



UNIVERSITÀ DEGLI STUDI DI CAMERINO

SCUOLA DI GIURISPRUDENZA

CASE STUDIES AND BEST PRACTICES ANALYSIS TO ENHANCE EU FAMILY AND SUCCESSION LAW. WORKING PAPER

a cura di Jerca Kramberger Škerl, Lucia Ruggeri, Francesco Giacomo Viterbo







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Indirizzo di contatto: lucia.ruggeri@unicam.it

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JERCA KRAMBERGER ŠKERL, LUCIA RUGGERI and FRANCESCO GIACOMO VITERBO

Foreword

This e-book is the result of the second period of the team's work on the Project Personal Solution in European Family and Succession Law. The Project is designed as a sequence of stages of progressive research leading to a better understanding and application of the European Union legislation property.

At the end of the first stage of our common journey, we published the e-book Family Property and Succession in EU Member States. National Reports on the Collected Data', which provides an updated insight into the current situation in each EU Member State emphasizing the most important issues in the context of property relations in family and succession law and the existing social structures. In the course of the second stage, we have collected working papers that analyze case studies and best practices to enhance EU family and succession law. In these case studies, careful consideration is given to concrete matters of both matrimonial property regimes and the property consequences of registered partnerships, as well as to cross-border succession, entailing the interpretation of EU Regulations Nos. 2016/1103, 2016/1104 and 650/2012. The working method adopted in all papers was to start from a hypothetical case description and focus on the resulting quaestio iuris. Case-law and doctrine (if relevant) are subsequently taken into consideration in order to illustrate the correct manner of legally resolving that hypothetical case. The focus is laid on the applicability of the EU Regulations and on the results of such application.

We believe this publication to be an important achievement and we are grateful for the support of the European Commission which, by virtue of its Justice Programme, facilitates results that would otherwise be difficult to accomplish. We also need to acknowledge the work and generous efforts of the national stakeholders who contributed to this collection of case studies on family and succession law and thus shared their professional experience and skills. Via the analysis of hypothetical cases, this publication provides an overview of the legal and social issues relating to the interpretation and application of the said EU Regulations. In this respect, it also contributes to the creation and the utility of the Atlas which is intended to provide couples with personalized and tailor-made solutions relating to the property consequences of marriage and register partnerships.

The Atlas (in its work-in-progress version) is available at the Project webpage https://www.euro-family.eu/.

Although the idea of this e-book comes from the Camerino PSEFS team, which is also the leader and coordinator of the PSEFS Project, and the Faculty of Law of the University of Ljubljana is leading the stage of the Project, the contents of the e-book are a common accomplishment of all Project partners: besides the Camerino and Ljubljana PSEFS team, also of the PSEFS teams of the universities of Rijeka and Almería.

Team building, cooperation with law professionals and academics, exchange between experts and other stakeholders, and the dissemination of the results entailed hard work and dialogue with the aim of improving the quality of life of persons and families which are characterized by a cross-border element. The editors wish the thank all contributors for their excellent and expedient work and for endorsing the idea of the EU as a single area where diverse cultures and traditions meet and cohabitate peacefully and freely.

Camerino-Ljubljana, 7th December 2019

MARÍA BELÉN BARRIOS GARRIDO-LESTACHE

Transborder successions including unliquidated matrimonial property regime of a dissolved marriage

Summary: 1. Quaestio iuris. – 2. Description of the hypothetical case: questions. – 3.
Analysis of the hereto case-law and scholarly opinions in EU Member States (relevant to the hypothetical): Jurisdiction and law applicable to the divorce. – 4. EU Regulations impact on the issue with short description of different scenarios (hypothetical case with or without application of EU Regulations): Jurisdiction and law applicable to the matrimonial property regimen (hereinafter "MPR") between Ana and Tiziano, given that the action to liquidate MPR is brought on march 2019, both Ana and Tiziano live in Spain, Ana has Spanish citizenship and Tiziano is an Italian citizen. – 5. Conclusion.

1. Quaestio iuris

Ana, a Spanish citizen with residence in Salamanca (Spain) met Tiziano, an Italian citizen who lived in Torino, (Italy) while he is enjoying an "Erasmus" scholarship. They got married in Salamanca in February 1989 and they settled in Salamanca after the wedding. They are going through a marital crisis and they want to know their options in case of a divorce. Later, Ana dies in the absence of descendants, under a will made before a Spanish notary, according to the Spanish law, name heirs to her four brothers. The MPR between Ana and Tiziano remains unliquidated.

2. Description of the hypothetical case: questions

In order to resolve the facts described in the previous section and assess possible scenarios, we will answer the following questions:

A) About the divorce of Ana and Tiziano, given that court is seised in March 2019.

- 1.- Which jurisdiction and law are applicable to the divorce?
- 2.- What if Tiziano has returned to Italy?
- 3.- What if Tiziano is now domiciled in Denmark, according to Danish law?
- B) About the matrimonial property regimen (hereinafter MPR) between Ana and Tiziano:
 - 1.- Which jurisdiction and law are applicable to the MPR liquidation?
 - 2.- What if marriage was concluded in February 1997?
 - 3.- What if marriage was concluded in February 2013?
 - 4.- What if marriage was concluded in February 2019?
- 5.- What if Ana passes away in October 2019? She executed a deed in which named her four brothers as heirs.
- C) Which jurisdiction and law are applicable to the succession, existing international elements?
- 3. Analysis of the hereto case-law and scholarly opinions in EU Member States (relevant to the hypothetical): Jurisdiction and law applicable to the divorce.

1.- Both Ana and Tiziano reside in Spain.

- About the jurisdiction: under the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter "Regulation 2201/2003"), Spanish court is competent because of the habitual residence of the spouses (Article 3.1 a), first Paragraph)
- As for applicable law: according to Article 5 of the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter "Regulation 1259/2010"), Ana and Tiziano may agree to designate as law applicable: (i) the law of Spain, where they are habitual resident (5.1.a); (ii) the Italian law, as Tiziano is an italian citizen (5.1.c); (iii) the law of Spain where Ana and Tiziano are habitual resident in (Article 8).

2.- Tiziano returns to Italy and Ana stays in Spain:

- Regarding the jurisdiction, pursuant to Regulation 2201/2003 (3.1.b) the jurisdiction shall lie:
- With Spanish Court: if Ana files the lawsuit before it, because Ana and Tiziano were last habitually resident in Spain and Ana still resides there (second Paragraph).
- With Italian Court: (i) if Ana file the lawsuit before it, as Tiziano, the defendant, resides in Italy (third Paragraph); (ii) if Tiziano file the lawsuit before Italian Court having resided in Italy at least six months immediately before the application is made, since he is an Italian citizen (sixth Paragraph) or (iii) having resided in Italy for more than one year before making the application, even if he is granted a different citizenship (fifth Paragraph).
- With Spanish or Italian Court if Ana and Tiziano agree to file the application before any of them, because each one resides in one of them. (fourth Paragraph)

This forum diversity is possible because the grounds laid down in Article 3 are alternatives¹. At the same time, in accordance with Article 6, the jurisdiction established under this Article 3 is exclusive where the defendant is a habitual resident or a citizen of a Member State. Thus, Ana and Tiziano can choose any forum of Article 3, but only one of those forums.

If the respondent is neither a resident in nor a citizen of a Member State but one of the forums established in Article 3 have jurisdiction, the court of a Member State cannot base its jurisdiction to hear the petition on their national law, even if that means to apply de Regulation 2201/2003 to resident in and nationals of non-Member State². Hence, if Tiziano would reside in Slovenia and Ana were a Japanese citizen and Japan resident, Slovenian court may have jurisdiction under the fifth or the sixth Paragraph of Article 3.1.a), regardless the citizen and the residence of Ana, and no other Member State (not even Italy) shall determine its jurisdiction by the laws of the State.

As an additional ground to determine jurisdiction, if the defendant is neither a citizen of nor a resident in a Member State, the court of the Member State in which the claimant having the citizenship of another Member State has the habitual residence, shall determine

¹ Case-law C-168/08 "HADADI".

² Case-law C-68/07 "SUNDELIND".

its jurisdiction by the laws of that State (Article 7.2). For instance, if Ana is a Japanese citizen and resides in Japan and Tiziano is an Italian citizen and has his residence in Slovenia, Tiziano may avail himself of the Slovenian rules of jurisdiction.

In any other case, the jurisdiction applicable will be decided by the laws of the State.

- * As to the laws of the Member State applicable to the primary case, if Ana, Spanish citizen, would stay in Spain and Tiziano, Italian citizen would have come back to Italy, according to the Italian Law 31 May 1995 No 218, the court of Italy shall have jurisdiction (i) in any case, since Tiziano is an Italian citizen (Article 32) and (ii) if Ana sues Tiziano, who has his residence in Italy (Article 3). On the other hand, the Spanish Ley Orgánica 6/1985 del Poder Judicial states the grounds to determine the jurisdiction in the Article 22 quater, which replicates the grounds of the Article 3 of the Regulation 2210/2003 and they are applicable «as long as no other foreign court has jurisdiction». In that case, if Ana sues Tiziano before Spanish Court, both the Italian and the Spanish law have jurisdiction, but if Tiziano sues Ana, only the Spanish court will have jurisdiction. Additionally, both National laws set forth the possibility of an agreement between the spouses.
- With respect to the law applicable to the primary case, pursuant to the Regulation 1259/2010, Ana and Tiziano may agree to designate as law applicable: (i) the law of Spain, because Ana and Tiziano were last habitually resident in Spain and Ana still resides there (5.1.b); (ii) the Italian law, as Tiziano is an Italian citizen (5.1.c); (iii) the law of the forum (5.1.d). In the absence of this choice, the divorce shall be subject to the law of Spain, where Ana and Tiziano were last habitually resident and Ana is residing yet. (Article 8).

It is worth mentioning that, unlike Regulation 2201/2003, the grounds laid down by Regulation 1259/2010 are sequential, not alternative.

3.- Tiziano set his residence in Denmark and Ana stays in Spain:

• About the *jurisdiction*: since Denmark does not participate in the Regulation 2201/2003, the case is subject to 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial (hereinafter "1968 Convention"), subscribed by the European Union and Denmark, among other states.

The 1968 Convention does not provide special grounds for jurisdiction in matters of divorce, so we apply the Articles 2 and 3, according to which the jurisdiction shall lie with de Court in whose state the defendant has the domicile. Therefore, if Ana brings the action the Italian court will have jurisdiction whereas if the claim is presented by Tiziano, the Spanish court will have jurisdiction. In addition, in accordance with Article 4, if the respondent is not domicile in a Contracting State (for example, if Ana lives in Japan) jurisdiction will be determined by the laws of each Contracting State and any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force. In contradistinction to Regulation 2201/2003, the 1968 Convention does not take into account the citizenship of the parties. Under the Articles 17 and following, the jurisdiction can also be established in favour of another Contracting State by the agreement of the spouses.

- Concerning applicable law, Denmark does not participate in Regulation 1259/2010 and there is no other applicable international convention on this matter, in consequence this issue will be established by the laws of each State.
 - 4. EU Regulations impact on the issue with short description of different scenarios (hypothetical case with or without application of EU Regulations): Jurisdiction and law applicable to the matrimonial property regimen (hereinafter "MPR") between Ana and Tiziano, given that the action to liquidate MPR is brought on march 2019, both Ana and Tiziano live in Spain, Ana has Spanish citizenship and Tiziano is an Italian citizen

1.- Ana and Tiziano got married in February 1989:

- About *jurisdiction*: It is necessary to analyse if any of the European Regulation sanctioned so far prescribes criteria about this subject, including the connection to previous processes.
 - Pending the divorce proceeding:

The Regulation 2201/2003 does not specifically exclude the MPR liquidation but none of its dispositions provides the prorogation of the jurisdiction on this matter, as it is stipulated for parental responsibility (Article 12). Moreover, according to Recital 8, the Regulation

should not deal with issues such as property consequences of the marriage. As a result, Regulation 2201/2003 is not applicable.

There is also the 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 (hereinafter "Regulation 1215/2012"), which have a more general scope. However, Article 12 thereof, in similar terms as Article 1 of the 1968 Convention, exclude from its scope «rights in property arising out of a matrimonial relationship». In consequence, Regulation 1215/2012 is not applicable either.

- If divorce is already settled, it was brought before the Court of Justice of the European Union (hereinafter CJEU) if it was possible to apply the Regulation 1215/2012, since the marriage was already dissolved. CJUE ruled out that in the case of a dispute between former spouses relating to the liquidation property acquired during the marriage, is closely connected to proprietary legal relationships between spouses resulting directly from the matrimonial relationship so it does not come within the scope of Regulation No 1215/2012³.

Consequently, to establish jurisdiction it is irrelevant if there are pending proceeds about the divorce and, at the same time, there is no European regulation in this matter it is imperative to apply the law of the Member States.

Both Italian and Spanish International Private Law (hereinafter IPL) lay down the same grounds to determine jurisdiction in matters of divorce as in matters of MPR liquidation, so we refer this question to the section A).1) on jurisdiction issues.

- Regarding *applicable law*: Maybe this question could be solved by Regulation 1259/2010. However, the Article 1.2.e) states "This Regulation shall not apply to [...] the property consequences of the marriages". Therefore, there is no European regulation in this matter, so it is imperative to apply, again, the law of the Member States.
- The Italian International Private Law in force at the time the marriage was concluded is represented by the Articles 17 to 31 of the Italian Civil Code General Laws Dispositions. Those Articles were repealed by the above-mentioned Italian Law 31 May 1995 No 218, which was entered into force 1 September 1995. Nevertheless, after principles of legal certainty and protection of third parties, given the date the marriage was concluded we have

³ Case-law C-67/17 "ILIEV".

to apply the former Article 19 of the Italian Civil Code, according to which the patrimonial relationships between the spouses are ruled by the laws of the State of which the husband had the citizenship when the marriage was concluded. The Spanish Civil Code applicable to the case, previous to the reform which entered in force 7 November 1990, provides the same solution in its Articles 9.2 and 9.3. Therefore, the MPR between Ana and Tiziano is the properties community established in Articles 177 and following of the Italian Civil Code.

2.- Ana and Tiziano got married in February 1997:

- About *jurisdiction*: As in the previous case, it is irrelevant if there are pending proceeds about the divorce and, at the same time, there is no European regulation in this matter it is imperative to apply the law of the Member States. Both Italian and Spanish International Private Law lay down the same grounds to determine jurisdiction in matters of divorce and in matters of MPR liquidation, so we refer this question to the section A). 1) on jurisdiction issues.
- As to applicable law: The IPL in force in Italy at the time the marriage is concluded is Italian Law 31 May 1995 No 218, whose Articles 29 and 30 establish that Articles 29 and 30, the patrimonial relationships between the spouses are ruled by the law of the State in which the life of the marriage is prevailing located. Accordingly, the applicable law is the Spanish law. On the other hand, the Spanish Civil Code applicable to the case state in its Articles 9.2 that (i) in the absence of common national law of the spouses and (ii) in the absence of a document executed by both of them choosing the matrimonial law or the law of the habitual residence of any of them (ii), the patrimonial relationships between the spouses are ruled by the law if the habitual residence of the spouses right after the marriage is concluded, which is the Spanish law.

In conclusion, unlike the solution in section B). 1), the MPR between Ana and Tiziano is the "Sociedad de gananciales" – a properties community regimen- established in Articles 1346 and following of the Spanish Civil Code.

3.- Ana and Tiziano got married in February 2013:

In matters of applicable law, Regulation 1259/2010 entered into force 21 Jun 2012, so it is interesting to analyse if any of the European Regulation sanctioned so far prescribes criteria about this subject, including the connection to previous processes.

Regulation 1259/2010 expressly excludes this question from its scope in Article 1.2.e), which states: «*This Regulation shall not apply* [...] *to the property consequences of the marriage*». As a result of that disposition, Regulation 1259/2012 is not applicable to this question.

- **4.- Ana and Tiziano got married in February 2019,** after the entering in force of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter "Regulation 2016/1103")
 - Concerning *jurisdiction*:
- Pending the divorce proceeding: the first Paragraph of Article 5 stipulate: «Where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation 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». Also, when the jurisdiction to solve the divorce is based on the grounds set forth in Paragraphs five and six of the Regulation 2201/2003, the jurisdiction in matters of MPR is subject to the agreement of both of the spouses.

Thus, fulfilling the requirements of Article 5, the jurisdiction issues refers to the tribunal seised to rule the divorce, a question previously analysed in sector A), to which we refer to.

In the absence of an agreement it is not possible to prorogue the jurisdiction on the divorce, and the grounds laid down in Articles 6 and 7 are applicable.

Article 7 allows an agreement of the spouses to choose the jurisdiction of the court whose National law is applicable to MPR by Articles 22 or 26, which will be studied below. Pursuant to Article 8 the agreement can be implicit or explicit.

In the absence of an agreement, pursuant to Article 6, the jurisdiction shall lie with Spanish Court since Ana and Tiziano are still habitual resident in Spain (a).

On the other hand, if Tiziano comes back to Italy, jurisdiction shall lie:

- -With Spanish court if Ana files the lawsuit before Spanish Court, because Ana and Tiziano were last habitually resident in Spain and Ana still resides there (b).
- With Italian Court if Ana file the lawsuit before it, as Tiziano, the defendant, resides in Italy (c).

It is worth mentioning that, unlike Regulation 2201/2003, the grounds laid down by Regulation 2016/1103 are sequential, not alternative.

- If divorce is already settled:

The first issue to be studied is if, in spite of being the marriage dissolved, it is still possible to apply the prorogation of jurisdiction provided by Article 5, so the jurisdiction that ruled on the divorce will now have jurisdiction on the MPR. The Regulation 2016/1103 does not exclude this prorogation, but Recital 35, when talking about the connection between jurisdictions, refers to "proceedings pending" so it appears that if the proceeding is concluded the prorogation of the jurisdiction it is not possible.

This is the solution the most respectful to principles of procedural economy, since it might have passed a long period of time between the conclusion of the marriage and the claim to liquidate MPR. Hence, in this case the applicable law is subject directly to Articles 6 and 7.

■ About applicable law, this matter is under the Regulation 2016/1103, as it expressly states in Article 27 (e).

In the terms of Article 22, and keeping in mind the primary case in which both Ana and Tiziano reside in Spain, they could have chosen to apply to their MPR the law of Spain since Ana and Tiziano are still habitual resident in Spain or the law related to any of the Member States of which and Tiziano are citizen, whether it is the Italian or the Spanish law.

By virtue of Recital 45, the agreement must be concluded before the marriage, at the time of conclusion of the marriage or during the course of the marriage so it is not permitted to choose the law applicable after the dissolution of the marriage although the MPR had not been already liquidated.

In the absence of an agreement, Article 26 lays down various criteria which are sequential, not alternative. In compliance with this Article, MPR will be ruled by the Spanish law, because of the habitual residence of Ana and Tiziano at the time of the solution of the marriage. However, in those cases where the ground to determine the jurisdiction is the habitual residence of the spouse, the court having jurisdiction might hold that it is to be applicable the law of the State in which the spouses had a significantly longer residence than

the residence after the conclusion of the marriage or the law of the State on which the spouses rely to arrange or plan their property relations (Paragraph 3).

5.- Ana and Tiziano got married in February 2019 and Ana passes away in October 2019

- In matters of *jurisdiction* we continue to apply Regulation 2016/1103:
- Pending the divorce proceeding, the passing of Ana ends the procedure since the marriage is automatically dissolved by the death of Ana. A different issue would be to determine if the claim about the divorce have consequences on the succession, for example to provoke the loss of the successional rights of the surviving spouse.
- If the divorce is settled, as we have already analysed in section B).4), it is not possible to invoke the jurisdiction deciding on the divorce.
- If the succession of Ana is subject to 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 (hereinafter Regulation 650/2012), according to Article 4 of the Regulation 2016/1103, the court seised to in matters of the succession of a spouse pursuant to Regulation 650/2012, the courts of that State shall have jurisdiction to rule on matters of the MPR arising in connection with that succession case. In accordance to Regulation 650/2012, in this case the jurisdiction shall lie with the Spanish court (Article 4).
- If the succession of Ana is not subject to Regulation 650/2012, the jurisdiction must be decided upon the grounds specified in Articles 6 and following of the Regulation 2016/1103, but, given a dead person cannot be a citizen or have a resident, these dispositions must be adapted to the case in question, such as, the liquidation of MPR carried out by the surviving spouse/ex-spouse and the heirs of the deceased.

In accordance with the Recital 35 of the Regulation 2016/1103, when there are not proceedings pending, the connecting factors for the purposes of determining jurisdiction are set in in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised. It is our understanding that the Articles 6

and following must be studied under the light of this intention, referring to the parties involved.

We see no obstacles to the parties agreeing on the jurisdiction under the Article 7.

In the absence of an agreement, some of the grounds of Article 6 must be accommodated or even ignored, despite its sequential nature. Firs of all, Paragraph (a) cannot be applied because there is no residence of the spouses anymore. Secondly, concerning Paragraph (b) we think that it can be applied if the surviving spouse or the heirs of the deceased reside where the residence of the spouse was, with no detriment to any of the parties, at least, not more detriment that when applying this Paragraph if living both spouses.

Jurisdiction can also be determined by Paragraphs (c) and (d), taking into account the common citizenship of the surviving spouse and the heirs, and by Article 9.2, second Paragraph, which invoke the jurisdiction of the State where the marriage was concluded, meaning, in compliance with Recital 37, the State whose authorities the marriage was conclude before.

Finally, but only regarding immoveable property, the Articles 10 or 11 shall be applied to.

Therefore, if the brothers of Ana, who are Spanish citizens and Tiziano reside in Spain and in the absence of an agreement the Spanish court will have jurisdiction according to Paragraph (b); if Tiziano comes back to Italy, either the Italian and the Spanish court may have jurisdiction depending on who is the respondent; and if the brothers of Ana do not live in Spain either, the jurisdiction shall lie in the Spanish Court, because the marriage was concluded before Spanish authorities.

• As to *applicable law*, the answer is similar to the solution set in section B. 3), exception made for Article 22, given that, having Ana passed away the marriage is dissolved and there is no possible choice of law, according to Recital 45. Furthermore.

5. Conclusion

To sum up, apart from cases statistically infrequent, European Union Regulation in matter of civil law has experienced a huge improvement, represented by the Regulations 2201/2003, 1259/2012, 4/2009, 1259/2010, 1215/2012, 650/2012, 2016/1103 and 2016/1103, so as to provide cross-borders situations with legal certainty.

Abstract: This practical case follows the marital crisis of Ana and Tiziano through their divorce and the liquidation of their matrimonial property regime, proposing different temporary scenarios and involving different countries, as an approach to study the interconnection (or, sometimes, the lack of it) between the diverse European Union Regulations in the matter.

VINCENZO BONANNO

Patrimonial regimes and de facto cohabitation in European and Italian law

Summary: 1. Quaestio iuris focus. - 2. Description of a hypothetical case. - 3. The solutions of jurisprudence and doctrine. The regulation of de facto cohabitation in European and Italian law. - 4. The impact of EU Regulations No 2016/1103 and No 2016/1104 of 24 June 2016 and the different legal scenarios. - 5. Conclusions

1. Quaestio iuris focus

Following a long process whose priorities had already been highlighted in the 1998 Vienna Action Plan the two new European Regulations applicable from 29 January 2019 in the European countries implementing enhanced cooperation were approved on 24 June 2016. The EU Regulation No 1103/2016 implements enhanced cooperation in the area of jurisdiction, applicable law, the recognition and enforcement of decisions in matters of matrimonial property regimes and the EU Regulation No 1104/2016 implements enhanced cooperation in the area of jurisdiction, applicable law, the recognition and enforcement of decisions regarding the property effects of registered partnerships. The Member States participating in the aforementioned enhanced cooperation are: Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. This procedure is open to all Member States wishing to participate in the establishment of binding regulation cooperation.

As for the scope of application of the EU Regulation No 1104/2016 Article 1, Paragraph 1, provides that the regulation «shall apply to matters of the property consequences of registered partnerships» remaining the *de facto* cohabitation and their patrimonial regime ex-

cluded from the scope of application, for which we will try to identify the possible interpretative scenarios following a normative, jurisprudential and doctrinal analysis which in general the Member States and in particular Italy will have to face, following the many application problems.

2. Description of a hypothetical case.

The continuous evolution of society and customs, finds expression in a renewed social conscience open to new relationships and consequent juridical institutes that are able to protect the new social formations towards the overcoming of a formal definition of the traditional family founded on marriage. The reference is in particular linked to the European territory where it is possible to find legal alternatives to marriage, such as registered partnerships, increasingly the subject of attention by national legislations and the European legislator and to the derived protection of new rights related to cohabitation more uxorio. The increase in births within couples not united by the marriage bond is confirmed in 2016, for a percentage equal to 42.6% compared to 27.3% in 2000. In 2017, in several EU Member States they exceed those within the marriage: France (59.9%), Bulgaria (58.9%), Estonia (58.6%), Slovenia (57.5%), Portugal (54.9%), Sweden (54, 5%), Denmark (54.2%) and the Netherlands (51.0%), as well as in Iceland (71.2%) and Norway (55.7%) among the EFTA countries, registering an increase in 2017 compared with to 2016 in fifteen EU Member States, according to the latest established data. Moreover according to the most recent data in the European territory there are 2.2 million marriages and almost a million divorces in 2016¹. To emphasize the importance of the two new EU Regulations No 1103/2016 and No 1104/2016, the impact they will have on the lives of European citizens and on national regulations also involving professionals in the sector, it is sufficient to consider that the international couples currently present in Europe exceed 16 million, according to the figures of the European Commission. Therefore, the jurisprudential cases concerning the patrimonial relations deriving from a de facto cohabitation could be increasing.

¹ See https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics

The case of a request for the dissolution of the patrimonial relationships resulting from a cohabitation of fact not registered between two European citizens who coexisted in the period between the month of May 2004 and the month of March 2014 is given. Following the termination of their relationship, one of the cohabitants proposes a request to terminate the patrimonial regime deriving from cohabitation, at the State Court which recognized and regulated the patrimonial regime of this form of cohabitation, in October 2014, in order to obtain payment of a credit recognized by the legislation of the State under consideration. With final judgment the other partner is sentenced to pay a sum of money for the dissolution of their patrimonial regime. Subsequently a procedure of forced execution is started with a negative outcome, due to the lack of assets in the property. However, having ascertained the presence of a regular income received by the former cohabitant, who has long been domiciled in another Member State, a request is issued for the release of the certificate referred to Article 53 of the Regulation No 2012/1215 in March 2018².

The query that arises in this context is the following: what is the discipline applicable to the case in question?

3. The solutions of jurisprudence and doctrine. The regulation of de facto cohabitation in European and Italian law.

The answer to the question set out above relates to the regulation applicable to the specific case being analyzed.

As will be explained in more detail later in the discussion, unregistered cohabitations do not fall within the scope of application of the two new EU Regulations No 1103/2016 and No 1104/2016, as registration, governed by the domestic law of the Member States, is mandatory and is a prerequisite for the application of the EU Regulation No 1104/2016.

For this reason it is necessary to answer two questions. The first is aimed at verifying whether the patrimonial regime deriving from a *de facto* cohabitation falls within the sphere of civil or commercial matters pursuant to chapter I, Article 1, Paragraph 1, of the Regulation

² Article 53 of Regulation No 1215/2012 relates to the release by the originating court on request of any interested party of the certificate that certifies the enforceability of the issued decision.

No 2012/1215³ or if it is to be considered among the subjects excluded from the field of application as per chapter I, Article 1, Paragraph 2, letter a) of the same regulation and specifically to the «rights in property arising out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage».

The second question is aimed at ascertaining whether the same patrimonial regime deriving from a *de facto* cohabitation is governed by the previous Reg. No 2001/44⁴ ratione temporis. According to the Article 66 of the Regulation No 1215/2012 this applies to the legal claims proposed on or after 10 January 2015. Instead the provisions of the Regulation (EU) No 44/2001 are applied to the proposed actions and to the decisions formed after its entry into force, that is, the day one of March 2002 and until January 10th 2015. Therefore, the reference date for the purposes of the regulation applicable to the case in question is the month of October 2014, i.e. the one in which the action defined with a decision was proposed.

Therefore, to answer the second question represented above, *ratione temporis* the regulation applicable in our case is the Regulation (EU) No 44/2001.

With reference to the first question, it is first of all necessary to highlight the regulatory evolution in matters of jurisdiction and the enforcement of decisions in civil and commercial matters. In fact, the Member States concluded the Brussels Convention on 27 September 1968 and « [...] in as much as Regulation No 44/2001 replaces the Convention of 27 September 1968 [...] the interpretation provided by the Court in respect of the provisions of that convention is valid also for those of that regulation, whenever the provisions of those Union instruments may be regarded as equivalent⁵». Therefore it follows that the notion of matrimonial property regime includes not only the regime of assets specifically and exclu-

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³ The EU Regulation No 2012/1215 regulates jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴ The EC Regulation No 44/2001 concerns jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁵ ECJ, 16 July 2009, C-189/08, Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA., EU:C:2009:475, Paragraph 18; ECJ, 10 September 2015, C-47/14, HoltermanFerhoExploitatie and Others, EU:C:2015:574, Paragraph 38.

sively contemplated by certain national legislations in view of marriage, but also all the patrimonial relationships that derive directly from the conjugal bond or from the dissolution of this⁶.

Returning to the case in point and being the parts not linked by marriage bond, their patrimonial regime is not included among those excluded from the field of application of which in the Chapter I, Article 1, Paragraph 2, Letter a) of the Regulation No 44/2001 for which this provision does not apply. The above has been confirmed subsequently with the legislative amendment referred to in Chapter I, Article 1, Paragraph 2, letter a) of the Regulation No 1215/2012, which excludes from the field of application of the same «the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage» in this way «[...] that exclusion was extended by that regulation beyond rights in property arising out of a matrimonial relationship, in relation only to relationships deemed comparable to marriage [...]⁷». This makes it impossible to apply the exclusion from the scope of application of Regulation No 44/2001 of the Article 1, Paragraph 2, Letter a) to the *de facto* couple referred to in the case in question.

Ultimately, it is possible to conclude that in the case under study, following an action for the dissolution of property relationships arising from a *de facto* cohabitation proposed before the entry into force of Regulation No 1215/2012, the applicable regulation is that set out in Regulation No 44/2001, chapter I, Art. 1, Paragraphs 1 and 2, letter a), concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4. The impact of EU Regulations No 2016/1103 and No 2016/1104 of 24 June 2016 and the different legal scenarios.

The new European regulation pursuant to EU Regulations No 1103/2016 and No 1104/2016 is applied as established by Art. 70, in the Member States participating in the

⁶ ECJ, 27 March 1979, C-143/78, Jacques de Cavel v Louise de Cavel, EU:C:1979:83, Paragraph 7.

⁷ ECJ, (Sixth Chamber), 6 June 2019, C-361/18, Commissioners for Her Majesty's Revenue and Customs v The Chancellor, Masters and Scholars of the University of Cambridge, Paragraph 44.

enhanced cooperation starting from 29 January 2019 and according to the Art. 69, transitional provisions, applies only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019. If the proceeding in the Member State of origin was started before this date, the decisions taken subsequently are recognized and executed according to the provisions of the Regulations on the recognition, enforceability and enforcement of decisions, if the rules on competence applied are in accordance with those established by the provisions of Chapter II of the same Regulations now under consideration.

Furthermore, the provisions on the applicable law referred to in the Regulations in question, according to the Articles 69, refer only to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019 and only to partners who register their partnership or who specify the law applicable to the property consequences of their registered partnership after the aforementioned date.

The EU Regulation No 1104/2016 as established by chapter I, Article 1, Paragraph 1, «shall apply to matters of the property consequences of registered partnerships» remaining excluded from the scope of application according to Recital 21 «other preliminary questions such as the existence, validity or recognition of a registered partnership, which is covered by the national law of the Member States, including their rules of private international law». In fact, according to the Recital 16 «The way in which forms of union other than marriage are provided for in the Member States' legislation differs from one State to another, and a distinction should be drawn between couples whose union is institutionally sanctioned by the registration of their partnership with a public authority and couples in *de facto* cohabitation. While some Member States do make provision for such *de facto* unions, they should be considered separately from registered partnerships, which have an official character that makes it possible to take account of their specific features and lay down rules on the subject in Union legislation».

Therefore a necessary requirement for the application of the aforementioned Regulation is the presence of a union « [...] the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation», as defined by the Art. 3, Paragraph 1, letter a) of the aforementioned Regulation governed by the national and

international private law of the Member States. It follows that, since registration is a constituent element of the juridical case now examined for cohabitation or European *de facto* couples, more precisely to unions not registered in relation to the domestic law of the Member States, the EU Regulation No 1104/2016 will not apply⁸. The question therefore refers to the internal discipline of the Member States and their rules of private international law and how they proceeded to regulate this type of family formation.

The de facto cohabitations have found protection and recognition already in some Member States: the Austrian family law and inheritance law recognizes the de facto cohabitation between people of the opposite sex and of the same sex; Belgian family law and inheritance law recognizes informal cohabitation between persons of the opposite sex and of the same sex even if considered only partially and for some limited legal effects regulated by different laws; in Bulgaria it is possible to find a limited discipline of de facto heterosexual and homosexual cohabitation with regard to medical law, domestic violence and some aspects of public law, tax law, in the field of civil registration and it is possible to regulate property relations between them for by means of a contractual agreement; in Croatia, de facto cohabitations are recognized by law with different rules regarding property and successor regimes according to whether they are of the same sex or of the opposite sex; the legal system of the Czech Republic, Denmark, Finland, France, Germany, Greece, Malta, Portugal, Spain, Sweden recognizes both de facto heterosexual and homosexual couples; in Slovakia, de facto cohabitations are not recognized by family law by receiving certain protections in not many provisions of the civil code regarding property and succession. In Slovenia, the law recognizes cohabitation between people of the opposite sex and non-formal civil unions between persons of the same sex. In the United Kingdom, *de facto* couples are only granted certain limited rights⁹.

In Italy the family not based on marriage before the Law May 20, 2016, No 76, so called Cirinnà Law, did not find a formal definition even if there were already several legal

⁸ P. Bruno, I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate, Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019, Milano, 2019, passim.

⁹ Personalized Solution in European Family and Succession Law Project, PSEFS Project, https://www.euro-family.eu/atlas.

rules aimed at regulating some aspects in a disorganized manner¹⁰. The recognition and the consequent legal protection in the absence of a reference legislation was reflected, as confirmed by the jurisprudence of the Constitutional Court of November 18, 1986, n. 237, in Article 2 of the Italian Constitution which recognizes and guarantees the inviolable rights of man, both as an individual and in social formations where his personality is carried out and the consequent connected manifestations of freedom and solidarity. In fact it is from the social formations that the doctrine and the jurisprudence find a foundation to legitimize the protection to this kind of *affectio coningalis* between people not united by the bond of the marriage or today also in a civil union in absence of formalization of the relationship of couple.

A further reference for the purposes of protecting *more uxorio* cohabitations was Art. 3 of the Constitution invoked by the Court in sentence n. 404 of 7 April 1988 in the matter of succession in lease contracts for residential purposes, not because of its equalization but the condition of the spouse remaining different from that of the cohabiting partner, but for the logical contradiction of the exclusion of a cohabitant from the provision of a disposition which intends to protect the habitual cohabitation, being unreasonable that in the list of successors in the lease does not appear who to the original owner of the contract was in the stable cohabitation tied *more uxorio*, where the existence of natural offspring further enhances the *ratio decidenti* for the conservation of home to the remaining family community. It is precisely in the matter of legitimization of the cohabiting partner *more uxorio* to the exercise of the possessory actions that the Italian Constitutional Court with different sentences, constitutionally recognizes the *de facto* family relevant to the right and worthy of legal protection. The Supreme Court of Cassation also followed the orientation expressed by the Constitutional Court by defining the cohabiting partner as a qualified holder¹¹, thus recognizing the possessory protection.

