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SECTION LAW

THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES AFTER THE REGULATION (EU) No. 2016/1103. THE IMPACT UPON THE ITALIAN LAW

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ABSTRACT

The discipline on matrimonial property regimes presents significant difficulties for cross-border couples. Therefore, it is necessary to guarantee uniformity in the context of law applicable to the matrimonial property regimes, taking into account the peculiarities of the different legal systems of the Member States.

In this regard and in order to guarantee legal certainty, spouses must be made aware in advance with respect to the law applicable to a matrimonial property regime.

With Regulation No. 1103/2016, the European Union has introduced harmonized rules that allow spouses to knowingly choose the law applicable to their property regime.

Therefore, the aims is to examine the impact that the Regulation will have upon the Italian legal system. It is interesting to analyze the cases in which there will be conflict of rules and how those cases will be solved. In Italy, the Regulation will replace the national rules of private international law, only limitedly to the matrimonial property regimes constituted after the entry into the force of the Regulation.

So the purpose is to analyze how the Regulation affects the Italian private international law rules.

It will be interesting to understand which is the closest connection criteria that leads to the resolution of conflicts and to identify the law applicable to the matrimonial property regimes. The Regulation defines a series of connection criteria which, taking into account all the circumstances, allows to identify the applicable law even when the spouses didn't make the choice. In this sense, it is possible, for the cross-border couples, to reduce the practical and legal difficulties deriving from the disparity between the applicable laws. In fact, if there is legal uncertainty over the management of assets, the risk of not satisfying the family's interests increases.

Keywords: family, property regimes, cross-border

INTRODUCTION

The complexity of cross-border couples property regimes issues involves the increasing necessity of finding a common and uniform discipline.

In fact, the discipline of the aspects related to the property regimes of cross-border family has a particular concern for both the constant expansion in our social reality of

cross-border people unions and the different legal system, in the Member States, of the family property regimes.

For this reason with Regulation No. 1103/2016, the European Union has introduced harmonized regulations on conflicts of law in the Member States of the enhanced cooperation. Main objective is to guarantee that the family property regimes, as well as the effects of registered unions (Regulation (EU) No. 1104/2016), can be regulated from a law strictly correlated with cross-border couples.

To achieve legal certainty and to avoid the fragmentation of the property regimes, the applicable law must be able to regulate the inheritance of the couples properties, regardless of their nature or the fact that they are in a different Member State or even in a third State [1].

In order to facilitate spouses in management their properties, the Regulation No. 1103/2016 allows to choose the applicable law to the property regimes by reason of the habitual residence or the citizenship. A choice that can be made at any time, both before and after the celebration of marriage, and that cannot be changed without an express manifestation of will from the parties, nor undermine the rights of third parties [2].

The predictability of the applicable law aim to avoid that spouses may have uncertainties in the management of their properties.

Anyway, if spouses don't make the choice of the property regimes applicable law, the new European regulation provides for conflict of law rules wich identify a set of subsequent connecting factors and allow to designate the applicable law to the group of spouses properties.

II. The applicable law to couples property regimes. Connecting factors.

In order to guarantee legal certainty to the citizens, spouses must be aware of the applicable law to their property regimes (whereas 43, Reg. (EU) No. 1103/2016). In particular the European Regulation provides for specific hierarchically sorted connected factors wich allow to identify the applicable law and the social reality in wich the couple is more involved [3].

Precisely to ensure the predictability of the law, the regulation provides a set of objective criteria wich allow the spouses to establish the discipline that regulate the set of their properties.

A choice that can be made at any time, both before and during the marriage or on the occasion of the marital bond dissolution.

For example if a Portuguese and a Slovenian citizen that live in Italy, where they got married and work steadily, wants to choose the law that regulate their property regimes, they can use the criteria set in the Reg.(EU) 1103/2016.

In fact, Article 22 states that spouses can designate or change by mutual agreement the applicable law to their property regimes according to their usual residence or of one of them at the time of the agreement conclusion (article 22, paragraph 1, letter *a*). Therefore, in the present case law might be the Italian one, or the law of a State in wich one of the spouses has the citizenship at the moment of the agreement conclusion and in this case it would be Portuguese or Slovenian law.

Furthermore, the modification of the connecting factor which has determined the choice of the applicable law to the property regimes does not entail an automatic modification or invalidation of the agreement without the spouses being aware of it, unless there has been an explicit will to do so and in any case it will only affect the future (article 22, paragraph 2).

Among the criteria indicated in the article 22 there is no hierarchy, therefore parties can freely exercise their choice.

Certainly, *professio iuris* through a "certain" criterion is aimed at making the law regulating the property regimes determined by the continuous change of the spouses habitual residence less variable. This highlights the willingness of the European legislator to give the parties more private autonomy, although within the limits set by the legislation.

Where the spouses did not make any choice of the law for the management of their assets as a whole, it is possible to use the connecting factors indicated hierarchically in the article 26 Reg. (EU) No. 1103/2016, in order to reconcile the need of legal certainty with the real needs of the couple [4].

In this case the judge will be asked to use the criterion indicated in the article 26 and therefore that of the first habitual residence of the spouses after the marriage conclusion (letter *a*) or, in case of lack, the common citizenship of the spouses at the time of the marriage conclusion (letter *b*). Finally, when these two criteria cannot be applied, it will be used the criteria of the State law with wich the spouses have the closest relation, taking into account all the circumstances.

Therefore, examining the same case as before, the Italian law should be applied to the spouses property regimes, by virtue of the criterion indicated by the article 26, paragraph 1, letter *a*.

With regard to the identification of the first common current residence referred to in article 26 paragraph 1 letter *a*, particular attention must be paid to the moment in which it has to be placed and determined.

