Co. Inc v. Société Générale de l'Industrie du Papier RAKTA and Bank of America* [1974], 508 F. 2d 969.

21 See also Corthaut, T.: *EU Ordre Public*, Aalpen aan den Rijn, 2012, p. 21.

22 This conception of morality, which focuses on the realization of the common good, is named by Fuller, L.: *The Morality of Law* (Revised Edition), London, 1969, pp. 5-6, as "the morality of duty" and it is the conception of morality to which we will refer for the purpose of this book, because it is aimed at ensuring the correct regulation of private relationships within an ordered society.

clarified is whether, when and how the *application* of peremptory principles or rules allows an adjudicator to make reference to *her/his* idea of what is moral[23].

As imaginable, solutions might be different depending on the kind of legal system under examination. Civil law systems are based on rigid constitutions that are assumed to enshrine the basic axiological, moral foundations upon which the legal system is grounded. As a matter of principle, therefore, there should be no place for moral evaluations in the application of the law[24]. Contrariwise, common law systems (both having a written constitution, like the US, and not, as the UK) are traditionally based on judge-made law, which, by definition, involves a greater level of discretion by adjudicators and, therefore, allows them to make reference to basic notions of morality and justice.

More in detail, as to civil law systems, it is worth noting that the legal relevance of any fact of life is related to ethical and social evaluations, but is grounded on an *ad hoc* criterion of evaluation, i.e. the founding principles of the legal system, which represent, among the values which inspire the society, those which have been considered by decision-makers so important as to require, *through legalization*, the guarantee of their realization[25] (emphasis added).

As a consequence, it is possible to say that morality is duly taken into account when a society agrees upon the values that have to inspire the legal principles at the basis of its legal system. Afterwards, it will be for these legal principles to guide adjudicators in their decisions. Fundamental principles of the legal system generate a so-called "positive morality" or "*Rechtsmoral*"[26], which shall drive judges in their work. Hence, we are excluding that morals as such drive adjudicators' work, but we are accepting that *positivized* morals affect the decision-making process. The idea according to which the identification of the founding principles of a state (and the choice of the moral conceptions to employ in the law) can find confirmation also in the use of the word "policy" instead of "order" in the current English (and mainly US) understanding of the concept of *ordre public*. The use of the word "policy" impliedly tells us that fundamental principles aimed at filling in the empty box of *ordre public* are a matter of political choices to be carried out by legislators.

23 Subjective/personal conceptions of morality are, according to Fuller, L.: *The Morality*, cit., p. 5 f., part of "the morality of aspiration", which is the one which dictates behaviors which tend to inspire people to the reach excellence and to get the full realization of their capacities. Obviously, the morality of aspiration varies in accordance with the beliefs of each person. It is not relevant, as we will see, in the application of the law.

24 Viola, F.: "La teoria della separazione tra diritto e morale", in AA.VV.: *Studi in memoria di Giovanni Tarello, Giuffrè,* Milano, 1990, p 673 ff.; Barberis, M.: "Diritto e morale: la discussione odierna", *Journal for Constitutional Theory and Philosophy of Law,* 2011, p. 56 f.

25 Falzea, A.: "Complessità giuridica", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, Napoli, 2011, p. 5 (own translation).

26 Pastore, B.: "Dworkin giusnaturalista?", *Rivista internazionale di filosofia del diritto*, 1984, p. 80; Perlingieri, G.: "La via alternativa alle teorie del «diritto naturale» e del «positivismo giuridico inclusivo» ed «esclusivo». Leggendo Wil J. Waluchow", *Annali SISDIC*, 2020, p. 73 ff.

Hence, in the identification of imperative norms (including principles composing public policy), judges shall always refer to those choices (as expressed by the legal system).

As Gerald Goldstein puts it [l]'emploi du mot *policy*, et non *order*, implique bien cette idée de considération de *politique* gouvernementale, qui se retrouvera au cœur des conceptions américaines modernes. Ceci explique la [moderne] tendance très nette des juges anglais de restreindre leur usage de la notion en invoquant la séparation des pouvoirs; c'est le législateur, en principe, et non le juge, qui a le pouvoir de déterminer les grandes orientations politiques et ce qui constitue leur violation[27] (emphasis in original).

From this angle, the norms expressing the fundamental values and moral foundations upon which a state is grounded are to be considered as imperative[28]. In the words of an authoritative scholar: [l]egal systems are inspired by a certain philosophy, *which lets us evaluate certain behaviours as permissible or impermissible on the basis of cultural values inherent to the legal system*, and which inspires the understanding of the technical choices made by legislators[29] (emphasis added).

We know that the way in which legal principles are to be applied depends on the circumstances of the concrete case[30]: judges make, in all their decisions, an evaluation of which value (encapsulated in a legal principle or rule) has to prevail, by way of balancing the interests and values which may be potentially applied to the dispute[31]. This generates a circular process in which the sensibility of judges comes significantly into play as a decisive factor in unravelling the complexity of concrete cases through the process of balancing. Hence, morals come before the law, but also exercise a certain influence when the law has to be interpreted and applied[32]. Imperative principles composing public policy, whose application depends on interpretation, are not extraneous to this process.

27 Goldstein, G.: *De l'exception d'ordre public aux règles d'application necessaire*, Montreal, 1996, p. 153.

28 This, however, implies that decision-makers can expressly provide – within the law – that certain decisions are to be based on (or related to) moral evaluations. The reference applies, e.g., to the rare cases in which the law refers to "good morals", a concept which seems to imply (*infra* Section 2.3) social, ethical and moral evaluations by judges. Bianca, C.M.: "Riflessioni di un civilista sul diritto naturale", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, cit., p. 40.

29 Perlingieri, P.: "La «grande dicotomia» diritto positivo - diritto naturale, in Oltre il «positivismo giuridico»", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, cit., p. 91 (own translation). See also Bianca, C.M.: "Riflessioni di un civilista", cit., p. 42 and Criscuolo, F.: "Constitutional Axiology and Party Autonomy", *The Italian Law Journal*, 2017, p. 372, affirming that "within a democratic State governed by the rule of law, featuring a hierarchy of sources with a rigid Constitution at its top, it may never be stated that there is no shared essential project of justice as an expression of constituent values and not merely of moral imperatives".

30 Scaccia, G.: "Constitutional Values and Judge-Made Law", *The Italian Law Journal*, 2017, p. 178.

31 This is called as "reasonableness-style" legal reasoning and is probably the most applied style of legal reasoning today. See, in general terms, Perlingieri, G.: *Profili applicativi della ragionevolezza nel diritto civile,* Napoli, 2015, *passim*.

32 Pino, G.: "Diritto e morale", in Bongiovanni, G. (ed.): *Che cos'è il diritto. Ontologia e concezioni del giuridico*, Torino, 2016, p. 18.

The situation is not very different in common law, but, as to these systems of law, it is necessary to account for a longer tradition in which law and morals have been significantly intertwined. Indeed, with reference to the common law as developed in the UK, adjudicators' decisions were pervaded by their idea of morality, possibly the one which best represented the societal sentiment[33]. Indeed, as it has been authoritatively said, [t]he judge, according to the classical common law conception, expresses the essence of the community's moral experience, distilling it in the form of 'wise' decisions. (…) The wise decision would be the one that would satisfy the popular sense of justice of the community, and would be capable of being understood as rational, principled and constituent in the light of prior decisions and predictable future cases[34].