¹⁰ G. OBERTO, La famiglia di fatto. Introduzione alla «riforma Cirinnà», in Riv. dir. fam. pers., 2019, II, p. 709.

¹¹ See Supreme Court of Italy, 21 March 2013, No 7214, in www.dirittoegiustizia.it.

The doctrine identifies the distinctive features of the *de facto* families in the presence of a series of parameters such as: the daily *affectio*, the stability of the bond, the effective coexistence, the obligation of loyalty, the assistance and the mutual contribution to the capital charges.

After a long journey aimed at legally framing the *de facto* family, it came to its formalization with the Law of 20 May 2016, No 76 so called Cirinnà law on the regulation of civil unions between persons of the same sex and discipline of convivences, which does not use the expression *de facto* family but cohabitation of fact. Pursuant to Article 1, Paragraphs 36 to 65 of the aforementioned 2016 regulatory reform are intended as cohabitants of fact two persons of age united permanently by emotional ties of couple and mutual moral and material assistance, not bound by kinship, affinity or adoption, by marriage or civil union. The reform law that came into force on June 5, 2016, refers to Paragraph 37 of the Art. 1 to the registry declaration pursuant to Art. 4 and letter b) of Paragraph 1 of the Art. 13 of Presidential Decree No 223, for the verification of the stable cohabitation mentioned above.

Therefore, from a careful examination of the discipline in question, the registration according to the law of the unions under the EU Regulation No 1104/2016 is mandatory as a constitutive element of the case in question for the purposes of applying the same regulation. The registration itself being not provided for the forms of cohabitation referred to in the Cirinnà Law would exclude the application of the regulations in question to the *de facto* cohabitation of the Law No 76/2016. The same aforementioned registry declaration as Law No 76/2016, could not be considered a constitutive element of a *de facto* cohabitation but a fulfillment for the purposes of advertising, an instrument of assessment and proof of the constraint in question¹². The optional cohabitation agreement with which the cohabitants in fact can regulate their property relations, pursuant to Paragraph 50 of the Article 1 of the Law No 76/2016 drawn up in written form, under penalty of nullity, with a public deed or private deed with a notarized signature by a notary or attorney attesting to its compliance with the mandatory rules and the public order which must be transmitted to the common of

¹² See Court of Milano, ord., 31 May 2016, in www.rivistafamilia.it, drafter G. Buffone.

residence of the cohabitants for the registration to the registry office it would be out of the same from the field of application of the UE regulations in examination.

Also the Ministry of the Interior, Central Directorate for Demographic Services, with note n. 231 of 06/02/2017 related to the request for an opinion on the *de facto* cohabitation of the Law No 76/2016 writes that Paragraph 37, without prejudice to the existence of the conditions of cohabitation of fact, indicated in Paragraph 36, expressly finalizes the institutions proper to the registry system to ascertain the stable cohabitation and not already to the constitution of the *de facto* cohabitation.

Therefore, for *de facto* cohabitation, it is not possible to find any registration obligation in legislation, an indispensable requirement for the application of the EU Regulation No 1104/2016. So we must ask ourselves what is the legal discipline, the source of regulation of the patrimonial relations between the *de facto* European cohabitations in Italy. The reference is the Art. 30 *bis* of the Law n. 218/1995 that is the law of reform of the Italian system of private international law, as the same Law No 76/2016 does not regulate the *de facto* cohabitation but only the optional cohabitation agreement.

The text in force since 05/06/2016, Art. 30 *bis* of the Law No 218/1995 and listed cohabitation contracts, establishes that it is the common national law of the contracting parties to apply to cohabitation contracts. In addition, the law of the place where cohabitation is mainly located applies to the contractors of different citizenship, without prejudice to national, European and international rules governing the case of multiple citizenship.

Therefore, in light of the considerations set out above, it is possible to outline the impact that EU Regulations No 1103/2016 and No 1104/2016 will have on the *de facto* European cohabitation. In fact, these remain outside the scope of application of the twin Regulations. They will then be the rules of national law and private international law of the Member States, pursuant to recital 21 of the EU Regulation No 1104/2016, for which the same does not apply to other preliminary questions, such as the existence, validity or recognition of a registered partnership, qualify the legal case of the *more uxorio* cohabitations in relation to the constitutive and obligatory registration procedure by law, for the purposes of the existence of the union, a precondition for the application of the regulation and the consequent legal protection of cohabitations in general.

Moreover, for the European legislator, if they want to find legal protection for their property regimes, they have the necessary legal instruments for this purpose, namely the EU Regulation No 1103/2016 which implements enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and EU Regulation No 1104/2016 which implements the 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 and the related EU Execution Regulations No 1935/2018 and No 1990/2018 of the European Commission.

5. Conclusions

Ultimately it is possible to conclude that the two new EU Regulations of 24 June 2016, No 1103 and No 1104, mark a step forward towards an increasingly unequivocal community legislation in the regulation of matrimonial property regimes and the property effects of registered partnerships. This enhanced cooperation is open to accession by other Member States. This enhanced cooperation is open to accession by other Member States.

With regard to *de facto* unregistered unions, remaining outside the scope of application of the two EU Regulations No 1103 and No 1104 of 2016 will be governed by the internal regulations of the Member States and their rules of private international law, constituting the registration a constitutive element for the purposes of the application of the Regulation No 1104/2019.

The *de facto* cohabitation in Italy, as regulated by the Art. 1 of Paragraph 36 of Law No 76/2016, remain excluded from the scope of application of EU Regulations No 1103/2016 and No 1104/2016, as the registration cannot be identified as a constitutive element but only a prerequisite for the purposes of advertising, an assessment tool and proof of the constraint in exam.

Abstract: The entry into force of EU Regulations No 1103/2016 on matrimonial property regimes and No 1104/2016 on the property effects of registered partnerships, places the

interpreter in the face of new challenges including the delimitation of the scope of application of the new rules.

In particular, the subject of the study concerns the patrimonial regime of *de facto* partnerships in the light of the two new Regulations.

The *de facto* cohabitations have found protection and recognition already in some Member States.

As for the scope of application of the EU Regulation No 1104/2016 Article 1 § 1 provides that the regulation «shall apply to matters of the property consequences of registered partnerships» remaining the *de facto* cohabitation and their patrimonial regime excluded from the scope of application, for which we will try to identify the possible interpretative scenarios following a normative, jurisprudential and doctrinal analysis which in general the Member States and in particular Italy will have to face, following the many application problems.

MARÍA JOSÉ CAZORLA GONZÁLEZ

Matrimonial property regimes after the dissolution by divorce: connections and variables that determine the applicable law

Summary: 1. Quaestio iuris focus. – 2. Description of the hypothetical case. – 3. Analysis of the hereto case-law and scholarly opinions in EU Member States (relevant to the hypothetical). – 4. EU Regulations impact on the issue with short description of different scenarios (ipotetical case with or without application of EU Regulations). – 5. Conclusions.

1. Questio iuris focus

Application or not of Council Regulation (EU) 2016/1103, of 24 June, taking into account the right of free choice of law applicable through a marriage between persons of different sex before the entry into force of the rule and the difference in default of applicable law pact, together with the effects referred to the temporal application (retroactivity) and the differences of substantive law existing in Europe where there are States such as Spain which has a plurilegislative system.

Furthermore, in the practical case, possible *a priori* connection elements will be examined with multiple States in order to establish territorial and jurisdictional competence with States that participate in enhanced cooperation as opposed to others that do not.

2. Description of the hypothetical case

A Swedish national (country participating in enhanced cooperation and regulating marriage and common-law unions, of the same sex and different sex), manager of a multinational, married an Irish woman on 6 January 2012 in Ireland (country not

participating in enhanced cooperation and regulating both marriage and common-law couples with the same or different sex) whose profession is a part-time translator.

According to her, the habitual place of residence of both after the celebration of the marriage was Holland, but he says that he worked in Sweden and lived there so it was impossible to have a common residence after the celebration of the marriage, although he recognizes that his wife did live in the Netherlands (Holland), until July 2016 when both move to live in Barcelona where they buy a house and establish their common domicile. Three years later, on December 1, 2019, they actually separated, moving him to live in Germany and staying with her in Barcelona (Spain).

Subsequently, on February 5, 2020, he files for divorce in the Courts of Barcelona, and requests the dissolution and liquidation of the matrimonial property regime.

This is a marriage made up of people of different nationalities from two EU Member States: Sweden and Ireland, where it is not clear from the facts stated where the place of residence is after the celebration of the marriage to determine the applicable law and there is no evidence that there was an agreement or pact. But it is obvious that he works in Sweden and she in the Netherlands immediately after marriage, as well as that in July 2016 they move to live in Barcelona and that in February 2020 he decides to file for divorce, although a few months earlier they had actually separated and he moves to Germany.

It is important to remember that when the Swedish national filed the application in 2020, Council Regulation (EU) 2016/1103 of 24 June on enhanced cooperation in matters of jurisdiction, applicable law and the recognition and enforcement of judgments in matrimonial property regimes was already in force. However, the marriage took place before the entry into force of the Regulation, namely in 2012. Thus, it would not be applicable because this regulation will affect marriages celebrated after its entry into force, that is, from January 29, 2019, although we must remember that the choice of law will be allowed after that date when the marriage was previously celebrated, in which case Regulation (EU) 2016/1103 may come into force.

The questions to be studied will be those referring to the jurisdiction of the court, as well as the determination of the applicable law when they opt for the applicable law or in the absence of a pact, and the retroactivity of the patrimonial effects taking into account the

voluntary nature of the parties. In order to respond to these contents, we pose the following questions:

- Which court has jurisdiction for the dissolution of a marriage entered into before the entry into force of Regulation 2016/1103?
- Is it necessary to know the substantive law of each of the States involved in the case as information prior to the exercise of the right of option that the parties have to choose the applicable law?
- If the parties had chosen to apply Regulation 2016/1103, are there variations in the determination of the court's jurisdiction?
- If you had opted for the application of EU Regulation 2016/1103, would there be a difference?
- In the absence of agreement of the parties, how would the applicable law be determined?
- Since when would the application have the effects of the matrimonial property regime under Regulation (EU) 2016/1103? Is there room for retroactivity?
- 3. Analysis of the hereto case-law and scholarly opinions in EU Member States (relevant to the hypothetical)
- A. Which is the competent court for the dissolution of a marriage celebrated before the entry into force of Regulation 2016/1103?

The jurisdiction of the court of a marriage celebrated before the entry into force of Regulation (EU) 2016/1103 in the absence of choice of applicable law (as is the case in which we find ourselves) will be determined under the application of the Rome III Regulation and the Brussels II Regulation taking into account the time of celebration of the marriage, to subsequently assess whether by choice of spouses Regulation (EU) 2016/1103 was not applicable. Since the marriage as we have stated took place in 2012 and the applicable law would not be the new Regulation, except by agreement of the parties.

The normative framework that regulates matrimonial crises with elements of aliens is until the entry into force of Regulation 2016/1103 in two regulations, which will continue to apply from the territorial point of view in the States that do not participate in the enhanced

cooperation and if in them under the rules of private international law or when the parties by option determine otherwise if their marriage was celebrated before January 1, 2019:

- One concerning international jurisdiction and the recognition and enforcement of judgments is contained in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter referred to as the Brussels IIa Regulation), which is binding on all the Member States of the European Union with the exception of Denmark.
- The second refers to the law applicable to divorce and legal separation, but not to marriage annulment. Council Regulation (EU) No 1259/2010 of 20 December 2010 establishing enhanced cooperation in the field of law applicable to divorce and legal separation (the Rome III Regulation), which binds 17 Member States of the European Union, including Spain.

Consequently, we will attend to the Brussels II *bis* Regulation, Article 3 of which contains seven alternative forums to which we must attend in order to resolve our practical case.

Let us remember that it was the Swedish national who presented the request for dissolution of the marriage before the Courts of Barcelona and not in Germany which was where he lived at that time or in Sweden of which he was a national and he resided alone after the celebration of the marriage. General jurisdiction in matters relating to divorce, legal separation and marriage annulment shall therefore lie with the courts of the Member State in whose territory it is situated:

- the habitual residence of the spouses, or
- the spouses' last habitual residence, provided that one of them still resides there, or
- the habitual residence of the defendant, or
- in the case of a joint application, the habitual residence of one of the spouses, or
- the plaintiff's habitual residence if he or she has resided there for at least one year immediately prior to the filing of the application, or

- the applicant's habitual residence if he has resided there for at least six months immediately preceding the lodging of the application and is a national of the Member State concerned or, in the case of the United Kingdom and Ireland, has his domicile there.

In the light of the foregoing, the competent body for resolving the divorce would be the Spanish courts, since the only common habitual residence proved before the court would be in Barcelona, and she still resides there and is the defendant.

It is a verifiable fact before the competent court that the plaintiff is a subject of Swedish nationality who is habitually resident in Germany at the time the application is filed, and that the defendant has Irish nationality but does not reside there, does so after marriage in the Netherlands and subsequently does so in Spain, where both spouses resided before separating in 2019. Therefore, under the application of Article 3 of the Brussels II *bis* Regulation, we can affirm that the claim can be filed in Spain and that these courts are the competent courts according to two forums: on the one hand, the forum of the last habitual residence of the spouses provided that one of them still resides there and, on the other hand, the habitual residence of the defendant, since the marriage took place before the entry into force of the Regulation.

The dissolution of the matrimonial bond through divorce consequently implies the dissolution and liquidation of the matrimonial economic regime, which until the entry into force of Regulation 2016/1103 was regulated in the domestic rules of private international law. Thus, the international jurisdiction of the Spanish courts will be determined by the forums included in the LOPJ, as in our case would be the one included in Article 22 *bis* LOPJ, referring to the defendant's domicile in Spain.

While the applicable law will be regulated in accordance with Articles 9.2 and 9.3 of the Spanish Civil Code for the entire national territory: the second Paragraph of Article 9 for spouses who have entered into marriage covenants or capitulations; and the third Paragraph, when they have not been agreed.

As there was no choice of applicable law, and the spouses did not have a common nationality at the time the marriage was celebrated, the law applicable to the effects of divorce and liquidation will take into account the provisions of Article 9.3 of the Spanish Civil Code. According to which, the law of the common habitual residence immediately following the

celebration of the marriage shall apply, but since it is not proven that there was a common habitual residence after the celebration of the marriage, the law of the place of celebration of the marriage, i.e. Ireland, shall apply.

If the spouses had chosen the law applicable to the time of celebration of the marriage, we would go to Article 9.2 Civil Code; their choice would have been between the law of nationality (Sweden or Ireland) or of the habitual residence of either of them (Sweden or Holland).

B. <u>Is it necessary to know the substantive law of each of the States involved in the case</u> as information prior to the exercise of the parties' right of option to choose the applicable law?

The difference from one applicable law to another is decisive in the legal liquidation of the economic regime in the absence of an agreement, since the distribution in a community of assets regime is not the same as when the liquidation corresponds to the separation of assets¹.

That is why we understand that we have to consider the different possibilities with regard to the marriage of a Swedish national with an Irish national some issues that affect the national substantive law of each Member State as regards the liquidation of matrimonial property, because in the face of a matrimonial crisis the first thing that most couples think about is how their economy is going to be after the separation, divorce or annulment. Being in this sense decisive to know the applicable law by choice if there has been, or in its absence, that which is legally determined in a supplementary way, that is to say, being foresighted or not, it serves a more economically beneficial interest, and not nationality or habitual residence because the regulatory framework known to them; because practice shows us that any commercial company as when the civil company is liquidated, the parties wish to benefit, in relation to the other partners or community members, but also, in relation to third creditors if any.

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¹ L. RUGGERI, I. KUNDA and S. WINKLER (eds): Family Property and Succession in EU Member States National Reports on the Collected Data, Rijeka, 2019, passim. See https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf This book in open access has the civil law applicable in the 28 Member States in relation to marriage and unmarried couple law.

Thus, the Swedish national who entered more than his wife would reasonably prefer the legal application of the Catalan regime of separation of goods² as opposed to the Dutch or the Swedish where the community of goods governs. In the same way, the patrimonial responsibility of the spouses according to the applicable legal regime will vary accordingly. In this context, and in accordance with Article 27 of the Regulation, it will be necessary to know: the assets within the patrimony, since a home that is the family home of another that does not have this protection is not the same. That is to say, it will be necessary to classify the properties of movable and immovable property, according to the different categories and protection, because in the regulation of the liability of each of the spouses, or both towards third parties, it is not the same to apply the German statutory nationality law, in which the assets contributed and acquired during the marriage do not become common property, while the accumulated profits acquired during the marriage are equal when the patrimonial regime ends (Article 1363, Paragraph 2 *BGB*)³, different from the supplementary legal regime of marital property regulated in the Spanish Civil Code.

On the other hand, the Swedish legal⁴ regime governing the community of deferred assets through which each of the spouses is entitled to half of the net value of the marital assets after dissolution, and where in addition to being holders of a common patrimony they can be holders of a private patrimony of which they are individually free to make decisions about their assets, with the exception of housing and household goods, similar to that regulated in the Spanish Civil Code and the Dutch in terms of the legal regime of community applicable to assets, but with a fundamental differentiation: In the case we are analyzing, marriage celebrated before January 1, 2018, all the goods that the spouses contributed to the marriage and those acquired during the same will belong to the matrimonial patrimonial community as well as the debts.

This situation has recently changed for married spouses after 1 January 2018 following the amendment to the Dutch Civil Code. As of this date, the spouses can dispose of a private

² PEREZ, A. and CAZORLA, MJ Family property and succession in Spain, in the book L. RUGGERI, I. KUNDA and S. WINKLER (eds): Family Property and Succession in EU Member States National Reports on the Collected Data, Rijeka, 2019, p 610 ff.

³ National report prepared by Tereza Pertot. https://www.euro-family.eu/atlas_scheda-de.

⁴ National report prepared by Erik Mägi, Paolo Quacquarini, Sanna Thorslund, Lisa Nordlund, Giovanna Di Benedetto, Vincenzo Bonanno & Lisa Nordlund. https://www.euro-family.eu/atlas_scheda-se.

patrimony derived from donations or inheritance to one of them, and consequently, it is also possible that the debts derived from assets excluded from the community are private, as well as from pre-marital debts; because from this date, they no longer form part of the joint property, unless by mutual agreement the spouses decide otherwise.

Ireland⁵ and Catalonia, for their part, follow a different regime and effects to be applied at the time of dissolution of the marriage and liquidation of the estate.

In this sense, let us remember that in Ireland the spouses cannot choose any economic regime for marriage, which is not the case in the Spanish Autonomous Community of Catalonia, where the spouses can choose prior to marriage, or subsequently change it as many times as they deem appropriate, since the principle of free choice applies.

Both territories have in common the fact that they are governed by the legal regime of property separations, and some similarity in terms of the use of family housing, because in Ireland when one of the spouses has low incomes, the courts try to satisfy basic needs by assuring to him or her a home, similar to the attribution of the use of family housing in relation to the most vulnerable spouse in Catalonia.

The effects with respect to burdens or debts maintain similarities and differences, because while it is common to both regulations that each spouse is responsible for the administration, management and disposition of their assets, in addition to taking appropriate measures to avoid economic imbalances, which make it possible to satisfy after the rupture the basic needs of the most vulnerable spouse due to lack of income or low income in Ireland, for its part the Catalan Family Code regulates the possibility of financial compensation for work⁶.

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⁵ MARRIAGE: Articles 41 and 42 of the Constitution of Ireland, Judicial Separation and Family Law Reform Act 1989 (1989 Act), Family Law Act 1995 (1995 Act), Family Law (Divorce) Act 1996 (1996 Act), Children and Family Relationships Act 2015, Family Law (Maintenance of Spouses and Children) Act 1976, Guardianship of Infants Act 1964. CIVIL PARTNERSHIP: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act), Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010. SUCCESSIONS: Administration of Estates Act 1959, Succession Act 1965. Vid. Based on the national report prepared by Elisa Sgubin. https://www.euro-family.eu/atlas_scheda-ie.

⁶ The Compilation of Catalan Civil Law (Civil Code of Catalonia book III-Article 232.5, provides for the possibility of financial compensation for work, so that, if a spouse has worked for the house substantially more than the other, is entitled to financial compensation for this dedication provided that at the time of extinction of the regime by separation, divorce, nullity or death of one of the spouses or, where appropriate, the effective cessation of cohabitation, the other has obtained a higher asset increase. The regulation regarding the form of payment, actions to which the injured party is entitled against acts detrimental to the right to compensation, as

4. EU Regulations impact on the issue with short description of different scenarios (ipotetical case with or without application of EU Regulations)

A. If the parties had chosen to apply Regulation 2016/1103, are there variations in the determination of the court's jurisdiction?

The entry into force of the Regulation implies that parties who have celebrated their marriage before can choose as applicable law Regulation 2016/1103, in force since 29 January 2019, and consequently, with possible application in 2020 the year in which the application for divorce is filed.

In the case that we are commenting on, we can assume, taking into account either the connections with habitual residence that are made in Article 5 of the Rome III regulation, or, under the choice of Regulation 2016/1103, there is nothing to object to the international jurisdiction assigned to the court of first instance of Catalonia. Although we must remember that under the application of Regulation 2016/1103, jurisdiction is understood in a broad sense, because it includes not only the courts in the strict sense of the word, which exercise judicial functions, but also, for example, the notaries of some Member States as happens in Spain since the Law of Voluntary Jurisdiction of 2015.

From this point on, and in accordance with Article 5 of the Regulation on matrimonial property regimes 2016/1103, the competent court will be the court of the Member State before which a request for divorce has been filed which is competent to rule on questions relating to the matrimonial property regime raised in relation to that request, in accordance with the rules on jurisdiction in divorce matters laid down in the Brussels IIa Regulation (2201/2003), Article 3 of which provides that a spouse may file for divorce in the courts of the Member State in which he or she has his or her habitual residence if he or she has resided there for at least one year immediately before the filing of the application and the other spouse is still residing there, which is the case in question.

well as the exercise of said right, is contemplated in the Compilation of Catalan Civil Law Article 232.8, Compilation of Catalan Civil Law (Article 232.9 and Article 232.11 Compilation of Catalan Civil Law). To add that the Compilation of Catalan Civil Law Article 232.10 specifies in this respect that the right to financial compensation for work is compatible with the other economic rights that correspond to the creditor spouse and must be taken into account to establish these rights and, if appropriate, to modify them.

B. <u>If you had opted for the application of EU Regulation 2016/1103</u>, would it make any difference?

The EU Regulation 2016/1103 does not adopt the criterion of nationality, but opt for the criterion of residence; and therefore, it is not necessary to start from the nationality of the spouses in order to know the applicable law with or without regard to enhanced cooperation, since habitual residence becomes a determining element when it comes to knowing the applicable rule.

From habitual residence onwards, the regulation develops two situations:

Law applicable by option freely chosen by the parties: When the members of the marriage select the applicable law according to Article 22 of the corresponding Regulation, exercising the right of option to apply to their matrimonial regime or registered partnership one of the laws specified in the aforementioned precept. In this case, the spouses or members of the couple may agree to designate or amend the law applicable to their matrimonial property regime, provided that such law is one of the following:

- a) The law of the State in which the spouses, or one of them, have their habitual residence at the time of the conclusion of the agreement;
- b) The law of a State of the nationality of one of the spouses or future spouses at the time of the agreement.

This option is not exercised by the parties in the case we are analysing, but imagining that by residing together they would have made marital contracts, Catalan law will be applicable because it is the residence they had at the time of the conclusion of the agreement.

In our case, bearing in mind that the Regulation adopts the criterion of residence, and only one of the consorts belongs to a State that has expressed its will regarding enhanced cooperation in relation to the aforementioned Regulations and the other party is a national of a State that did not adopt it, according to Article 20, the law conceived as applicable by the Regulation applies regardless of whether or not it is the law of a Member State. It could therefore also be applicable to the property consequences of marriage by universal application of that Article in those countries which have not expressed themselves in favour of enhanced cooperation such as Ireland, in accordance with the Regulation.

From here on, when there is a choice, we will follow the provisions of Article 22 in both Regulations and when there is no choice, we will apply Article 26 of Regulation (EU) 2016/1103. Both situations differentiate the hierarchical order according to whether or not they have exercised their right of option to the applicable law and to the determination of international jurisdiction.

C. In the absence of agreement of the parties, how would the applicable law be determined?

In the absence of agreement on the choice of applicable law under Article 22, we must apply the provisions of Article 26 of the relevant Regulation, which establishes a hierarchy that helps determine the law applicable to the matrimonial regime or registered partnerships. Under this provision, the law applicable to the matrimonial property regime/registered partnership will be the law of the State:

- a) of the first common habitual residence of the spouses after the celebration of the marriage; or, failing that,
- b) of the common nationality of the spouses at the time of the celebration of the marriage; or, failing that,
- c) with whom the spouses have in common the closest links at the time of the celebration of the marriage.

Add that exceptionally and at the request of either of the spouses with more than one common nationality (Article 26.2) to whom only letters a and c of the first Paragraph shall apply, the judicial authority competent to rule on the property consequences of a marriage, as determined in the third Paragraph of Article 26, may decide the legislation of a State other than the one whose legislation is applicable by virtue of Paragraph 1, if the legislation of that other State attributes property consequences to the institution of the registered partnership and if the applicant proves it by this exceptional means that:

- the spouses had their last common habitual residence in that other State for a significantly longer period than in the State designated under Paragraph 1(a), and
- both parties had relied on the legislation of that other State to organize or plan their property relations.

Both connections reflect a certain proximity to the personal circumstances of the spouses, being furthermore ordered in the alternative form, and fixed temporarily, in order to avoid problems of mobile conflict. By way of exception and at the request of either spouse, the judicial authority having jurisdiction over the matrimonial property regime may decide that the law of a State other than the State whose law is applicable by virtue of Paragraph 1(a) shall govern the matrimonial property regime if the plaintiff proves that: the spouses had their last common habitual residence in that other State for a considerably longer period of time than in the State of first common habitual residence of the spouses after the celebration of the marriage; and that both spouses relied on the law of that other State to organise or plan their property relations.

Whereas 49 of Regulation 1103/2016 literally states that in the event that the applicable law is not chosen, attention will be paid to the already analysed scale of connection points (first common habitual residence of the spouses immediately after marriage should constitute the first criterion, over and above the law of the common nationality of the spouses at the time of the celebration of the marriage. And in the absence of both criteria, since it is not proven that there is no first common habitual residence and the spouses do not have a common nationality at the time of the celebration of the marriage, the third criterion will be the law of the State with which the spouses have a closer connection. In applying the latter criterion all circumstances must be taken into account and it must be clear that these connections must be those existing at the time of the celebration of the marriage. Therefore, applying Irish law would be inconsistent with whereas 51 of the Regulation which legitimises, in exceptional cases, the judicial authority of a Member State, at the request of either spouse, when the spouses have moved to the State of their habitual residence for a long period, to be able to conclude that it is the law of that State which can be applied when the spouses invoke it, with the limit being that its application may prejudice the rights of the third party.

On the basis of this wording, it appears that the longest period of residence of both spouses was in Spain, and specifically in the province of Barcelona, but it is not enough to comply with this sole requirement, but it is necessary for both to organise their property relations during the years of marriage under the Catalan civil code and, consequently, in separation of property.

And according to the facts set out in the judgement, we understand that after the celebration of the marriage, there was no common residence although the longest period of residence together was in Catalonia and by connection, if we take into account the law of the place of celebration of the marriage, Irish law must be applied, where we must remember there is no concept of economic matrimonial regime - own solution common law - i.e. property acquired before and during the marriage belongs to each spouse, a circumstance which in the judgement was assimilated to the existence of a sort of regime of separation of property.

At this point, the only controversy between the spouses would be whether to the liquidation of the marital patrimony the regime of separation of goods or the marital is applied, knowing that in the region of Catalonia governs the separation of goods, in Ireland for the case in which we are where the spouses have not made pacts or matrimonial capitulations there is no concept of economic matrimonial regime, which has been understood by the DGRN as an identity with the separation of goods historically. Therefore, where we will find the controversy is if the Dutch law is applicable -where the supplementary economic matrimonial regime is that of community of goods, resulting that, with exceptions, the goods acquired after the celebration of the marriage are part of the community of gain.

Therefore, Article 26 of the Matrimonial Regime of Regulation 2016/1103 is applicable, which regulates the applicable law in the absence of choice of the parties, the law corresponding to the State of the first common habitual residence of the spouses after the celebration of the marriage will apply. The first and only common habitual residence was in Spain, specifically in the Autonomous Community of Catalonia, as objectively demonstrated; therefore, the Spanish law applicable to the division of their property will be the Catalan Civil Code, because two conditions are met: her habitual residence in Catalonia is maintained after the de facto separation as well as her intention to remain there, both had been living in this territory during the twelve months prior to his change of residence and filing for divorce on their part. Therefore, the Catalan courts have jurisdiction to decide on the divorce and the division of their assets will govern the separation of assets, but differentiating two times as far as the liquidation affects: one from the beginning of the marriage until their residence in

Catalonia governs the place of celebration of the marriage (Irish law) and since they had their residence in Catalonia the Catalan Civil Code.

Since when would the application have the effects of the matrimonial property regime under EU Regulation 2016/1103? Is there room for retroactivity?

The first premise is given, since he (a Swedish citizen) is the one who demands and the longest period of time has been in Barcelona. But this law will only apply from the celebration of the marriage, unless one of the spouses does not agree (in this case the law of that other State will take effect from the establishment of the last common habitual residence in that State, the application of which will not negatively affect the rights of third parties deriving from the applicable law by virtue of Paragraph 1(a); or where the spouses have entered into marital contracts prior to the establishment of their last common habitual residence in that other State.

Bearing in mind that they married in 2012 and that habitual residence in Barcelona does not occur until 2016, two different situations may occur: one that is less likely is that she agrees, in which case, Catalan law will take effect retroactively from the celebration of the marriage. And another, which in our case is more likely, would be that she opposes, in such a case, the Catalan Civil Code will apply from the date in 2016 that both established their habitual residence in Barcelona.

5. Conclusions

The main conclusion is that the importance of nationality is shifted in favour of habitual residence, and consequently the applicable law is changed in States such as Spain and the United Kingdom, which are plurinational, where the application of their rules is allowed.

To add, that the right of option granted to the parties by Regulation 2016/1103 implies that the temporal impact of application goes beyond the date of entry into force; and the retroactivity of the effects from the celebration of the marriage will depend on the will of the spouses, but if it does not occur, the effects will be only from the celebration of the agreement.

The division between the countries participating in the enhanced cooperation and those which do not does not constitute an absolute limit for the application of the Regulation, since under the principle of free choice the parties can determine its application.

Finally, the dissolution of the matrimonial bond entails, together with the most obvious personal consequences, a series of patrimonial implications, including the dissolution and liquidation of the matrimonial property regime. This issue is currently regulated under Council Regulation (EU) 2016/1103 of 24 June 2016 establishing enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes (hereinafter Regulation 2016/1103), the order of precedence under the above-mentioned Rome III Regulation, which continues to apply in accordance with the rules of conflict of private international law where the parties do not choose the law applicable in one of the 18 countries participating in the enhanced cooperation or where the latter is not applicable, will then be replaced.

Abstract: It analyzes the jurisdiction of the court to dissolve the divorce and the law applicable to the economic matrimonial regime of a plurinational marriage whose demand is presented when Regulation 2016/1103 is already in force, from different scenarios.

STEFANO DEPLANO

Applicable law to succession and European public policy

Summary: 1. Quaestio iuris: the case. – 2. Case description. – 3. Case-law solutions with the current Regulation. – 4. The impact of the EU Regulation on the case at hand and short description of possible different scenarios. – 5. Conclusions.

1. Quaestio iuris: the case

In 1988 Mr. Karim, a Saudi man resident in France, makes his will. He chooses to apply to his succession the Saudi law. In accordance with the Islamic rule which prohibits a non-Muslim from inheriting, he orders his daughter to inherit only on condition that she converts to the Muslim religion.

May Karim choose the law applicable to his succession in 1988? And nowadays? Is, in 2019, the aforementioned testamentary clause valid under French legal system?

2. Case description

The procedural *iter* that led to the enactment of the Regulation EU No 650/2012 (further referred to as ESR) began on 2009 and came to conclusion after about three years¹. This regulation is considered one of the most important milestones achieved by the European legislator in its attempt to create a uniform legal system of international European private law. It came into force on the 16th of August 2012 and became applicable thereafter

¹ A. DAVÌ, Riflessioni sul futuro diritto internazionale privato europeo delle successioni, in Riv. dir. int., 2005, p. 310 ff.; A. BONOMI, Prime considerazioni sulla proposta di regolamento sulle successioni, in Riv. dir. int. priv. proc., 2010, p. 899 ff. and P. KINDLER, La legge regolatrice delle successioni nella proposta di regolamento dell'Unione europea: qualche riflessione in tema di carattere universale, rinvio e professio iuris, in Riv. dir. int., 2011, p. 422. Also, see: Max Planck Institute for Comparative and International Private Law, Comments on the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, in RabelZ, 2010, pp. 523 ff.

to any succession of an individual who hold assets in those EU Member States who are signed up to the Regulation and opened in a Member State starting from the 17th of August 2015.

ESR, whilst laying down a comprehensive legislation concerning inheritance matters, appears to be perfectly in line with the process of «communitisation of the international private law»² which characterizes both the pre-existing 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, and the Regulations EU 2016/1103 of 24th June 2006 (implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes) and EU 2016/1104 of 24th June 2006 (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)³.

Having in mind the prospective of legal harmonisation of European law, this Regulation presents strong peculiarities.

Firstly, it does not draw its characteristics from any other applicable legislation. From this stand point, it differentiates itself from Regulation EU No 4/2009 which and, on the contrary, draws its own discipline from the applicable legislation concerning maintenance obligations, the homonymous protocol of the 23rd of November 2007.

Furthermore, unlike Regulations No 1103 and No 1104 EU (which entered into force by way of enhanced cooperation procedure according to the Article 328, Paragraph 1 ff, Treaty on the functioning of the European Union)⁴, ESR is applicable to every Member State and becomes part of the *acquis communautaire*⁵.

As far as the case at hand is concerned, the Regulation presents two different characteristics that are worth our attention and further examination.

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² «Comunitarizzazione del diritto internazionale privato», R. CLERICI, È ora di riformare la legge di riforma del sistema italiano di diritto internazionale privato del 1995? Sulla riforma dell'art. 42 della legge n. 218/1999, in Riv. dir. int. priv. proc., 2011, p. 643 ff.

³ C. GRIECO, Il ruolo dell'autonomia della volontà nel diritto internazionale privato delle successioni transfrontaliere, Milano, 2019, p. 119 ff.

⁴ R. CLERICI, o.c., p. 242.

⁵ R. CLERICI, o.l.u.c.

Above all, having created a comprehensive legislation, therefore meant to regulate every aspect concerning a board-crossing succession (the jurisdiction, the applicable law, the mutual recognition of deeds and sentences) is of paramount importance. This, indeed, entails to exclude the applicability of each Member State's rules of international private law.

Secondly the new rules, as far as the matter of which law shall apply to the succession is concerned, the Regulation makes the law of a third State applicable if the deceased was legally a national of that Country.

Regarding the succession itself, the generally applicable criterion adopted by the European legislator is the one of «habitual residence». This being a factual circumstance that requires a material test, this rule allows, at least in the vast majority of cases, to identify where the subject had his domicile⁶.