In this regard, according to European and internal jurisprudence orientation, the definition of "habitual residence" has to be traced back to the presence of symptomatic indices linked to the continuity of the spouses' lives in a State and to the practical organization of life in common, so that subsequent and undesirable effects of the parties can be avoided.

Anyway it is still possible, by way of exception and upon request of spouses, as provided for in article 26, paragraph 3, to ask the competent authority a different law enforcement from the one indicated in letter *a*) whenever both the spouses had relied on the law of that State to organize or to plan their property regimes, or alternatively when it can be demonstrated that the last common habitual residence took place in a different State and for a period significantly longer than that of the habitual residence designated on the basis of letter *a*).

The limits to the choice of law are those arising from the overriding mandatory provisions, that article 30 Reg. No. 1103/2016 defines as provisions whose compliance is considered by a Member State to safeguard its public interests and those of public order.

Public order operates as a consequent and specific limit in the sense that it is exposed when the effects of law or of the foreign decision may produce unacceptable consequences for the national law [5].

III. Regulation No. 1103/2016 and the rules of private international law

Reg. 1103/2016 can only be applied to the property regimes of the spouses after January 29, 2019. As a consequence for the choice of the applicable law to the property regimes of the couples married before the entry into force of the new European regulation, it is necessary to appeal to the rules of private international law (1. 218/1995).

It appears of particular importance the sentence of the Court of Cassation No. 1609/2007 with wich, after a long procedure, the applicable law to the property regimes of cross-border spouses was identified. The husband of Austrian citizenship and the wife of Italian citizenship, had decided to live in Italy and only after many years the husband obtained the Italian citizenship.

Faced with a marriage crisis, the couple appealed a judge to dissolve the marriage and to regulate their own property regimes, the husband wanted to apply the Austrian law and the wife the Italian one. The decision on the applicability of the Italian law, rendered after more than 10 years, was based by the Supreme Court on the basis of the last law common to the spouses during the marriage.

According to the rules of private international law, under the references of the article No. 30 and No. 29 (1. 218/1985) in absence of *professio iuris*, the applicable law to property regimes is coincident to the law which regulate the personal relationships. As a consequence the law should be identified on the basis of the spouses common national law (except for the references of the article 13 law No. 218/1995).

In lack of a common national law, the applicable law should be that of the State in which married life is mainly located but the identification of the applicable law on the basis of this criterion requires to the interpreter of the law a delicate weighting of the circumstances [6] which can better lead to an evaluation suitable to satisfy the interest of the spouses in the regulation of the property regimes.

Spouses can also conclude an agreement on the applicable law according to private international law. However, if the spouses can agree in writing that their property regimes are regulated by the law of the State in which at least one of them has its own residence, the agreement can be considered valid only if the choosen law or that of the place where the agreement was stipulated provides for it.

Moreover it must be taken into account, that property regimes of the different legal systems are not often coincident and that the choice of the law determines the change of the property regimes between the spouses. Furthermore, if the choice is made in favor of the Italian law, the solemn form expressly provided for the matrimonial property agreement is required.

It must also be pointed out that the enforceability to third parties of the property regimes regulated by a foreign law is conditioned by the fact that third parties are aware of it or they ignored it through fault of their own and the proof lies upon the spouses [7]. And, where the spouses cannot give the demonstration of being aware of the property regimes, Italian law is applied in relations with third parties.

In this way spouses are not allowed to have the certainty of the applicable law to their property regimes, as there is a variability in the application of the rules resulting from such circumstances [8]. As a consequence this affects the unity of the spouses property discipline and of the effects.

The criterion of the "prevailing location" must therefore be understood in a "dinamic" way [9] and requires a principle of reasonableness based analysis to the interpreter [10] so that the applicable law will be the one that suits the best to regulate the cross-border couple property regimes and especially to respond the concrete interest of the family.

At the moment the subject of the Court of Cassation decision No.1609/2007 would be evaluated in a shorter time and on the basis of the connecting factors provided for in Reg. 1103/2016.

International law provisions have an evident different approach to the regulation of the property regimes compared to that of Reg. 1103/2016 that splits the patrimonial aspects from the personal ones, whose discipline is left to the national law.

In any case the rules provided for in Reg. 1103/2016 have a great impact on the corresponding provisions of internal private international law, being addressed to replace the corresponding provisions.

CONCLUSION

The need to predict the choice of the applicable law to the property regimes of the spouses is characterized by the principle of universal application, which provides the law designated to be applicable even when it is not that of a Member State and from the principle of unity of applicable law, which consists in the possibility of regulating all the properties of the spouses no matter where they are.

The article 20 of the Reg. 1103/2016 allows to apply the law of a third State not participating to the enhanced cooperation and consequently also that of a non-European State, except in cases where, for reasons of public order of the Member State concerned, should be excluded.

It is a principle that on the one hand meet the needs of applicable law certainty, but on the other requires the judge to deal with rules different from those in which it operates [11]. In any case, the introduction of this principle allows the parties to avoid the complex activity of rules identification provided for in the private international law and to avoid conflicting results. Furthermore, as to avoid the fragmentation of the property regimes, the applicable law is intended to regulate all the properties of the spouses regardless of the nature or the fact that they are located in another Member State or in a third State.

Therefore, the principle of unity (article 22) avoids that even a part of the assets will be referred to a different discipline compared to that choosen from the spouses. In this way, the applicability of such principles plays a role in preventing any abuse by spouses or third parties.

The European regulation, through predicting a unitary discipline of the patrimonies and by handing over the choice of the parties autonomy, contributes to the increase the needs of certainty in the applicability of the law and however it allows to reduce the

practical and legal difficulties which are present in the management of the property regimes of the spouses.

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