In light of the above, it can be said that in common law the adjudicators' task was that of creating legal principles out of diverse social and moral experiences[35]. Imperative norms were therefore directly grounded on the judges' conception of morality.

The situation has, however, evolved. Common law systems today have started developing the practice of enacting statutes, at least in certain crucial areas of the law. As a consequence, judicial activity has today become closer to the one of civil law judges, mainly consisting in statutory interpretation[36]. Moreover, the crystallization of precedents has generated – notwithstanding the obvious possibility of overrulings[37] – a *corpus* of principles and rules applicable to certain categories of cases that might be compared to written laws. Hence, like in civil law systems, positive law (either enacted by legislators or created through precedents) provides the "rules of the game" which establish the ways in which morality can enter into the law[38].

Indeed, as stated by the Supreme Court of Michigan, [p]ublic policy of a State is fixed by its Constitution, its statutory law, and decisions of its courts, and when

33 See Ferri, G.B.: *Ordine pubblico, buon costume* e *la teoria del contratto*, Milano, 1970, p. 92: "In presence of precise legal commands, moral evaluations become superfluous: what is important is the legal evaluation, that prevails and cannot be modified on the basis of moral conceptions" (own translation). This means that, if legal evaluations are lacking, moral ones find again place in judges' reasoning.

34 Cotterell, R.: "Common Law Approaches to the Relationship between Law and Morality", *Ethical Theory and Moral Practice*, 2000, p. 11. The strict link between law and morals also finds confirmation in an analysis of the role of juries, which had the obligation to issue "a verdict according to conscience".

35 Cotterell, R.: "Common Law", cit., p. 13.

36 Cotterell, R.: "Common Law", cit., p. 14.

37 Palombino, F.M.: *Fair and Equitable Treatment and the Fabric of General Principles*, The Hague – Heidelberg 2018, p. 144 ff.

38 Bobbio, N.: *The Future of Democracy: A Defence of the Rules of the Game*, Minneapolis, 1987, p. 156. According to Cotterell, R.: "Common Law", cit., p. 18, it is necessary to recognize that "law cannot realistically be regarded today as relating to a single morally unified community. Rather, it relates to different kinds of moral community reflecting different types of social relationship that bind people together".

the Legislature enacts a law (…) enactment is so far as it bears upon matter of public policy is conclusive (…). Public policy is but the manifest will of the State[39].

Then, the diverse values at stake in every case (expressed through fundamental principles of law) are to be balanced by adjudicators on the basis of an analysis of the circumstances of concrete cases and taking into account all the relevant competing principles and interests[40]. Therefore, in common law too, imperativeness is today grounded in positive law. However, it does not mean that morality does not play any role anymore: as in civil law tradition, to the extent that it is meant as positive morality, it does play a crucial role, when judges have to interpret the law and to balance imperative principles and rules[41].

III. THE INTERPLAY BETWEEN PUBIC POLICY AND GOOD MORALS.

From the above, it might be easier to infer how *ordre public* interacts with good morals (the French *bonnes moeurs*, and Italian *buon costume*), *i.e.* the societal conception of decency. This is, for the inextricable links existing between the law and non-legal traditions affecting this area of the law, another extremely important issue with regard to the functioning of public policy in family law matters.

According to Domat (whose thinking was based on Papinianus' writings)[42], when something is against good morals "it is a harm to human virtues, it offends people's honor and decency'"[43]. Historically, this is not a concept of *strictum ius*, but rather recalls some ethical, religious and somehow subjective evaluations of decency[44]. Good morals, according to the traditional view, seem to introduce a

39 Michigan Supreme Court, *Lieberthal v. Glens Fall Indemnity* [1946], 316 Mich 37; 24 NW 2d 547.

40 Currie, B.: "Married Women's Contracts: A Study in Conflict-of-Laws Method", *University of Chicago Law Review*, 1958, *passim*. See also Pound, R.: "Law and Morals – Jurisprudence and Ethics", *North Carolina Law Review*, 1945, p. 188.

41 It is, therefore, possible to try to arrange some general conclusions concerning the ways in which values penetrate in adjudicators' legal reasoning and influence the determination of which norms have to be considered as imperative. Following the approach of the distinguished US scholar Michael S. Moore, it is arguable that morality enters into judges' reasoning in four ways: (*i*) when the latter expressly refers to the former as a parameter for evaluating conducts (e.g. when the law refers to "good morals", "moral turpitude" etc.); (*ii*) as a matter of argumentation, judges may make recourse (also) to values in order to justify the (legal) solution they reach; (*iii*) in interpreting the law adjudicators duly take into account the values which are at the basis of the legal system; and (*iv*) in the cases where the application of the obvious law conducts to wrong, unjust or otherwise immoral results, judges may make recourse to the morality emerging from fundamental principles of the system in order to avoid to reach such results. In this regard, it is important to clarify that, while *sub* (*i*) the reference applies to the moral conception of the judge of what is right or wrong, *sub* (*ii*), (*iii*) and (*iv*) we always refer to the one we have called the "positive morality", i.e. the morality which is encapsulated in the rules and principles that are going to be applied. See Moore, M.S.: "Four Reflections on Law and Morality", *William and Mary Law Review*, 2007, p. 1527 ff.

42 Digesto 28, 7, 15. More generally, contracts with immoral consideration (*negotia ob turpem causam*) were forbidden in Roman law. See Gigliotti, F.: *Prestazione contraria al buon costume,* Milano, 2015, p. 13 ff.

43 Domat, J.: *Le leggi civili disposte nel loro naturale ordine*, VIII, Pavia (translation of the French edition of 1776) 1831, p. 348.

44 Trabucchi, A.: "Buon costume", in *Enciclopedia del diritto (online)*, Milano, 1959, p. 1; Carresi, F.: "Il negozio illecito per contrarietà al buon costume", *Rivista trimestrale di diritto e procedura civile*, 1949, p. 34.

form of imperativeness deriving from societal conscience[45] *to be added* to the imperativeness deriving from the law, which is encapsulated in the two notions of public policy and mandatory rules. If one accepts this approach (something which will be denied), when good morals are rendered applicable by the law, adjudicators would face to parameters of imperativeness to be applied in parallel: the legal one (public policy) and the one deriving from her/his conception of decency (good morals).

The analysis of the interaction between public policy and good morals is not a proof of concept, but an actual necessity dictated by the fact that traditionally the two categories have been referred to by domestic systems of law, in order to determine the nullity of domestic contracts and/or the impossibility to apply foreign law. In civil law countries, the law provides that contracts may be null and void either for violations of public policy or for contrariness to good morals (the two grounds are seen separately)[46]. Contrariwise, in common law systems the two notions of *ordre public* and good morals are usually jointly referred to by judges as parts of the broader public policy review[47].

In the words of Cardozo Justice, [t]he courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency and fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal[48].

Until the first half of the twentieth century, written laws very often made reference to common conceptions of morals ("public morals"), in order to allow or forbid certain behaviors to private parties. The reference to good morals (or *bonnes moeurs*) was also often made to provide judges with a tool to fill in the *lacuna*e of the legal order[49]. The reason for this continuous reference to *bonos*

45 Ferrara, F.: *Teoria del negozio illecito nel diritto civile italiano*, Milano, 1914, p. 6; Crea, C.: "La 'resilienza' del buon costume: l'itinerario francese e italiano, tra *fraternité* e *diversité*", *Rassegna di diritto civile*, 2019, p. 887.