The ESR has applied few correctives to temperate such general rule. For example, in order to allow to rule the succession under the law of a Country of which the testator is a national or citizen.

As pointed out by Italian legal scholarship⁷, the possibility for the testator to opt for a specific national law constitutes an amendment of fundamental importance for those legal systems that did not contemplate the opportunity to exercise a *professio iuris* (possibility/power of those involved to choose the law applicable to a relationship) in the field of successions⁸. This legislative choice clearly expresses a political decision made by the European legislator in a field of law where traditionally, at least in civil law systems, the individuals never had right to extended discretion in the exercise of their private autonomy.

⁶ A critical analysis of such legislative policy can be found in C. GRIECO, *Il ruolo dell'autonomia della volontà nel diritto internazionale privato delle successioni transfrontaliere*, cit., p. 125 ff.

⁷ C. GRIECO, o.c., p. 127 ff.

⁸ Actually, prior to ESR, the vast majority of the Member States did not allow any choice as far as the applicable law for succession was concerned. Among such States, particularly Austria, France, Greece, Latvia, Lithuania, Luxemburg, Poland, Portugal, Czech Republic, Slovakia, Slovenia, Spain, Sweden and Hungary. The very favourable solutions introduced by the Hague Convention of 1989 have positively influenced different other Member States such as Finland (Section 16:6 of Successions Code), Estonia (Sect. 25 of the international private law of 27 March 2020 – RT I 2002, 35, 217, which came into force on the 1 July 2002), Germany (sect. 25, co. 2 EGBGB despite merely offering the possibility to choose German law for the goods located in Germany), Italy (sect. 89, par. 5, of the Code of international private law of 13 May 2005) – although in the last mentioned three States the choice of a different law could not prejudice in any way the rights recognized by the law applicable in case no choice had been made – and Romania (sect. 68, par. 1, of the international private law of 22 September 1992).

This choice deserves to be supported as long as it is functional to the development of a uniformed legal order. These new rules indeed allow every European citizen, regardless of whether of different nationality than the one of the Country where they have established their domicile, to preserve their own legal relations. This way, the liberties recognized and guaranteed by the Union are suitable to be exercised in continuity with the ones of the Country of origin.

Moreover, especially the social and economic integration of immigrants is necessary to facilitate and to «promote economic and social cohesion, a fundamental Community objective stated in the Treaty», as stated for example by the recital No 4 of Council Directive 2003/86 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

The norm that enables the possibility of a *professio iuris* is contained in the Article 22, ESR⁹.

On the basis of this rule, the testator can choose the law of the Country of which he is a citizen at the moment in which the choice is made, or at the moment of his death.

The autonomy allowed by the European legislator appears to be particularly broad. The testator indeed enjoys a vast variety of options. Specifically, he may indeed opt for the law of the country of which he is a citizen when making the will or for the law of a Country he predicts to both become citizen in the future and maintains until the end of his lives¹⁰.

A fundamental limit to the applicability of the chosen law is constituted by the compatibility of the latter with the public policy of the legal system in which the succession produces its effects.

On basis of the public policy clause, the national Court shall indeed disregard the designated law in any and all cases where that leads to a result manifestly incompatible with the fundamental principles of the forum. Said norm is contained in Article 35 ESR and does

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⁹ Article 22, ESR: «A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death».

¹⁰ The freedom to choice between several citizenship is not new for European international private law. A similar possibility is indeed, for example, by the Article 5 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

not differ from others instruments of private international law adopted so far by the European Institutions¹¹.

Provided that the necessity to safeguard the legal system of the forum might arise any time a foreign norm is introduced, this remedy both substantially limits the applicability of a contrasting foreign law and also constitutes valid grounds to refuse the recognition of a judgment given by a Court of another State¹².

This legal tool acts as both general limit and obstacle to the normal functioning of the conflicting norm¹³.

Public policy, as intended in the ESR, is not limited to the protection of fundamental principles of each individual legal system. Although the wording of Article 35 ESR lacks the expressions «international» or «European», the outlined principles are central in determining the limits to have in consideration when pursuing any objective within the European framework¹⁴.

3. Case-law solutions with the current Regulation

The judges of the French Court of Cassation¹⁵, once deemed the *professio iuris* as inadmissible in the context of the French legal system at the time of the decision¹⁶, declared null and void the clause in the testament due to clear contrast to Articles 10 and 21 of the Charter of Fundamental Rights of the European Union.

4. The impact of the EU Regulation on the case at hand with short description of possible different scenarios

ESR greatly modified the French legal system.

¹¹ The norm reproduces the content of Article 21 Reg. (EC) No 593 of 2008 (Rome I), Article 26 of (EC) No 864 of 2007 (Rome II) and Article 12 of Reg. (EU) No 1259 of 2010 (Rome III).

¹² See Article 40, Lett. a, ESR.

¹³ G. BADIALI, Ordine pubblico (diritto internazionale privato e processuale), in Enc. giur. Treccani, XXII, Roma, 1990, p. 3 ff.

¹⁴ O. FERACI, L'ordine pubblico nel diritto dell'Unione europea, Milano, 2012, p. 1 ff.

¹⁵ Cass., 21 novembre 2002 No 10-17.365, 10-30.845, *Juris Data* No 2012-026552, commentata da C. GRIECO, *Il ruolo dell'autonomia della volontà nel diritto internazionale privato delle successioni transfrontaliere*, cit., p. 219.

¹⁶ In this regard P. DE CESARI, Autonomia della volontà e legge regolatrice delle successioni, Padova, 2001, p. 65 ff.

Before the implementation of said regulation, France indeed did not admit the validity of the *professio iuris* in favour of other legal system of any Country the testator was a citizen of. In the aforementioned case, the choice made by the testator to have Saudi law regulating the succession was beyond any doubt inadmissible.

After the entry into force of ESR, the situation completely changed. Nevertheless, pursuant to Article 35 ESR, the clause in the will that requires the heir to convert to Islam, is to be deemed null and void. This norm must indeed be systematically interpreted.

Despite the norm is unanimously deemed by the legal scholarship to have very restricted applicability to the protections of the heirs so nominated by way of «legal succession», the *optio iuris* clearly violates the values and principles enshrined by both the French Constitution and the Treaties of the European Union¹⁷, such as the European Charter of Fundamental Rights.

As laid down in Recital No 58, ESR: «Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination».

In the aftermath of the Lisboa Treaty, an integrated approach to the European legal framework requires indeed to interpret any norm deriving from secondary legislation, such as ESR, in strict accordance with Article 2, 3, 4 and 6 of the Treaty on European Union.

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¹⁷ «Despite its intractable character [...] there is a general agreement that public policy is meant to ward off foreign law if the result of its application would violate fundamental domestic values or public interests. Its function is therefore limited to the displacement or negation of foreign law, and in that respect it has a negative effect», T.M. DE BOER, Unwelcome Foreign law, Public Policy and other means to protect the fundamental values and public interest of the European Community, in A. MALATESTA, S. BARIATTI e F. POCAR, The External Dimension of EC Private International Law in Family and succession matters, Padova, 2008, p. 235 ff.

As a way of example, in 2009 the European Court of Human Rights¹⁸ established that, under no circumstances, the failure to recognise a wedlock between two people of the same sex by the national legislator constitutes a violation of Article 9 of the Charter. For sake of clarity, said article guarantees and protects the right of any couple, including the homosexual ones, to have their union recognized as a form of family.

Furthermore, Article 21 of the Charter strictly prohibits any form of discrimination in the enjoyment of the protected human rights merely based on the sexual orientation¹⁹. The Court has already sanctioned certain Member States due to discriminations perpetuated by their domestic law against children born out of a wedlock²⁰.

Besides, it is important to notice that on several occasion the legal doctrine has drawn attention to the contrast between the Qur'anic law and the principle of non-discrimination in respect of successions. It is customary in many Muslim countries that the succession rights vary greatly depending on the gender of the heir. As way of example, certain legal system differentiate depending on whether the surviving spouse or child is a man or a woman²¹.

The importance of the such essential interests has been also recognized by the European Court of Justice. Despite in the aftermath of the coming into force of the Charter of Fundamental Rights, the Court itself has initially hesitated to enhance the principles therein contained²², shortly after though, the whole prospective changed.

Firstly, the Judges gave axiological prominence to the freedom of assembly rather than to the freedom of movement of the goods²³ then they unequivocally enshrined that «the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law»²⁴.

¹⁸ ECHR, 14th June 2009, Schalk e Kopf c. Austria, No 30141/04.

¹⁹ F. MARONGIU BUONAIUTI, Il riconoscimento dei matrimoni e delle unioni tra persone dello stesso sesso alla luce dei più recenti sviluppi della giurisprudenza costituzionale, in Ord. int. dir. umani, 2014, pp. 629 ff.

²⁰ ECHR, 1st February 2000, Mazurek v. France, n. 34406/97 and more recently ECHR Fabris v. France, 7th February 2013, No 16574/08.

²¹ For example, the Islamic law applied in Morocco prescribes: «to the male twice the share of the female», see https://hasanmahmud.com/index.php/articles/islamic-english/109-inheritance-law

²² In the Jani case, prostitution has been examined merely as performance of work, without analysing from the angle of the rights and the dignity of the person, see ECJ, 20th November 2001, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, C-268/99.

²³ ECJ, 12th June 2003, Eugen Schmidberger Internationale Transport Planzüge v. Republik Österreich, C-112/00.

²⁴ ECJ, 14th October 2004, Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, C-36/02.

5. Conclusions

The case at hand perfectly highlights the ratio between the right of choosing the applicable law to someone own succession – clearly recognized by ESR – and the limits said freedom encounters.

It is worth mentioning that this matter is somewhat innovative for many Member States of the European Union because, prior the coming into force of the Regulation, they did not provide any possibility for the testators to choose which law shall regulate their succession. Having this in mind, the public policy clause must be innovatively interpreted in order to avoid the applicability of foreign norms which might be in clear contrast with the principles and the values that characterize the European legal order²⁵.

In this respect, the foreign norms that clearly violate the general non-discrimination principle are of particular importance. Even before the ESR came into force, the various national Courts used to apply the norms contained in the Charter of Fundamental Rights of the EU.

These judicial precedents are definitely worth sharing, especially in a concerted and integrated legal system, for two reasons.

Firstly, to avoid that the professio iuris becomes a way to bypass the fundamental principles of the system itself. Secondly, to identify certain values and principles that may constitute the «legal backbone» of European Countries which, despite having different legal traditions, may then be able to identify themselves to a common core.

Abstract: The essay analyzes the ratio of professio iuris according to Article 22 of Regulation No 650/2012. Particular importance is given to public policy as a limit to the choice of the applicable law for the succession. Particular attention is given to the relationships between the aforementioned general clause and the principles enshrined in European Charter of Human Rights.

²⁵ G. PERLINGIERI and G. ZARRA, Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale, Napoli, 2019, p. 77.

GIOVANNA DI BENEDETTO

Contents of the European succession certificate and the rights of the surviving spouse under the German law

Summary: 1. Casus. – 2. Quid iuris? – 3. Quaestio facti et quaestio iuris. – 4. Regulation (EU) No 650/2012 and European Certificate of Succession. – 5. Regulation (EU) No 1103/2016 and No 1104/2016 related to matrimonial property regime and on the property consequences deriving from registered partnerships: field of application ratione materiae. – 6. The communion regime limited to the property increase in German law and surviving spouse's succession rights. – 7. Solutio. – 8. Conclusion.

1. Casus

Martin, German citizen, who was born in Berlin, has been for many years architect and automotive designer for a well-known German car multinational, in Munich.

As soon as he got a master degree, he knew Maria, Italian citizenship, art expert and restorer.

Both fall in love with each other, they started a relationship and finally they got married in Germany.

Between them the matrimonial property regime was effective as far as the property increase realised during the marriage was concerned and they have never drawn up any contract to regulate their patrimonial regime.

Maria decided to leave her work and to move permanently to Germany, in Munich, where the couple had established its own usual residence, immediately after the marriage, and where familiar gain of both spouses and Martin's work interest were concentrated.

Immediately after the marriage, Martin has bought an eighteenth-century villa in front of the sea, in the Temples Valley, in Agrigento, in Italy, where the couple used to spend at least five weeks per year, during summertime, for all their matrimony.

Martin suddenly died on 29 of March 2019 and his succession is opened *ab intestato* and for this reason, it is ruled only by law.

The only Martin's heirs are his wife Maria and his son Friedrich.

In particular, after the opening of Martin's succession, his wife Maria is holder *iure successionis* (so for hereditary right) of 1/4 part of the inheritance. This quota is increased by another 1/4 part, because of the dissolution of the matrimonial property regimes between the spouses which was limited to the property increase realised during the matrimonial relationship. By this way, she results to be the owner of 1/2 overall of the inheritance.

On the contrary, after the opening of Martin's succession, Friedrich is holder *iure* successionis of 1/2 part of the inheritance.

The inherited patrimony results to be composed by the real estates in Germany in addition to a building located in Agrigento, Italy.

After Maria's request, the competent local Court for Martin's succession has issued the German succession certificate, reporting the division of the inheritance parts according to the German Laws.

In the German succession certificate, it is attested Friedrich's inheritance quota and Maria's inheritance quota of 1/4 increased by another 1/4 quota, as it is provided by national laws dictated for the hypothesis of the releasing of the communion of the increase between spouses, of another 1/4 quota.

On 16 September 2019, Maria requires to a Notary, according to and for the effects of the Regulation (EU) No 650/2012, the issuance of a European Certificate of Succession which indicates that she and her son Friedrich are co-heirs, each one for 1/2 part of Martin's inheritance patrimony, according to the German Law.

Maria intends to use this European Certificate of Succession to easily demonstrate the capacity of inheritance and to exercise the right claimed by her and her son Friedrich in Italy where one of the real estates of the inheritance is located.

2. Quid iuris?

Can the European Certificate of Succession be issued containing the rights that the living spouse obtains according to the matrimonial property regimes rules between spouses?

In other words, if the Article 1, Paragraph 1 of the Regulation (EU) No 650/2012, on the subject of succession and creation of European Certificate of Succession must be interpreted meaning that the application field of such regulation is referred to national law rules which regulate the matrimonial property regimes for the period after one spouse's death, considering the legal succession quote increase which is due to the surviving spouse.

Otherwise, if this regulation concerning the surviving spouse rights related to the matrimonial property should be considered as a matter related exclusively to the matrimonial property regimes and consequently to be included in the application field of the Regulation (EU) No 1103/2016 which realizes the strengthened cooperation in the field of matrimonial property regimes.

In case of positive answer to the previous question, if the same interpretation could be extended to the hypothesis of registered partnership.

Otherwise, if this regulation should be considered as a matter related only to a patrimonial regime between two people with a registered partnership and so to be included in the application field of the Regulation No 1104/2016 which realizes the strengthened cooperation in matter of property consequences of the registered partnerships.

Quid iuris?

3. Quaestio facti et quaestio iuris

In absence of *professio iuris*¹, the applicable law to Martin's whole succession is the one of the state government in which the *de cuius* had his usual residence at the moment of the death².

¹ Declaration of choice of law by which regulate his/her own succession (c.d. *electio legi*), previewed by Article 22 of Regulation (EU) 650/2012. For example, the German citizenship, who fixes his usual residence in Germany, can effectuate the *electio legi* by *professio iuris* in a testament. By this way he can choose the Italian law to regulate his succession *mortis causa*. About *professio iuris* and subsidiary link criteria consult: L. SARTORI, *Casi e problemi di interesse notarile – Documenti – Attualità*, in Riv. not., 5, 2013, p. 1262.

² About international successions: F. MOSCONI, Diritto internazionale privato e processuale – Parte Speciale, Torino, 1997, passim; E. CALÒ, Le successioni nel diritto internazionale privato, in Letture notarili, G. LAURINI (ed.), Torino, 2007, passim; ID, Verso una disciplina europea delle successioni internazionali, in Fam. dir., 2010, p. 527; A. DAVÌ,

In the examined case, Martin had his usual residence in Munich, in Germany, where all familiar and patrimonial interests were concentrated³.

For this reason, at Martin's succession, according to Article 21, Paragraph 1 of the Regulation (EU) 650/2012, German law is applied⁴.

Therefore, what to be due to his wife Maria and his son Friedrich will be determined according to German Law.

In particular, as far as Maria is concerned, she will receive 1/4 of the inheritance quota, according to the article 1931 of the German civil code (*«Bürgerliches Gesetzbuch»*)⁵, which will be increased of another 1/4⁶ quota, according to Article 1371, Paragraph 1, *BGB*, because of a balance of the property increase realised during the matrimonial period.

At this point, it must be considered that the Article 1, Paragraph 2, Letter d), of the Regulation (EU) 650/2012 which acts the strengthened cooperation in succession matter and which issues the European Certificate of Succession, explicitly excludes the application of *ratione materiae* from the aforementioned regulations as far as the matrimonial property regimes or property consequences due to a registered partnership is concerned.

At the Recitals 11 and 12 of the Regulation (EU) 650/2012 it is specified that it is not applicable to other civil sectors different from succession and, for this reason, it is not applicable to matters concerning to matrimonial property regimes between spouses or patrimonial regimes related to relationships whom effects could be compared to matrimonial ones.

Riflessioni sul futuro diritto internazionale privato europeo delle successioni, in Riv. dir. int., 2005, p. 297; C. MARIOTTINI, Successioni di cittadino straniero: questioni di diritto internazionale privato e processuale alla luce della proposta di regolamento europeo sulle successioni internazionali, in Fam. pers. succ., 2012, p. 110; S. ACETO DI CAPRIGLIA, Disciplina successoria europea, in Rass. dir. civ., 2013, p. 495.

³ About jurisditional competence in case of *electio legis*: A. BONOMI, *Il regolamento europeo sulle successioni*, in *Riv. dir. int. priv. e proc.*, 2, 2013, p. 298.

⁴ However, according to Article 21, Paragraph 2 of the Regulation (EU) 650/2012, in absence of *professio iuris* (choice of the law applicable to succession), exceptionally, if the circumstances of the concrete case clearly display that at the moment of the death the *de cuius* had evident connections with one State different from the one for which the Law should be applicable, according to paragraph 1 of the same regulation, for this reason the law of that State is applicable. For example, it is the case of the Italian citizenship who moves his usual residence in Germany where his patrimonial and familiar interests are concentrated. In this case, it will be possible to apply the German law to succession *mortis causa* of the Italian citizenship at his death.

⁵ Following named with the abbreviation «BGB».

⁶ As Maria takes part in the succession of the *de cuius* with her son Friedrich who is part of the first category of the successors.

Equally, the Article 1, Paragraph 2, Letter d), of the Regulation (EU) 1103/2016, which acts the strengthened cooperation in matrimonial property regimes matter, expressly exclude from the application field of *ratione materiae* of the last aforementioned regulation matters related to succession caused by death of the surviving spouse.

Symmetrically, the Article 1, Paragraph 2, Letter d) of the Regulation (EU) 1104/2016, which acts the strengthened cooperation in property consequences of registered relationship matters, expressly excludes from the application field of the last aforementioned regulation the succession for death of the surviving partner.

The Recital 18 of both Regulations (EU) 1103/2016 and 1104/2016 specify that they are applicable to all the aspects of civil law and patrimonial regimes between spouses, even for the ones related to the closing of the patrimonial regime even for one spouse's death.

However, some institutions and regulations of substantial law which regulate the matrimonial property regimes and the property consequences of registered partnerships, in effect in some Member State law regulations, are not easily qualifiable, as it is in the examined case, as strictly succession matters or, on the contrary, as strictly related to matrimonial property regimes or effects deriving from registered partnerships.

In the examined case, for example, the difficult qualification of the juridical nature of the institute⁷ previewed in the Article 1371, Paragraph 1, *BGB*, as a rule of succession law or as a matrimonial property regime rule, does not help the law interpreter to determinate if in the European Certificate of Succession, related to Regulation (EU) 650/2012, these rights should be inserted or not.

For this reason, to answer to the question it is appropriate to develop some preliminary considerations regarding the Regulation (EU) 650/2012, the Regulation (EU) 1103/2016 and the Regulation (EU) 1103/2016, in addition to some clarifications regarding the complex juridical nature of the legal communion of the matrimonial property increase institution, as it is previewed by German law system.

As a matter of fact, in the examined case, the qualification of the quota due to the survived spouse (according to the Article 1371, Paragraph 1, *BGB*, considering also the aims

⁷ It is aimed to the payment of the property increase in favour of the surviving spouse when the legal communion ends because of one spouse's death, by the increasing of the due quota for *iure successionis*.

of this regulation) will determine if it is a rule concerning the applicable field of matrimonial property regime or to the succession one.

For this reason, if it is possible to insert it in the European Certificate of Succession or not.

4. Regulation (EU) No 650/2012 and European Certificate of Succession

The Regulation (EU) No 650/2012, of 4 July 2012, of the European Parliament and Council related to the competence, at the applicable law, at the identification and execution of the decision and acceptance and execution of the public acts in succession matters and for the creation of a European Certificate of Succession⁸, it is applied to all the succession that have international elements and that are opened since that same date that is 17 August 2015.

In the mentioned Regulation, the creation of the «European Certificate of Succession» stands out, it has been issued to offer to all people involved⁹, in various ways, in a succession *mortis causa* which presents some stranger elements from the belonging legal system, a document that is issued by a public authority which is useful to assert its own quality and power in succession¹⁰ function among the Countries which adhere to the Regulation without any further formality.

By this way the Regulation contributes to remove the obstacles that intervene to the free circulation of people in the European sole market.

The recital 7, in fact, states that the Regulation contributes to the correct functioning of the market removing the obstacles of the free circulation of people who face difficulties in exercising their rights as far as succession field is concerned with cross-border implication, in order to guarantee heirs' rights, linked to other subjects near to the *de cuius* as well as creditors.

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⁸ Published on the Official Journal of European Union, series L No. 201, of 27 July 2017, 107.

⁹ Heirs, legatees, testamentary executors, inheritance administrators, creditors or debtors of the inheritance.

¹⁰ F. PADOVINI, Il certificato successorio europeo, in G. GABRIELLI - S. PATTI - A. ZACCARIA - F. PADOVINI (eds.), Famiglia e successioni – Liber amicorum per Dieter Henrich, Tome II, Torino, 2012, p. 215; I. RIVA, Certificato successorio europeo. Tutele e vicende acquisitive, Napoli, 2017, p. 11; M.C. BIANCA, Certificato successorio europeo: il notaio quale autorità di rilascio, in Vita not., 1, 2015, p. 1; S. PATTI., Il certificato successorio europeo nell'ordinamento italiano, in Contr. impr. eu., 2, 2015, p. 466.

By this way, the aims of the European legislative policy are recognisable in the promotion of a certainty and predictability atmosphere to juridical solution considering the growing phenomena of cross-border successions and so the promotion of the free and sure circulation of movable and immovable properties coming from succession¹¹.

According to the Regulation, «succession» indicates the one for « death cause», that comprehends every transfer of property, rights and obligation caused by death. Regardless if it is a voluntary transfer (by testament disposition) or a transfer given by legitimate succession.

Recovering an important notion for Italian civil law¹², the succession for death, to whom it is necessary to refer to find the applicative field of the examined Regulation, is that phenomena for which a person (assign or successor) replaces another (assignor) in a specific juridical situation.

Having considered the meaning of succession for a person's death, it appears fundamental to individuate which information might be contained or excluded to issue the European Certificate of Succession.

The competent authority to issue the certificate cannot just collect only general information, on the contrary it must evaluate all the elements related to the succession in question, taking care about the concrete succession case and the applicable Law.

It must be considered that many questions, which are very pertinent succession cases, are expressly excluded from the application field of the examined Regulation.

In other words, it is necessary to explain the application field of the Regulation *ratione* materiae in order to issue the certificate.

The list of the subject matters expressly excluded is in the Article 1, Paragraph 2 of the Regulation to whom the fiscal, customs and administrative ones must be added.

¹¹ In this sense F. PADOVINI, *Il certificato di eredità europeo*, in *Tratt. Successioni e donazioni*, in G. BONILINI (ed.), Vol. I, *La successione ereditaria*, Milano, 2009, p. 1623.

¹² P. PERLINGIERI, Dei modi di estinzione delle obbligazioni diversi dall'adempimento. Artt. 1230-1259 c.c., in Comm. cod. civ., Scialoja and Branca (eds.), Bologna – Roma, 1975, passim; F. SANTORO PASSARELLI, Dottrine generali del diritto civile, Napoli, 1997, p. 90; G. CAPOZZI, Successioni e donazioni, Milano, 2009, Tome I, p. 5; L. BARASSI, Le successioni per causa di morte, Milano, 1947, passim; A. CICU, Successione per causa di morte. Parte generale, in Tratt. dir. civ. comm., Cicu and Messineo, Milano, 1961, passim; C. GIANNATTASIO, Delle successioni, Torino, 1971, passim; L. CARIOTA FERRARA, Le successioni per causa di morte. Parte generale, Napoli, 1977, passim; G. GROSSO and A. BURDESE, Le successioni. Parte generale, in Tratt. dir. civ., Vassalli, Torino, 1977, passim; For the most recent doctrine see P. FAVA (ed.) Tratt. succ. don., Milano, 2017, passim.

In particular, as it has already been said, the matrimonial property regimes and the property regimes referred to relationships which have similar effects to matrimony according to law, are expressly excluded.

However, the Article 23 of the Regulation, which provides clear indications about the subjects that constitute the field of application, recalls to the individuation of the beneficiaries of the succession and their quota and the eventual costs imposed to them by the *de cuius* and the determination of other successors. In this field it is necessary to add the surviving spouse or partner' rights subject matter.

In this sense, it is opportune to read the regulation of the frame offered by the content of the Recital 9 of the succession Regulation which clarifies that the regulation is applicable to all the civil law aspects of the succession for death, for all the ways to transfer the properties, rights and obligation for death, including the one concerning the matrimonial property regime or the property consequences deriving from a registered partnership.

5. Regulation (EU) No 1103/2016 and No 1104/2016 related to matrimonial property regime and on the property consequences deriving from registered partnerships: field of application ratione materiae

To answer the question which occupies us, it is opportune to develop some consideration even related to the Regulation (EU) about matrimonial property regime and on the property consequences deriving from registered partnerships¹³.

In particular, even in the case of these regulation, it is necessary to reflect on the contents and on the objective applicative field.

The Regulation (EU) No 1103/2016 of 24 June 2016 of the EU Council, relating to the competence, the applicable law, the recognition and the execution of the decision about matrimonial property regimes matters, it has been applied since 29 January 2019 to all matrimonial properties regimes to allow an easier arrangement of the patrimonial aspects of the matrimony.

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¹³ About Regulation (EU) 1103/2016 and Regulation (EU) 1104/2016 see: P. BRUNO, I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019, Milano, 2019, passim; O. FERACI, Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate, in Riv. dir. int., 2016, p. 529; S. MARINO, I diritti del coniuge o del partner superstite nella cooperazione giudiziaria civile dell'Unione europea, in Riv. dir. int., 2012, p. 1114; G.V. COLONNA, Il regolamento europeo sui regimi patrimoniali tra coniugi, in Notariato, 3, 2019, p. 300.

According to Article 3, Paragraph 1, Letter a), of the last mentioned regulation for the matrimonial property regime it must be interpreted as the laws that regulates the patrimonial relationship between them and with other people consequently to the matrimony or its dissolution.

As it is confirmed by Recitals 1 and 8 of the mentioned regulation, the aim of the European law is to preserve and develop a freedom, security and justice space in which it is ensured the free circulation of people, properties and rights for the suitable functioning internal market.

In other words, the aim is to eliminate the obstacles that interpose to the free circulation of people and in particular to remove the difficulties that the couple face in the administration or separation of their properties.

Therefore, the Regulation will be destined to those citizens of different adhering Member States or to the citizens who are in the same adhering Member State who are residing or domiciliated in a different country or whose properties are located in other countries.

Basically, according to Recital 14, this regulation is applied in the context of matrimonial property regimes which present every kind of cross-border¹⁴ implication, to grant to married couple the certainly of the rights relating to familiar properties and a partial predictability on the destination of the property.

The Recital 18 of the Regulation identifies the application field *ratione materiae* all the aspect of civil law and matrimonial property regimes related not only to the diary administration of the spouses' property, but also the dissolution of the property regime with a specific and expressed reference to the hypothesis of one spouse's death¹⁵.

For this reason, all the aspects related to the settlement of the matrimonial regime after one spouse's death should be included.

However, it must be underlined that at the article 1 of the same Regulation it is expressly excluded the matter relating with the succession for one spouse's death.

¹⁴ According to Article 81 TFUE.

¹⁵ All the juridical property situations which are not consequent to the existence of a commitment between people united in matrimony or in a registered partnership are obviously excluded from the application field of the Regulations (EU) 1103/2016 and 1104/2016.

To confirm this, the Recital 22 of the Regulation (EU) 1103/2016, which repeats that the succession due to one spouse's death are objectively excluded, often refers to Regulation (EU) No 650/2012.

The same normative argumentation could be carried out in favour of the Regulation (EU) No 1104/2016 of 24 June 2016 of the EU Council referred to the competence, the applicable law, the recognition of the execution of decisions as far as the property consequences of registered partnerships is concerned.

According to Article 3, Paragraph 1, Letter a), of the last mentioned Regulation for property consequences of a registered partnership it must be taken into account the totality of laws that regulate the property regimes of the partners between themselves and with third parts, as a consequence of the juridical relationship that has been created by the registration of the union or by its dissolution¹⁶.

For this reason, it is necessary to wonder about the range of the subject matters expressly subtracted by the application field of both regulations taken into exam.

In this sense, the Recital 19 of both Regulations expressly clarifies that some matters that could be considered connected to a matrimonial property regime or united people are excluded from the objective field of application of the same regulations in order to avoid interpretative doubts and contrasting decisions.

Among these, at the Article 2, Paragraph 2, Letter d), it is expressly excluded the subject matter relating to succession *mortis causa* of one surviving spouse or partner.

The reason of the exclusion of the succession matter from the application field of the regulation must be researched on the consideration that in the different law systems of the member countries firstly the hereditary axis and secondly the attribution of the spouse or partner's succession quota will depend on the termination and for this reason from the dissolution of the hereditary axis.

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¹⁶ To the Regulation (EU) 1104/2016 dealing with property consequences due to registered partnerships it is valid what has been said about matrimonial property regimes.

6. The communion regime limited to the property increase in German law and surviving spouse's succession rights

The institute of the communion regime limited to the property increase (*«Zugewinngemeinschaft»*) constitutes the legal regime applicable between spouses¹⁷ in absence of a different agreement in Germany.

The increase communion regime is based on the principle of rights equality between man and woman intrinsic in German civil law.

Even if at a first sight the *nomem iuris* of the institute could make one suppose the immediate establishment of a communion property regime at the very moment of the matrimony, an immediate patrimony communion of the assets bought in constancy of matrimony is not immediately established between the spouses

Indeed, the examined institute has been introduced in the already existing matrimonial separation property regime by the legislator¹⁸.

However, the examined property regime must not be considered as completely comparable to the separation of property regime.

The German legislator may have found in the instrument of the communion of the increase the right equilibrium between the exigence to guarantee a certain individual freedom in the management of the property and the necessity to compensate the disadvantaged economic condition of the economic weakest partner at the moment of the dissolution of the matrimony due to every cause.

In other words, it is a regime in which the principle of the property separation is balanced with the ones of a communion of nett purchase bought during the matrimony.

The Article 1363 of the *BGB* states that: «the spouses live in a regime of property communion increase [...]»

¹⁷ About communion of property increase: E. BETTI, Systéme du code civile allemand, Milano, 1865, p. 117; A. LORUSSO CAPUTI, I regimi matrimoniali e la loro pubblicità nell'ordinamento giuridico tedesco, in Il nuovo diritto di famiglia, Quaderni della Rivista del notariato, Milano, 1975, p. 483; L. ENNECCERUS, T. KIPP and M. WOLFF, Lehrbuch des Burgerlichen, Tubingen, 1959, passim; T. PERTOT, Germany, in L. RUGGERI, I. KUNDA and S. WINKLER (eds.), Family property and succession in EU member States. National reports on the collected data, Rijeka, 2019, p 256.

¹⁸ This system has been considered the best regime to comply with socio-economic and political ideal, individuality and freedom existing in Germany after the War. In this sense, E. Betti, o.c., p. 117.

However, the same article clarifies also that: «Man's property and woman's property do not become commune property; this is also valid for the property that one spouse buys after the matrimony conclusion. The property increase realized by the spouses during the matrimony is, however, balanced if the communion of the property increases ends».

Therefore, this institute seems to stay at an intermediate position between a separation of property regime and the communion of purchase. During the matrimony, the separation of property regime regulates the property consequences for the effect of the first. On the contrary, a communion of property regime is established only for the purchase (*rectius*: to «property increases») obtained by each spouse during the matrimony only at the subsequent moment of the matrimony dissolution for the effect of the second.

At the dissolution of the matrimony, the spouse whose personal patrimony has increased less than the other spouse's patrimony has the right to obtain a part of the spouse's increase who has got richer during the matrimony, as a compensation title (*«Ausgleich des zugewinnes»*).

It is a compensative measure for the disadvantage resulting from the interruption of the matrimonial property communion regime.

In particular, the Article 1373 *BGB* defines the concept of increase that is the difference between the initial property, crystallized at the moment of the matrimonial union, and the final property of each spouse, this latter crystallized at the moment of the matrimony dissolution.

The phase of the compensation of the increase coincides with the dissolution of the matrimony commitment because the spouses conventionally agree or judicially achieve the anticipated compensation of the patrimony increase.

The compensation of the increases consists in a complex procedure of patrimony evaluation (initial and final ones) of each spouse and eventually in the payment of the verified patrimony increase (*«Guterrechttliche losung*¹⁹») in favour of the spouse who is disadvantaged compared with the other²⁰ at the moment of the matrimony dissolution.

¹⁹ Matrimony solution.

²⁰ According to Article 1377 *BGB*, the spouses can write an inventory, according to Article 1035 *BGB*, about the each one's property amount and value related to the period before the matrimony settlement. According to

In other words, according to Article 1378 *BGB*, the spouse, who has realized the minor property increase during the matrimony, has a credit due from the other spouse which amount is fixed at the half part of the difference between the patrimony increase which have been realized by each spouse.

However, the matrimony dissolution is not applied when the dissolution of the patrimony regime is caused by one spouse's death.

In this last hypothesis, if the spouse is heir (for law or ex testament) or legatee it is not applied the payment by calculating the patrimony increase between initial and final patrimony amounts, but the surviving spouse's hereditary quote is increased by a 1/4 flat-rate²¹ («Erbrechtliche losung²²»)

For this reason, in case of dissolution of the patrimony increase regime due to one spouse's death, the surviving spouse, who may be nominated heir (for law or testament) with first degree relatives of the *de cuius*, according to the combined disposition of the Article 1931, Paragraph 1, first and third sentence of the Article 1371, Paragraph 1, *BGB*, he or she will enjoy 1/4 quota of the inheritance patrimony increased by another 1/4 part.

In such case, it will be irrelevant if the spouse before dying had realized a patrimony increase or not, with a consequent simplification of the procedure²³, which is due to the flatrate payment by succession solution²⁴.

Article 1379 BGB, each spouse has also the right to ask for the publicity of the information about the other spouse's property situation, which are essential to balance the property increases.

²¹It must be noticed that in some cases the succession solution could advantage the surviving spouse, without having really proved if he or she should have a compensation credit

²² Succession solution.

²³It has been observed in doctrine that the one surviving spouse's missing obligation to demonstrate if the property increase has effectively been obtained must be interpreted as a support in favour of a matrimony statement and it consist in a sort of reward for matrimonies which have not failed while the spouses were alive. In this sense: G.A.L. DROZ., Les régimes matrimoniaux en droit international privé compare, Recueil des cours de l'Académie de la Haye, Vol. 143, 1974, p. 98.

²⁴ It is also possible to pay *post mortem* the matrimonial property in communion regime of the increase by a mathematic calculation of the property increases, avoiding, by this way, the application of Article 1371, Paragraph 1, *BGB*.

7. Solutio

The juridical nature of the disposition of Article 1371, Paragraph 1, *BGB*, has been subject of an intense interpretative debate within the doctrine and the German jurisprudence, in particular concerning its belonging to succession or to matrimonial²⁵ property regime matters.

It must be noticed the missing of unanimity within the doctrine as far as the qualification of the juridical nature of the disposition of the Article 1371, Paragraph 1, *BGB* is concerned

In the predominant German doctrine before the entry into force of the Regulation (EU) No 650/2012 it seemed to prevail the thesis which stated that the juridical nature of the Article 1371, Paragraph 1 disposition would be referable to the applicable discipline of the matrimonial²⁶ property regime, even considering its code position within the law relating to the matrimonial property regime.

However, within the more recent German doctrine it is also present the thesis according to which the examined regulation seems to have strong connection with the laws related to succession *mortis causa*, even if it is located among the *BGB* laws pertaining to the matrimonial property regime as it is applicable after one spouse's death.

As a matter of fact, it is a settlement solution of the surviving spouse's right depending on *mortis causa*.

This had let the German doctrine to qualify the institute as pertaining to the succession matter²⁷.

The German jurisprudence has expressed its opinion which was opposite to the aforementioned doctrinal position.

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²⁵ About the juridical nature debate of Article 1371, Paragraph 1, BGB, it is possible to consult in doctrine: F. MAIOLI, Successioni, regimi patrimoniali tra coniugi e problemi di qualificazione in una recente pronuncia della Corte di Giustizia, in Riv. dir. int. priv. proc., 3, 2018, p. 676; A. BONOMI and P. WAUTELET, Articolo 1, in IDD. Il Regolamento europeo sulle successioni. Commentario al Reg. UE 650/2012 applicabile dal 17 agosto 2015, Milano, 2015, p. 35 and there ample doctrinal references.

²⁶ In this sense: H. DORNER, Internationales erbrecht. Art. 25, 26, EGBGB, in Kommentar zum Burgerlichen gesetzbuch, Einfuhrungsgesetz zum BGB, Berlino, 2007, art. 25, nb. 34; W. RIERING, Régime legal allemande et succession régie par la loi française, in Mélanges en l'honneur de Mariel Revillard, Parigi, 2007, p. 258; D.A. POPESCU, Liber Amicorum. Guide on international private law in successions matters, Onesti, 2014, p. 18; A. BONOMI and P. WAUTELET, o.c., p. 35.

Specifically, the German Federal Supreme Court (*«Bundesgerichtshof»*) has qualified the disposition relating to the settlement of the increase obtained during the communion regime, as it is linked to the property regime matter.

The German Federal Supreme Court, in a similar case that was exposed to its judgment, has established that the fundamental function of the disposition is not identifiable in the succession procedure, but in the dissolution of the matrimonial bond so by such regulation to discipline the solution of matrimonial property and not due to the devolution of rights and juridical relationship for succession.

In addition, the supranational jurisprudence of the EU Court of Justice²⁸ has expressed its opinion about a similar case, taking up another position.

The Court of Justice recalls that the qualification operated on the basis of the national conflict regulation towards a regulation like that previewed by Article 1371, Paragraph 1, *BGB*, cannot be decisive in order to solve the examined problem.

The harmonisation of the clashing laws within the Regulation (EU) No 650/2012 imposes to frame the problem in a vaster and supranational context and so in a European frame²⁹.

Specifically, the Luxemburg Court has analysed the juridical institute referring to Article 1371, Paragraph 1, *BGB*, underlining that the final aim is not only the settlement of the matrimonial property regime, but also the determining of the *quantum* of the succession quota to be attributed to the surviving spouse³⁰.

As a matter of fact, the regulation does not aim to property distribution or the matrimonial property settlement in the strict sense.

On the contrary, the disposition seems to aim to define the surviving spouse's position towards other heirs as far as the property inheritance is concerned. As a matter of fact, the regulation determines the amount of the surviving spouse's quota.

²⁸ EJC, 01 March 2018, C-558/16, *Mahnkopf*; Szpunar Advocate General's Conclusions presented on 13 December 2017.

²⁹ This to observe the need of uniform application of EU Law and of equality principle.

³⁰ F. MAOLI, *o.c.*, p. 676 ff.

In addition, as the Advocate General's conclusions relating to the aforementioned sentence³¹ explain, the examined regulation has one spouse's death as unique and inescapable application requirement.

On the contrary, the dissolution of the matrimonial property regime due to a different cause from death is never considered as a requirement for one spouse's succession.

This circumstance seems to be very explanatory of the succession nature of the regulation.

A link with the succession matter is consequent and, for this reason, the connection to the Regulation (EU) 650/2012

The classification within the succession law of the quota which is due to the surviving spouse, as in the analysed case, the increase of the succession quota previewed by the Article 1371, Paragraph 1, *BGB*, allows to include the information about the quota in the European Certificate of Succession.

On the contrary, in absence of indication about an information as the one relating to the increase of the spouse's succession quota increase, for the statement of the increase realized during the life of the *de cuius* during the legal communion regime, the aims of the regulation would be sacrificed and the efficiency of the European Certificate of Succession would be consistently obstructed³².

Even if, concretely, in the application field or the Regulation (EU) 650/2012 it is possible to see the exclusion of the whole civil field which is different from the succession for *mortis causa*, this fields are important every time some relation with succession aspects would happen.

Therefore, the examined Regulation will not be applied to the matrimonial property regime or property consequences of registered partnerships matters only if they are not related to succession problems.

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³¹ Maciej Szpunar Advocate General's Conclusions presented on 13 December 2017, Case C-558/16, *Mahnkopf*. ³² For a consideration of the probative efficiency of the European Certificate of Succession regarding a spouse or a partner with a registered partnership succession, see: D. DAMASCELLI, *Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante la successione di un soggetto coniugato o legato da unione non matrimoniale*, in *Riv. dir. int. priv. proc.*, 1, 2017, p. 67.

For this reason, in the examined case, the information relating to what is due to Maria, according to the Article 1371, Paragraph 1, *BGB*, must be inserted within the European Certificate of Succession.

More generally, the competent authority must consider the dissolution of the property regime within a matrimony or a registered partnership to issue the European Certificate of Succession, depending on the concrete case, to determine the inheritance of the *de cuius* and the beneficiaries' quota.

8. Conclusions

Actually, it is not so rare that a foreign country citizen buys a property in Italy, even continuing living abroad, neither that an Italian citizen, who is owner of a real estate in his/her native country, decides to reside abroad and move the seat of his/her interest out from the Italian territory.

In these cases, it is extremely important to know the juridical regime that will regulate the person's succession at the moment of his/her death.

For this reason, the adoption of a regulation which includes laws of conflict which are uniform for all the member states of the EU in succession matter concours to guarantee predictability and certainty in the succession *mortis causa*, as well as to create solid premise for a suitable and easy planning for the property interest matters.

Therefore, the Article 1, Paragraph 1 of the Regulation (EU) No 650/2012 must be interpreted in the sense that a national disposition, which plans, in case of one spouse's death, a flat-rate balance of the property increase realized during the matrimony, is part of the objective application field of the Regulation.

Since, in an opposite case, the aims of the European Certificate of Succession would be sacrificed.

The achievement of the tacit aims of the European Certificate of succession and its relating discipline can be guarantee only thanks to the maximal operativity of the certificate indicating all the information related to the succession rights due to the surviving spouse.

As it has been demonstrated, this is not contradicted by Recital 18 of both Regulations (EU) No 1103/2016 and No 1104/2016 which act the strengthened cooperation in

matrimonial property regime and property consequences of registered partnerships, maintaining the explicit exclusion of the discussed matter from their application field.

As a matter of fact, the latest named Regulations, even if they have been adopted to regulate all the aspects of the civil law and the spouses or partners' property regime which refer both the daily property management and the settlement of the property regime between them due to separation or one spouse's death, expressly exclude from their application field the succession due to one spouse or partner's death, according to their Article 1, Paragraph 2, Letter d), in order to exclude interpretative doubts or different decisions.

It seems to be essential that the law interpreter must consider the concrete case and act in order to independently qualify the institutes of the national law within a European supranational frame, in order to offer the most possible operativity to the disposition of the European Regulations.

To the result of this hermeneutical adopted solution in some case the qualification adopted by the member state juridical system should be overlapping or contrasting, in order to a uniform application of the EU law and of the equality principle.

Abstract: Article 1, Paragraph 1 of Regulation (EU) No 650/2012, relating to the creation of a European succession certificate, must be interpreted as meaning that provisions of a member country fall within the scope of application of this Regulation, which govern questions concerning marital property regimes for the period after death. of one of the spouses.

Therefore, it will be possible to insert within the European succession certificate a right whose rationale is to compensate the disadvantaged situation resulting from the interruption of the legal communion regime due to the death of the spouse.

This interpretation, moreover, is not denied by the scope of application of Regulations (EU) No 1103/2016 and No 1104/2016 which respectively implement the enhanced cooperation in matters of matrimonial property regimes and property consequences of recognized partnerships.

In fact, although they have been adopted in order to regulate all aspects of the civil law of property regimes between spouses and the property effects between partners, also with reference to the phase of liquidation of the estate following the death of one of the spouses or partners, they explicitly exclude, in Article 1, from its application area *ratione materiae*, all the rights arising from the succession mortis causa.

Otherwise the ultimate aims of Regulation (EU) No 650/2012 would be significantly affected.

Such as, for example, that of contributing to the proper functioning of the internal market, removing the obstacles to free movement within the European territory of people who currently encounter difficulties in exercising their inheritance rights with cross-border implications.

FILIP DOUGAN

Matrimonial property and succession - The interplay of the matrimonial property regimes regulation and succession regulation

Summary: 1. Introduction. – 2. Case. – 2.1. Application of Regulation 650/2012. – 2.2. Delimitation between the scopes of application of Regulation 650/2012 and Regulation 2016/1103. – 2.3. Application of the Regulation 2016/1103. – 2.4. Assessment of the outcome. – 2.5. Application of Slovenian substantive law. – 3. Variation 1. – 3.1. Application of Regulation 650/2012 and Regulation 2016/1103. – 3.2. Assessment of the outcome. – 4. Variation 2. – 4.1. Application of Regulation 650/2012 and Regulation 2016/1103. – 4.2. Issues arising from application of Slovenian and German substantive law. – 5. Conclusion.

1. Introduction

One of the principal goals pursued by the adoption of 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 (Matrimonial Property Regimes Regulation, hereinafter Regulation 2016/1103), was to strengthen predictability and legal certainty of married couples. This was to be achieved by bringing together (in a single instrument) harmonized rules on jurisdiction and applicable law, as well as on recognition and enforcement of decisions, authentic instruments and court settlements, thus allowing citizens to avail themselves of the benefits offered by the single market.²

In practice, questions concerning matrimonial property regimes – in particular regarding the dissolution and the partition of matrimonial property – regularly **emerge after the death**

¹ See Regulation (EU) 2016/1103, Recital No 15.

² See Regulation (EU) 2016/1103, Recital No 16 and 43.

of one of the spouses. Therefore, to fully comprehend their legal position in relation to matrimonial property, consideration needs to be given to the interplay between rules of private international law concerning matrimonial property regimes and succession.³

Regarding the latter, the same goals of legal certainty and predictability were pursued by the adoption of the 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 (Succession Regulation, hereinafter Regulation 650/2012).

The present case study will examine some aspects of the interplay between both instruments. With the help of a fictitious case, I will attempt to present their application in a typical situation, in which matters concerning matrimonial property regimes are intertwined with matters concerning succession. With two variations of the main case, I will also point out some issues that may arise when applying both regulations to different aspects of the same case.

2. Case

Maja (a citizen of Slovenia) and Luka (a citizen of Croatia) concluded marriage on 1 February 2015 in Rijeka, Croatia, where they lived together at the time. Two years later, the spouses moved to Ljubljana, Slovenia, where they lived and worked until Luka died (intestate) on 1 March 2019. He was survived by Maja and his mother, who lives in Croatia. The couple had no children and did not conclude any agreement on the choice of court or applicable law. During marriage, spouses bought an apartment in Ljubljana and a small week-end house on the Croatian coast. In the land registers, both properties are registered under Luka's name. When succession proceedings were instituted, a disagreement arose between Maja and Luka's mother. Maja was of the opinion that the apartment and the week-end house represent spouses' community of property. Therefore, she believed that she was the owner of ½ and that only the other ½ could be subject to succession. Luka's mother, on the other hand, claimed that both

³ It should be noted that the both regulations discussed in the present case study do not apply to purely internal situations (without international element).

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properties in question represented Luka's separate property. Therefore, they could be inherited by the two in their entirety.

2.1. Application of Regulation 650/2012

Case 1 aims to represents a rather typical example of international succession. However, in order for Regulation 650/2012 to apply, certain conditions need to be fulfilled. Firstly, the circumstances of the case must include an international element. In the present case, the international element is undoubtedly included, as the deceased was a citizen of Croatia with habitual residence in Slovenia and his succession estate comprises immovable property in Slovenian and Croatia. Furthermore, conditions of application *ratione materiae*, *ratione temporis* and *ratione loci* are also fulfilled. The Regulation 650/2012 applies to succession to the estates of deceased persons (Art. 1(1) of Regulation 650/2012), Luka died after 17 August 2015 (according to Art. 83(1), Regulation 650/2012 only applies to succession of persons who die on or after 17 August 2015), and his habitual residence at the time of death was in Slovenia, which is an EU Member State and where the provisions of Regulation 650/2012 are applicable.

The condition *ratione loci* also connects with the question of **international jurisdiction**.⁴ Since Luka did not choose applicable law,⁵ the provision on general jurisdiction (Art. 4 of Regulation 650/2012) applies. Luka's habitual residence at the time of death was in Slovenia. Therefore, Slovenian courts will have jurisdiction to rule on the succession as a whole.⁶

In addition to governing international jurisdiction, the connecting factor of habitual residence at the time of death also governs the determination of **applicable law** (Art. 21(1) of Regulation 650/2012). This coordination of connecting factors is intended to facilitate the proceedings, as it allows the competent court to adopt a decision based on its own (substantive) law. A Slovenian court will therefore be able to rule on the succession by applying Slovenian law, which will govern: the causes, time and place of the opening of succession, the determination of beneficiaries and their respective shares, the capacity to

⁴ J. DOLŽAN and C. RUDOLF, 'Uredba o dedovanju v teoriji in praksi', Pravosodni bilten, vol. 38, No 2, p. 38.

⁵ The choice of applicable law may also influence international jurisdiction in succession proceedings.

⁶ Since the Regulation 650/2012 only provides for international jurisdiction, Slovenian courts will have to use national legislation to determine territorial jurisdiction.

inherit, the disinheritance and disqualification by conduct, the liability for the debts under the succession, the sharing-out of the estate, etc. (Art. 23 of Regulation 650/2012).

It should be pointed out that Art. 4 and Art. 21 of Regulation 650/2012 stipulate that the designated court shall rule on the succession as a whole and that the designated applicable law shall apply to the succession as a whole. Therefore Slovenian courts will have jurisdiction to decide (by application of Slovenian succession law) on all of the property included in the succession estate in the present case, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State. With this approach, the Regulation 650/2012 attempts to avoid fragmentation of the succession.

2.2. Delimitation between the scopes of application of Regulation 650/2012 and Regulation 2016/1103

In the present case, particular attention needs to be given to delimitation between the scope of application of Regulation 650/2012 and Regulation 2016/1103. The former should only be applied to succession, while other areas of civil law are excluded from its scope. ⁹ It also expressly excludes questions concerning matrimonial property regimes and property regimes of relationships deemed (by the law applicable to such relationships) to have comparable effects to marriage (Art. 1(2)(d) of Regulation 650/2012). This delimitation is mirrored by the Regulation 2016/1103, which applies to matrimonial property regimes and expressly excludes the succession of the estate of a deceased spouse (Art. 1 of Regulation 2016/1103).

Delimitation between the scopes of both regulations was further clarified by the European Court of Justice (hereinafter CJEU) in the *Mahnkopf* case and by the opinion of Advocate General Maciej Szpunar rendered in this case. The scope of Regulation 650/2012 includes the question, whether a spouse is a beneficiary of the estate, and the size of his/her

⁷ See Regulation (EU) 650/2012, Recital No 37.

⁸ Problems might still appear with recognition and enforcement of decisions in cases where parts of the estate (in particular immovable property) lie in a third State and where its private international law rules envisage exclusive jurisdiction of its courts to decide on the property. To avoid such situations Art. 12 of Regulation 650/2012 gives the designated court that possibility (on request of one of the parties) to decide not to rule on such assets.

⁹ See Regulation (EU) 650/2012, Recital No 11.

¹⁰ See: Judgement of 1 March 2018, *Mahnkopf*, C-558/16, ECLI:EU:C:2018:138; Opinion of Advocate General Szpunar delivered on 13 December 2017, *Mahnkopf*, C-558/16, ECLI:EU:C:2017:965.

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hereditary share, while the Regulation 2016/1103 applies to the determination of which property rights (and assets) form part of the succession estate.¹¹

Although the delimitation between scopes of various regulations in the field of EU private international law needs to be interpreted autonomously, it can be noted that a similar approach is used by Slovenian succession law, namely the Inheritance Act (*Zakon o dedovanju*, hereinafter *ZD*).¹² Questions concerning the determination of which property belongs to the succession estate (including a disagreement on whether certain property presents the community of property of spouses) are not addressed within succession proceedings, but in separate civil litigation.¹³

2.3. Application of the Regulation 2016/1103

Due to the disagreement between Maja and Luka's mother, whether the apartment and the week-end house represent spouses' community of property or whether they represent Luka's separate property, the competent Slovenian court (applying Slovenian procedural rules) will need to suspend the succession proceedings and **refer the parties to civil litigation** (Art. 212 of *ZD*).

In these separate proceedings, courts will have to apply the rules of private international law concerning matrimonial property. In Slovenian legal order, such rules may be found in the Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku*, hereinafter *ZMZPP*)¹⁴ and in Regulation 2016/1103.¹⁵ Therefore, courts will first need to determine which of the potential two legal sources they should apply.

The Regulation 2016/1103 applies to legal proceedings (concerning matrimonial property regimes), which were instituted **on or after 29 January 2019** (Art. 69(1) of Regulation 2016/1103). An exception is envisaged regarding Chapter III, which contains rules on applicable law. These rules apply only to spouses who marry or specify the law applicable to

¹¹ Opinion of Advocate General Szpunar delivered on 13 December 2017, *Mahnkopf*, C-558/16, ECLI:EU:C:2017:965, §§76, 77, 91, 92.

¹² Uradni list SRS, št. 15/76, 23/78, Uradni list RS, št. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US in 63/16.

¹³ See also: K. Zupančič and V. Žnidaršič Skubic, *Dedno Pravo*, Ljubljana, Uradni list, 2009, p. 258.

¹⁴ Uradni list RS, št. 56/99 in 45/08 – ZArbit.

¹⁵ Slovenia is one of the 18 Member States participating in the enhanced cooperation regarding the Regulation 2016/1103 (and the Regulation 2016/1104).

their matrimonial property regime on or after 29 January 2019 (Art. 69(3) of the Regulation 2016/1103).

In the present case, the spouses married on 1 February 2015 and the proceedings concerning their matrimonial property were instituted after 29 January 2019. Therefore, in order to determine **international jurisdiction**, a court will apply the Regulation 2016/1103. On the other hand, for the determination of **applicable law** it will still have to apply the *ZMZPP*. The fact that in many cases, jurisdiction will be determined according to the Regulation 2016/1103, while applicable law will be determined according to other legal sources (e.g. national legislation) could cause problems, as connecting factors might not be coordinated.

Regarding international jurisdiction, Regulation 2016/1103 takes into account that questions relating to matrimonial property are often closely connected to the death of a spouse. In such cases, it connects international jurisdiction in proceedings regarding matrimonial property regimes with international jurisdiction regarding succession. Thus, where a court is seized in matters of succession of a spouse pursuant to Regulation 650/2012, the court of that Member State has jurisdiction to rule on matters of matrimonial property regimes arising in connection with that succession case (Art. 4 of Regulation 2016/1103). Therefore, in the present case, Slovenian courts will have jurisdiction in the proceedings to which Maja in Luka's mother were referred after the disagreement on the succession estate arose. Furthermore, a Slovenian court will not only decide on the apartment in Ljubljana, but will also rule on the week-end house in Croatia.¹⁶

Regarding applicable law concerning matrimonial property regimes, Slovenian ZMZPP points to the law of the state where the spouses (of different nationalities) have their **permanent residence**. In the present case, this would be Slovenian law.

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¹⁶ The Regulation 2016/1103 attempts to unify the jurisdiction (and applicable law) in respect of the entire matrimonial property of spouses. See: Art. 21 and Recital No. 43 of Regulation 2016/1103. See also: C. GRIECO, 'The Role of Party Autonomy under the Regulations on Matrimonial Property Regimes and Property Consequences of Registered Partnerships', *Cuadernos de Derecho Transnational*, vol. 10, no. 2, p. 464.

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2.4. Assessment of the outcome

Based on the analysis above, we can conclude that both proceedings (regarding succession and matrimonial property) will be conducted by the courts of the same Member State. Furthermore, both proceedings will be governed by the law of that state, which means that the courts will be able to decide on both matters by applying their national substantive law. From the perspective of private international law, such outcome can be viewed as favourable. The decision making process will be facilitated by the fact that the competent courts will apply their national law. This could also improve predictability and legal certainty for the couple.

On the other hand, it should be remembered that the outcome in the present case is not a result of meticulous coordination of connecting factors by European legislators – applicable law was namely determined according to the Slovenian *ZMZPP*. This favourable outcome is thus partially coincidental.

2.5. Application of Slovenian substantive law

As Luka died intestate and left no children, Maja would inherit with Luka's mother in the second order of inheritance (Art. 14 of ZD). She would inherit $\frac{1}{2}$ of the succession estate and Luka's mother the other $\frac{1}{2}$.

In the present case, however, a dispute has arisen regarding the scope of succession estate. According to Art. 67 of Slovenian Family code (*Družinski zakonik*, hereinafter *DZ*), ¹⁷ community of property includes all property, which was acquired by work or against payment during the marriage or domestic community of the spouses. Community of property is also the property, which is acquired on the basis and by means of community of property and which arises from the community of property. When it is being divided, spouses' shares are deemed to be equal (Art. 74 of *DZ*). Nonetheless, each may prove that he/she has contributed more.

Although some relevant circumstanced might be missing in the present case, it could be presumed (for the sake of this case study) that the apartment in Ljubljana and the week-end house in Croatia both represented Maja's and Luka's community of property. Unless proven

¹⁷ Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19 in 67/19 – ZMatR-C.

otherwise, Maja's share is ½, meaning that only the other half, which has belonged to Luka, may be subject to succession.

Variation 1

Maja and Luka concluded marriage on <u>1 February 2019</u> in Rijeka where they lived together at the time. Two years later, the spouses moved to Ljubljana, where they lived and worked until Luka died (intestate) on <u>1 March 2023</u>...

In order to achieve predictability, the European legislators attempted (at least to a certain extent) to coordinate the rules and connecting factors in Regulation 650/2012 and Regulation 2016/1103. Therefore, it is worth examining the outcome if the Regulation 2016/1103 applied in its entirety.

2.6. Application of Regulation 650/2012 and Regulation 2016/1103

As in the case above, we can determine (despite the variation) that the Regulation 650/2012 should apply. Considering that Luka's habitual residence at the time of death was in Slovenia, Slovenian courts will have jurisdiction to decide on the succession as a whole and, in doing so, will apply Slovenian Law.

Since a question regarding matrimonial property regimes arose in connection with the succession case, Art. 4 of the Regulation 2016/1103 will again be applied, giving Slovenian courts the jurisdiction to decide on matters of matrimonial property. However, in order to determine applicable law, they will not rely on provisions of Slovenian *ZMZPP*, but will have to apply Chapter III of the Regulation 2016/1103 (the couple married after 29 January 2019). Art. 26 of Regulation 2016/1103, which refers to situations where spouses did not choose applicable law, points to the law of the State of spouses' **first common habitual residence after the conclusion of marriage** (Art. 26(1)(a)). Thus, in the present case, the court would have to apply Croatian substantive law.

2.7. Assessment of the outcome

Contrary to the Case, in Variation 1, the jurisdiction and applicable law in both proceedings do no align entirely. A Slovenian court ruling on questions concerning matrimonial property will have to apply Croatian law. This does not only cause additional work for the court, but might also be problematic for the spouses, since they may already have a closer connection to Slovenia.¹⁸

For this reason, Regulation 2016/1103 envisages a special **escape clause** in Art. 26(3). As an exception and upon application of a spouse, the competent court may decide to apply the law of the State of the **last common habitual residence**. This is, however, only possible if the applicant demonstrates that the spouses had their habitual residence in that State for a **significantly longer period** than in the State where they had their first common habitual residence. Furthermore, the applicant needs to demonstrate that both **spouses relied on the law** of that State in arranging and planning their property relations.

Regulation 2016/1103 does not define the expression "significantly longer period". ¹⁹ It also does not further specify how to determine whether spouses have relied on the law of a State in arranging and planning their property relations. Such examples could be referring to a legal system when entering into legal relationships (either between them or with third parties), fulfilling of every kind of publicity according to that law, etc. ²⁰

When examining the possibility of applying the escape clause to the present case, it can be concluded that the first condition is not met. Considering that Maja and Luka lived in both States for around two years, it cannot be argued that they had their habitual residence in Slovenia for a significantly longer duration.

Despite the impossibility of applying the escape clause, it is unlikely that Maja's legal position would be disproportionately disfavoured due to the application of Croatian law. Since its provisions concerning matrimonial property regimes closely resemble Slovenian law,²¹ the

¹⁸ See also: P. Poretti, 'Odlučivanje o imovinskim odnosima bračnih drugova u ostavinskim postupcima sukladno Uredbi 2016/1103 o bračnoimovinskom režimu', *Zbornik Pravnog Sveučilišta u Rijeci*, Vol. 38, No 1, pp. 462 – 463.

¹⁹ Recital No 51 of Regulation 2016/1103 mentions »long duration«.

²⁰ See: S. MARINO, 'Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships', *Cuadernos de Derecho Transnational*, Vol. 9, No 1, p. 283.

²¹ M. BUKOCAC PUVAČA, et al., 'Croatia', in L. RUGGERI, I. KUNDA and S. WINKLER (eds.), Family Property and Succession in EU Member States, National Reports on the Collected Data, Rijeka, University of Rijeka, Faculty of Law, 2019, pp. 75 – 77.

outcome after applying Croatian substantive law would closely resemble the outcome in the Case. However, problems could arise if differences in legal systems and approaches to the division of matrimonial property between connected States were bigger. This will be demonstrated with the following variation.

3. Variation 2

Maja (a Slovenian citizen) and Paul (a German citizen) concluded marriage on 1 February 2019 in Stuttgart where they lived together at the time. Two years later, the spouses moved to Ljubljana, where they lived and worked until Paul died (intestate) on 1 March 2023. During succession proceedings, a disagreement arose between Maja and Paul's mother, whether the apartment in Ljubljana and the week-end house in Croatia fall within the community of property regime or whether they represent Paul's separate property.

3.1. Application of Regulation 650/2012 and Regulation 2016/1103

Based on the connecting factor of **last habitual residence at the time of death** (Art. 4 and Art. 21(1) of the Regulation 650/2012), a Slovenian court applying Slovenian substantive law will decide on the succession as a whole. Thus (in compliance with ZD), Maja and Paul's mother would each be entitled to $\frac{1}{2}$ of the succession estate.

On the other hand, and in accordance with the Regulation 2016/1103, the dispute between Maja and Paul's mother on whether just ½ or the apartment and the week-end house form part of Paul's succession estate, will be decided by a Slovenian court (**connection with the succession case**, Art. 4 of Regulation 2016/1103) applying German substantive law (where the spouses had their **first common habitual residence**, Art. 26(1)(a) of the Regulation 2016/1103).

3.2. Issues arising from application of Slovenian and German substantive law

Due to significant differences between Slovenian and German substantive law regarding matrimonial property regimes, such outcome may prove problematic. While German law .

protects the surviving spouse's property interests with instruments characteristic of succession law, Slovenian law uses an approach relating to matrimonial property regimes (see above).²²

Under the German Civil Code (*Burgerliches Gesetzbuch*, hereinafter *BGB*), the default matrimonial property regime is the **community of accrued gains** (*Zugewinngemeinschaft*, Art. 1363 of *BGB*). The property that spouses bring into their marriage, as well as the property that they acquire after marriage is concluded, does not become their common property, but remains **separate**. An equalisation of accrued gains takes place only when the community of accrued gains ends.²³

Special provision regulates the equalisation, when the community of accrued gains ends due to death of one of the spouses (who dies intestate). The equalisation is effected so that the spouse's hereditary share is **increased by one quarter of inheritance** (Art. 1371 of *BGB*). This fixed equalisation takes place regardless of whether the spouses have made accrued gains.

When applying relevant substantive law of Slovenia and Germany to the present case, Maja is treated disfavourably, due to differences between both legal systems. On the one hand, Slovenian law is not familiar with a provision similar to the provision of Art. 1371 of *BGB*. Therefore, Maja's hereditary share cannot be increased by ½ according to Slovenian succession law, which applies to succession proceedings. On the other hand, German law (unlike Slovenian) does not protect her property interests in proceedings relating to matrimonial property regimes.

Furthermore, the application of Art. 1371 of *BGB* to matters regarding matrimonial property is also questionable, since the CJEU (in the *Mahnkopf* case) already characterized it as a provision relating to succession and thus falling under the scope of Regulation 650/2012 (not Regulation 2016/1103).²⁴

Unfortunately, the present case also cannot be solved by applying the **escape clause** (Art. 26(3) of Regulation 2016/1103), which would allow Slovenian law to apply in the proceedings on matrimonial property (the spouses did not have their habitual residence in Slovenia for a significantly longer period than in Germany).

²² This issue was already pointed out by the Advocate General Szpunar in his opinion in the case *Mahnkopf* (C-558/16), see \$54-55.

²³ More on matrimonial property regimes in Germany in: T. PERTOT, 'Germany', in L. RUGGERI, I. KUNDA and S. WINKLER (eds.), *Family Property and Succession in EU Member States, National Reports on the Collected Data*, Rijeka, University of Rijeka, Faculty of Law, 2019, pp. 280 – 286.

²⁴ The circumstances and the facts of the *Mahnkopf* case, however, differed from Variation 2.

On the other hand, the issue could be avoided if the competent court could apply German law to succession proceedings. By way of exception, the Regulation 650/2012 does allow the application of the law of a state, with which the deceased was manifestly more closely connected at the time of death (Art. 21(2) of Regulation 650/2012). This exception, however, is only possible when "all circumstances of the case are clear". Considering the circumstances of the present case, Art. 21(2) of Regulation 650/2012 most probably could not be applied.

With the Variation 2, I attempted to present some open questions regarding the interplay of both regulations. As a satisfactory solution could not be presented, this issue remains opened to be solved by the courts, including the CJEU.

4. Conclusion

Although the interplay between Regulation 650/2012 and Regulation 2016/1103 raises some questions that are still to be solved by the courts, it could be concluded that the adoption of these legal instruments improved the predictability and legal certainty for spouses in many areas, thus achieving its goal. Despite the best attempts, the connecting factors concerning jurisdiction and applicable law in various connected proceedings do not align completely. This is naturally understandable, as complete coordination would be impossible (especially when considering the plethora of various situations, in which spouses live). Nonetheless, some issues could arise and problems may appear, in particular where significant differences exist between relevant legal systems.

Abstract: The adoption of the Matrimonial Property Regimes Regulation (Regulation 2016/1103) and the Succession Regulation (Regulation 650/2012) undoubtedly brought improvements to predictability and legal certainty of married couples. One of the approaches used by the European legislators to achieve this goal was the coordination of rules regarding international jurisdiction in cases concerning matrimonial property and succession. This is of particular importance since questions concerning matrimonial property often arise in connection with the death of a spouse. Nonetheless, the interplay between both instruments might still raise several questions, as the connecting factors often do not align. The case study therefore attempts to present how this interplay affects the property position of a surviving

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spouse. It also points out some issues, which may arise when courts will apply national law of one state to matters of matrimonial property and national law of another state to matters of succession.

ROBERTO GARETTO

Opposite-sex registered partnerships and recognition issues

Summary: 1. Introduction. – 2. Quaestio iuris: the «limping status» for opposite-sex registered partnership. – 3. The hypothetical case: John and Melanie. – 4. The case law: to Rome with love. – 5. The European impact on the issue. – 6. Conclusion.

1. Introduction

This paper aims to enhance problems related to the recognition of opposite-sex partnerships. This specific type of relationship poses relevant taxonomic issues. Registered partnerships were adopted in the last decades in the several Member States to offer a solution to the request of legal recognition of same-sex couples. In that perspective, same-sex registered partnerships were conceived as substantially correspondent to opposite-sex marriage, despite formally different from marriage itself. Understandably registered partnerships, in general, were reserved for couples of the same sex. Only some Member States allowed since the beginning both opposite-sex and same-sex couples, to enter a registered partnership. After the progressive adoption of same-sex marriage in many of the Member States, a straight line in order to registered partnerships did not prevail in the European Union. Some Member States tended to overcome same-sex registered partnership, allowing the couple to convert it into marriage. Other Member States abolished same-sex registered partnerships simultaneously to the approval of same-sex marriage. Others, on the contrary, extended registered partnerships to opposite-sex couples.

At the moment in 18 Member States, a same-sex couple can enter a registered partnership or a civil union, and only in 12 of them an opposite-sex couple can enter into a registered partnership¹.

The paper takes into consideration two Member States that had recent evolution regarding the regulation of registered partnerships: Italy and the UK. Italy recognised registered partnership (*«unione civile»*) on 21 May 2016, with Law No 76/2016, and reserved it to same-sex couples. In the same law *de facto* partnerships were regulated as well, providing some benefits to couples of any sex that had recorded their *status* at the registry office and that had subsequently concluded an agreement on patrimonial issues in front of a notary or a lawyer, on condition that the agreement would be recorded at the registry office.

The UK has significant differences in regulation with England and Wales², Scotland³, and Northern Ireland. Registered partnerships are provided all over the county, but opposite-sex couples can enter them only in England and Wales. Scotland and Northern Ireland do not allow opposite-sex registered partnerships (it must be kept in mind that Northern Ireland does not provide marriage to same-sex couples, unlike Scotland, England and Wales). Recently a campaign for an equal civil partnership in England and Wales was pointed out that opposite-sex couples were discriminated against, not being allowed to choose between marriage and registered partnership, as same-sex couples had⁴. In June 2018, the Supreme Court ruled that allowing only same-sex couples to enter a civil partnership is incompatible with the European Convention on Human Rights, and on 26 May 2019, the Civil Partnerships, Marriages, and Deaths (Registration etc) Act enabled opposite-sex couples entering civil partnerships.

¹ See S. DE SIMONE, Taxonomical Table Related to Models of Couple in the European Union, in R. GARETTO (ed.), Report on Collecting Data. Methodological and Taxonomical Analysis, PSEFS 2019, p. 24 ff., available in https://www.euro-family.eu/documenti/news/psefs_report_data_2019.pdf.