46 It is here sufficient to mention, with regard to domestic relationships, Article 1133 of the *Code Napoleon* of 1804 (in force until 2016), as well as articles 1343 and 1418 of the Italian Civil Code, saying that a contract is null and void whenever the consideration is illegal, i.e. it is contrary to mandatory rules, *ordre public*, or good morals. It is worth noting that in Germany the situation is different, considering that § 138 of the BGB attributes to good morals (*gute Sitten*) the functions that are traditionally proper of public policy. As to private international law relationships, Article 31 of the Italian Preliminary Norms to the Italian Civil Code (in force until 1995) stated that the application of foreign law was to be forbidden when in violation of *ordre public* and *bonnes moeurs*.

47 Forde, P.B.: "The «Ordre Public» Exception and Adjudicative Jurisdiction Conventions", *The International and Comparative Law Quarterly*, 1980, p. 259; Carter, P.B.: "The Role of Public Policy in English Private International Law", *The International and Comparative Law Quarterly*, 1993, p. 6; Mansoor, Z.: "Contracts Contrary to Public Policy under English and Dutch Law", *European Journal of Comparative Law and Governance*, 2014, p. 300 ff.; Perrone, R.: *"Buon costume" e valori costituzionali condivisi. Una prospettiva della dignità umana*, Napoli, 2015, p. 185 ff.

48 Court of Appeals of New York, *Loucks v. Standard Oil Co. of New York*, [1918] 120 NE 198, 202.

49 Ferrara, F.: *Teoria del negozio*, cit., p. 4; Carresi, F.: "Il negozio illecito", cit., p. 33.

mores in legislative texts mainly lied in the fact that *ordre public* was not seen, as it is today, as a way for recalling general principles, but it usually overlapped with specific and rigid mandatory rules of the forum[50]. This means that public policy was seen as a *summa* of the imperative norms of a domestic system of law.

As we noted in the previous Section, however, the advent of modern constitutions determined that, in principle and save for certain exceptions, the only admissible ethical evaluations to be made by judges are those which are expressed by the values which are crystallized in positive law, especially in constitutions[51]. In the words of a distinguished scholar it is not possible to even imagine that the imperativeness of the law and the determination of what is permitted is referred to moral evaluations[52].

A reference to good morals would, indeed, entail the risk that the evaluation of what is decent (and therefore licit) is carried out by adjudicators on a subjective basis; and this is exactly the risk that modern legal culture was borne to avoid.

For this reason, one may recall that several scholars talk about *Rechtsmoral*[53] in order to avoid to let subjective morals come into play in the legal reasoning. Similarly, *bonnes moeurs* should today be deduced from the fundamental principles of any legal system[54]. As a consequence, good morals do not represent an autonomous legal category[55], and their content started to be merged in the concept of *ordre public*[56]. It is not by chance, indeed, that the Italian reform of private international law carried out in 1995 (by means of Law No. 218)[57] and the recent French reform of the *Code Napoleon* (2016)[58] have excluded good morals from the causes for refusing the application of foreign law and for declaring a

50 Rodotà, S.: "Ordine pubblico o buon costume?", *Giurisprudenza di merito*, 1970, p. 105; Crea, C.: "La 'resilienza'", cit., p. 888.

51 Rodotà, S.: "Ordine pubblico", cit., p. 104; Perlingieri G., "La via alternativa", cit., pp. 73 ff.

52 Trabucchi, A.: "Buon costume", cit., p. 1 (own translation).

53 See Crea, C.: "La 'resilienza'", cit., p. 890.

54 These principles (as we saw in Chapter 1) may be directly applied to private law relationships. See Caroccia, F.: *Ordine pubblico. La gestione dei conflitti culturali nel diritto privato*, Napoli, 2018, p. 163; Perlingieri, P.: "Constitutional Norms and Civil Law Relationships", *The Italian Law Journal*, 2015, p. 17 ff.

55 Blom, J.: "Public Policy in Private International Law and Its Evolution Over Time", *Netherlands International Law Review*, 2003, p. 392: "[t]he growth of constitutionally protected social and economic rights within domestic legal systems may enhance considerations of public policy, where private legal issues intersect with these constitutional norms".

56 Crea, C.: "La 'resilienza'", cit., p. 890, talks about a "philanthropic" conception of *ordre public*. This renders *bonos mores* a residual and mainly useless category. See Panza, G.: *Buon costume e buona fede*, Napoli (reprinted in 2013), 1973, p. 142.

57 Articles 16 and 17 of this law only say that foreign law can be refused if it is contrary to public policy and overriding mandatory rules respectively.

58 *Ordonnance* n. 131 of 10th February 2016. Newly enacted Article 1102, para. 2, of the new French *Code Civil* only says that party autonomy cannot derogate to public policy.

contract null and void respectively[59]. The same happened when the *Code Civil* of Quebec has been reformed[60].

With the possible exceptions of sexual morality[61] and some indecent religious practices (such as, e.g., certain voodoo rituals)[62], where ethical evaluations are still commonplace,[63] good morals now shall be located *within* the framework of positive law[64] and, except for common law countries, some post-communist states and Germany[65], the category of good morals has been completely eroded[66]. As of today, when judges evaluate the compatibility of private actions with *bonnes moeurs*, they are often actually carrying out a *legal* analysis that could be equally made under the umbrella of public policy. A significant example of this practice is the English case *City of Gotha v. Sotheby's*[67]. The Federal Republic of Germany, which prior to the Second World War owned a seventeenth century Dutch painting, sought to recover it, when a Panamanian company tried to sell it through auction in London, in 1989. The owner of the painting admitted that he was aware of the possibility that the painting had been subject to smuggling, but he claimed that Germany's action was time barred under German law. While refusing to apply the time bar, the Court stated that the defense was precluded, because who acquired a stolen property in bad faith cannot take advantage of the limitation period against the rightful owner. The Court highlighted the dishonest behavior of the defendant and affirmed that this "lent a fundamental moral character to the issues that faced the Court"[68]. Unsurprisingly, the defense was considered against public policy. Actually, the adjudicator applied – even if without mentioning it –

59 Guarneri, A.: "La scomparsa delle bonnes moeurs dal diritto contrattuale francese", *La nuova giurisprudenza civile commentata*, 2017, p. 404 ff.

60 Terlizzi, G.: *Dal buon costume alla dignità della persona*, Napoli, 2013, p. 103 ff.

61 In this regard, it is sufficient to think about prostitution (in the legal systems where it is forbidden). While in principle a sexual performance could be considered as a form of job to be remunerated, the payment of a sum of money for this kind of activity is considered to be *contra bonos mores* and therefore illegal. See, in this sense, Italian Supreme Administrative Court, Decision of 22 October 2008, No. 5178. On this matter see Carusi, D.: *Contratto illecito e soluti retentio,* Napoli, 1995, p. 20 f., saying that sexual performances "belong to an area of protection of fundamental rights of individuals that cannot be subject to a market logic" (even if, when prostitution is forbidden, it could be replied that jointly with the moral disappointment there is always a legal ban which, again, could render the category of *bonos mores* useless). See also Panza, G.: *Buon costume*, cit., p. 100.