² See G. DOUGLAS, The Changing concept of "family" and challenges for family law in England and Wales, in J.M. SCHERPE (ed.), European Family Law Volume II, The Changing Concept of "Family" and Challenges for Domestic family Law, Cheltenham, 2016, p. 22 ff.

³ See K. MCK. NORRIE, The Changing concept of "family" and challenges for family law in Scotland, in J.M. SCHERPE (ed.), European Family Law Volume II, cit., p. 235 ff.

⁴ See. M. Ní SHÚILLEABHÁIN, *Private International Law Implications of 'Equal Civil Partnerships'*, in *ICLQ*, 2019, 68, p. 161 f.

The case presented in the paper refers to an English opposite-sex couple that entered a civil partnership in England. After the death of one of the partners, the survived partner has expectations to receive a survivor's pension provided by the Italian pension found. Although adequately developed, the aspects that regard the entitlement to a survivor's pension in Italy are not central in this paper. It focuses indeed on the effects of a «limping status» related to opposite-sex registered partners that move to a country where the national law does not provide opposite-sex registered partnerships.

2. Quaestio iuris: the «limping status» for opposite-sex registered partnership

In family law, the «limping *status*» is generally referred to as the validity of a marriage. It is the effect of the prevalence of the principle *lex loci celebrationis* over the principle *locus regit actum*. A «limping *status*» is unjust to the parties⁵ and socially undesirable⁶. In the last year's questions of «limping *status*» arose significantly with relation to same-sex marriage, as the Member States that do not allow it tend to deny its recognition or to «reduce» it to other forms of recognized union⁷.

While the undesirable consequences of «limping» marriage are long since known⁸, and the new hypothesis of a marriage between persons of the same sex represents just a «theme variant», the adverse effects of «limping *status*» for registered partnerships started being fully considered recently. In the beginning, these effects were conceived as an unavoidable consequence of the effort of offering a form of acknowledgment to couples of the same sex.

⁵ See F. DEANNA, Cross-border continuity of family status and public policy concerns in the European Union, in DPCE, 2019, 3, p. 1982: «[l]imping status might cause devastating consequences to status holder and his/her family members, such as impossibility to gain the citizenship of a given State, benefit from migration rights like family reunification and determine who holds parental responsibility or obligations of maintenance to a child or to a former spouse following divorce». See also M. NÍ SHÚILLEABHÁIN, o.c., p. 166: «[l]imping status can result in an arbitrary denial of all of the rights and obligations ordinarily associated with the status, particularly in the event of relationship breakdown».

⁶ See I.F. BAXTER, Recognition of Status in Family Law. A Proposal for Simplification, in Can. B. Rev., 1961, XXXIX, 3, p. 344.

⁷ This is the case of Italy, for example: see S. MARINAI, Recognition in Italy of Same-sex Marriages Celebrated Abroad: the Importance of a Bottom-up Approach, in EJLS, 9, 1, p.12: «a same-sex marriage celebrated abroad will only produce the effects of a civil union in Italy with the consequent downgrading of the couple's rights» (emphasis added).

⁸ It is significant what written several decades ago about «limping» marriage: see I.F. BAXTER, *o.l.c.*: «[o]ne jurisdiction should not be indifferent to the solutions of other jurisdictions on the same problem - to the undesirability of the same persons being married here and single there [...]. But the conflict rules of a country are part of its legal system and international uniformity would involve agreement by sovereign systems».

Since 1989° a limited number of Member States started providing same-sex registered partnerships. The initial marginality of the innovation, at the international level, made negligible the issue of «limping *status*» itself. The progressive diffusion of same-sex legalized relationships (registered partnership and, later, also marriage) gave rise to this problematic issue.

While most of Member States provided registered partnerships reserved to same-sex couples, some opted for a form of registered partnership which was open also to opposite-sex couples. Thus, the new regime as an alternative to marriage, which was the choice of the Netherlands, Belgium, and France¹⁰. The two different approaches were based on different objectives. The aim of the Member States that opted for a same-sex registered partnership was providing a legal instrument, equivalent to marriage, in favor of the subject not allowed to marry¹¹. On the contrary, the aim of the Member States that allowed both same-sex couples and opposite-sex couples to enter registered partnerships was providing an alternative to marriage. For sure, the opportunity of choosing between marriage and a registered partnership was still precluded to a part of the citizens based on their sexual orientation, but formally a new model of a recognized relationship was available to everyone¹².

The situation significantly changed when the Member States that already had registered partnerships progressively provided legislation that allowed same-sex marriage.

Some of the Member States that provided only same-sex registered partnerships, like Finland and Sweden, abolished the institution of registered partnership at the time of introducing same-sex marriage. Most of them, on the contrary, juxtaposed same-sex marriage to a same-sex registered partnership. Others considered it necessary to extend registered

⁹ Denmark took the lead in 1989. See E.D. ROTHBLUM, Same-Sex Marriage and Legalized Relationships: I Do, or Do I?, in J. GLBT Fam. Stud., 2005, l, 1, p. 23. In the very following years also Norway (1993), Sweden (1995), Iceland (1996) legalized same-sex registered partnerships. See K. BOELE-WOELKI, Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe Conflict of Laws, in La. L. Rev., 2000, 60, p. 1053.

¹⁰ Netherlands (1997), Belgium (1998), France (1999). See J.M. SCHERPE, *Quo Vadis, Civil Partnership*, in *Victoria U. Wellington L. Rev.*, 2015, 46, p. 759.

¹¹ See J.M. SCHERPE, *The Past, Present and Future of Registered Partnerships*, in ID. and A. HAYWARD (eds.), *The Future of Registered Partnerships*, Cambridge, 2017, p. 570.

¹² J.M. SCHERPE, *Quo Vadis*, cit., p. 759. The same concept is expressed in ID., *The Past, Present and Future*, cit., p. 565.

partnerships to opposite-sex couples, according to a principle of equality. That is the case of England and Wales, which will be deepened further in the paper. *Nulla quaestio* for the Member States that already had registered partnerships regardless of sex. Providing same-sex marriage, they perfectly balanced the two alternative forms of legalized relationships: marriage and registered partnership.

The tangled situation outlined above makes us realize how frequent – in such cases – can be the rise of «limping» partnership¹³. When an opposite-sex couple that entered a registered partnership in a Member State that provided that opportunity decides to move to other member States to work and living, there is the real possibility that the hosting Member State does not provide regulation for opposite-sex partnership. In that case, the registered partners would not be recognized as «legalized couples», with rights and mutual duties. That would lead to a lack of protection, mainly for the weakest part.

A pretextual argument would be pointing out that the couple had the chance to marry and opted for the registered partnership. Since a legal system provides two forms of the legally recognized couple relationship, substantially equivalent for rights and mutual duties, each one has the right to choose the model he or she prefers, according to his or her cultural and moral background. The subsequent decision of moving to another Member State, probably not contemplated at the moment of the celebration of the registered partnership, does not justify –on a formal plane – any pejorative treatment for the couple.

The hypothetical case presented in this paper is aimed at highlighting the negative effects of «limping *status*» for a couple that enters a registered partnership in England, but works and lives in Italy.

3. The hypothetical case: John and Melanie

John and Melanie are UK nationals, and both live in Italy. They are in their sixties and are in a stable relationship, started in 1989. John worked in Italy in a travel agency for more than 30 years, and in September 2019, he finally retired. As in 2018, Melanie lost her job in London, after many years of a long-distance relationship, she decided to move to John in Italy and started working in an international bookstore in Rome.

¹³ See M. Ní SHÚILLEABHÁIN, *o.c.*, p. 165, *sub* note 25: «[a] 'limping' partnership is one which is valid and recognized in one country, but denied validity and recognition in another».

In consideration of the fact that they started living together, John and Melanie decide to formalize their union. Melanie, for cultural issues, never accepted the traditional idea of marriage, as she considered it as a form of imposition of social roles. Since the beginning, she was supporting the campaign for an equal civil partnership. When the civil partnerships are approved by law in England and Wales in March 2019, she proposes to John to enter a civil partnership. Due to the active role in the campaign, she obtains to be scheduled for the celebration of their civil partnership in London, the first available day, on 31 December 2019. The period seems quite convenient, as they use to spend the New Year's Eve in England. After the celebration of the civil partnership, John and Melanie go back to their apartment in Rome. On 23rd January 2020, John has a heart attack. He is taken to the hospital, but unfortunately, he passes away after a few hours. Melanie is devastated by the death of John. Thanks to the supports of some Italian friends, she organizes the funeral and manages all the bureaucracy issues.

In consideration of the recent celebration of the civil partnership, Melanie is suggested to apply for the survivor's pension at the Italian national pension fund, *INPS*, as John worked for an Italian employer for more than 30 years, and his survived partner is entitled to the treatment of pension. By applying, Melanie realizes that her *status*, in the Italian legal system, is not equivalent to the one of a spouse, of course, as she was not married to John. However, it is not equivalent to the *status* of the survived civil partner either, as in Italy civil unions, according to Law No 76/2016 (Paragraphs 1-35) are reserved for same-sex couples. The only comparable situation to hers seems to be the one of *de facto* partnership recorded at the registry office, as provided by Law No 76/2016 (Paragraphs 36-65). Nevertheless, in that case, the survived *de facto* partner would not be entitled to a survivor's pension.

4. The case law: to Rome with love

Echoing the title of a famous film by Woody Allen, Melanie moves to Rome from England, as for many years she is in love with John.

Despite the possibility of opting for marriage, Melanie and John decide to enter a civil partnership in the UK. They are induced to this choice for personal issues related to a cultural and social view (Melanie, in particular, has an ideological objection to marriage). They know

that in England, the two recognized couple relationships provide almost the same rights and duties¹⁴.

The recent legislation that in England and Wales provides the opposite-sex couples to enter a civil partnership is the result of a vibrant campaign for an «equal civil partnerships». An opposite-sex couple who wished to enter a civil partnership, Rebecca Steinfeld and Charles Keidan, challenged the disparity of treatment¹⁵. They applied to the registry office of the place of residence but were reputed disqualified to enter a civil partnership, reserved by law to same-sex couples. The couple initiated so a judicial review proceeding on the basis that the English law discriminated unlawfully in its treatment of opposite-sex couples compared to the treatment of same-sex couples. The claim was rejected by the High Court and by the Court of Appeals¹⁶, but the Supreme Court finally upheld it. The Supreme Court stated that the Marriage (Same-Sex Couples) Act of 2013 should have been accompanied concomitantly by the abolition of civil partnership, or by its extension to opposite-sex couples. The Supreme Court pointed out a «manifest inequality of treatment»¹⁷ and declared the incompatibility under section 4 of the Human Rights Act of 1998 of sections 1 and 3 of the Civil Partnership Act of 2004 that prohibited an opposite-sex couple from entering into a civil partnership. This provision was openly conflicting with Article 14, in conjunction with Article 8 of the European Convention on Human Rights (ECHR). Although the Supreme Court could not force the Government to act promptly, it made clear that discrimination was taking place and exerted intense pressure upon the Government to reform the civil partnerships¹⁸. In response to those initiatives, the Government recognized the need for adopting legislation to extend partnership to opposite-sex couples. At the end of the legislative procedure, on 16 March 2019, the Civil Partnerships, Marriages and Deaths (Registration etc) Act entered in force.

¹⁴ See A. HAYWARD, Relationships between adults: Marriage, Civil Partnerships, and Cohabitation, in R. LAMONT (ed.), Family Law, Oxford, 2018, p. 44.

¹⁵ See R. GARETTO, 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 2019, Conference Proceedings, 2019, 6, 1, p. 66 f. ¹⁶ See A. HAYWARD, Relationships, cit., p. 50 f.

¹⁷ R (on the application of Steinfeld and Keidan) v Secretary of State for International Development, [2018] UKSC 32, § 3, available in https://www.supremecourt.uk/cases/docs/uksc-2017-0060-judgment.pdf

¹⁸ A. HAYWARD, Equal Civil Partnerships, Discrimination and the Indulgence of Time: R (on the application of Steinfeld and Keidan) v Secretary of State for International Development, in Mod. L. Rev., 2019, 82, 5, p. 925.

John and Melanie, in our hypothetical case, being UK nationals, decide to celebrate their civil partnership in England, but they live and work in Italy.

This Member State since 2016, has legislation concerning different forms of registered partnerships. The main aim of Law No 76/2016 was actually to give legal recognition and protection to same-sex couples. The Italian Constitutional Court, in the ruling No 138/2010, established that the recognition of these couples was a matter of legislation and not of judicial determination, and excluded thus that the Constitution required the recognition of same-sex marriage¹⁹.

Due to the inactivity of the Italian Parliament after the decision of the Constitutional Court, on 21 July 2015, the ECtHR ruled in *Oliari vs. Italy* and condemned Italy for its «repetitive failure» to recognize same-sex couples and provide proper protection for them²⁰. Passing Law No 76/2016, Italy opts for a legal instrument, equivalent to marriage, in favor of same-sex couples that are not allowed to marry. Like some other Member States, it applies a technique of «separate but equal»²¹.

Law No 76/2016 also regulates *de facto* partnerships. It provides some benefits to opposite-sex and same-sex couples that had recorded their *status* at the registry office and that had subsequently agreed on patrimonial issues in front of a notary or a layer, on condition that the agreement would be recorded at the registry office.

It has to be noted that the civil union (*«unione civile»*), as provided by Law No 76/2016, Paragraph 1, is reserved to persons of the same sex (*«persone dello stesso sesso»*), and does not apply to John and Melanie. If applicable, Melanie would be entitled to the survived partner's pension. Indeed Law No 76/2016, equalizing the civil partner to the spouse²², ensures him

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¹⁹ Italian Constitutional Court, 15 April 2010, No 138, in Fam. dir., p. 653 ff. See. M.M. WINKLER, Same-Sex Marriage and Italian Exceptionalism, in ICL Journal, 2018, 12, 4, p. 439.

²⁰ Oliari and Others v. Italy, App. Nos. 18766/11 & 36030/11, Eur. Ct. H.R., (21 July 2015), in *Nuova giur. civ. comm.*, 2015, I, p. 918 ff. with a note of L. LENTI, *Prime note a margine del caso Oliari c. Italia*, in the same *review*, II, p. 575 ff. With reference to the decision, see also: M.M. WINKLER, o.c., p. 442.

²¹ J.M. SCHERPE, *The Past, Present and Future*, cit., p. 570 effectively describes the logic followed by the countries that opted for same-sex registered partnerships: «the aim of this 'technique' was to show, on a superficial and formal level, that this was a very different legal regime – even if substantially it was not. Thus, the slogan 'equal but different' (or 'separate but equal') was used. But even to the uninitiated it is apparent that emphasis of this statement for political reasons was on 'different' (or 'separate') rather than 'equal', as the whole point was that this regime was not marriage».

²² Law No 76/2016, Paragraph 20: «[a]l solo fine di assicurare l'effettività della tutela dei diritti e il pieno adempimento degli obblighi derivanti dall'unione civile tra persone dello stesso sesso, le disposizioni che si riferiscono al matrimonio e le disposizioni

or her the same entitlement to the pension that the spouse has. The Italian national pension fund, *INPS*, with a note, confirms that the civil partner is entitled to the survivor's pension²³.

Law No 76/2016 also regulates, at Paragraphs 36-65, *de facto* partnerships. It provides some benefits to opposite-sex and same-sex couples that had recorded their *status* at the registry office. In any case, among these benefits, it is not included the entitlement to the survivor's pension (and the mentioned note of *INPS* does not include the *de facto* partners in the category of partners entitled to survivor's pension). A recent decision of the Court of Appeals of Milano²⁴ recognizes the entitlement to survivor's pension to a person whose *de facto* partner passed away. The decision is based on two assumptions. First: the appellant entered a same-sex *de facto* partnership before 5 June 2016, when Law No 76/2016 entered in force, and his partner died before that date. Second: the *de facto* partners had no opportunity to enter a «civil union» being so entitled to rights and duties.

John and Melanie entered a civil partnership, so the assimilation to a *de facto* partnership would anyway be inappropriate. However, even taking into consideration this hypothetical assimilation, the assumption of the decision could not find application, as John and Melanie had other options to formalize their relationship, with an instrument, like marriage, that would have been fully recognized in other legal systems.

5. The European impact on the issue

It is a matter of fact that same-sex marriage and registered partnership are central issues in family law in Europe nowadays. The European Court of Human Rights (ECtHR) opted for an extensive interpretation of art. 8 of the ECHR, moving beyond the idea of the traditional family. This evolution can be noticed considering some decisions of the ECtHR²⁵,

contenenti le parole "coniuge", "coniuge" o termini equivalenti, ovunque ricorrono nelle leggi, negli atti aventi forza di legge, nei regolamenti nonce negli atti amministrativi e nei contratti collettivi, si applicano anche ad ognuna delle parti dell'unione civile tra persone dello stesso sesso» (for the sole purpose of ensuring the effectiveness of the rights and the full fulfillment of obligations arising from a civil union between persons of the same sex, the provisions that refer to marriage and the provisions containing the words "spouse", "spouses" or equivalent terms, wherever they occur in laws, in acts having the force of law, in regulations as well as in administrative acts and collective agreements, are also applied to each of the party of the civil union between persons of the same sex).

²³ INPS, Direzione Centrale Pensioni, 21 December 2016, message No 5171.

²⁴ Court of Appeals of Milano, 26 April 2018, in Riv. giur. lav., 2019, II, p. 157, with note of M. Falsone.

²⁵ D. COESTER-WALTJEN, The impact of the European Convention on Human Rights and the European Court of Human Rights on European Family Law, in J.M. SCHERPE (ed.), European Family Law Volume I, The Impact of Institutions and Organizations on European Family Law, Cheltenham, 2016, p. 67 ff.

particularly Schalk and Kopf v. Austria²⁶, Hämäläinen v. Finland²⁷, Gas and Dubois v. France²⁸, and Oliari and Others v. Italy²⁹. The Court expressed a clear principle: the ECHR does not ask the Member States to recognize same-sex marriage; it requires, on the contrary, to ensure same-sex couples specific rights. Each state will be free to achieve this goal through marriage or a form of civil partnership. This framework, on the plane of private international law, has led to a complex taxonomy regarding all forms of legally recognized couples. As already outlined above, the registered partnership raised mainly in order to recognize and give regulation to same-sex unions, and its diffusion and discipline vary from one country to the other.

Concerning the hypothetical case that we are analyzing, Article 8 of the ECHR is a pivotal legislative reference. The pass of recent legislation regarding registered partnerships both in Italy and in England (and Wales) is based on the provisions of Article 8 of the ECHR.

Those provisions are aimed at protecting individuals from arbitrary state interference in their private and family life and may also impose on the latter the adoption of positive measures to ensure effective respect of the rights related to the family sphere.

In applying positive measures, the State enjoys a certain margin of appreciation, but, according to the jurisprudence of the ECtHR, when it comes to particularly essential aspects of private life, this margin may be subject to restrictions.

The decision of the UK Supreme Court regarding the opposite-sex registered partnership is based on the applicability of Article 8 in conjunction with Article 14 of the ECHR, as the difference in treatment of opposite-sex couples must be related to sexual orientation³⁰. In this case, it is remarkable that the subject of discrimination is an opposite-sex couple, while in most cases are same-sex couples to be discriminated. This observation must be taken into account in order to consider that the complex taxonomy of couple relationships in the EU has cross effects on the generality of European citizens, and not only on specific categories of citizens.

²⁶ Schalk and Kopf v. Austria, App. No 30141/04, Eur. Ct. H. R., (24 June 2010), in *Nuova giur. civ. comm.*, 2010, I, p. 1137, with note of M.M. Winkler.

²⁷ Hämäläinen v. Finland, App. No 37359/09, Eur. Ct. H. R., (16 July 2014), in *Nuova giur. civ. comm.*, I, 2014, p. 1145 ff.

²⁸ Gas and Dubois v. France, App. No 25951/07, Eur. Ct. H. R., (15 March 2012), available in https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109572%22]}.

²⁹ Oliari and Others v. Italy, cit.

³⁰ A. HAYWARD, Equal Civil Partnerships, cit., p. 925.

The mentioned decision *Oliari and Others v. Italy*³¹ sanctioned Italy for a violation of Article 8 of ECHR. The country indeed did not provide to the claimants, a same-sex couple, an effective instrument to legalize their partnership³². This decision is one of the determining elements for the approval of Law 76/2016 in Italy³³.

With regard to Italy³⁴, it must be pointed out that the lawmaking process aimed at providing registered partnerships for same-sex couples, must be put in relation also with Articles 7, 9, and 21 of the Charter of Fundamental Rights of the European Union (CFR)³⁵. The rights guaranteed by Article 7 of the CFR correspond to those guaranteed by Article 8 of the ECHR, and Article 9 of the CFR is based on Article 12 of the ECHR. Particular attention needs to be paid to Article 21 of the CFR, which establishes that any discrimination based on any ground such as sex or sexual orientation shall be prohibited in the EU. This provision is aimed at promoting legislative interventions to avoid discrimination.

6. Conclusion

Melanie will not receive a survivor's pension in Italy. Despite John had acquired pension rights in Italy and, thus, his life companion – in case of opposite-sex marriage or same-sex civil union – would be entitled to the survivor's pension, Melanie cannot be recognized as a spouse, nor like a (same-sex) partner.

She opted for entering a civil partnership in England for a personal, cultural view: she disagreed with the same idea of marriage for the social implications of this legal instrument.

Her choice is not attributable to ignorance, nor distorted information: she chose a civil partnership consciously, as she knew that this form of recognized union had provided same

³¹ Oliari and Others v. Italy, cit.

³² N. CIPRIANI, Unioni Civili: Same-Sex Partnerships Law in Italy, in Italian Law Journal, 2017, 3, 2, p. 346.

³³ See N. CIPRIANI, o.l.c.

³⁴ In the negotiations that led up to the signing to the Lisbon Treaty, the United Kingdom secured a protocol to the treaty relating to a limited application of the Charter of the Fundamental Rights in its territories, see S. PEERS, *The "Opt-out" that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights*, in HRLR, 2012, 12, p. 376 f.

³⁵ See N. CIPRIANI, a.c., p. 344: «[t]he contribution of supranational judgments was important, if not decisive, particularly European Court of Human Rights (ECHR) rulings regarding Arts 8, 12 and 14 of the European Convention on Human Rights regarding respect for private and family life, the right to marry and to found a family, and the prohibition of discrimination, respectively».

rights and duties of marriages, without being marriage (as to say, without the historical and cultural structure of marriage, and without its social imagery).

Her free choice, linked to the sphere of personal values, is frustrated by the effect of the «limping *status*» concerning opposite-sex registered partnerships.

Despite the progressive inclusion of the family law among the competences of the EU, since the Treaty of Nice in 2001³⁶, issues related to the «limping *status*» of specific forms of recognized couple relationships are not yet overcome.

At the moment, as provided by Article 45 of the Treaty on the Functioning of the European Union, the EU citizens, according to the principle of free moving, can travel and establish themselves in any MS. They can even work without needing a work permit, and practice their profession in any MS with no limitations (unless the ones related to the knowledge of specific discipline contents).

Families move in the EU almost as much as persons, workers, and professionals, but no specific provisions are provided to avoid «limping *status*». Marriage is a «quasi-universal»³⁷, but same-sex marriage raised issues related to «limping» marriage.

Registered partnerships are not a «quasi-universal»: several MS do not allow them at all; others allow only same-sex partnerships. Others, on the contrary, let people enter a registered partnership regardless to their sex.

A functional approach to the multiplicity of the couple relationship and family forms³⁸ is aimed at considering as prevalent the mutual relationship on the formal status, in order to ensure dignity and equality of the partners.

The intention of ignoring the adverse effects of «limping *status*» of recognized couple relationships, when citizens move from one MS to another, undermines the dignity of human

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³⁶ C. MCGLYNN, Families and European Union, in R. PROBERT (ed.), Family Life and the Law: Under One Roof, Farnham, 2007, p. 257. See in particular: L. RUGGERI, Brexit and New European Framework in Family Property Regimes, in 6th SWS International Scientific Conference On Social Sciences 2019, Conference Proceedings, 2019, 6, 1, p. 60: «after 2000, there is a EU-level Family law legislation based on crossborder implications».

³⁷ W.N. STEPHENS, *The Family In Cross-Cultural Perspective*, New York, 1982, p. 401.

³⁸ See G. CHIAPPETTA, La "semplificazione" della crisi familiare: dall'autorità all'autonomia, in P. PERLINGIERI and S. GIOVA (eds.), Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità, Napoli, 2019, p. 447: «[ʃ]a concezione funzionale delle "famiglie" ha messo infatti in luce che gli effetti possono, anche in assenza di un valido atto dichiarativo, fondarsi sulla solidarietà e sull'affetto esistente tra i membri del gruppo familiare» (functional conception of the "families" has in fact highlighted that the effects can, even in the absence of a valid declarative act, be based on the solidarity and affection existing among the members of the family group).

being, by preventing the fulfillment of his personality in a fundamental social formation: the family³⁹. Formal barriers and rigid models in the sphere of the family are improper: «[h]appy families are all alike; every unhappy family is unhappy its own way»⁴⁰.

Abstract: This paper aims to enhance problems related to the recognition of opposite-sex partnerships. It is based on the analysis of the case which exposes an English opposite-sex couple, that entered a civil partnership in England, and that lives in Italy. After the death of one of the partners, the survived partner has expectations to receive a survivor's pension provided by the Italian pension found.

In Italy only the survived spouse of an opposite-sex marriage or the survived partner of a same-sex civil union are entitled to the survivor's pension. The survived opposite-sex partner has no right to claim the pension benefit. The paper will deepen the adverse effects of «limping *status*» for cross-border opposite-sex registered partnerships and will take into account the related taxonomic issues.

³⁹ See P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli, 2006, p. 923: «il senso dell'intervento dello stato sulla comunità familiare [...] si traduce nella necessità di rispettare il valore della persona nella vita interna: ciò non per una ragione di stato, nè "di famiglia", superiore cioè all'interesse delle parti. La comunità familiare deve ispirarsi, come ogni formazione sociale, al principio di democraticità» (the sense of state intervention in the family community [...] results in the need to respect the value of the person in its internal life: this is not for a reason of state, nor of "family", that would be by itself superior to the interests of the parties. Like any social formation, the family community must be inspired by the principle of democracy).

⁴⁰ L. TOLSTOY, *Anna Karenina*, Cambridge, 1997, p. 3.

HELENA MACHADO BARBOSA DA MOTA and ISABEL ESPÍN ALBA Matrimonial property regimes and succession issues after the dissolution by death of a cross-border marriage: a study case

Summary: 1. Quaestio iuris. – 2. Hypothetical case. – 3. Solution. – 4. Impact of the application of the European Regulations on matrimonial property regimes and succession by death and comparison with the solutions of the domestic sources of Portuguese PIL. – 5. Conclusions.

1. Quaestio iuris

Territorial and temporal application of Council Regulation (EU) 2016/1103 of 24 June, in cases of marriages celebrated before 29.01.2019 with elements of connection with non-participating Member States; exercise of conflict autonomy and issues of formal and material validity of *professio iuris*. Competent jurisdiction and validity of a jurisdiction agreement in concurrence with the rules of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July. Validity of the will and the right to the reserved share of the surviving spouse and the children of the couple. Renvoi to the law of a non-participating Member State.

2. Hypothetical case

«A, Hungarian, and B, Portuguese, marry without a prenuptial agreement, in 1990, in Oporto, where they have been living in a *de facto union* since 1987.

At the end of 2015, due to an employment contract signed by A with a German company, they took up residence in Berlin with their two grownup children.

In February 2019, on the advice of a friendly lawyer, they went to a notary's office in Berlin, where they drew up an agreement on a choice of applicable law in favour of the Hungarian law to govern their property regime, but which they failed to register, as required by German law; they also chose the Portuguese court as the competent court for any dispute or matter relating to that property regime, since they had left property in Portugal and planned to return, after A's retirement, to this country.

A suddenly dies in April 2019 and the descendants request a judicial inventory and heritage share before German courts.

B, who had returned to Portugal in the meantime, wants to get her share on the couple assets before the Portuguese courts, which, under the terms of the Hungarian legal regime (communion of property), includes the property that A had acquired in 1988.

In the meantime, it turns out that A had made a will under Hungarian law in 2018, leaving almost all of his inheritance property to a childhood friend».

Questions to decide:

- a) Does the Portuguese court have jurisdiction to rule on the question of A and B's matrimonial property regime?
- b) What will be the law applicable to the marriage property regime? Is the agreement signed in February 2019 valid?
- c) What is the law applicable to A's succession?
- d) Can the heirs of A apply for a reduction on the basis of an exceed in the disposable portion, in the knowledge that the legitimate quota is lower than that laid down in both Portuguese and German law?
- e) Is it relevant that (in mere hypothetical terms) the Hungarian succession conflict rules finds the *lex rei sitae* applicable?

3. Solution

a) Under the terms of Articles 69 (1) and 4 of Regulation 2016/1103, the Portuguese court does not have jurisdiction by virtue of the already existent succession procedure brought in a court of another Member State (Germany) with jurisdiction under Article 4 of Regulation 650/2012 (automatic forum). If this were not the case, the choice of forum clause would be valid under the terms of Article 7 of the Regulation, since A and B married in Portugal; the (Portuguese) nationality of B is not a criterion for the validity of the choice of forum clause since there was no choice of Portuguese law to govern the property regime, but of Hungarian law [Article 22, No 1, b), ex vi Article 7, No 1].

b) Both in Portugal and in Germany, the applicable law to the property regime is the law chosen by the spouses, the Hungarian law, even if it is not a participating Member State [Article 69, No 3, Article 22, No 1, b), and Article 20].

The tacit choice of the Hungarian legal and supplementary regime (communion of property that includes goods acquired before marriage when the couple is already in a *de facto union*) implies a material change of regime (the supplementary regime applicable under Portuguese law was that of the communion of acquired property under which only goods acquired after marriage are common) but is allowed by the chosen law (Article 24).

However, if the agreement on choice of law is not registered under German law, the law of the spouses' habitual residence, it is formally invalid [Article 23 (1) and (2)] and internal conflict rules would apply since the marriage was concluded before January 2019 [under the provision of Article 69, No 3, in terms of the applicable law regulated in Chapter III of the Regulation, this shall not apply to marriages entered into before January 2019, except for the possibility, as was the case, of having a choice of law (valid!) under the terms of the Regulation].

In this case, the Portuguese courts would apply Portuguese law, under the terms of Portuguese conflict rules (Article 53 (2) of the Portuguese Civil Code).

- c) The succession of A must be governed by the law of the last habitual residence, the German law (Article 21, No 1 of Regulation 650/2012); however, A has expressly chosen the Hungarian law to regulate his will, which will be valid (Article 22, ex vi Article 24 of Regulation (EU) 650/2012) and one may consider that there was also an implicit choice of the same law to govern the succession itself.
- d) If so, it will be this law that will assess the extent of the lawfulness and the possible reduction of the inofficious will [Article 23, No 1, h) and i)]; otherwise it will be the German law (Article 21) or, possibly, the Portuguese law under the terms of Article 21, No 2 (exception clause).
- e) The application of the Hungarian law and its possible renvoi to the *lex rei sitae*, is irrelevant under Article 34 (2) as the Hungarian law was a chosen law.

4. Impact of the application of the European Regulations on matrimonial property regimes and succession by death and comparison with the solutions of the domestic sources of Portuguese PIL

Although the action was brought after January 2019, in the *sub indice* case the application of the rules of the Regulation was doubtful, since the marriage in question (whose property effects are discussed after its dissolution on the death of one of the spouses) was concluded before, in 1990.

In fact, from the point of view of its temporal scope, Council Regulation (EU) 2016/1103 of 24 June implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes, hereinafter referred to as 'Regulation 2016/1103¹ shall apply from 29.01.2019² and shall replace, in the participating Member States³, the conflict rules relating to its material scope as defined in Article 1(1) and (2), Article 3(1)(a) and Article 27 as regards the scope of the applicable law. Also from the point of view of time, Regulation 1103/2016 will apply to actions brought on or after 29.01.2019 and to authentic instruments formally drawn up and registered on or after that date and to court settlements approved or concluded within the same time limits; however, pursuant to Article 69 (2), if the action brought in the Member State of origin was brought before 29.01.2019, judgments given after that date will be recognised and enforced under the Regulation if its rules of jurisdiction have been respected; in addiction the law applicable under Regulation 2016/1103 will affect marriages

aos efeitos patrimoniais do casamento, in F. RUSCELLO (ed.) Famiglia, responsabilità genitoriale e intervento pubblico,

¹ On the Regulation, in Portugal, see R. MOURA RAMOS, Os efeitos patrimoniais do casamento e das parcerias registadas no Direito Internacional Privado da União Europeia, BFD, 93/1(2017), pp 1-55; J. G. ALMEIDA, Breves considerações sobre o conceito de Estado-Membro nos regulamentos em matéria de regimes matrimoniais e de efeitos patrimoniais das parcerias registadas, in Revista do Centro de Estudos Judiciários, 2016, II, pp. 165-78 and H. MOTA, Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito Internacional Privado da União Europeia. Breve análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de Junho, in RED - Revista Electrónica de Direito, n. 2, FDUP/CIJE, Junho 2017, pp. 1-33, http://www.cije.up.pt/revistared, ID, La armonización de la ley aplicable a los regímenes matrimoniales en la Unión Europea. The long and winding road, in Persona y familia en el nuevo modelo español de derecho internacional privado, [Mónica Guzmán Zapater e Carlos Esplugues Mota (Dir.) e Mónica Herranz Ballesteros e Marina Vargas Gómez-Urrutia (Coord.)], Valência, Tirant Lo Blanch, 2017, pp. 273-285; ID, La protección de terceros en el Reglamento (UE) 2016/1103, (Protection of Third Parties in the Regulation (UE) 1103/2016) in Anuario Español De Derecho Internacional Privado, vol. XVIII, 2018, pp. 45-60; ID, A oponibilidade a terceiros da lei aplicável

Biblioteca di diritto civile 15, Aracne, Roma, 2018, pp. 223-239.

² See Article 70, No 2, § 2. With the exception of some rules on information and communication duties of participating States (articles 63 and 64: 29.04.2018; Articles 65, 66 and 67: 29.07.2016).

³ Portugal, Spain, France, Italy, Germany, Belgium, Luxembourg, Netherlands, Finland, Sweden, Malta, Greece, Cyprus, Slovenia, Bulgaria, Austria, Czech Republic and Croatia.

entered into only after 29.01.2019 but will allow the choice of law made after that date even if the marriage was previously celebrated; in other cases, and as far as the Portuguese courts are concerned, the conflict rules of Portuguese Private International Law (Articles 52, 53 and 54 of the Civil Code) in relation to applicable law and the rules of civil procedure (Articles 62, 63, 978 to 985 of the Civil Procedure Code) in relation to international jurisdiction and the recognition of foreign sentences remain in force.

From a personal point of view, the Regulation applies to international issues (EU or non-EU) even if there is only one foreign element, i.e., with contact, even partial, with a foreign legal system (for example: determining the property regime of a couple of Portuguese nationality usually resident in Lisbon and who own a property in Switzerland)⁴.

Territorially, the application of the Regulation is limited to the participating Member States [Article 70 (2)], but the applicable law under its conflict rules has universal application (Article 20), i.e. it will apply even if it is the law of a non-participating Member State (Hungary, for example) or of a third State (Switzerland or Brazil, for instance).

The Regulation (EU) 1103/2016 unifies, for the participating Member States, the rules on conflicts of jurisdiction by determining the jurisdiction of their courts [as defined under Article 3(2)] to deal with questions relating to matrimonial property regimes.

The application of these rules is also universal, and it is not necessary, apart from the international character of the *sub indice* issue, that it has a specific connection with the Member State of the forum. Thus, the Regulation is not subjectively limited (such as, for example, the Brussels *I bis* Regulation)⁵ and it is sufficient for the Member State of the forum to be bound by the Regulation pursuant to Article 70(2), irrespective of whether the parties are nationals or residents either in the European Union or in other non-participating Member States, without prejudice to the connecting factors relevant to the rules on jurisdiction. The international character of the issue is also an unconditional prerequisite⁶.

⁴ In the same way, see H. PÉROZ, e E. FONGARO, *Droit international privé patrimonial de la famille, 2*^a ed., Paris, LexisNexis, 2017 p. 1.

⁵ Regulation 1215/2012 of the EP and of the Council of 4.7.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶ In this sense, even if the parties are national and resident in the same State but have assets in another State, see P. PEITEADO MARISCAL, 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, 1103/2016 y 1104/2016, in CDT, Vol.9, no 1°, 2017, pp. 300-326, p. 302 and p. 304.

In general, Regulation 2016/1103 establishes the following criteria for the attribution of jurisdiction: exclusive and automatic forums (Articles 4 and 5), supplementary/subsidiary forums (Article 6), elected forums (Article 7), forums based on the appearance of the defendant (Article 8), alternative jurisdictions (Article 9), subsidiary jurisdictions(Article 10) and *forum necessitatis* (Article 11).

Pursuant to Articles 4 and 5 of Regulation 2016/1103, and for obvious reasons of proximity and procedural economy, where there is an action pending in a Member State concerning the succession on the death of one of the spouses or an application for divorce, legal separation or marriage annulment, the question of matrimonial property regimes will have to be examined in the same Member State, whose jurisdiction was determined by Regulation 650/2012 and the «Brussels II bis» Regulation, respectively. These forums are varied: from the forum of the deceased's habitual residence at the time of death, to the forum of the location of assets (Articles 4 and 10 of Regulation No 650/2012) to the forum of the residence of the spouses or of one of them or of their nationality in the event of divorce, separation or annulment of marriage in the various cases provided for in Articles 3 to 7 of Regulation No 2201/2003, of 27 November.

The advantage is clear: since the questions are connected (and in a certain sense they are referred for a preliminary ruling), it is by all means appropriate to have the same Member State jurisdiction, even though not the *same* court has to rule on them: «Where a court of a Member State is seised in matters [...] *the courts* of that State shall have jurisdiction [...]». A coincidence between *forum* and *ins* won't happen necessarily because the applicable law for dealing with succession or matrimonial matters is not the same as that indicated in Regulation 2016/1103 to regulate property regimes. There will even be a lack of proximity since, for example in matters of succession, the criterion of jurisdiction provided for in Regulation no. 650/2012 is, in the majority of cases, that of the *deceased person's* habitual residence or

nationality, which eventually will not coincide with that of the surviving spouse, especially in the latter case.^{7 8}

This jurisdiction is exclusive, automatic and binding and, in this case, does not consent any agreement of jurisdiction signed by the spouses.

The choice of forum clause is, like the exercise of conflict autonomy *strictly speaking*, limited: under the terms of Article 7, and in the absence of an automatic forum under the terms of Articles 4 and 5, the parties may choose: a) the forum of the applicable law (the law chosen, under the terms of Article 22 or the law applied additionally, under the terms of Article 26) or b) the forum of the Member State where the marriage was celebrated.

With the exception of the forum corresponding to the Member State in which the marriage took place, the remaining connections will make it possible for the *forum* and *ius* to coincide and in favour of the law of the forum, in accordance here with the principle of the good administration of justice, which also applies to the conferral of jurisdiction on the same forum(s) by virtue of the appearance of the defendant (Article 8).

Of course, for the spouses, not knowing in advance whether there will be divorce or legal separation proceedings or marriage annulment, or not knowing in the event of death which forum has jurisdiction over the succession, the advantage and effectiveness of concluding the agreement is always very limited, bearing in mind that if the choice of court follows the criterion of the law applicable in the absence of choice (in this case, the law of the first common habitual residence), there may be an error on the part of the spouses in that determination, given its indeterminate nature and case by case nature in the implementation of such a connecting factor.⁹

With regard to the applicable law and the possibility of exercising the *professio iuris*, Article 22 of the Regulation provides that the spouses may, by agreement, before, on or after

⁷ Highlights that disadvantage S. MARINO, Strengthening the European Civil Judicial Cooperation: The patrimonial effects of family relationships, in CDT, Vol. 9, no 1°, 2017, pp. 265-284 (p. 271). In general, on the harmonisation of the criteria of jurisdiction in this area and in matters of succession, see M. REQUEJO ISIDRO, La coordinación de la competencia judicial internacional en el Derecho Procesal Europeo de la familia (sucesiones y régimen económico matrimonial y de las uniones registradas), directed by A. Domínguez Luelmo and M.P. García Rubio, Estudios de Derecho de Sucesiones. Liber amicorum T.F. Torres García, Madrid, 2014, passim.

⁸ In the same Member State, but not necessarily in the same court, simultaneous proceedings are not necessary. Thus, P. PEITEADO MARISCAL, *Competencia internacional por conexión*, cit., pp. 310 e 311.

⁹ Pointing out these disadvantages, S. MARINO, Strengthening, cit., p. 272 and p. 273.

the marriage «"Article 22 (1): Spouses or future spouses may agree [...]"» designate as the law applicable to the matrimonial property regime the law of the State of common habitual residence or of one of them or the national law of one of them at the time the agreement is concluded [Article 22 (1) (a) and (b)].

The possibility of this choice being made during the marriage period means that <u>the spouses can change the applicable law whether it is the law chosen previously or the law applied in the absence of choice</u>.

A change in the applicable law will obviously cause a change in the property regime and, in general, a change in substantive rules regulating the property effects of marriage: even if the regime in the new law chosen is typically identical (the communion of acquired goods of the Portuguese law and the *sociedad de gananciales* (community of assets) of Spanish law, for example) there will always be dissonance with some of its rules and solutions. The change of applicable law will inevitably lead to a succession of statutes; under the terms of Article 22 (2), the spouses may agree on the retroactive application of the new law chosen, thus avoiding such succession and subjecting the property status of their marriage to a single law, from the moment it is concluded. However, and because such retroactivity could surprise and harm third parties, in particular creditors, who relied on the existence of a different and diverse regime for their claim under Article 22 (3), *«any retroactive change to the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from the law»*.

It should be noted that the possibility of choosing a law introduces an important change in what concerns the Portuguese citizens, since couples of Portuguese common nationality residing abroad or owning property abroad or marrying foreigners in Portugal may freely modify their property regime, through the choice and change of the applicable law which, in principle, would not be permitted under Article 1714 of the Civil Code if, under the terms of Articles 53 and 52, *ex vi* Article 54 of the Civil Code, Portuguese law was applicable as a common national law or common habitual residence.

The limitation of *professio iuris* is justified by the guarantee it offers of the application of a law close to family life, not making it necessary to prevent the fictitious internationalization of the relationship as is done by Article 3.3 and Article 14.2 of the Regulations «Rome I» and «Rome II», in obligations matters, respectively. However, it should

be noted that the range of laws offered by Article 22 (law of habitual residence or the nationality of *either* spouse) may be close to each spouse, but not necessarily to both as a couple and therefore to family life.

In the end, therefore, the Regulation attached more importance to the spouses' agreement, their will being the inspiring source of this list rather than the proximity principle¹⁰, and some authors advocated extending this list to the law of the Member State in which the marriage took place, since it is possible to choose jurisdiction of the place where the marriage was celebrated under Article 7 *in fine*, in which case the same law would apply, since the *lex loci* normally applies the *lex fori*: the spouses would marry in the Member State according to its law or applied by it, which would be both the law chosen to govern the property consequences of the marriage and the *lex fori*.

According to Article 23, the agreement on choice of law must be expressing in writing¹¹, dated and signed by the spouses, which can be classified as a rule of substantive private international law; the «written form» will be equivalent to «communication by electronic means which provides a durable record».

Under the terms of the recent opinion of the Consultative Council of the Portuguese Institute of Registries and Notaries (IRN), of 01.03.2019¹², the position of the CJEU regarding the «express» or «tacit» nature of the agreement of choice of law, for the purposes of Article 23, is expected. On the other hand, according to this opinion, the «electronic form» referred to in article 23, No 1, 2nd part, replaces the written form but does not dispense with the digital signature. The Advisory Council of the IRN also considered that the agreement of choice of law should be made by public deed or inserted in a notarized prenuptial agreement; the possibility of being inserted in a prenuptial agreement made through a declaration at the Civil Registry, under the terms of Article 189 of the Registry Civil Code, will be restricted to the choice of Portuguese law.

¹⁰ See S. MARINO, Strengthening, cit., p. 277, note 41, and p. 278.

¹¹ The term *«expressed in writing»* is used in the English version. Article 23 thus seems to exclude the possibility of a tacit choice of law, contrary to what happens in matters of obligations (Rome I and II Regulations) and succession (Regulation of International Succession). Defending this possibility if there is a formal and materially valid nuptial agreement and with reference to the property regime of one of the laws indicated in Article 22, see S. MARINO, *Strengthening*, *cit.*, p. 279.

¹² https://www.irn.mj.pt/IRN/sections/irn/doutrina/pareceres/predial/2019/parecer-1-5/downloadFile/attachedFile_f0/CC_114-2018_STJSR.pdf?nocache=1551707813.7

In addition to these formalities, the agreement on choice of law must also comply with the additional formal requirements of the marriage contracts required by the law of the Member State¹³ of habitual residence of both spouses at the time of the agreement or of each spouse if they are not resident together or of only one of them when the other spouse is resident in a third State. These rules will also apply to marriage contracts (Article 25), which will also have to comply with the additional formal requirements of the law applicable to the matrimonial property regime.

If there is, by means of the *professio iuris*, a change in the law applicable to property regimes and, with it, a concrete material change in that regime, the validity and effectiveness of that change should be assessed by the new law chosen; in the same way if the change in regime was a direct result of a nuptial agreement concluded at the same time as the agreement on the choice of law.

It seems to us that the question of the acceptance and material validity of the choice of law agreement is currently regulated in Article 24 of Regulation 2016/1103 and is relevant, especially if the choice of law agreement, entered into during the marriage and amending the law applicable until then, aims at the substantial alteration of the regime without indication, in a marriage contract, of the regime specifically adopted by the spouses, in which case the supplementary regime of the new law chosen¹⁴ will be applied. In the Portuguese case, and in view of the still existing Article 1714 of the Civil Code, it is important to know, in the event of a change of law, through the exercise of conflict autonomy, whether it is the law to which one moves or the law from which one moves that will decide on the admissibility of the material change in the property regime.

The question had already occupied doctrine and case law, in particular that of the countries that ratified the Hague Convention of 14 May 1978 on the law applicable to matrimonial property regimes – France, Luxembourg and the Netherlands – and defended the full autonomy of the parties in this matter, who, by choosing another law applicable to

¹³ On the notion of Member State within the scope of this Regulation and defending that for the purposes of this Article 23, the concept corresponds to that of participating Member State, see J. G. ALMEIDA, *Breves considerações sobre, cit.*, in *Revista do Centro de Estudos Judiciários, cit.*, pp. 165-78 (pp.173-76).

¹⁴ Apparently in the opposite, see M. VINAIXA MICQUEL, La autonomia de la voluntad en los recientes reglamentos UE en matéria de régimenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones regitradas (2016/1104), InDret, 2/2017, pp. 274-313, p. 295.

their property regime, would implicitly conform it materially differently without being subject to any kind of limitation either from the previous law or from the chosen law¹⁵.

It is clear that if the spouses conclude, at the same time as the agreement on the choice of law amending the applicable law previously, a marriage contract (or including in it the clause of the agreement on the choice of law) by which they specify the property regime adopted, the question of the validity of the amendment is resolved by the applicable law, under the terms of Article 22, and the new law may be chosen by the spouses – and since the question of the material validity of the marriage convention is now expressly included in the scope of the law applicable to property regimes (Article 27, g) –, the one that will authorise or not the material change of regime.

However, if the spouses do not conclude a marriage contract but merely exercise their conflict autonomy and choose the new law applicable to their matrimonial property regime, the problem would arise as to whether or not the automatic change to a legal system of the new law would be allowed and in the light of which law: Article 24(1) now clarifies that the law designated by Article 22 will be the new law chosen by the spouses and not the law previously applicable there, the matter being settled.

As regards the law applicable to successions, Regulation (EU) No 650/2012, of 4 July 2012, seeks to ensure, *«in order to provide legal certainty»*, that persons may organise their succession in advance by choosing or providing the law applicable to dispositions of property upon death (primarily wills and agreements as to succession) so that they are not become invalid by application of the law applicable to the succession in in the absence of choice (law of habitual residence at the time of death or law closest to the deceased at that time) or, in the limit, by the national law chosen to regulate the succession itself; thus provides for special connections to regulate precisely the substantive validity of those provisions and their very

¹⁵ See M. REVILLARD, Les changements de régimes matrimoniaux dans l'ordre international, in Travaux du Comité Français de DIP, 1995-1998, Paris, Pedone, 2000, pp. 265-295; D. BUREAU and H. WATT, Droit international privé, Paris, PUF, 2007, 2.° vol., p. 219; Y. LEQUETTE, Le droit international privé de la famille à l'épreuve des conventions internationales, in Recueil des cours, 1994, p. 246, Haya, Martinus Nijhoff Publishers, 1995, pp. 172-3; G. DROZ, Les nouvelles règles de conflits françaises en matière de règimes matrimoniaux, in RCDIP, no 4, 1992, t. 8, pp. 631-935, p. 658. For further consideration, cfr. H. MOTA, El ámbito de aplicación material y la ley aplicable en la propuesta de Reglamento "Roma IV": algunos problemas y omisiones, in Cuadernos de Derecho Transnacional, Vol. 5 (Out.), No 2, 2013, pp. 428-447(pp. 443 ff).

admissibility (and, in the case of agreements as to succession, their binding force). These special connections may be objective (law of habitual residence or law closest to the deceased) and are immobilized at the time of the provision or they result of the exercise of conflict autonomy, the deceased being able to choose the law of nationality at the time of the provision or at the time of death, as provided for in Article 22 (see Articles 24 and 25).

However, it will continue to be the *lex successionis*, possibly different from these ones, which will govern all other aspects of the succession (Article 23), namely the determination of the heirs, their shares, the disinheritance, the succession capacity, the determination of the legitimate and the collation and possible reductions of the provisions due to inofficious liberalities. This means that we may have two laws governing the succession, which are the result of applying these special connections. We can understand their existence, since they are different legal issues and have different objectives, and the introduction of a special connection is intended precisely to immobilise, at the time of the provision, the applicable law in order to avoid a mobile conflict and not to distort the validity of the provision under a law other than that applicable to the succession, which may surprise the author of the provision which he did not rely on at the time when he made it.

The issue, so debated in the doctrine, on the limitation of private autonomy in the planning of the succession by the *deceased* and even in his material conformation in result of the maintenance of the application of the succession law to fundamental issues such as the provision of the legitimate, its measure, and the inofficious donations made during life, starts, from our point of view, from a fundamental dissent regarding the objectives pursued by the European legislator in the establishment of these special connections.

In fact, it seems to us that the European legislator, rather than trying to restrict contractual freedom, has understood that the *professio iuris* serves (still) in this case as a broker of that putative limitation by allowing it, at the moment it makes the disposition on death, to choose the *lex successionis* itself; it is even normal for it to do so knowing that the choice of this law, under Article 22, Paragraph 2, should take the form of a disposition on death or result, tacitly, from the terms of this provision. It will not be credible that the *deceased person*,

in making a will and having the concern of choosing the law applicable to its material validity, does not also accede to the law of succession that he may also choose at the same time¹⁶.

Finally, the renvoi, exceptionally provided for under Article 34 of the Regulation, will not be admitted [Article 34(2)] whenever the conflict autonomy has been exercised which presupposes, in order to guarantee its useful effect, a material reference to foreign law, as is, in fact, the traditional solution in this matter (cf. Article 19 of the Portuguese Civil Code).

5. Conclusions

The application of European Regulations on private international law in the field of family and succession relations has clear advantages over the competition between the various conflict solutions (laws and jurisdictions) in force in the Member States, which is only «overshadowed» by the partial accession of the Member States, particularly in the case of the Regulation on matrimonial property regimes, but are offset by the universal nature of the applicable law and the subjective unconditioning of its territorial and personal scope.

The Regulations will facilitate the movement and establishment of citizens in the various Member States by ensuring legal certainty and continuity of legal relations. They assume the primacy of conflictual autonomy and allow spouses to adapt their property status to successive changes in their living conditions. However, as we have said in the strict framework of the practical hypothesis that we have formulated, some solutions are misguided and there are gaps and/or less fortunate solutions, which are likely to be revised in the near future.

Abstract: After the dissolution by death of a cross-border marriage with connections with participating and non-participating Member States both Matrimonial Property Regimes and Succession Regulations will apply in order to determinate the competent jurisdiction and the applicable law to issues concerning rights of the surviving spouse.

¹⁶ See H. MOTA, A autonomia conflitual e o reenvio no âmbito do Regulamento (UE) no 650/2012 do PE e do Conselho, de 4 de Julho de 2012, in RED - Revista Electrónica de Direito, No 2, FDUP/CIJE, Fevereiro 2014. See http://www.cije.up.pt/revistared

Luka Mišič

Case study: social rights of EU citizens and their family members in cross-border situations

Summary: 1. Introduction. – 2. Lex loci domicilii, lex loci laboris. – 3.
Unemployment benefits. – 4. Sickness benefits. 5. Residence criteria. –
6. Social assistance: equal treatment of workers. – 7. Family benefits. –
8. Frontier workers and health care. – 9. Pensions: export and calculation. – 10. Death grants.

1. Introduction

The case study addresses the legal status of European Union (hereinafter: EU) citizens and their family members with regard to social security (sickness, old-age, pre-retirement, unemployment, maternity and paternity, disability and survivors' benefits, benefits in respect of accidents at work and occupational diseases and death grants; not all listed benefits are however included in the case study)¹ and social assistance rights (means-tested benefits, aimed at eliminating poverty and social exclusion, e.g. minimum income benefits) in cross-border situations.²

It is composed of several real-life situations in which, due to the existing cross-border element, more than one Member State (hereinafter: MS) could be the competent state in the field of social security, e.g. in cases in which an EU citizen works in one and together with his or her family members resides in another MS. If, for example, he resides in a MS in which nationals and (permanent) residents enjoy coverage in a particular social security scheme and works in a MS where all economically active individuals (e.g. workers, the self-employed) enjoy coverage, he would fall under the competence of two MS simultaneously. Thus,

¹ Note that the Basic Regulation does not stipulate long-term care benefits under the provision on its material scope. According to the case-law of the CJEU, they have so far been treated as sickness-benefits.

² Note that traditional social assistance benefits, which are not linked to another contingency (e.g. sickness, old age), covered by social security benefits, are excluded from the material scope of the Basic Regulation and are not coordinated.

national social security rules are coordinated (not harmonized), either by bi- and multi-lateral social security agreements (have been traditionally), or by secondary EU law, in order to prevent double competence or competence of several MS. The fact that more than one state or MS is competent in the field of social security, leads not only to additional administrative hindrances and possibly a lack of legal certainty and predictability, but also to the imposition of an increased financial burden on the persons covered. Conversely, if a person resides in a MS in which economically active individuals enjoy coverage in a particular social security scheme and works in a MS in which nationals and (permanent) residents enjoy coverage, he and his family members could be left without sufficient or any social protection. Without rules on social security coordination, such situations might deter EU citizens from taking advantage of their free movement and residence rights stipulated under primary and secondary EU law.

The determination of the single competent state and single applicable legislation, together with other coordinating mechanisms, such as the equal treatment principle, protection of rights in the course of acquisition and protection of acquired rights, enables in the EU free movement of workers and their family members as well as other persons falling under the personal scope of the (basic) Regulation (EC) No 883/2004 of the European Parliament and of the Council from April 24th 2004 on the coordination of social security systems and (its implementing) Regulation (EC) No 987/2009 of the European Parliament and of the Council from September 16th 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems.

The Regulations apply to MS nationals, stateless persons and refugees residing in a MS who are or have been subject to the legislation of one or more MS, as well as to their family members and survivors. Rules on social security coordination also apply to nationals of Switzerland, Iceland, Liechtenstein and Norway. Coordinating provisions take effect in cross-border, not purely domestic situations.

The case study in its single story-line also includes the legal status of economically inactive EU citizens, as regulated by the so called Citizens' Directive, *i.e.* Directive 2004/38/EC of the European Parliament and of the Council from April 29th 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365 EEC and 93/96/EEC. In the case study, provisions of Regulation (EU) No 492/2011 of the European Parliament and of the Council from April 5th 2011 on freedom of movement for workers within the Union are included as well.

Please note that **the selection of MS is random**, that differences between residential (coverage on grounds of nationality and/or residence), and insurance schemes (coverage on grounds of work performance) as well as differences between benefits in-kind and reimbursement schemes concerning health care benefits are as a rule not explicitly considered in the main text. Also note that **after the competent MS has been determined**, **national social security rules apply and have to be strictly considered**.

As aforementioned, the case study consists of an extensive story line, gathering selected textbook examples with more complex issues concerning different types of benefits (e.g. special non-contributory cash benefits) surfacing in reality. The case study should be considered only as an initial glimpse into the field of social security coordination within the EU, since it addresses readers, not specialized in social law. Further literature, also regarding coordination of occupational pensions, particular position of posted workers, rules on socially earmarked taxes, tax subsidies,³ all topics excluded from this case study, should be consulted in order for the reader to get the full and precise picture of this highly complex field.⁴

³ See, for example, SPIEGEL (ed.), DAXKOBLER, STRBAN: The Relationship Between Social Security Coordination and Taxation Law. Analytical Report 2014 (2014).

⁴ See, for example, PENNINGS: European Social Security Law (forthcoming: 2020), STRBAN, Member States' Approaches to Bilateral Social Security, in: European Journal of Social Security 20 (2018) 2, pp. 129-147, ESSERS & DISTLER: Guide for Mobile European Workers (2017), STRBAN, Brexit and Social Security of Mobile Persons, in: ERA-Forum, 8 (2017) 2, pp. 165-185, STRBAN, Family Benefits in the EU: Is it Still Possible to Coordinate Them, in: Maastricht Journal of European and Comparative Law, 23 (2016) 5, pp. 775-796, PENNINGS, in: PENNINGS, VONK (eds.): Research Handbook on European Social Security Law (2019), pp. 321-343, STRBAN, Social Security Coordination for Non-EU Countries in South and Eastern Europe: A Legal Analysis (2013), CORNELISSEN, How Difficult is to Change EU Social Security Coordination Legislation? A Story of Changing Legal Basis, in: Pravnik 67 (2012) 1-2, pp. 57-78, PIETERS & SCHOUKENS: The Social Security Co-Ordination between the EU and Non-EU Countries (2009). For social security, free movement and residence rights of economically (in)active EU citizens and their family members see, fore and foremost, work by HERWIG VERSCHUEREN: VERSCHUEREN: Recent case before the Court of Justice of the European union, in: European Journal of Social Security, 19 (2017) 1, pp. 71-82, VERSCHUEREN (ed.): Residence, Employment and Social Rights of Mobile Persons (2016), VERSCHUEREN: Free Movement of EU Citizens. Including the Poor?, in: Maastricht

Hazel's private and career journey through the EU

2. Lex loci domicilii, lex loci laboris

Beardsley and Hazel, both nationals of the United Kingdom, move from the south coast of England to Brussels, where they both now reside and work. Beardsley is a self-employed rugby coach, whilst Hazel is employed with a consulting firm. According to Article 11(3)(a) of the Basic Regulation, a person pursuing an activity as an employed or self-employed person in a MS shall be subject to the legislation of that MS. Beardsley and Hazel thus no longer fall under the competence of the United Kingdom, but under the competence of Belgium, where they can access health-care, unemployment benefits, etc., and the Belgian social security provider(s) pay for the incurred costs. From a social security point of view, they are treated equally to nationals (national workers) of the host MS. Since they changed residence, the *lex loci domicilii principle* (state of residence principle) coincides with the *lex loci laboris principle* (state of work principle). If they worked in Belgium and resided in the United Kingdom, the former would take priority over the latter due to the application of the *lex loci laboris principle*. Special rules apply to persons working (or performing self-employment) simultaneously in different MS whilst residing in one of the working MS's or a MS, where they do not perform any economic activity.⁵

3. Unemployment benefits

After a while, Hazel, who is the breadwinner in the relationship, loses her job. Since Beardsley's income is not high enough, and Hazel only worked in Belgium for a short period, they are eager to return to the United Kingdom. However, because Hazel, before migrating to Belgium, also worked in the United Kingdom for a while, she has completed the nationally prescribed insurance period and is now entitled to receive unemployment benefits in

Journal of European and Comparative Law, 22 (2015) 1, pp. 10-34, and VERSCHUEREN, Free Movement or Benefit Tourism: The Unreasonable Burden of Brey, in: European Journal of Migration and Law, 16 (2014) 2, pp. 147-179. See also MIŠIČ: The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality, in: KOPETZKI (et al.) (eds.): Autoritäres vs. Liberales Europa (2019), pp. 3-29 and MIŠIČ: Equality of Opportunity in the EU: Rethinking the European Pillar of Social Rights in Light of Free Movement as a Supranational Principle of Justice, in: Zbornik znanstvenih razprav, Special Issue, (forthcoming: 2020).

⁵ See Article 13 of the Basic Regulation.

Belgium, and is eligible to look for work in either Belgium or any other MS. According to Article 61(1) of the Basic Regulation, the competent institution of a MS whose legislation makes the acquisition, retention, recovery or duration of the right to unemployment benefits conditional upon the completion of either periods of insurance, employment, or self-employment shall, to the extent necessary, take into account periods completed under the legislation of any other MS as though they were completed under the legislation it applies. The couple thus remains in Belgium, but Hazel struggles to find a job in which the salary would match her education and expertise. After a month, she decides to go to Paris in order to search for a better-paid job. According to Article 64 of the Basic Regulation, unemployment benefits shall be retained for a period of three months from the moment the unemployment person ceased to be available to the employment services of the MS which she left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of her entitlement to benefits under the legislation of that MS.

4. Sickness benefits

Since Hazel is a highly skilled worker, she finds work within a couple of weeks and Beardsley follows her, only to put his self-employment as a rugby coach on a hold in order to pursue his love of art. The couple however struggles to find a reasonably priced apartment in Paris. Beardsley thus returns to Belgium and moves south, where life is much cheaper. Hazel follows him and registers residence in Belgium, but due to her workload returns to Belgium every other weekend⁶ in order to spend time with Beardsley, who is now not only a naïve painter and sculptor, but also a dependent family member. For him, the *lex loci laboris principle* no longer applies directly, since he no longer performs economic activity. For Hazel, the *lex loci laboris principle* applies, since she performs economic activity, even if her residence is registered in Belgium, not in France.

Whilst Hazel works in Paris, Beardsley wanders the fields of Wallonia, seeking inspiration for his abstract oil paintings. Wind and rain soon get the better of him and he

⁶ If she returned more often, she would have been considered a *frontier worker* or a person, pursuing an activity as employed or self-employed person in one MS whilst residing in another MS to which he or she returns as a rule daily or at least once a week. See Article 1(f) of the Basic Regulation.

succumbs to pneumonia. Being unemployed and dependent upon Hazel, he fears the day when the medical bill for treatment, obtained in Belgium, will be issued. The day never comes and Beardsley realizes, after talking to his neighbour, who is a social lawyer, that, according to Article 17 of the Basic Regulation, an insured person or his family members who reside in a MS other than the competent MS shall receive in the MS of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation. He receives treatment in Belgium, for which the institution, competent for Hazel, covers the costs. In that sense, the *lex loci laboris principle* applies to him indirectly, via Hazel's insurance based on her economic activity or performance of work.

After a few years of seeing each other only a few days per month, Beardsley and Hazel grow distant and get divorced. Beardsley remains in Belgium, whilst Hazel permanently moves to Paris and takes up residence there.

5. Residence criteria⁹

Beardsley has meanwhile been living in Belgium for three years and has thus not yet fulfilled the permanent residence criteria. Again talking to his lawyer neighbour, he starts to fear expulsion from Belgium since he is not economically active. Not possessing the right to permanent residence and not being a worker or self-employed person but still only a hobby painter, he does not meet the criteria stipulated in Article 7(a) of the Citizens' Directive, according to which all Union citizens shall have the right of residence on the territory of another MS for a period of longer than three months if they are workers or self-employed persons in the host MS. Luckily for him, after the divorce, he obtained a right

⁷ Note that after the competent MS (France) has been determined, national social security rules apply and have to be considered regarding coverage and/or derivative insurance with insured family members. Belgian rules on co-payments, benefits in-kind or cash benefits (reimbursement instead of in-kind provision of medical services) also have to be considered.

⁸ Provided French law allows for derivative health insurance with insured family members irrespective of residence and that the Belgian social security system (regarding health care) is not based on a residence-based system under which Beardsley would have been insured originally.

⁹ Note that the question of residence criteria for economically inactive EU citizens is only indirectly linked to the rules on social security coordination.

to maintenance and also received a major part of his and Hazel's matrimonial property, and thus possesses sufficient resources for himself not to become a burden on the social assistance system of the host MS during his period of residence, as stipulated by Article 7(b). With his income, he is also able to conclude comprehensive sickness insurance, thus fulfilling the final criteria of Article 7(b). Fear of expulsion is lost.

6. Social assistance: equal treatment of workers

Meanwhile Hazel, who continued to live and work in Paris, finds a new partner, Hildegard, a university researcher, who has moved from Germany to Paris in order to continue her research work. After living together for a while, Hazel quits her well-paid job in consulting in order to spend more family time with Hildegard and takes up a job as an English teacher. A few months later, after finally publishing her research, Hildegard takes a year off. Because of Hazel's career shift and Hildegard's break from work, their household income lowers below the minimum income threshold per person. They start to worry and Hildegard is eager to return to the university but is not able to secure an employment contract until beginning of next academic year. However, after calling Hazel's former Belgian neighbour, they are relieved. They realize that according to Article 7(1) and 7(2) of the Regulation No. 492/2011, a worker, who is a national of a MS may not, in the territory of another MS, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should she become unemployed, reinstated or re-employed. She shall enjoy same social and tax advantages as national workers. Since Hazel is a worker, but her teacher's salary is not sufficient to provide for herself and Hildegard, who is now her dependant family member, Hazel, who lost the majority of her property in the divorce with Beardsley and spent her savings buying an apartment in Paris, can apply for social assistance benefits or tax advantages. 10 Since she is a worker, the permanent residence condition, which, after it has been met, secures equal treatment for all

¹⁰ Provided French law offers social assistance benefits to workers who do not earn enough income in order to support themselves and their family members. Again, national rules have to be considered.

EU citizens hosted by another MS regardless of their economic activity, does not apply. 11 Residence rights of her family member are also safeguarded.

7. Family benefits

After several years of life in France, Hildegard, who now has a child with Hazel, moves to the Netherlands, where she received a tenured track job offer. She is a frontier worker, who works and resides in the Netherlands but returns home, back to France, on a weekly basis. Hazel, who leaves her job as an English teacher, remains in France, so that Hubert, their son, can finish primary education there. If Hildegard worked in France, France would have been the competent state concerning family benefits. However, since Hildegard works in the Netherlands, according to Article 67 of the Basic Regulation, she is entitled to family benefits, comprising all benefits in kind or in cash intended to meet family expenses but excluding advances of maintenance payments, special child birth and adoption allowances, in accordance with the legislation of the competent MS, including for her family members residing in another MS, as if they were residing in the former MS. Family benefits are thus exported from the Netherlands to France. If the family for example resided in Belgium, where family benefits are enjoyed on the basis of economic activity, which is in the case at hand performed in the Netherlands, the competence of the former MS would prevail and benefits would be still be exported, even if they are provided on a residence basis in the Netherlands.12

8. Frontier workers and health care

Soon later, during holidays, Hazel and Hubert visit Hildegard in Maastricht, where she works and resides during workdays. There, Hazel breaks her leg whilst cycling and receives medical treatment. Fearing she will have to pay for her unplanned treatment, she calls her

¹¹ See Article 16 of the Citizens' Directive.

¹² See: ESSERS & DISTLER: Guide for Mobile European Workers (2017), p. 35. For priority rules, see Article 68 of the Basic Regulation. Rights, based on economic activity, take priority over rights based on the receipt of a pension and on residence. For a detailed analysis of family benefits coordination (for example in cases where one MS is obliged to cover for the difference to the higher amount provided by another MS) see also: STRBAN, Family Benefits in the EU: Is it Still Possible to Coordinate Them, in: Maastricht Journal of European and Comparative Law, 23 (2016) 5, pp. 775-796.

former neighbour in Belgium for advice. Luckily, she finds out that according to Article 18 of the Basic Regulation, unless otherwise provided, the family members of a frontier worker shall be entitled to benefits in kind while staying in the competent MS. The benefits in kind shall be provided by the competent institution and at its own expense, in accordance with the provisions of the legislation it applies, as though the persons concerned resided in that MS. Under Article 18(2) of the Basic Regulation, family members of frontier workers derivatively insured with them¹³ are entitled to receive benefits in kind without prior authorisation during their stay in the competent MS, unless the MS is listed in ANNEX III of the Basic Regulation. Hazel thus stumbles upon a problem the Belgian social lawyer did not anticipate. Since the Netherlands is in included in ANNEX III, listing MS in which rights to benefits in kind for family members of a frontier worker are restricted during short stays in the competent MS, Article 19(1) applies, making access to benefits without further restrictions possible only in the state of residence, i.e. France. However, since her treatment became necessary on medical grounds, taking into account the nature of the benefits and the expected length of the stay and is thus proven to be medically necessary during her stay (i.e. broken leg during a short term stay),14 the benefits were provided without prior authorisation on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation. 15

9. Pensions: export and calculation

After Hubert finishes school, Hazel starts working again. Having worked in the United Kingdom, Belgium, and France, she moves to the Netherlands, where Hildegard is already employed, and takes up a position there. They continue to live and work in the Netherlands for a few years, but then both move to Slovenia, where they open a bookshop and remain self-employed until they each reach retirement age. Hazel, who is a few years older, retires

¹³ Again note that after the competent MS has been determined, national social security rules apply and have to be considered

¹⁴ See special conditions stipulated in Article 19(1). See also Article 18(2) and Article 17.

¹⁵ Note that the provisions of Article 19 primarily apply to unplanned medical treatement obtained by any EU citizen, who is on a short stay in a MS, which is not the competent MS (not the MS in which he or she is insured/enjoys social security coverage).

first and has now worked in five different MS. Since she worked in every MS for less than the minimum insurance period (e.g. 15 years in Slovenia), she fears she will not obtain the right to an old-age pension or her full old-age pension. The couple also plans to move to Portugal once Hildegard reaches retirement age. They however doubt whether their pensions, regardless of the amount, will be exported to a MS in which they had never worked. They also fear what would happen to Hubert, who is meanwhile studying to become a social lawyer, if they were to die suddenly. Would he be entitled to receive a family pension even if studying and residing in Austria?