62 Pacillo, V.: *Buon costume e libertà religiosa*, Milano, 2012, p. 149 ff.; Perrone, R.: *Buon costume*, cit., p. 285 ff.; and, with specific regard to Muslim practices, Mancini, L.: *Immigrazione musulmana e cultura giuridica*, Milano, 1998.

63 Reference to "public morals" also took place in the ECHR context as a legal basis for limiting the enjoyment of conventional rights. This understanding of the concept of good morals is not the subject of the present book; see Perrone, R.: *Buon costume*, cit., p. 155 ff.

64 Lonardo, L.: *Ordine pubblico e illiceità del contratto*, Napoli, 1993, p. 268 ff. For a contrary approach see Gazzoni, 2006, pp. 803 ff. On the primacy of constitutional principles see also Salerno, F.: "La costituzionalizzazione dell'ordine pubblico internazionale", *Rivista di diritto internazionale privato e processuale*, 2018.

65 In this Country *ordre public* is completely encompassed in the *gute Sitten*.

66 Guarneri, A.: "La scomparsa", cit., p. 405.

67 *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.*, [1998] QBD (unreported but mentioned in Blom, J.: "Public Policy", cit., p. 390).

68 Blom, J.: "Public Policy", cit., p. 390.

the notorious principle "e*x iniuria jus non oritur*", according to which nobody can take advantage of its illegal conduct. The issue was, therefore, purely legal and the moral character that the judge gave to it was actually absorbed in the application of the mentioned principle.

In light of the above, we can state that, generally speaking, both domestic and international public policy involve an analysis of the possible violation of *Rechtsmoral* and, consequently, the concept of good morals in private international law nowadays is superfluous[69]. *Ordre public*, being a *Generalklausel* to be filled in with the relevant fundamental principles, is able to fulfill the function of "window on the outside world"[70], without the necessity to recur to the category of *bonnes moeurs*[71], which originally carried out this task.

However, some authors affirm that the concept of good morals is currently to be interpreted as a reference to human dignity and, for this reason, they still consider *bonnes moeurs* as a useful legal category[72]. Hence, a contract violating human dignity (e.g. providing for slavery) would be null for violation of good morals. It is possible to reply to these authors that human dignity, as encapsulated in constitutions (e.g. Article 2 of the Italian Constitution and Article 2 of the 1999 Bolivarian Constituion of Venezuela, affirming the preeminence of human rights) or in international charters on human rights, is today a legal value to be related to the human rights protected by the law. For this reason, it is not necessary to revive the concept of good morals in relation to the safeguard of human dignity, in particular to the extent that human dignity is protected through the prism of public policy.

In conclusion, we can affirm that the only source of public policy stays in the fundamental principles of the positive legal system. representing the *Rechtsmoral.*[73] For the sake of this analysis, therefore, we will not refer to the concept of good morals henceforth.

69 More generally, for this opinion see Badiali, G.: *Ordine pubblico e diritto straniero*, Milano, 1963, p. 90 ff.; Rodotà, S.: "Ordine pubblico", cit., p. 107; Carusi, D.: *Contratto illecito,* cit., p. 32 ff.; Caroccia, F.: *Ordine pubblico.*, cit., p. 167.

70 This locution is from Crea, C.: "La «resilienza»", cit., p. 875.

71 For a contrary opinion see Crea, C.: "La «resilienza»", cit., p. 892 ff, talking about a "resiliency" of *bonos mores*.

72 Oddi, A.: *"La riesumazione dei boni mores"*, *Giurisprudenza costituzionale*, 2000, p. 2247; Terlizzi, G.: *Dal buon costume,* cit., p. 99. For a confusion between morality and universally protected human rights see also Verheul, H.: "Public Policy and Relativity", *Netherlands International Law Review*, 1979, p. 112.

73 This was originally envisaged by Rescigno, P.: "In pari causa turpitudinis", *Rivista di diritto civile*, 1965, *passim*. See also Patti, F.P.: "In pari causa turpitudinis", cinquant'anni dopo, in AA.VV.: *Liber amicorum Pietro Rescigno*, Napoli, 2018.

IV. THE ROLE OF SOFT-LAW IN DETERMINING THE CONTENT OF PUBLIC POLICY.

Having clarified that the moral conceptions of individuals do not contribute to the content of the public policy *Generalklausel*, for the sake of completeness, it is now necessary to spend some lines on whether and how a widely discussed (alleged) source of the law, namely soft law, may contribute to the content of public policy and, if so, what is the relationship of soft-law sources with domestic fundamental principles. Preliminarily, it must be noted that the definition "soft law", traditionally attributed to Lord McNair, is used to describe instruments with extra-legal binding effect.

In this regard, it has been explained that extralegal norms can serve as a compromise between sovereignty and the need to establish rules to govern international relations. Such rules represent social norms where the expectation of compliance is of lesser significance. If a State violates such soft law norms, condemnation will be less swift and severe than when it violates a legal norm.[74] (…) It is not easy to define soft law in a precise sense. It does not represent a legal concept with a clearly determinable scope and content. It is more of a catchword, symbolizing a specific form of social rules in the penumbra of international law. To put it abstractly, soft law as a phenomenon in international relations covers all those social rules generated by State[s] or other subjects of international law which are not legally binding but which are nevertheless of special legal relevance[75].

As it was correctly noted, the expression "soft law" seems to contain an oxymoron, because the law cannot, by definition, be "soft" since it is characterized by coercibility[76]. Hence, our discussion should end up here, considering that a "soft" kind of law is, again, by definition, unable of generating imperative norms (*i.e.* the hardest source of law). Soft law might produce mere social blame.

However, while some authors deemed soft law as a threat to the rule of law[77], today it is very common to see soft law norms at the basis of the reasoning conducting to judicial decisions, in particular in certain areas of public international law where a written source of law is lacking (such as the regulation of evidence and conflicts of interests in international arbitrations). Hence, some authors claimed that, in such cases, there is a very thin line between soft law and hard law.[78]

74 Thurer, D.: "Soft Law", in Wolfrum, R. (ed.): *Max Planck Encyclopedia of Public International Law*, (online edition) 2009, para. 6.

75 Thurer, D.: "Soft Law", cit., para. 9.

76 Palombino, F.M.: *Introduzione al diritto internazionale*, Bari, 2019, p. 130.

77 Klabbers, J.: "The undesirability of Soft Law", *Nordic Journal of International Law*, 1998, p. 381.

78 Kaufmann-Kohler, G.: "Soft Law in International Arbitration: Codification and Normativity", *Journal of International Dispute Settlement*, 2010; Palombino, F.M.: *Introduzione*, cit., p. 131.

This phenomenon takes place mainly in cases where the soft law source comes from a very distinguished author, such as the International Law Commission or the General Assembly of the United Nations. As an example, it is possible to mention the Resolution 64/292 of 28 July 2010, through which the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. This is certainly a soft law instrument which, however, was applied by the investment arbitration Tribunal in *Urbaser v. Argentina*[79] as a representation of customary international law[80].

Does this mean that soft law instruments are apt to directly generate imperative principles at the domestic level? The answer seems to be in the negative, for the following reasons which directly attain to the functions of this soft law in relation to general international law.