Hubert is glad to assure them that their pensions are not lost, even if not meeting the pension conditions in individual MS of work, and will be exported to their MS of residence or his MS of residence in case he, as a family member, would become the beneficiary. According to Article 7 of the Basic Regulation, cash benefits payable under the legislation of one or more MS or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on the account of the fact that the beneficiary or the members of her family reside in a Member State other than that in which the institution responsible for providing benefits is situated. He lets his parents know they can apply for a pension in the MS where they live, unless they have never worked there, or in the MS they last worked in. When calculating the pension, insurance periods from all MS's in which they worked at least for a year will be taken into consideration. The sum of individual amounts, obtained from every MS, taking into consideration the individual insurance period and relevant income, will make up a full pension, as if it was obtained in a single MS of work. 18

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¹⁶ It is also the general rule concerning cash benefits.

¹⁷ See Article 45 of the Implementing Regulation.

¹⁸ For calculation methods, see Article 52 of the Basic Regulation. In simplified terms, every MS pays the amount (percentage) of the full calculated pension, corresponding to the insurance period reached in that MS (*pro-rata* calculation). However, if the person has reached at least the minimum insurance period, prescribed in the particular MS, a twofold calculation ought to be made. Following the abovementioned *pro-rata* calculation, the amount has to be calculated individually, as if a purely national situation was the case, not as part of the *pro-rata* calculation. The higher amount out of the two has to be paid in order for the existence of a cross-border element not resulting in a lower amount of the pension. The amount, calculated in accordance to 15 years of insurance as if a purely national situation was the case, might namely be higher than the amount calculated according to the *pro-rata* calculation as percentage of the full calculated pension due to the amount of the calculation percentage applied after 15 years (e.g. 30% of the calculation base after 15 years).

10. Death grants

Sadly, the couple never makes it to Portugal together. Whilst renovating a country house near Porto, Hazel receives news of a car crash in which Hildegard, then still living and performing self-employment in Slovenia, loses her life. Death occurred in Slovenia, at that moment in time the MS competent for Hildegard in the field of social security (*lex loci laboris*). Once the dust settles, Hubert proceeds with a death grant claim. According to article 42(2) of the Basic Regulation, the competent institution shall be obliged to provide death grants payable under the legislation it applies, even if the person entitled resides in a MS other than the competent MS. Unfortunately, the Slovenian social security legislation does not provide insurance-based death grants.

Abstract: The case study follows the career and private life path of Hazel, who decides to leave the United Kingdom and move abroad in order to live and work in a different Member State (hereinafter: MS). In her life- and career-cycle, in which herself or her family members (first Beardsley, then Hildegard and Hubert) enjoy particular social security benefits (e.g. sickness, old-age, unemployment benefits), which are set in the heart of the case study, she takes up residence in five and works in four different MS. In all cross-border situations she or her family members find themselves in, rules on social security coordination as provided by secondary European Union law apply in order to determine the single competent MS and single applicable legislation, whilst safeguarding acquired rights and rights in the course of acquisition, and ensuring the principle of equal treatement takes full effect. Without effective rules on social security coordination, free movement of workers and self-employed persons, their family members, and other persons within the EU would namely face severe limitations.

FEDERICO PASCUCCI

Intersectional discrimination and survivors' pension

Summary: 1. Quaestio iuris focus. – 2. Hypothetical cases' description – 3. Case law and doctrine's solutions. – 4. EU Regulations' impact on the issue. – 5. Conclusion.

1. Quaestio iuris focus

After the authoritarian tendencies of last century, Constitutions of European countries put the figure of human person, with all its inalienable rights, in the center of their attention. Under this point of view, European Union too, even if following a longer path¹, adopted the same perspective, especially with the emanation of Nice Charter in the year 2000, its subsequent equality with the Treaties establishing the European Union proclaimed in year 2009 and the acknowledgement of European Convention of Human Rights as fundamental principle of Union's law².

In these last documents, indeed, the dignity of the person occupies the place of honour as prominent right and principle compared to all the other rights and principles contained

¹ It's enough on the issue to remember that the Treaty of Rome didn't mention fundamental rights, focusing its attention only on the four basic freedoms: a) free movement of goods, b) free movement of people, c) free movement of services and d) free movement of capital. See R. MONACO, *Comunità economica europea*, in *Enc. dir.*, VIII, Milano, 1961, p. 321, and L. SITIZIA, *Pari dignità e discriminazione*, Napoli, 2011, p. 126. However for this one, despite their absence in the Treaty of Rome, should not be right to speak of indifference of European countries towards fundamental rights.

² See Article 6 of the Consolidated Version of Treaty on European Union, where the Paragraph No 1 recognizes «the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties» and paragraph No. 3 states that «rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law».

within. Position confirmed by Article 2 of Consolidated Version of the Treaty on European Union too, where the first of Union's founding values is exactly the respect of human dignity.

This means – *rectius*, should mean³ – discarding the vision purely economic and mercantilist that produced the European Common market in favour of a new approach, where the human person gains political importance *per se* and is recognized on a European level regardless of economic terms and simple negative freedom's profiles, with a passage which finds its antecedent in the national Constitutions and changes the European Economic Community in the European Union.

The concept of dignity is moreover a complex one. It involves a set of attributes and features that form its fundamental and irreducible content, and from which derive rights, but duties also, because every human being is equal to another. And if this is true, then the acknowledgement of the other requests also the need not only to don't deny, but, on the contrary, to promote his/her personality, in a synergy for which «caring for the other» is a part of the very concept of «person»⁴.

The consequence of this «personalistic» vision imposes therefore relationships with others that are made by rights and duties. And these relationships bind everyone of us because «persons» that are part of a «community» founded on the value of «human dignity». If the person is in the center of the community, then interpersonal relationships demand also that towards the other not only an omissive attitude is needed (tolerance and respect), but also an active one (solidarity).

This is the binomial which our Constitution crystallizes in Articles 3 (principle of equality) and 2 (principle of solidarity), and that finds its European *pendant* in Article 2 of UE Treaty, because if it's true that the Union founds itself on the values, between the others, of equality and freedom, it's not less true that the society which it promotes is characterized

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³ The use of conditional tense is due to the obvious lack of solidarity in EU's actions followed to the precarious situation of European common currency, that, in turn, is born from the global economic crisis of year 2008. This lack has substantially frustrated the European social model as planned on the Maastricht Treaty and crystallized by Lisbon Treaty. See on the issue M. CINELLI and S. GIUBBONI, *Cittadinanza, lavoro, diritti sociali. Percorsi nazionali ed europei*, Torino, 2014, p. 21 ff.

⁴ See P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, 3^a ed., Napoli, 2006, p. 435. On the issue see also S. COTTA, *Persona (filosofia del diritto)*, in *Enc. dir.*, XXXIII, Milano, 1983, p. 168, according to which no man could deny dignity and value to another man without denying the same to himself, and L. SITZIA, o.c., p. 6. For this author the belonging to the man of attributes that represent his irreducible heritage, implies necessarily the recognition by him of ontological parity with the others.

by non-discrimination and solidarity⁵. And this is the binomial that could be found in the European Charters on the fundamental rights, and more precisely on Articles 5 (right to liberty) and 14 (prohibition of discrimination) of European Convention on Human Rights, and in the Chapters I (dignity), III (equality) and IV (solidarity) of Nice Charter.

Moreover solidarity doesn't permeate of itself only the relationship between citizens and State, because the concept of «community» can cover the state entity, the supranational one, and finally the intermediate social bodies which are between the single citizen and his Country, until to reach the grassroots community, namely the «family», intended as a stable community of life between two persons — not necessarily of different sex — united by an affective relationship⁶.

And one of the most important expression of solidarity between family members is given by the survivors' pension, that is the social security institute which allows to make up for the lack of one – but, most of all times, the most important one – of the income's sources due to the death of the worker or the retired insured. His or her death becomes in fact the protected event, which is considered by the legal system as the event giving rise to a socially relevant need⁷, and the pension represents the means with which is assured a decent standard of living to the survivors and their freedom from the state of need.

What happens if the family is made by same sex partners? If the State's law allows same sex couples to marry, or creates for them a specific institute which regulates their situation – such as civil partnership – , there are no problems. This law, to avoid discrimination, usually equalizes same sex couples with the heterosexual ones, thus planning for them equal rights and duties.

⁵ About solidarity in EU's scope see R. MANFRELOTTI, *Per una sintesi tra iniziativa privata e utilità sociale nel contesto dell'integrazione comunitaria*, in R. PRISCO, *Unione Europea e limiti sociali del mercato*, Torino, 2002, p. 56. For this author the purposes pursued by European Union, other than of economic nature, are not so far from the ones stated by articles 2 e 3 of our Constitution.

⁶ See on the issue what is stated by the European Court of Human Rights in the sentence Schalk and Kopf v. Austria, App. No 30141/04, Eur. Ct. H. R., (24 June 2010), in *Nuova giur. civ. comm.*, 2010, I, p. 1137, with note of M. M. Winkler. According to the Court is «artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would».

⁷ See M. CINELLI, *Diritto della previdenza sociale*, 9^a ed., Torino, 2010, p. 586.

Problems could instead arise about same sex partners for which the conditions that would allow them to benefit from survivors' pension (such as death, registry age or seniority in contributions) come into being without the legal system had them equalized to «normal» families. The reason for this situation could be the lack of a specific law, or, even if this law is present, because it doesn't provide a retroactive clause that extends to them the same benefits provided for heterosexual couples.

So without a dedicated rule which recognize their family life, and legally unable to marry, same sex couples are exposed to the risk of discrimination, and not only for their sexual orientation, but for other factors too (age, gender, race, etc.).

2. Hypothetical cases' description.

Although the hypothetical cases that could be set are many, it's better to focus the attention on the most probable ones.

In the first case one of the same sex partners dies before the couple had legal recognition by the State, or this recognition has occurred but the social security institution opposes it, because there is no clear rule that imposes the full equality between same sex and heterosexual couples.

Other cases could regard the meeting of the requirements provided by the law for claiming the pension, or the coming of an impediment condition (typical the condition that imposes to marry before the coming of a certain age, so to avoid the so called «deathbed marriages», contracted only to allow the living spouse to profit from the survivors' pension), before the couple's legal recognition.

In each one of the seen hypothesis the involved subjects risk to be at disadvantage not only for their sexual orientations, but also, if not mostly, for their old age. All these factors in fact prevent them to fulfil all the required conditions – first of all the marriage – to claim the pension benefit, so that they find themselves further discriminated inside a category (the LGBT one) already heavily penalized. And all without that to these same sex couples could be made a charge of fault, being them in the classic case of legal impossibility, because their State failed to extend the marriage to homosexuals, or didn't provide a specific law to recognize their bound.

3. Case law and doctrine's solutions.

The judicial answers given to these issues both by European judges and national ones are, nevertheless, very fluctuating, showing the extreme delicacy of addressed matters, which cross the person's fundamental rights to freedom, solidarity, dignity and non discrimination, with, on the other side, Member States' discretion about family and social security and the economic interest of social security institutions to welfare system's book-keeping.

Two cases could be considered emblematic in unveiling the difficulty met by the Court of Justice of the European Union (from now on CJEU) in its task to solve the interweaving: the *Maruko* case and the *Parris* one.

The first one, decided with sentence of 1 April 2008, C-267/068, concerns a same sex couple to which, after the death of one of the partner, the institution refuse to grant the survivors' pension.

More in detail, Mr. Maruko and is same sex partner, this one affiliated to the *VddB* (*Versorgungsanstalt der deutschenBuhnen*), that is the social security institution of employees in German theatres, have registered their union under the law 16 February 2001, which regulates in Germany registered life partnerships between same sex persons. At the moment of his partner's death, in year 2005, Mr. Maruko applied to the *VddB* for a widower's pension, but was rejected on the ground that *VddB*'s regulations did not provide for such an entitlement for surviving life partners. From his part, the claimant asserted that, since 1 January 2005 in Germany, both the law on registered life partnerships and the Social Security Code had placed life partnership and marriage on an equal footing.

The CJEU, seised of the case, decides using Directive 2000/78 that establishes a general framework for equal treatment in employment and occupation. First of all, European judges define the pension delivered by *VddB* as «pay», thus permitting them to apply to the specific case the Directive 2000/78. Secondly, the Court states the principle according which the Recital 22 of the Directive, if on one hand doesn't prejudice any competence of Member States on the matter regarding civil status and the benefits flowing therefrom, on the other

⁸ ECJ, 1 April 2008, C-267/06, Tadao Maruko c. Versorgungsanstalt der deutschen Buhnen, in Riv. giur. lav., 2009, II, p. 237, with note of L. Calafà and in Riv. dir. sic. soc., 2008, p. 817, with note of G. Caruso.

one surely doesn't allow that one of the same States, in the exercise of that competence, could derogate from EU law and in particular from the fundamental principle of non-discrimination.

But the most delicate issue solved by the Court is surely the third one, where the European judges affirm that the *VddB*'s refusal to pay the pension to the surviving partner of a life partnership, because the benefit is restricted only to surviving spouse, constitutes, within the meaning of Articles 1 and 2, Paragraph 2, Lett. a), of Directive 2000/78, direct discrimination on grounds of sexual orientation. But this result is reached only because there is a national law that brings same sex couples united by a life partnership on the same level of marriage, being this one reserved only to opposite sex persons.

The CJEU practically, although affirming the right of the claimant, ends up putting itself on a compromise position⁹, and recognizes the presence of a discrimination only when there is a specific national law that equalize – and only in case of survivors' pension – same sex life partners to spouses. So, even if it's true that European judges reconsider the importance of Directive's Recital n. 22, on the same time they left unaffected a whole series of issue, the first of which is if the impossibility to marry for same sex couples was a requirement that, even if it appears as neutral, in reality puts persons with a particular sexual orientation in a disadvantageous situation respect heterosexual ones¹⁰.

And this question, not answered by CJEU on *Maruko*, recurs in all its complexity in the second case presented, decided by the Court with sentence 24 November 2016, C-443/15¹¹, that concerns the right of a same sex couple's member to entitle as beneficiary of the future survivors' pensions his partner.

More specifically, Mr. Parris, lecturer at Dublin's Trinity College and member of a pension scheme operated by the College itself, lived with his same sex partner for over 30 years in a stable relationship, but only with the entry of force of Civil Partnership Act in year

⁹ See G. CARUSO, Discriminazione fondata sull'«orientamento sessuale»: la Corte di giustizia riconosce la pensione di reversibilità al partner di un'unione solidale registrata, in Riv. dir. prev. soc., 2008, p. 835, for which the Court doesn't push itself until making a break choice with its consolidated orientation about homosexuality.

¹⁰ This is the question that puts L. CALAFÀ, Unione solidale registrata fra persone omosessuali e pensione superstiti: il caso Tadao Maruko dinanzi alla Corte di giustizia CE, in Riv. giur. lav., 2009, II, p. 251.

¹¹ ECJ, 24 November 2016, C-443/15, David L. Parris c. Trinity College Dublin, on www.curia.europa.eu.

2011, at the age of 64, he was able to have his civil union, stipulated in the United Kingdom in year 2009, registered in Ireland.

During year 2010 Mr. Parris claimed the Trinity College to entitle his male partner to receive the future survivors' pension rising at the moment of his death, but his claim was denied because under rule No 5 of the pension scheme a survivors' pension could be entitled only if the member married, or after 2011, entered a civil partnership before the age of 60. It's a pity that Mr. Parris could never had the chance to satisfy this condition, because in year 2006, that is the year in which he reached the age of 60, there was no law in Ireland that provided marriage for same sex couples or, at last, the registration of a civil partnership.

Invested in the case, CJEU was referred of three questions: 1) if there was a direct or indirect discrimination on the grounds of sexual orientation; 2) if there was a direct or indirect discrimination based on the grounds of age; 3) if there was a discrimination due to the combined effect of age and sexual orientation.

Applying Directive 2000/78, the Court in *Parris* finds no direct or indirect discrimination on both the grounds of sexual orientation and age, neither, at last, on the grounds of combined effect of both. About the first issue, according to the European judges the rules provided by the pension scheme does not directly discriminate under Article 2, Paragraph 2, Lett. a), of the Directive, since it doesn't differentiate between same sex or opposite sex couples. Neither there is an indirect discrimination, since Recital 22 didn't impose to Ireland to legally recognize same sex partnerships.

On this last problem can be pointed out that the CJEU seems disavowing what it already stated in *Maruko*, namely that Recital 22 should never stand in contrast with principle of non-discrimination. In fact EU judges don't explain at all why Ireland's choice to not provide itself with a law on same sex partnerships does not set up a discrimination, seeming on the matter to be enough the simple presence of this Recital to justify the difference in treatment between same sex couples and heterosexual ones¹².

¹² With the consequence that the Court, trenching itself behind the Recital 22, not only does not invade the competences of Member States on the matter, but practically ends up to endorse a discrimination against homosexual couples that, since the legal impossibility to reach certain conditions, are disadvantaged regarding opposite sex couples which, instead, have the possibility to reach the same conditions, but decide not to do it. On the issue see A. TRYFONIDOU, *Another failed opportunity for the effective protection of LGB rights under EU law: Dr.*

Then, there is no discrimination on the grounds of age, due to the letter of Article 6, Paragraph 2, that allows member States to set age restrictions to benefit from social security schemes, provided this does not result in discrimination on the grounds of sex. The problem is that the CJEU focuses its reasoning only on the Paragraph 2 of Article 6, but fails completely to analyze the issue under the letter of entire Article 6, disregarding on the matter the assessments made by General Advocate in her conclusions¹³. As the result, the exclusion from the pension for the ones that did not marry before a certain age limit should nevertheless find always a political or social justification. And also said exclusion should always be proportionate to the fixed aim. Instead European judges fail to find any justification for the excluding rule of Trinity College's pension scheme.

But, regardless of the problems seen before, is on the ground of the third issue that the Court probably makes the real misstep, because it states that there could be no discrimination coming from the combination of multiple grounds, when there is no discrimination on the basis of each grounds taken separately. With this the Court shows its complete lack of an «intersectional» or «crossed» vision of the discrimination. Facing the grounds of risk in a completely single-axis way even when they are requested to value the combined effects of multiple factors, European judges don't take into account a discriminatory outcome that could show up as «exponential», given that the union between different grounds could lead to a damage of human dignity greater than the one deriving from the simple sum of them. And this, even when these grounds, taken individually, could present no discriminatory effects of the problems of the problems.

David L. Parris v. Trinity College Dublin and others, 2016, in http://eulawanalysis.blogspot.com/2016/12 /another-failed-opportunity-for.html.

¹³The conclusions of Advocate General Kokott could be read on http://curia.europa.eu/juris/document/document.jsf?text=&docid=181063&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=278009.

¹⁴ On the concept of «intersectional» discrimination see B. SMITH, Intersectional Discrimination and Substantive Equality: a Comparative and Theoretical Perspective, in The Equal Rights Review, 2016, Vol. 16, p. 73 ss. Regarding the analysis of the Court's reasoning on Parris about intersectional discrimination see S. ATREY, Illuminating the CJEU's Blind Spot of Intersectional Discrimination in Parris v Trinity College Dublin, in Industrial Law Journal, Vol. 47, Issue 2, 2018, p. 278.

¹⁵ This expression is used by O. BONARDI, Le discriminazioni basate sull'età, in M. BARBERA (ed.), Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale, Milano, 2007, p. 168.

¹⁶ See again O. BONARDI, o.c., p. 168.

Under this point of view, the study of a recent case solved by Italian judges¹⁷ could be paradigmatic of how an axiological based approach, founded on the principles of human person's protection as fixed by the fundamental Charters – the Italian Constitution in the specific issue – could lead to outcomes completely different from the ones stated by CJEU.

The case regarded a retired architect, having an already stable cohabitation with a same sex partner, who dies in year 2015, namely before the enforcement of law No 76/2016, which established in Italy too civil partnerships for same sex couples. To the remaining partner's claim to survivors' pension, *Inarcassa* – social security institute of Italian architects – provided a denial, since the claimant was not the spouse of the deceased pensioner.

As already seen in *Maruko*, the couple was not allowed to enter a marriage because of the sexual orientation of the partners, but as in *Parris* the event to which the pension benefit was related – in the specific issue, the death of the retired – happened before the enforcement of a law that allowed a legal union of same sex couples.

However, Milano's Court of Appeals does not allow itself to be stopped neither by unenforceability of law No 76/2016 on civil partnerships in the case, nor by the lack of a retroactive provision, nor, lastly, by the regulatory nature of contested rule (i.e., Article 24 of *Inarcassa*'s General Regulations of Pension), but making direct implementation of fundamental principles stated by Articles 2 and 38 of Italian Constitution, grants the survivors' pension befit to the surviving partner.

More specifically, if survivors' pension is nothing but the retirement pension, the benefit of which is claimed, exactly, as «survivor», it finds its constitutional cornerstone in Article 38, Par. 2, and its more general acknowledgement in Article 2, due to its function of human dignity's protection, since this type of welfare benefit grants to the surviving partner the keeping of a decent life even when the family income's share provided by the other partner ceases because his/her death¹⁸.

If to this we next add the fact that same sex unions are still social formations founded on affective relations and stable cohabitation, which anyway give birth to that mandatory duties of economic and social solidarity demanded by the second part of Article 2 of Italian

¹⁷ Court of Appeals of Milano, 26 July 2018, in Riv. giur. lav., 2019, II, p. 157, with note of M. Falsone.

¹⁸ See on the issue M. FALSONE, Quali diritti per le coppie omosessuali prima della legge sulle unioni civili? Il caso della pensione di reversibilità, in Riv. giur. lav., 2019, II, p. 165.

Constitution¹⁹, then the legal framework could be seen as complete. Survivors' pension, as setting out of a human fundamental right like dignity, and of a no less fundamental duty like solidarity, lies, according to constitutional discipline, with same sex couples too apart from their possibility to marry, and so the right to its entitlement could be allowed even by common judges.

Finally, there would be no need, in the Italian judges' argument, of anti-discrimination discipline, since on the issue every mention to cohabiting heterosexual couple – practically, the sole hypothetical comparator – should be inappropriate, seen the substantial difference between this one and same sex couple, for which Italian legal system didn't allow - and does not allow today either—the marriage.

4. EU Regulations' impact on the issue.

The path of direct application of constitutional principles about human rights followed by Milano's Court of Appeals could be followed even by CJUE, so to avoid in future the questionable choices made in Parris?

The answer could be positive, but probably a greater «boldness» of European judges in the application of Nice Charter on fundamental rights is required on the issue. The Nice Charter in fact, even if it cannot be considered equal to national Constitutions, has nevertheless the same juridical value of the European Treaties, and provides the principle of non-discrimination on Article 21, and the protection of social security and social assistance rights that allow «to ensure a decent existence» on Article 34.

It is indeed true that the Charter, as provided by Article 51, must be applied only to Member States and only when they implement Union law, but nevertheless it's clear the Union's trend to act in domestic law of Member States every time that they act in the scope of Union law, and not only when they act to strictly implement and enforce it. This, united to the fact that Nice Charter includes basically every aspect of human life, makes the area of

¹⁹ See Italian Constitutional Court, 15 April 2010 No 138, in Giust. civ., 2010, No 2, p. 1604.

its application as provided by Article 51 blurred, and so could allow an extensive application of its discipline²⁰.

Furthermore it's not strictly necessary having a direct application of Nice Charters to avoid the errors made in *Parris*. It would be enough in fact a different interpretation of the Directive 2000/78, an interpretation more oriented towards fundamental rights of the human person and less towards Member State's discretion and social security institutions' budgetary requirements.

The most important misunderstanding made by the European Court in *Parris* has been that of basing its analysis of discrimination only on the «single-axis approach»²¹, when instead it was requested to value the discriminatory content of a rule which, asking the marriage before the age of 60 in a situation of legal impossibility to obtain it, didn't put in a disadvantageous position all the homosexuals (discrimination for sexual orientation) or all people born before 1951 (discrimination for age), but only the homosexuals born before 1951 (discrimination for both sexual orientation *and* age).

The CJEU, on the contrary, with a dubious interpretation of Article 1 of Directive 2000/78, states that there is «no new category of discrimination resulting from the combination» of some of the grounds set in Article 1 which «may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established»²².

Put it in another way, European judges take into no account both Article 2, Paragraph 1 of Directive, that, in defining «principle of equal treatment», states that «there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1», and Recital 3, which recognizes that women «are often the victims of multiple discrimination». Nor these expressions must be necessarily read in a restrictive manner, *i.e.* that they imply only the single-axis approach, since «multiple» discrimination not only means

²⁰ See on the issue C. CHIARELLO, *Il valore costituzionale della Carta di Nizza: un problema ancora aperto anche alla luce della sentenza no 269/2017 della Corte costituzionale*, in *Consulta online*, 2018, pp. 380-381.

²¹ See for explanation of «single-axis approach» and «single-axis model» of discrimination, B. SMITH, *o.c.*, p. 74.

²² Practically European Court falls in the same trap in which was caught the District Court of Missouri when deciding the case *DeGraffenreid v General Motors*, that is the case law that originated all the studies on intersectional discrimination, where a black woman was discriminated on her workplace not simply because black or because a woman, but because she was black *and* a woman. See on the issue S. ATREY, *o.c.*, p. 282 ff. See also District Court of Missouri, 413 F Supp 142 (ED Mo 1976) (*DeGraffenreid*), in https://openjurist.org/558/f2d/480/emma-degraffenreid-et-al-v-general-motors-assembly-division-st-louis.

that the grounds act independently or simply additively, but that they could act also in synergy among themselves²³.

Still, even in its single-axis approach the Court doesn't persuade.

First, European judges assert the absence of a direct discrimination based on sexual orientation, since pension scheme's rule that impose to marry before the age of 60 to entitle the surviving partner of the pension benefit is written in a neutral way, so that it could be enforced towards both same sex couples and opposite sex ones.

On the other way, indirect discrimination is excluded by the Court using Recital 22 of the Directive 2000/78, which preserves Member States' competences in regulating «marital status and the benefits dependent thereon».

Now, one could agree on the lack of direct discrimination, but the fact remains that, as the Court itself stated in *Maruko*, the Member State's freedom of choice is always bound by the Union law and their discretion could never harm the fundamental EU law's principle of non-discrimination.

Instead, in *Parris* the CJUE seems to consider the presence of Recital 22 enough to justify the different treatment between same sex couples and opposite sex ones, making on the issue a real «U-turn»²⁴ from the decision in *Maruko*. But in so doing, the Court ends to set that an exception contained in a simple Recital²⁵ is more binding than both the general rules contained in the main articles of the Directive and a fundamental principle of Union law as the one of non-discrimination²⁶, and to sacrifice the fundamental human rights «at the altar of Member State sovereignty»²⁷.

Nor for the European judges exist an age-based discrimination, according to Article 6, Paragraph 2, of Directive 2000/78. In fact, if survivors' pension is nothing but the retirement pension entitled to survivor members of the deceased's family, and if, as stated in Article 6, Paragraph 2, Member States could provide that fixing of a particular age to be entitled to a

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²³ See S. ATREY, o.c., pp. 285-286.

²⁴ See again S. ATREY, *o.c.*, p. 291.

²⁵ And that a simple Recital has no binding force, but it is nothing but a reminder, is recalled by L. CALAFÀ, *Le discriminazioni basate sull'orientamento sessuale*, in M. BARBERA (ed), *o.c.*, pp. 220-221.

²⁶ See S. ATREY, o.c., pp. 291-292 and C. DANISI, *Tutela dei diritti umani, non discriminazione e orientamento sessuale*, Napoli, 2015, pp.182 and 190-191, on the general binding force of principle of non-discrimination and its primacy against the Recital 22 of Directive 2000/78.

²⁷ See A. TRYFONIDOU, o.l.u.c.

retirement pension benefit does not constitute a discrimination on the grounds of age, then for European judges the rule provided by the pension scheme in *Parris* would simply fix the age to be entitled of survivors' pension, thus being covered by the exception of Article 6, Paragraph 2, of Directive.

Neither this interpretation persuades. In the first place, not a single one of the three exceptions provided by Article 6, Paragraph 2, of the Directive seems to fit with *Parris*, since the specific case doesn't discuss on Mr. Parris' right to be entitled to the pension benefit, but his right to entitle his partner as beneficiary of survivors' pension, or , which is the same, the right of his partner to be entitled to the survivors' pension²⁸.

Lastly, CJEU doesn't take into account the entire letter of Article 6, which on Paragraph 1 provides that different treatments on the grounds of age are not considered discriminations only if they are «objectively and reasonably justified by a legitimate aim». But European judges neither find this «aim» nor even try to search for it, but, on the contrary, they limit themselves to attest that the contested rule simply falls in the exceptions of Article 6, Paragraph 2, without making that analysis of (strict) proportionality between the general rule of non-discrimination and the given exception that constitute one of the most important principle of EU law²⁹.

²⁸ For this reason the case in *Parris* doesn't fit neither with age limits which are a condition to be admitted to occupational social security schemes, due the fact that Mr. Parris was already admitted to Trinity college's pension scheme, nor with the age limit required to the entitlement to retirement benefit, since that the age limit fixed – to be married before 60 – didn't regard Mr. Parris' partner, *i.e.* the one that was the pension benefit's recipient, but Mr. Parris himself. Lastly, the age limit provided by the contested rule doesn't seem to fit neither with the third exception provided by Article 6, Paragraph 2, namely the age criteria in actuarial calculations. See on the point Advocate General Kokott's Conclusions, Paragraphs 123-127.

²⁹ See S. ATREY, *o.c.*, pp. 292-293. According to her, the Court's reasoning argues even with Recital 25 of the Directive no 2000/87, which instead states that it is «essential to distinguish between differences in treatment which are justified [...] and discrimination which must be prohibited».

5. Conclusions.

The Court's dismay in the approach to the problems of intersectional discrimination doesn't amaze.

This issue surely implies a greater difficulty respect to the single-axis model, so imposing an equal greater effort of interpretative undertaking. In fact, in intersectional discrimination is more difficult to find the comparator against which to confront the situation of the one that pretends to be discriminated, since this match must be done on multiple grounds, instead of on the only one provided by the single-axis model³⁰.

But could the Court's interpretation in *Parris* be really defined as «dismay»? According to some authors the answer should be negative. European judges had been specifically requested only to recognize – in the specific case – the combined presence of two different grounds of discrimination (sexual orientation and age), a task that could be done simply making a correct interpretation of the rules already provided by Directive 2000/78³¹.

It seems difficult to disagree with this last point of view. Excluding the fact that a wiser use of single grounds of discrimination could have already assured the protection of the claimant in *Parris* as disadvantaged subject, it's the denial of the European Court to recognize an intersectional dimension of discriminatory phenomenon that is puzzling.

The swiftness and the poverty – even in terms of reasoning's length – of the motivation with which the issue of intersectional discrimination is faced and dismissed by the Court, following an almost math approach, according to which zero plus zero is equal to zero, cannot be endorsed.

In fact, this reasoning brings to deny the protection of one of the fundamental principles of the entire EU law, the one of non-discrimination, and in the end it sacrifices the principal value on which that law is founded – or it claims to be founded on, at last –, that is the dignity of human person.

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³⁰ A. Tryfonidou, o.l.u.c.

³¹ See S. ATREY, o.c., pp. 295-296. So, maybe, more than dismay, one should speak of aware reluctance from the Court in doing that (unprecedented) change of course hoped by a part of legal doctrine. See again L. CALAFA, *Le discriminazioni basate sull'orientamento sessuale*, cit., p. 200, who already predicted in the near future the substantial deadlock of CJEU about sexual orientation.

So, if human dignity is the primal right to defend, and solidarity is the duty that more effectively uphold this right, it cannot be understood why EU Court should condone rules that deny to some persons already less favoured fundamental benefits (like the survivors' pension), that of these rights and duties are expressions, simply trenching itself behind Member States' discretion on the matter or the economic needs of the common market.

This doesn't mean to impose an «Union's vision» on civil status and/or social rights that would completely obliterate the single Member States' competences on the matter³², seen the deep cultural, economical and social differences that could still be found between them, but simply to defend those fundamental values, principles and rights of human person's protection that are consecrated in the founding documents of the European Union, and that even today too often aren't uphold *ex se*, but only in function of the economical and mercantile vision which still imbue a large part of the Union's actions.

Abstract: The assay studies the problem of intersectional discrimination and how it could deny a social security benefit that is fundamental for the protection of human person's dignity such as survivors' pension. Discrimination due to combined grounds, like sexual orientation and age, is in fact more difficult to recognize than the one caused only by a single factor of risk, as show the different solutions given on the issue by both European and national judges, and so it can bring to critical outcomes, most of all when it denies the protection offered by EU law to particularly disadvantaged people.

³² A. TRYFONIDOU, o.l.u.c.

Ana María Pérez Vallejo

Waiver of economic benefits on premarital agreement whith cross-border dimension

Summary: 1. Quaestio iuris. – 2. Hypothetical case. – 3. Impact of the application of the European Regulations on matrimonial property regimes and harmonization with other European regulations on private international family law. – 3.1. (Follows) ...& International Jurisdiction and Applicable Law to Divorce. – 3.2. (Follows) ...& Law applicable to the matrimonial property regime and to the prenuptial agreement. – 3.3. (Follows) ... & Conflict rule applicable to the compensatory pension (ex Article 97 c.c.) and to the economic compensation (ex Article 1438 c.c.). – 4. Solution of the case according to the applicable Spanish legislation. Doctrinal and jurisprudential annotations. – 4.1. (Follows) ... & Formal validity of the premarital agreement. – 4.2. (Follows) ... & Validity of the premarital agreement to waive unborn rights (subject matter). Controversial issues. – 5. Conclusions.

1. Quaestio iuris

EU Regulation 2016/1103 of 24 June establishing enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes is a further step towards the unification of international private family law. It is binding only on the participating States, ¹ but the law determined to be applicable will be so, even if it is not the law of a Member State (principle of universality *ex* Article 20). This international instrument will apply – from 29 January 2019 – to legal actions brought before its courts, to public documents that are formalised and to court settlements that are approved, in respect of matrimonial property regimes (*ex* Article 69.1) whenever there are "cross-border implications".

¹ The Regulations are applicable, at the moment, in eighteen EU countries: Germany, Austria, Belgium, Bulgaria, Cyprus, Croatia, Slovenia, Spain, Finland, France, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Republic Czech and Sweden.

EU Regulation 2016/1103 does not incorporate a definition of marriage. Nor does it refer to the cross-border nature of the property effects resulting from it. This will happen when any of the following circumstances are present: different nationality of the spouses, different habitual residences, residence in a country different from that of their nationality or possession of goods in different EU States. Thus, the cross-border impact of the marriage "would be verified when they were linked to two or more national legal systems in such a way that the doubt arose as to which of them would be the one claimed to regulate them".²

As far as the scope of Regulation 2016/1103 is now concerned, it must include all aspects of civil law relating to the matrimonial property regime. This is understood as the "set of rules relating to property relations between spouses and with third parties as a result of marriage or its dissolution" (Article 3.1.a). For the purposes of the Regulation, the matrimonial property regime "must be interpreted autonomously and must cover not only mandatory rules for the spouses, but also optional rules which the spouses may agree in accordance with the applicable law". It therefore includes 'not only the specific and exclusive marriage settlements provided for by certain national legal systems, but also any property relationship, between the spouses and in their relations with third parties, resulting directly from the marriage bond or its dissolution' (C. 18).

The question we are asking ourselves is whether, for the purposes of the Regulation, matrimonial settlements³ are equated with prenuptial agreements in anticipation of a future matrimonial crisis. Note that the determination of the matrimonial property regime constitutes the (typical) content of the matrimonial chapters, but it is not the only one. Today, in practically all EU legal systems, the conclusion of prenuptial agreements is legally or case-law admitted, the content of which may be diverse and cover matters excluded from the scope of the Regulation. Especially those which provide for the fixing or renunciation of property benefits or financial compensation in the event of legal separation or divorce.