Indeed, soft law may have three effects in its relationship with general international law, i.e. declaratory effect, crystallizing effect and generating effect[81]. The first of these effects concerns the codification in written form of an already existent general international law norm. In so far as one of these effects takes place, it is evident that there may be an indirect interference between this kind of soft law norms and domestic imperativeness, which is influenced by the existing norm of customary international law, but whose content may be ascertained recurring to the soft law instruments. The discourse is slightly different with regard to soft law instruments which help in crystallizing customary international norms whose content is still in formation and, therefore, subject to variation: here the soft law instrument – which, again, does not directly influence domestic imperative norms – may be useful for domestic judges in ascertaining the scope of application of general international law norms that have a direct influence over domestic fundamental principles. Finally, as to soft law instruments which have a catalytic effect for the creation of general international law, it is evident that – once the general international law norm eventually comes into existence – its content may be easily ascertained referring to the "generating" soft law instrument. In this case, as well as in the others, soft law influences domestic fundamental principles through the medium of general international law within a circular process which

79 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1197.

80 See also Riphagen, W.: "From Soft Law to Ius Cogens and Back", *Victoria University of Wellington Law Review*, 1987, who demonstrated that soft law may also influence the creation of international *jus cogens* norms.

81 Greco, D.: "Soft law e diritto internazionale generale", in *Rassegna di diritto pubblico europeo*, 2021 (in course of publication). We will not deal in this book with the relationship between soft-law and treaties since this issue falls outside the scope of the present analysis. For a general analysis of the phenomenon of unification of domestic systems of law through soft law see Šarčević, P., "Unification and «Soft Law»", in Stoffel, W.A. and Volken, P. (ed.): *Conflicts and Harmonization: Mèlanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire*, Fribourg, 1990.

exists between the general international law norm and the soft instruments which determine its content and scope of application.

As an example of this practice, it is possible to mention a well-known decision of the Italian Supreme Court[82] which applied Article 15 of the Universal Declaration of Human Rights (concerning the right to citizenship) as the legal basis for denying the possibility to consider as stateless certain formerly Italian citizens who went to live in Libya prior than the WWII and then lost their Libyan citizenship when the United Kingdom of Libya was constituted in 1951. Article 15 of the Universal Declaration (which, being a resolution of the General assembly, is a soft law instrument) was therefore apparently used as a direct source of imperativeness. However, scholarship, noted that a correct (and contextualized) reading of the decision reveals that the Italian Supreme Court used Article 15 to confirm already existing norms (both domestic and international) concerning the prohibition of statelessness.

In the same vein – and more explicitly – the same Italian Supreme Court used Article 19 of the Universal Declaration (on the right to information)[83] and Article 25 (on the right to housing)[84] to corroborate already existing customs directly generating rights for individuals.

In conclusion, as far as this author is concerned, while there are no judicial decisions *directly* applying soft law sources as a reason backing the refusal of either recognition of foreign judicial decisions or application of foreign law, it seems possible (and likely) that the above reasoning applies also in this context. Judges might, therefore, refer to soft law instruments in order to ascertain the content of existing general international law norms and confer them imperative value on the domestic law level in the form of national fundamental principles. This does not mean that soft law norms are *per se* binding[85]: they provide, indeed, an

82 Decision of 1st February 1962, n. 191.

83 See Italian Supreme Court (Plenary Session), decision of 17th July 2015 n. 31022.

84 Italian Supreme Court, decision of 1st July 2015, n. 27809.

85 We have therefore to deny the theses which, referring to soft forms of regulation of legal relationships, affirm that "a new legal order is emerging: it comes from below, where social systems and sub-systems demand autonomy and self-regulation. They refuse the control of national governments and develop forms of auto-constitutionalism, becoming 'the realistic candidate (…) to represent the dynamism of civil society'. (…) Globalization, with its economic, cultural, social and political transformations, has determined a new legal order that is based on a legal pluralism, where official and formal forms of law are shaped with unofficial and informal legal sources". Scamardella, F.: "Law, globalisation, governance: emerging alternative techniques", *The Journal of Legal Pluralism and Unofficial Law*, 2014, p. 2 (citing Teubner, G.: *La cultura del diritto nell'epoca della globalizzazione*, Roma, 2005, p. 73). According to Scamardella, p. 2, "new legal pluralism is the main expression of a new global governance, which is trying to replace the government model based on the national state authority". This idea is, in our opinion, misplaced and does not find any confirmation in international practice, considering that judges – both national and international, use soft law instruments cautiously and are always careful in grounding their decision on existing, formal and binding sources of law. In this regard, it is to be noted that the alleged "new legal system" based on soft forms of regulation does not have any positive foundation and, moreover, it is even difficult to identify its actors. For a general criticism to the concept of soft law (sometimes exaggerated, as confirmed by the subsequent writings of

useful tool in order to identify general international law norms which have their autonomous binding force and which are apt to influence domestic conceptions of imperativeness[86].

From the above, and in conclusion, we can infer that while judges are precluded from applying their conception of what is moral in the concrete utilization of the public policy *Generalklausel*, other non-legal standards – known as soft-law sources – may, by way of interpretation, actively contribute to the delineation of the content of *ordre public*. The determination of the content of public policy for the purpose of Regulations 1103 and 1104 of 2016 will be a complex interpretative task which, in any case, will circularly involve the circumstances of concrete cases and the relevant fundamental principles, but will only be indirectly affected by considerations which are not linked to the relevant legal system.

the same author) see also D'Aspremont, J.: "Softness in International Law: A Self-Serving Quest for New Legal Materials", *The European Journal of International Law*, 2008.

86 Another, but related, discourse concerns the capability of soft-law norms to "codify" general principles of private international law and, more generally, the effects of soft law over private international law. In this regard see Leandro, A.: "La codificazione del diritto internazionale privato fra strumenti internazionalistici e diritto dell'Unione europea", in Annoni, A., Forlati, S., and Salerno F. (ed.): *La codificazione nell'ordinamento internazionale e dell'Unione europea*, Naples, 2019, p 283 ff. The author argues that soft law instruments may constitute a significant impulse for the codification of private international law within domestic legal systems, they may systematize the emergence of trends in state practice or, in any case, they may represent the state of art of private international law on a certain subject (even on the basis of a comparative approach). As an example of this practice, it is possible to mention the Model Laws enacted by UNCITRAL with regard to private international law regulation of subjects such as cross-border insolvency. The author highlights that soft law instruments related to private international law have been used also within the context of the European Union. The reference applies, e.g., to the Commission's communication COM (2018) 89 of 12th March 2018, on the applicable law to the proprietary effects of transactions in securities. This communication was aimed at promoting clarity and predictability about which country's law applies to determine who owns the underlying assets of the transaction is of the essence. In this regard, the Commission noted that in presence of various directives regulating the subject (98/26/CE of 19th May 1998, 2002/47/CE of 6th June 2002, 2001/24/CE of 4th April 2001) as well as of the Hague Convention of 5th July 2006 on the law applicable to certain rights in respect of securities held with an intermediary (which was neither ratified by the EU nor for the Member States), it was worth issuing a communication clarifying the Commission's views on important aspects of the existing EU acquis with regard to the law applicable to proprietary effects of transactions in securities (in order to avoid, as far as possible, the interpretative uncertainties generated by this bundle of legal instruments). In this regard, it is likely that the Communication will be a point of reference for adjudicators dealing with the subject.

BIBLIOGRAPHY

Badiali, G., *Ordine pubblico e diritto straniero*, Milano, 1963, p. 90 ff.

Barberis, M.: "Diritto e morale: la discussione odierna", *Journal for Constitutional Theory and Philosophy of Law,* 2011, p. 56 f.

Bianca, C.M.: "Riflessioni di un civilista sul diritto naturale", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, Napoli, 2011, p. 40.

Blom, J.: "Public Policy in Private International Law and Its Evolution Over Time", *Netherlands International Law Review*, 2003, p. 392.

Bobbio, N.: *The Future of Democracy: A Defence of the Rules of the Game*, Minneapolis, 1987, p. 156.

Bonomi, A.: "Le norme di applicazione necessaria nel regolamento «Roma I»", in Boschiero, N. (ed.).: *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Torino, 2009, pp. 173-189.

Caroccia, F.: *Ordine pubblico. La gestione dei conflitti culturali nel diritto privato*, Napoli, 2018, p. 163.

Carresi, F.: "Il negozio illecito per contrarietà al buon costume", *Rivista trimestrale di diritto e procedura civile*, 1949, p. 34.

Carter, P.B.: "The Role of Public Policy in English Private International Law", *The International and Comparative Law Quarterly*, 1993, p. 6.

Carusi, D.: *Contratto illecito e soluti retentio,* Napoli, 1995, p. 20 f.

Corthaut, T.: *EU Ordre Public*, Aalpen aan den Rijn, 2012, p. 21.

Cotterell, R.: "Common Law Approaches to the Relationship between Law and Morality", *Ethical Theory and Moral Practice*, 2000, p. 11.

Crea, C.: "La 'resilienza' del buon costume: l'itinerario francese e italiano, tra *fraternité* e *diversité*", *Rassegna di diritto civile*, 2019, p. 887.

Criscuolo, F.: "Constitutional Axiology and Party Autonomy", *The Italian Law Journal*, 2017, p. 372.

Currie, B.: "Married Women's Contracts: A Study in Conflict-of-Laws Method", *University of Chicago Law Review*, 1958, *passim.*

D'Aspremont, J.: "Softness in International Law: A Self-Serving Quest for New Legal Materials", *The European Journal of International Law*, 2008.

Damascelli, D.: "Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law", *Trusts*, 2018, p. 1 ff.

Domat, J.: *Le leggi civili disposte nel loro naturale ordine*, VIII, Pavia (translation of the French edition of 1776) 1831, p. 348.

Falzea, A.: "Complessità giuridica", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, Napoli, 2011, p. 5.

Feraci, O.: *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012, *passim*.

Ferrara, F.: *Teoria del negozio illecito nel diritto civile italiano*, Milano, 1914, p. 6.

Ferri, G.B.: *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970, p. 92.

Forde, P.B.: "The «Ordre Public» Exception and Adjudicative Jurisdiction Conventions", *The International and Comparative Law Quarterly*, 1980, p. 259.

Francescakis, P.: "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois", *Revue critique de droit international privé*, 1966, pp. 1-18.

Fuller, L.: *The Morality of Law* (Revised Edition), London, 1969, pp. 5-6.

Gigliotti, F.: *Prestazione contraria al buon costume,* Milano, 2015, p. 13 ff.

Goldstein, G.: *De l'exception d'ordre public aux règles d'application necessaire*, Montreal, 1996, p. 153.

Greco, D.: "Soft law e diritto internazionale generale", in *Rassegna di diritto pubblico europeo*, 2021 (in course of publication). Šarčević, P., "Unification and «Soft Law»", in Stoffel, W.A., Volken, P. (ed.): *Conflicts and Harmonization: Mèlanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire*, Fribourg, 1990.

Guarneri, A.: "La scomparsa delle bonnes moeurs dal diritto contrattuale francese", *La nuova giurisprudenza civile commentata*, 2017, p. 404 ff.

KAUFMANN-KOHLER, G.: "Soft Law in International Arbitration: Codification and Normativity", *Journal of International Dispute Settlement*, 2010.

KINSCH, P.: "Droits de l'homme, droit fondamentaux et droit international privé", *Recueil des cours*, vol. 195, p. 1 ff.

KLABBERS, J.: "The undesirability of Soft Law", *Nordic Journal of International Law*, 1998, p. 381.

LAS CASAS, A.: "La nozione autonoma di «regime patrimoniale tra coniug» del regolamento UE 2016/1103 e i modelli nazionali", *Nuove Leggi Civili Commentate*, 2019, p. 1538 ff.

LEANDRO, A.: "La codificazione del diritto internazionale privato fra strumenti internazionalistici e diritto dell'Unione europea", in ANNONI, A., FORLATI, S., and SALERNO F. (ed.): *La codificazione nell'ordinamento internazionale e dell'Unione europea*, Naples, 2019, p 283 ff.

LONARDO, L.: *Ordine pubblico e illiceità del contratto*, Napoli, 1993, p. 268 ff

MANSOOR, Z.: "Contracts Contrary to Public Policy under English and Dutch Law", *European Journal of Comparative Law and Governance*, 2014, p. 300 ff.

MANCINI, L.: *Immigrazione musulmana e cultura giuridica*, Milano, 1998.

MOORE, M.S.: "Four Reflections on Law and Morality", *William and Mary Law Review*, 2007, p. 1527 ff.

ODDI, A.: *"La riesumazione dei boni mores"*, *Giurisprudenza costituzionale*, 2000, p. 2247.

PACILLO, V.: *Buon costume e libertà religiosa*, Milano, 2012, p. 149 ff.

PALOMBINO, F.M.: *Fair and Equitable Treatment and the Fabric of General Principles*, The Hague – Heidelberg 2018, p. 144 ff.

PALOMBINO, F.M.: *Introduzione al diritto internazionale*, Bari, 2019, p. 130.

PANZA, G.: *Buon costume e buona fede*, Napoli (reprinted in 2013), 1973, p. 142.

PASTORE, B.: "Dworkin giusnaturalista?", *Rivista internazionale di filosofia del diritto*, 1984, p. 80.

Patti, F.P.: "In pari causa turpitudinis", cinquant'anni dopo, in AA.VV.: *Liber amicorum Pietro Rescigno*, Napoli, 2018.

Perlingieri, G. and Zarra, G.: *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, p. 48 ff.

Perlingieri, G.: "La via alternativa alle teorie del «diritto naturale» e del «positivismo giuridico inclusivo» ed «esclusivo». Leggendo Wil J. Waluchow", *Annali SISDIC*, 2020, p. 73 ff.

Perlingieri, G.: *Profili applicativi della ragionevolezza nel diritto civile,* Napoli, 2015.

Perlingieri, P.: "Constitutional Norms and Civil Law Relationships", *The Italian Law Journal*, 2015, p. 17 ff.

Perlingieri, P.: "Il rispetto dell'identità nazionale nel sistema italo europeo", *Foro. Nap.*, 2014, p. 449 ff.

Perlingieri, P.: "La «grande dicotomia» diritto positivo - diritto naturale, in Oltre il «positivismo giuridico»", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, cit., p. 91

Perrone, R.: *"Buon costume" e valori costituzionali condivisi. Una prospettiva della dignità umana*, Napoli, 2015, p. 185 ff.

Pino, G.: "Diritto e morale", in Bongiovanni, G. (ed.): *Che cos'è il diritto. Ontologia e concezioni del giuridico*, Torino, 2016, p. 18.

Pound, R.: "Law and Morals – Jurisprudence and Ethics", *North Carolina Law Review*, 1945, p. 188.

Rescigno, P.: "In pari causa turpitudinis", *Rivista di diritto civile*, 1965.

Ricci, C.: *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giudiziario europeo*, Padova, 2020, p. 32.

Riphagen, W.: "From Soft Law to Ius Cogens and Back", *Victoria University of Wellington Law Review*, 1987.

Rodotà, S.: "Ordine pubblico o buon costume?", *Giurisprudenza di merito*, 1970, p. 105.

Salerno, F.: "La costituzionalizzazione dell'ordine pubblico internazionale", *Rivista di diritto internazionale privato e processuale*, 2018.

SCACCIA, G.: "Constitutional Values and Judge-Made Law", *The Italian Law Journal*, 2017, p. 178.

SCAMARDELLA, F.: "Law, globalisation, governance: emerging alternative techniques", *The Journal of Legal Pluralism and Unofficial Law*, 2014, p. 2.

TERLIZZI, G.: *Dal buon costume alla dignità della persona*, Napoli, 2013, p. 103 ff.

THURER, D.: "Soft Law", in WOLFRUM, R. (ed.): *Max Planck Encyclopedia of Public International Law*, (online edition) 2009, par. 6.

TRABUCCHI, A.: "Buon costume", in *Enciclopedia del diritto (online)*, Milano, 1959, p. 1.

VERHEUL, H.: "Public Policy and Relativity", *Netherlands International Law Review*, 1979, p. 112.

VIARENGO, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", *Riv. dir. int. priv.* e *proc.*, 2018, p. 44 ff.

VIOLA, F.: "La teoria della separazione tra diritto e morale", in AA.VV.: *Studi in memoria di Giovanni Tarello* , Milano, 1990, p 673 ff.

BOOK REVIEWS

MARTÍNEZ CALVO, Javier, *El derecho al olvido digital como remedio frente a la hipermnesia de internet,* Aranzadi, Cizur Menor (Navarra), 2021, 236 pp.

Que internet ha transformado nuestras vidas es algo que hoy en día está fuera de toda discusión. Sería complicado tratar de enumerar aquí los beneficios que internet nos aporta en nuestro día a día, pero resulta de interés mencionar las que quizás sean las dos principales ventajas que nos ha traído: la ruptura de barreras geográficas en nuestras relaciones sociales y la posibilidad de acceder en cualquier momento a todo tipo de información. En relación con este último aspecto, hemos de tener en cuenta que internet tiene la capacidad de conservar la información perennemente, lo que le convierte en una especie de base de datos ilimitada e infinita. A ello hay que añadir la importante actividad que llevan a cabo los motores de búsqueda, con *Google* a la cabeza, filtrando la información en función de los criterios de búsqueda introducidos por el internauta y facilitándole de este modo el acceso inmediato a todo tipo de información.

Sin embargo, la capacidad de recordar que tiene internet plantea también algunos inconvenientes, que hasta tiempos recientes no podían siquiera presagiarse. Y es que, tradicionalmente, cuando se publicaba una información susceptible de afectar negativamente a una persona, esta debía soportar las consecuencias durante un tiempo limitado, pues tarde o temprano la gente olvidaba dicha información y su fama y buen nombre podían quedar reestablecidos. No obstante, internet, y, en concreto, los motores de búsqueda, han cambiado notablemente el panorama: una vez que determinada información relativa a una persona es indexada por los motores de búsqueda y queda vinculada a su nombre y apellidos, resultará fácilmente accesible para cualquier curioso, pues para ello basta con que introduzca el nombre y apellidos de la persona en cuestión y podrá acceder a una infinidad de datos suyos y a todas las informaciones relativas a ella que circulen por la red. Y claro, cuando el contenido de la información pueda resultar perjudicial para la fama y buen nombre del aludido, es lógico que este desee que dicha información deje de resultar accesible en los motores de búsqueda.

Ello ha puesto de relieve la necesidad de establecer mecanismos que permitan a los ciudadanos oponerse a que la información que les atañe pueda permanecer de forma indefinida a disposición de cualquier curioso que en un momento dado quiera acceder a ella a través de los motores de búsqueda de internet. Precisamente, con este objeto surgió el denominado derecho al olvido, que en su origen constituyó una creación jurisprudencial, pero que progresivamente ha ido adentrándose en nuestra normativa, primero a nivel comunitario y, en tiempos más recientes, incorporándose a nuestro ordenamiento interno. Sin embargo, su regulación es muy sucinta, por lo que todavía hoy es necesario que jurisprudencia y doctrina realicen un importante esfuerzo para dotarlo de contenido. Y a ello hay

que añadir que el legislador español ha extendido el derecho al olvido a nuevos horizontes, pues junto al derecho al olvido en los motores de búsqueda de internet ha introducido el denominado derecho al olvido en servicios de redes sociales y otros servicios equivalentes, lo que exige replantear muchos de los postulados tradicionales del derecho al olvido.

De ahí la oportunidad de la monografía que tengo el placer de recensionar, que ofrece una panorámica completa del derecho al olvido, abordando en profundidad sus diferentes vertientes y dando respuestas a muchas de las preguntas que se plantean en torno al mismo. El título —"El derecho al olvido digital como remedio frente a la hipermnesia de internet"— resulta bastante significativo y resume a la perfección su contenido, en el que, en síntesis, se plantea un problema: la capacidad de internet para recordarlo todo; y se analiza la solución que ofrece nuestro ordenamiento: el derecho al olvido.

En lo que respecta al autor, es Doctor en Derecho y actualmente desempeña su labor docente e investigadora en el área de Derecho civil en la Universidad de Zaragoza. Dentro de su producción científica encontramos diferentes trabajos en los que aborda temas de gran actualidad dentro del Derecho de familia, del Derecho de la persona y del Derecho de las nuevas tecnologías.

El libro comienza con el prólogo del profesor Sergio Cámara Lapuente, Catedrático de Derecho Civil de la Universidad de La Rioja y buen conocedor del Derecho de las nuevas tecnologías, materia en la que cuenta con varios trabajos de referencia, lo que sin duda le convierte en uno de los mayores expertos en la materia. Y, desde luego, el contenido del prólogo es buena prueba de ello, pues presenta el tema con maestría y crea en el lector la necesidad de proseguir con la lectura del libro, precisamente lo que ha de conseguir un buen prólogo.

Centrándome en el cuerpo del trabajo, se divide en tres partes bien delimitadas: comienza con un capítulo en el que presenta algunas cuestiones previas que permiten poner al lector en contexto y prepararle para que pueda seguir correctamente todo el contenido posterior; continúa abordando de forma pormenorizada el derecho al olvido en las búsquedas de internet, al que dedica la mayor parte de la obra; y, a continuación, pasa a analizar el derecho al olvido en redes sociales y servicios equivalentes, una modalidad del derecho al olvido que, como anticipaba, ha sido introducida en nuestro ordenamiento jurídico muy recientemente.

En la primera parte, que podría calificarse como introductoria, el autor lleva a cabo una aproximación a dos cuestiones básicas: la tutela de los derechos de la personalidad en internet y la necesidad de crear un derecho al olvido. Tras explicar y analizar los diferentes mecanismos que ha previsto tradicionalmente

nuestra normativa para la protección de los derechos de la personalidad pone de relieve cómo estos se han revelado insuficientes para atender a los nuevos problemas que plantea internet, y, en concreto, a la capacidad que tienen los motores de búsqueda para facilitar el acceso, conservación y difusión de todo tipo de información.

El segundo capítulo del libro está dedicado al derecho al olvido en búsquedas de internet. Comienza abordando su germen normativo, que ha de buscarse en las primeras normas de protección de datos, principalmente en la Directiva 95/46/CE y en la Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal; para pasar a examinar a continuación los principales hitos jurisprudenciales en la configuración del derecho al olvido, centrándose especialmente, como no podía ser de otra manera, en la importante Sentencia del Tribunal de Justicia de la Unión Europea de 13 de mayo de 2014 —*Google Spain S.L. y Google Inc. vs. Agencia Española de Protección de Datos y Mario Costeja González*—. Además, el autor presenta los hechos que dieron lugar a los principales pronunciamientos que han dictado nuestros tribunales nacionales en relación con el derecho al olvido, que posteriormente va trayendo a colación a lo largo del trabajo.

A continuación, se detiene en la plasmación legal del derecho al olvido, que tuvo lugar primero, a nivel comunitario, a través del Reglamento (UE) 2016/679; y posteriormente, en nuestro ordenamiento nacional, mediante la promulgación de la Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales.

Tras ello, el autor entra de lleno en la configuración actual del derecho al olvido en búsquedas de internet. Al respecto, comienza abordando su denominación y concepto, poniendo de relieve los principales problemas que plantean las definiciones legales del derecho al olvido y algunas imprecisiones terminológicas, llegando a proponer otras denominaciones para referirse a este derecho que probablemente reflejen mejor su contenido, como derecho a ser olvidado o derecho a la oscuridad práctica.

Seguidamente se detiene en su naturaleza, y, aunque reconoce que el derecho al olvido guarda estrecha relación con los derechos a la intimidad y al honor, considera que en realidad es una manifestación del derecho a la protección de datos personales frente a su tratamiento informático. En concreto, entiende que se trata de una reformulación del derecho de oposición, en contra de la que probablemente sea la opinión mayoritaria en la doctrina, que considera que se trata de un derecho de cancelación o supresión (como de hecho lo llega a calificar la normativa comunitaria).

También aborda los elementos subjetivos del derecho al olvido: el editor de la página web, el gestor del motor de búsqueda, el internauta y el interesado; centrándose especialmente en las vicisitudes que tienen que ver con el gestor del motor de búsqueda y con el interesado, pues son los que plantean mayores controversias.

El autor dedica una buena parte del trabajo a analizar los diferentes presupuestos que han de concurrir para que proceda el derecho al olvido, que en líneas generales son los siguientes: la indexación en los motores de búsqueda de información vinculada al nombre y apellidos del interesado, el incumplimiento del principio de calidad de los datos, la mera voluntad del interesado —por lo que no resulta necesario que se le llegue a causar un perjuicio— y que exista petición de parte.

A continuación, aborda los límites a los que queda sujeto el derecho al olvido, centrándose sobre todo en el relativo al ejercicio del derecho a la libertad de información y expresión. Al respecto, analiza la colisión que puede producirse entre el mencionado derecho y el derecho de protección de datos personales, explicando los criterios de ponderación que ha ido estableciendo la jurisprudencia para tratar de buscar un equilibrio entre uno y otro.

La obra prosigue con un apartado que resulta de enorme utilidad práctica, pues tiene por objeto analizar el modo en el que el interesado puede ejercer el derecho al olvido. Y es que, este puede sustanciarse por diferentes vías: extrajudicialmente, en vía administrativa o ante la jurisdicción civil.

El último apartado del segundo capítulo del libro está dedicado a exponer los efectos del derecho al olvido en búsquedas de internet. Obviamente, el principal efecto será la desvinculación entre la información y el nombre y apellidos del interesado en los motores de búsqueda. Pero, además, también puede dar lugar a la imposición de sanciones administrativas o al establecimiento de una indemnización por los daños y perjuicios causados al interesado. Así mismo, el autor se adentra en una cuestión ciertamente controvertida: el alcance territorial de los efectos del derecho al olvido. Téngase en cuenta que se trata de un derecho que ha sido reconocido en la Unión Europea pero no en otros muchos territorios, como por ejemplo en Estados Unidos, por lo que imponerlo en terceros Estados resulta muy complicado.

Como anticipaba, el tercer capítulo de la obra está dedicado al derecho al olvido en los servicios de redes sociales y otros servicios equivalentes. El autor se detiene especialmente en aquellos aspectos en los que difiere del derecho al olvido en búsquedas de internet, realizando una remisión al segundo capítulo del trabajo para todas aquellas cuestiones en las que uno y otro resultan coincidentes.

A tal efecto, se centra en tres aspectos fundamentales: la justificación de la introducción de esta nueva modalidad del derecho al olvido, su regulación y su configuración actual. A esta última cuestión dedica la mayor parte del capítulo, pues dentro de ella hace mención a diferentes aspectos: el concepto y naturaleza, los elementos subjetivos, las subcategorías que presenta, los presupuestos para su ejercicio, los límites a los que queda sujeto y los efectos de su estimación.

En cuanto al concepto y naturaleza, el autor considera que en la medida en que este derecho permite que la información publicada desaparezca definitivamente de internet, sí cabría hablar de un verdadero derecho de supresión; a diferencia de lo que ocurre con el derecho al olvido en búsquedas de internet, que ya hemos visto que identifica con el derecho de oposición y no con el de supresión.

De la sucinta regulación legal de este derecho, el autor infiere la existencia de dos subcategorías distintas, pues, efectivamente, parece que son dos las hipótesis en las que cabe ejercitarlo, cada una con sus propios presupuestos: la primera es aquella en la que el propio interesado publica por sí mismo contenidos que incluyen datos personales suyos, en cuyo caso el presupuesto para que proceda el derecho al olvido es la revocación del consentimiento que ha prestado para la difusión de dichos contenidos; y la segunda, aquella en la que la información que contenga datos personales haya sido publicada por un tercero, en cuyo caso el presupuesto para el ejercicio del derecho al olvido es que la información en cuestión incumpla el principio de calidad de los datos, por incluir datos inexactos, no pertinentes, no actualizados o excesivos o que hayan devenido como tales como consecuencia del paso del tiempo.

Como ha quedado patente a través de este breve análisis del contenido del libro, el autor nos ofrece una visión completa del derecho al olvido, tanto en búsquedas de internet como en redes sociales, a través del análisis de diferentes aspectos, como su concepto, sujetos que intervienen, modalidades, presupuestos para su ejercicio, límites a los que está sujeto y efectos.

Pero no se limita a describir las mencionadas cuestiones, sino que participa en los diferentes debates que van surgiendo a medida que avanza el trabajo y toma partido en todos ellos, proponiendo soluciones a muchos de los problemas que plantea el ejercicio del derecho al olvido.

Ni que decir tiene que se trata de un tema novedoso, actual y de gran relevancia. De hecho, el libro que estoy recensionando constituye uno de los primeros trabajos monográficos en abordar en profundidad esta materia tras la promulgación de la nueva normativa estatal y europea de protección de datos, que ha dado nueva configuración al derecho al olvido en búsquedas de internet y ha introducido por vez primera el derecho al olvido en redes sociales y otros

servicios equivalentes; lo que creo que la convierte en una obra de lectura obligada para todo aquel que desee profundizar en el derecho al olvido, y, en general, en el Derecho de las nuevas tecnologías.

José Ramón de Verda y Beamonte
Catedrático de Derecho Civil
Universidad de Valencia