² A. RODRÍGUEZ BENOT "Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión europea. *Cuadernos de Derecho Transnacional* (Marzo 2019), Vol. 11, Nº 1, pp. 8-50. DOI: https://doi.org/10.20318/cdt.2019.4612

³ The Article 3.1 b) defines the marriage certificates as "the agreement under which the spouses or future spouses organize their matrimonial economic regime".

Agreements that may be included in marriage settlements; or, in a later public or private document.

Determining which law would be applicable to the prenuptial agreement with cross-border repercussions, as well as the substantive and formal requirements required for its validity, is a complex task and shows the necessary coordination⁴ of Regulation 2016/1103, with other European Regulations in force relating to international private family law.

2. Hypothetical case

Anne (Spanish), 40, and Boris (Belgian), 35, met on Facebook in 2017. They start a relationship, with sporadic comings and goings to Brussels and Spain. Anne, divorced, is a businesswoman of an important chain of hotels and tourist apartments and Boris is a professional model. In 2018, Anne is expecting a child and Boris leaves in the hands of his brother the Academy of Models he runs in Brussels to come to Spain. He will mainly take care of the family and will collaborate in the business management tasks that Anne directs. In 2019, their daughter Andrea is born and they decide to get married. Marriage capitulations are granted before a notary from Almeria, on February 26, 2019, in which the following is stated:

"That it is the intention of the appearing parties to contract a civil marriage and establish their habitual residence in Almeria (Spain) 2. That the economic regime that will govern the marriage is that of separation of goods. That the future husband (...) renounces to the use of the familiar housing in case of divorce, for being privative of the future contracting (...) In the case that there were common children a housing in rent will be attributed to the husband and to the minors at the expense of the wife. 3.- That in the event of separation or divorce none of the appearing parties will claim the other compensation, compensation and / or compensatory pension that might correspond in application of the legal rules.

⁴ P. QUINZÁ REDONDO and J. GRAY, "La (des) coordinación entre la propuesta de reglamento de régimen económico matrimonial y los reglamentos en materia de divorcio y sucesiones". *Anuario español de derecho internacional privado*, No 13, 2013, pp. 513-542. M. REQUEJO ISIDRO, "La coordinación de la competencia judicial internacional en el Derecho procesal europeo de la familia (sucesiones y régimen económico matrimonial y de las uniones registradas)", en DOMÍNGUEZ LUELMO, A. and GARCÍA RUBIO, Mª P. (Dirs.), *Estudios de Derecho de sucesiones*. Liber Amicorum T.F. Torres García, Madrid, La Ley, 2014, pp. 1195-1217.

On March 18, 2019 they contract a civil marriage in Almeria where they have their habitual residence, although they spend long periods in Brussels. Suppose - hypothetically that in March 2027, after eight years of marriage, the husband (Boris) filed for divorce in the courts of Almeria. He requests a compensatory pension of 500 € per month for economic imbalance and also a financial compensation of 600,000 € for work for the house and for having worked in his wife's business since they got married. Anne opposes these claims and wants to validate the prenuptial renunciation pact they signed in 2019. Boris alleges that the pact is null and void because it is contrary to law, morality and public order and that the terms of what was signed reveal a clear inequality and abuse of his wife's dominant position".

3. Impact of the application of the European Regulations on matrimonial property regimes and harmonization with other European regulations on private international family law

For the resolution of the case we will address the impact of Regulation 2016/1103 with other Regulations with which there must necessarily be coordination.

3.1. (Follows) ...& International Jurisdiction and Applicable Law to Divorce

With regard to international jurisdiction, Regulation 2016/1103 refers to two different cases: one, that the matrimonial property regime is connected to the death of one of the spouses (Article 4); ⁵ or, that it is connected to divorce, legal separation or annulment of the marriage (Article 5). In both cases, "the objective of the European Union legislator is the concentration of cases under the same state court".6 As far as the divorce case is concerned, Article 5 provides that where an application for divorce, legal separation or annulment of the marriage is brought before a court of a Member State under Regulation (EC) No 2201/2003, the courts of that Member State shall have jurisdiction to rule on the matrimonial property regime arising in connection with that application. Without prejudice to Paragraph 2, which

⁵ Article 4: "When a court of a Member State becomes aware of the succession of one of the spouses pursuant to Regulation (EU) No 650/2012, the jurisdictional bodies of that State shall be competent to resolve the matrimonial property regime in connection with that succession ".

⁶ P. QUINZÁ REDONDO "Armonización y unificación del régimen económico matrimonial en la Unión Europa: nuevos desafíos y oportunidades". Revista chilena de derecho, Vol. 43, No 2, 2016, p. 634.

stipulates as a condition that this jurisdiction shall be subject to the agreement of the spouses where the court called upon to decide the claim is one of those referred to in the provision.

In order to determine the law applicable to divorce, reference should be made to Regulation (EU) No 1259/2010 of 20 December 2010, which complements Regulation (EC) No 2201/2003 and establishes enhanced cooperation in the field of law applicable to divorce and legal separation. This Regulation establishes its own set of rules for determining which national law should apply in divorce or legal separation proceedings involving spouses of different nationalities, residing in a country other than their country of origin or no longer residing in the same EU country. It applies from 21 June 2012. The Regulation, following the line established by the European legislator, gives priority to the principle of the autonomy of the will and allows the parties to designate by mutual agreement the applicable law as long as there are any of the connections established in its Article 58. In the case under analysis there is no applicable law convention and in the absence of a convention, the applicable law is determined in Article 8 of Regulation No 1259/2010 which establishes as the first connection that of habitual residence at the time of the filing of the lawsuit. In our case it coincides with Spanish law because the lawsuit is filed in a Spanish Court.

3.2. (Follows) ...& Law applicable to the matrimonial property regime and to the prenuptial agreement

In the case in question, the marriage formed by Anne and Boris did not conclude a convention on the law applicable to the economic regime, as provided for in the Regulation (ex Articles 22, 23 and 24). Article 26 (1)(a) therefore comes into play and applies. This article states that the law applicable to the matrimonial property regime, in the absence of an agreement, is the common habitual residence of the spouses after the celebration of the marriage (Spain). Therefore, the Spanish law, in this case the Spanish Civil Code, would be

⁷ This Regulation is applicable in sixteen EU countries participating in enhanced cooperation on this issue: Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

⁸ The applicable law agreement (ex Article 5 of Regulation 1259/2010) must comply with the formalities provided for in Article 7. Except that it is required to be in writing, dated and signed by both spouses, also complying with the additional formalities required by the Member State of their habitual residence.

applicable, as Almeria (territory subject to common law) is the habitual residence since the marriage took place.

The question then arises as to how far the scope of the applicable law extends? Does it cover pre-marital pacts? The Regulation seeks to cover the widest possible field of matters relating to the economic regimes of marriage, but does not expressly mention premarital pacts in anticipation of judicial separation or divorce. However, it is now very common to include such clauses in marriage settlements. In this respect, Article 27 points out as a conflict rule that the law applicable to the matrimonial property regime will also regulate the material validity of matrimonial settlements (Article 27 (g)). It is necessary to establish the conditions for the formal validity of these agreements (ex Article 25). All this, as the Regulation points out, in order "(...) to facilitate the acceptance in the Member States of matrimonial property rights acquired as a result of matrimonial contracts" (Recital 48).

It should be remembered that Anne and Boris granted marriage settlements in March 2019, incorporating in their clauses the prenuptial agreement of renunciation of certain economic benefits in anticipation of a future marriage crisis. Issues which, although related to the matrimonial property regime, should be expressly excluded from the scope of this Regulation (Recital 19). It is therefore appropriate to address a question that is controversial for the solution of the hypothetical case raised. It should be recalled that the husband applies for two different benefits which may be compatible. One, the compensatory pension of €500 per month (ex Article 97 c.c.) and €600,000 (one-off payment) as financial compensation for work for the house (ex Article 1438 c.c.). The latter is established exclusively for cases in which the economic regime is that of separation of goods, which is the one that governs between the spouses.

Consequently, the legal configuration of the two economic benefits, whose nature and presuppositions are different, must first be defined; and on the other hand, whether the applicable conflict rule is the same or whether Spanish or Belgian law may vary and apply.

3.3. (Follows) ...& Conflict rule applicable to the compensatory pension (ex Article 97 c.c.) and to the economic compensation (ex Article 1438 c.c.)

The purpose of the compensatory pension (ex Article 97 c.c.) is not to provide maintenance for one of the spouses. However, since there is no possibility of maintenance between spouses when the marriage is dissolved, it is admitted that the compensatory pension "is incorporated in a broad sense into the concept of maintenance obligation". (Judgment of the Provincial Court of León of 27 February 2015). And the maintenance obligation is expressly excluded from the scope of application of Regulation 2016/1103 (ex Article 1.2 Paragraph c), which refers to Council Regulation (EC) No 4/2009.

This international instrument in turn refers, as regards the determination of the applicable law, to the Hague Protocol of 23 November 2007). Article 3 of the Protocol states that "Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. In our case, it coincides that the habitual residence of the creditor (Boris) is Spain and would therefore also lead to the application of Spanish law, but not by application of Regulation 2016/1103, but by virtue of the Hague Protocol (2007).

However, this exclusion from the maintenance obligation by Regulation 2016/1103 does not solve the problem of the diffuse boundary between maintenance and the effects of marriage. This is because it is an aspect that can be understood as a burden of marriage as well as a duty of care between spouses. ¹⁰ In this sense, more doubts may arise from the pact renouncing the right to compensation for work for the house (ex Article 1438 c.c.). This compensation forms part of the primary matrimonial economic regime and is closely related to the duty of the spouses to contribute to the lifting of family burdens. Article 1438 c.c. seeks to mitigate the negative consequences that the regime of separation of property has on the spouse who has worked in the home; work that is recognized as a form of contribution to the support of the burdens of marriage and may give rise to the right to compensation for the extinction of the regime. It should be noted that the separation regime does not involve

⁹ ANTÓN JUÁREZ, I., "Acuerdos prematrimoniales en previsión de ruptura matrimonial: el test conflictual y material a tener en cuenta para que un acuerdo prematrimonial supere una revisión judicial ante tribunales españoles". *Cuadernos de Derecho Transnacional* (Marzo 2019), Vol. 11, No 1, pp. 82-111.

¹⁰ RODRÍGUEZ BENOT, A. "Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión europea. *Cuadernos de Derecho Transnacional* (Marzo 2019), Vol. 11, Nº 1, pp. 8-50. Apartado 36. DOI: https://doi.org/10.20318/cdt.2019.4612. ANTÓN JUÁREZ, I. "Acuerdos prematrimoniales en previsión de ruptura matrimonial: el test conflictual y material a tener en cuenta para que un acuerdo prematrimonial supere una revisión judicial ante tribunales españoles" *Cuadernos de Derecho Transnacional* (Marzo 2019), Vol. 11, No 1, p. 97.

any communication between the assets of one spouse and the other. Such compensation, in our opinion, cannot be configured as alimony, so it would fall within the scope of Regulation 2016/1103, although, in our case, it does not alter the applicable law.

In the case in question, the agreement to renounce the use of the family home is not questioned, the admission of which may be questionable, as it may be contrary to the interests of the minor. But in any case, the law applicable to this measure on the use of the family home, as in the case of the compensatory pension, is determined by Regulation EU No 4/2009, by the clearly alimentary component of the measure.

4. Solution of the case according to the applicable Spanish legislation. Doctrinal and jurisprudential annotations

Once these prerequisites have been determined, it would be up to the Spanish judge to analyse, in accordance with the applicable law, - in both cases the Civil Code - the formal and material validity of the prenuptial agreement. Especially, as in this case, because it is an agreement of early renunciation of the compensatory pension (*ex* Article 97 c.c.) and the economic compensation (*ex* Article 1438 c.c.), both requested by Boris after the divorce.

4.1. (Follows) ...& Formal validity of the premarital agreement

As for the formal validity, the agreement in question is inserted in the matrimonial capitulations granted in March 2016. Article 17.1 of the Law on Notaries establishes as the content of the public deed: "declarations of intent, legal acts involving the provision of consent, contracts and legal transactions of all kinds". Therefore, it complies with the validity requirements (minimum and additional) generally required by Article 25 of Regulation 2016/3011 for marriage settlements. Article 1327 c.c. requires that in order to be valid, the capitulations must be recorded in a public deed.

As is well known, the advantages of the public deed as an appropriate documentary support are undeniable and "it is called to have privileged juridical effects". The notary who authorises a deed in which the agreements are to be incorporated can judge the

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¹¹ See MARÍN CALERO, C. "El documento público notarial" Revista Jurídica del Notariado. No 40, October-December 2001, pp. 102-122.

capacity¹² of the grantors and ensure that the consent has been freely and cleanly formed, without any defect (error, fraud, violence and intimidation (ex Article 1265 c.c.). The Notary will draft and qualify the public instrument according to the common will of the grantors, which must investigate, interpret and adapt to the legal system, and will inform them of the value and scope of its drafting. At the same time, the notary, in his function of controlling legality, not only has to excuse his ministry, but also to deny notarial authorization or intervention when, in his opinion, the agreement is in whole or in part contrary to the law or contravenes public order or does not meet the necessary requirements for its full validity or effectiveness. Control of legality, which on the other hand, does not imply limitation to the autonomy of the will of the parties, but as the doctrine ¹³ points out "it is a mode of application of the same, with express legal qualification. The Notary whose "main task is and must be to produce valid public documents", ¹⁴ can and must provide full guarantees to the prenuptial agreement.

It is worth mentioning the Judgment of the Supreme Court of May 30, 2018, which resolves a case on the waiver of the compensatory pension that was formalized in a notarial act. Article 71.1 of the Law of Notaries establishes as the content of the acts: "the establishment of facts or the perception of the same by the Notary, provided that due to their nature they cannot be qualified as acts and contracts, as well as their judgments or qualifications". And although the appropriate public instrument would have been the public deed, the Supreme Court evaluates the action of the notary, as guarantor of the valid provision of the consent of the spouses. Especially in this case, where the marriage between Spanish and Russian, the wife later questions the validity of the prenuptial agreement to renounce the compensatory pension, claiming not to know the language. It should be noted that Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on the recognition of authentic acts between Member States of the European Union has been applicable since 16 February 2019. Which authentic acts fall within the scope of the

¹² TORRES ESCÁMEZ, S. "Un estudio sobre el juicio notarial de capacidad". Revista Jurídica del Notariado. Nº 34. Abril-junio de 2000, p. 216.

¹³ See MARTÍNEZ SANCHIZ, J.A. La escritura pública: entre la autonomía de la voluntad y la inscripción. El Notario del Siglo XXI, marzo-abril 2009 No 24, p.154.

¹⁴ See MARÍN CALERO, C. "El documento público notarial", cit. p. 101.

regulation? These would be documents issued by a public authority, such as documents emanating from a court or from an official linked to a court; administrative documents; notarial acts; official certificates that have been placed on private documents; diplomatic and consular documents.

Finally, once formal validity has been established, the judge must determine the validity of the content of the agreement. The merits of the case require a brief analysis of some questions that might arise. It should be remembered that Anne (wife) wants to assert the prematrimonial pact of early renunciation of the pension they signed in 2019. Boris (husband) argues that the pact is null and void because it is contrary to law, morality and public order and that the terms of what was signed reveal a clear inequality and abuse of his wife's dominant position.

4.2. (Follows) ...& Validity of the premarital agreement to waive unborn rights (subject matter).

Controversial issues

- Are premarital pacts that foresee the conjugal crisis admissible? The Spanish Civil Code - a law applicable to the case - does not expressly regulate or prohibit them. Unlike what happens in the Civil Code of Catalonia, approved by Law 25/2010, of 29 July (Articles 231-19). However, doctrine and jurisprudence consider them admissible in application of Articles 1323, 1325 and 1328 c.c. Precepts that enshrine the freedom to contract between spouses, in the seat of matrimonial capitulations. The content of which not only affects the matrimonial property regime, but also, with a more flexible criterion, "any other provisions by reason thereof" (Article 1325 c.c.). In this sense, the Judgment of the Supreme Court of June 24, 2015, ¹⁵ alludes to the profound change in the current social and matrimonial model (Article 3.1 of the c.c.). A change that "demands a less corseted system with a greater margin of autonomy within family law, compatible with the freedom of agreement between spouses ex Article 1323 c.c. Therefore, the spouses' power of self-regulation should be strengthened (Article 1255 c.c.). Similarly, the doctrine states that through premarital agreements, "the

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¹⁵ Sentencia del Tribunal Supremo de 24 de junio de 2015. Roj: STS 2828/2015 - ECLI: ES:TS:2015:2828. Ponente: Francisco Javier Arroyo Fiestas.

parties regulate their marital relationship or its eventual crisis in a way that is more in keeping with their special reality and represents a suitable instrument for reconstituted families". ¹⁶

- More controversial is the validity of prenuptial agreement of preventive renunciation of non-acquired rights. The available nature of the compensatory pension is not in question. The same cannot be said of the compensation for work for the house. Regarding this compensation (ex Article 1438 c.c.), doctrine and jurisprudence indicate indistinctly its restitutorial, compensatory and/or compensatory character. Some authors consider that this compensation should be structured as compensation for unjust enrichment, which is obtained by the spouse who does not work or works less for the home than the other, who with this dedication also suffers the corresponding loss of job opportunities. ¹⁷ This implies a violation of the principle of equality between spouses, in addition to contradicting the general principle that prohibits unjust enrichment, which cannot be waived a priori, and this precept implies its application. 18 Thus, in my opinion, the agreement of early renunciation of the compensation for work for the house (ex Article 1438 c.c.) could be declared invalid and the compensation could be estimated. Moreover, in our case, the new jurisprudential line that the Supreme Court Plenary Decision of 26 April od 2017 establishes could be applied by "establishing that collaboration in professional activities or family businesses, in precarious working conditions, can be considered work for the home and gives the right to this compensation".

Returning to the compensatory pension (ex Article 97 c.c.), the complex thing is to determine your early resignation. Are we facing a waiver of the application of the law (Article 6.2 C. Civil) or a waiver of a future right (Article 1328 C. Civil)? In our opinion we are facing a voluntary exclusion of the applicable law (ex Article 6.2 c.c.). That is, the free will of the parties not to acquire the right, an acquisition that would have occurred, if the applicable law had not been excluded. Waiver that is valid and effective, except for a substantial change in circumstances since the conclusion of the agreement. Which would lead to applying the rebus

¹⁶ GARCÍA RUBIO M.P., «Los pactos prematrimoniales de renuncia a la pensión compensatoria en el Código Civil», *Anuario de Derecho Civil*, T. LVI, Fascículo IV, octubre-diciembre 2003, pp. 1657-1658.

¹⁷ See GETE-ALONSO, M^a del C. and SOLÉ RESINA, J. "Mujer y patrimonio (el largo peregrinaje del siglo de las luces a la actualidad)". *Anuario de Derecho civil*, T. LXVII, 2014. Fasc. III, p. 866.

¹⁸ EGEA FERNÁNDEZ J., «Pensión compensatoria y pactos en previsión de una ruptura matrimonial», Estudios Jurídicos en homenaje al Profesor Luís Díez-Picazo, T. III, Thomson Civitas, Madrid, 2003, p. 4571

sic stantibus clause. The Supreme Court¹⁹ notes in this regard that it is possible to ignore the pacts or moderate the agreement for having changed the circumstances and requires for the application of the "rebus" clause, with greater flexibility than in other times, that the alteration be superseded and increase concurrence extraordinary of the onerosidad or that does not concur the possibility of having made a reasonable forecast of the unchained situation. The Supreme Court Judgment of June 24, 2015, where a pact for the establishment of a life annuity (not compensatory pension) is questioned also refers to the non-application to the case of the rebus sic stantibus clause, with its unpredictability and alteration requirements future circumstances, but this does not directly link this to the limit of being seriously harmful to the spouses (or harmful to the children), as the pact can be seriously harmful to a spouse even if the circumstances taken into account at the time of its bestowal.

- Is the litigation agreement contrary to law, morality or public order? Does it limit the equal rights that correspond to each spouse (Article 32.1 of the Constitution)? In general, the agreement entered into is admissible, as a family business legal business, governed by the general principle of autonomy of will. Pact, whose concrete content, will have to be valued for being subject to limits. According to Article 1255 of the Civil Code cannot be contrary to law, morality and public order and Article 1328 of the Civil Code considers null the stipulations that are contrary to the laws, good customs or limiting the equal rights of the spouses. In our opinion, these limits are mainly redirected to the protection of the equality of the spouses and the interest of the minor children, applying analogically to these pacts Article 90.2 of the Civil Code. In our case, the judge must assess whether it can be inferred from the pact that one of the spouses is in a situation of abuse of a dominant position, as the husband (Boris) alleges. Circumstances that the Supreme Court Judgment of June 24, 2015 has interpreted in the sense that the pact "has imposed a situation of submission to one of the parties, which may violate the principle of equality (Article 14 of the Constitution) or injury to the right to dignity (Article 10 of the Constitution) or personal freedom (Articles 17 and 19 of the Constitution). Nor that it has plunged the other spouse into a clear

¹⁹ Sentencias del Tribunal Supremo de 17 de enero de 2013, recurso 1579 de 2010, 18 de enero de 2013, recurso 1318 de 2011 y 15 de octubre de 2014, recurso 2992 de 2012.

precarious situation that generates the need for assistance from public or private institutions. "Circumstances that a priori do not occur in the case analyzed.

5. Conclusions

Regulation EU 2016/1103 represents a further step towards the harmonization of European private international family law. It deals with three basic issues: determination of the competent court, realization of the applicable law, and recognition and enforcement of judicial decisions regarding matrimonial property regimes. The hypothetical case that we have submitted for consideration shows the difficulty of coordinating the law applicable to premarital agreements with cross-border repercussions. Its content can be diverse and encompass clauses of a personal and heritage nature. We have limited ourselves to analyzing the early waiver agreement to two economic benefits of a different nature and configuration; which, in our opinion, could lead to the application of different conflict rules and the application of different legal systems, to the same premarital agreement.

But the scenario could get even more complicated; as the premarital agreements in anticipation of the marriage crisis can be very varied, face different limits for its validity and present diffuse content, because it affects different matters. Situation that, on the contrary, could be avoided, if the spouses or future spouses made use of the wide margin that the European legislator has granted to the autonomy of the will. Interested parties may make use of the possibility offered by the European Regulations involved and make the agreement of choice of applicable law with consistency, adjusting to what is best for their own interests.

Abstract: Premarital agreements have a long history and experience in Common Law systems. Currently they are not foreign to the Civil Law systems, especially in the countries of Continental Europe. Regulation 2016/1103 determines the Law applicable to marriage certificates, but does not refer to premarital agreements in anticipation of a future marriage crisis. Pacts whose content may be diverse and cover matters excluded from the scope of the Regulation. Determining what would be the law applicable to the premarital agreement with cross-border repercussion, as well as the substantive requirements and form required for its validity, is presented as a complex task.

GIOVANNI RUSSO

Legacy by vindication: how to manage right in rem issues

Summary: 1. Quaestio iuris: the case. – 2. Case description. –3. Case-law solutions with the current regulation. – 4. EU Regulations impact on the issue with short description of different scenarios. - 5. Conclusion.

1. Quaestio iuris: the case

The legal issue that wants to be treated here concerns the choice of an «X» citizen, residing in Italy, to include the legacy by vindication in favor of his daughter in his testament. The legacy relates to a right *in rem* on a real estate, located in Germany, where the daughter contracted marriage and resides. The notary refuses to draw up the succession act, in his opinion illicit, because Germany did not provide for this type of legacy and therefore it would be impossible to leave a real estate with an institution which is not present there.

The problem dates in the past, it born in the TFEU¹ in which it had already been figured out what the consequences of the rights of moving freely within of what was then the European economic community would have been. Well, subsequently some European Regulations, and in particular the No 650/2012² and his «twins» 1103³ and 1104⁴ of 2016,

¹ According to Article 21 of TFEU the European citizen is allowed to move freely within the European Union. However, the same legislator of that time had already highlighted how people circulation, in most cases, won't lead to a citizenship application if not the mere residence application. This led to what we are studying today and that can be solved thanks to the recent decisions of the Court of Justice. In this regard may be read P. K. INDLER, *La legge regolatrice delle successioni nella proposta di regolamento dell'Unione Europea: qualche riflessione in tema di carattere universale, rinvio e* professio iuris, in Riv. dir. int., 2011, Issue. 2, p. 425.

² We can see the Regulation (EU) on https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0650&from=IT.

 $^{^3}$ We can see the Regulation (EU) on https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1103&from=IT.

⁴ We can see the Regulation (EU) on https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1104&from=IT.

have attempted to solve the problem. If on the one hand the latter admitted the application of the legislation of a State which is not the one where the act will be effective, even though with some restrictions⁵, on the other hand these Regulations led to a solution in the event that some individuals choose to recognize rights that are not regulated in all the States, such as rights *in rem*.

In order to understand the subject matter, we have to take a step back and see where it all came from.

The opening of the market, the overcoming of work barriers and the subsequent emigration to different States other than their own, led to a combination of couples having different nationalities. This historical evolution can be summarized with a single word, which is the term «globalization». The problems encountered on this matter are by no means insignificant, in fact many questions have been overcome and many others are waiting to be solved.

It can be guessed, then, that the *quaestio iuris* does not exclusively concern European law but also national legislation which, in many cases, appears to be different from State to

⁵ Regulation (EU) 650/2012, Article 22 states: «1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death. 2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition. 3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law. 4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death».

Regulation (EU) 1103/2016, Article 22 states: «1. The spouses or future spouses 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, 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. 2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only. 3. Any retroactive change of the applicable law under Paragraph 2 shall not adversely affect the rights of third parties deriving from that law».

Regulation (EU) 1104/2016, Article 22 states: «1. The partners or future partners may agree to designate or to change the law applicable to the property consequences of their registered partnership, provided that that law attaches property consequences to the institution of the registered partnership and that that 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 (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. 2. Unless the partners agree otherwise, a change of the law applicable to the property consequences of their registered partnership made during the partnership shall have prospective effect only. 3. Any retroactive change of the applicable law under Paragraph 2 shall not adversely affect the rights of third parties deriving from that law».

State. Think of succession law and in particular the legacy by vindication, which in most cases is guaranteed but in certain States, such as in Germany, it's not. One point needs to be highlight. All Member States, and in particular Germany, as a result of the entry into force of the Regulation (EU) 650/2012, were «forced» to adapt their own succession system to the provisions of the EU regulation. Think also to the usufruct and to the different regulation envisaged between France and Germany.

In these cases, it will be necessary to apply both the European Law and national legislation. For this reason, a proper interpretation of the European rules is needed, but also must be taking into account the various national legislations.

2. Case description

The hypothesized case concerns two spouses with different nationality. The spouse «A» was born and resides in Germany. The spouse «B» is an Italian citizen but, after marrying a partner of German origin, turns out to be resident in Germany.

The couple resides in a home owned by the parents of the spouse «B». The latter, holder of a double citizenship (Italian and German), have opted for the Italian legislation as it better guarantees the right object of protection.

In doing so they have included in their testament a legacy by vindication in favor of the daughter. The bequest not only represent a gift to the couple for their marriage, but it will allow them to continue to enjoy the property even after the death of the parents. For this reason, the property, being under a communal estate of the spouses, will become property of both.

However, the notary, due to the reasons indicated in the first Paragraph, refused to draw up the act because it would be illicit.

This is a classic problem born from the lack of knowledge of the European legislation. That is why we need more attention in reading and applying EU Regulations. In this case it is necessary to read in conjunction not only the recent EU Regulations on the property regime of the spouses and on succession matter, but it is also essential to link them to the national legislation.

The question that needs to be made is: the spouses are right in demanding the application of the Italian legislation to a real estate located in Germany or is the notary right and the act appears to be illicit because the right that wants to be transferred is not present in the country where the property is actually located?

Before solving the case, it is correct to dwell on the relevant legislation.

3. Case-law solutions with the current regulation

The starting point will be the Italian legislation, chosen by the parents of the spouse «B» which, besides having to be compared with the German legislation, will have to be read taking into account the relevant European legislation.

The Italian civil code distinguishes between universal and singular succession. Both can find their foundation so in the testament that in the law⁶, but what makes the difference is the responsibility that comes from them. In this regard in the singular succession, unlike what happens in universal succession, the legatee will exclusively respond for the received property value. For this reason, unless there is an express renunciation, the legacy will be purchased without the acceptance of the legatee⁷.

The legacy can not only be testamentary or *ex lege*, but also of species or quantity. The latter concern the hypothesis in which an asset is identified only in the genus but, in the present case, a testamentary legacy of species⁸ is present because the parents of spouse «B» inserted in the testament the legacy of a specific right *in rem* on a real estate in favor of the daughter.

The German legislator, instead, in succession matter did not envisage the legacy type for *vindicationem* but in Paragraph No 1939 of the BGB^9 he regulates the possibility that the *de cuius* would benefit a person who is not an heir.

Analyzing the EU Regulation 650/2012 in the matter of «jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic

⁶ In this sense P. PERLINGIERI, Manuale di diritto civile, 9^a ed., Napoli, 2018, p. 1119.

⁷ Article 649 Italian Civil code.

⁸ In this sense F. GALGANO, *Diritto Privato*, 18^a ed., Milano, 2019, p. 960 ff.

⁹ Article 1939 *BGB* states: «The deceased may by will give a material benefit to another person without appointing the other person as heir (legacy)».

instruments in matters of succession and on the creation of a European Certificate of Succession» we can extract a principle useful to us. This principles states that if a person chooses to apply the legislation of another State that recognize a right *in rem* not recognized in the State in which the act will produce effects, this latter, by analogy, must recognize the right *in rem* through the application of the regulation most similar to the case regulated in the other legislation.

This principle emerges from Article 1, Paragraph 2, point k^{10} and l^{1} of Regulation No 650/2012, as well as from Article 31¹² of that EU¹³ Regulation. For the principle under consideration to be valid, it is necessary that the right *in rem* the testator wants to pass on, as well as in this case, concerns the property right of a real estate located in Germany to which German legislation may be applied by analogy.

In a similar way the «twin» Regulations (EU) 1103 and 1104 of 2016, which came into force on 29 January 2019, both require it in Article 29¹⁴.

4. EU Regulations impact on the issue with short description or different scenarios

It is necessary to highlight the important contribution of the Regulations (EU) (650/2012, 1103/2016 and 1104/2016) to try ending the problems born with the birth of the European Union.

¹⁰ Article 1, Paragraph 2, point k states: «the nature of rights in rem; and».

¹¹ Article 1, Paragraph 2, point / states: «any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register».

¹² Article 31 states: «Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it».

¹³ In this regard we can read D. BOGGIALI, *Il riconoscimento degli effetti reali dei legati nel Regolamento Successioni*, in Riv. not, 2018, p. 1251.

¹⁴ Article 29 states: «Where a person invokes a right *in rem* to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it».

Anyway, there were several advantages derived from the «twin» Regulations. For example: the grater facility in identifying the competent court¹⁵ – so called *forum shopping* – by putting an end to cross-border law conflicts and to the lack of unity of the law¹⁶; the uniformity of reference's regulations to competent law with the aim of simplifying the cases' solution avoiding implementation of differences; the elimination of securities, taxes or rights aimed at enforcing¹⁷; the information¹⁸ exchange and the obligation to inform the judicial network in civil and commercial matter; the increase of the couple autonomy in negotiating the applicable law (Articles 20-22 of Regulation No 1103 and 1104 of 2016) and the formal or substantive validity depending on whether it is «marriage contract» or «partners property agreement»; the recognition and the enhancement of the European Court of justice's interpretative competence.

If several have been the benefits, same can be said for the disadvantages. In fact, several are the raised doubts: the non-conformity of Article 26 of Regulation No 1103 and 1104 of 2016 with respect to the homogeneity of the text between the same Article of both the

¹⁵ Article 11 of both the Regulations, avoiding forum shopping, provides for the use of *forum necessitates* whenever the subsidiary jurisdiction criterion (Article 10) may not be used.

¹⁶ In this regard we can read S. ACETO DI CAPRIGLIA, *Timidi tentativi di armonizzazione della disciplina successoria*, in Europa, in Rass. dir. civ., Napoli, 2013, p. 495 ff.

¹⁷ In this regard the Regulation (EU) 1103 and 1104 of 2016 at Article 56/57 states: «No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement» and «In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement».

¹⁸ In this regard the Regulation (EU) 1103 and 1104 of 2016 at Article 63/64 states: «The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to the property consequences of registered partnerships, including information on the type of authority which has competence in matters of the property consequences of registered partnerships and on the effects in respect of third parties referred to in Article 28. The Member States shall keep the information permanently updated» and «1. By 29 April 2018, the Member States shall communicate to the Commission: (a) the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 44 (1) and with appeals against decisions on such applications in accordance with Article 49 (2); (b) the procedures to contest the decision given on appeal referred to in Article 50; The Member States shall apprise the Commission of any subsequent changes to that information. L 183/54 EN Official Journal of the European Union 8.7.2016 2. The Commission shall publish the information communicated in accordance with Paragraph 1 in the Official Journal of the European Union, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of Paragraph 1. 3. The Commission shall make all information communicated in accordance with Paragraph 1 publicly available through any appropriate means, in particular through the European Judicial Network in civil and commercial matters».

Regulations. Regulation No 1104 states that, in the event of failure by the parties to choose the applicable law, will be applied the legislation of the State in which the registered partnership was created.

Instead, Regulation No 1103 identifies three possibilities of referral «(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». Finally both Regulations use different connecting factors compared to Article 30 of Law 218 of 1995¹⁹, opting for parties' common habitual residence criterion over than the citizenship's one.

If it's still early to speak about adaptation of Member States' law to Regulations' discipline in property regimes matter, the same cannot be said respect to the EU Regulation in succession matter. In fact, after the entry into force of the latter, many States were forced to adapt not only to Article 31 but also to Recital No 37. In particular Germany was forced to adapt through the *internationales erbrechtsverfahrensgesetz* of 2015. In detail German law compared the legacy by vindication to QED mandatory legacy. This has been possible thanks to the specific legacy type concerning an immovable property and the *titulus* and the *modus adquirendi* that made it possible to apply, by analogy, the discipline of Paragraph 2174^{20} of BGB^{21} .

A similar situation was brought to the attention of the European Court of justice²². The case has regarded a controversial issue that arose between a woman of Polish origin but

¹⁹ Article 30 states: «1. I rapporti patrimoniali tra coniugi sono regolati dalla legge applicabile ai loro rapporti personali. I coniugi possono tuttavia convenire per iscritto che i loro rapporti patrimoniali sono regolati dalla legge dello Stato di cui almeno uno di essi è cittadino o nel quale almeno uno di essi risiede. 2. L'accordo dei coniugi sul diritto applicabile è valido se è considerato tale dalla legge scelta o da quella del luogo in cui l'accordo è stato stipulato. 3. Il regime dei rapporti patrimoniali fra coniugi regolato da una legge straniera è opponibile ai terzi solo se questi ne abbiano avuto conoscenza o lo abbiano ignorato per loro colpa. Relativamente ai diritti reali su beni immobili, l'opponibilità è limitata ai casi in cui siano state rispettate le forme di pubblicità prescritte dalla legge dello Stato in cui i beni si trovano».

²⁰ The Article of *BGB* states: «A legacy creates a right for the person provided for to demand delivery of the bequeathed object from the person charged».

²¹ In this regard we can read P. MAZZAMUTO, *Note in tema di legati ad efficacia obbligatoria*, in *Eur. dir. priv.*, 2018, p. 707-708.

²² At this regard we can read the sentence from the ECJ, 12 October 2017, C-218/16, Sąd Okręgowy w Gorzowie Wielkopolskim. You can see that on https://eur-lex.europa.eu/legal-content/EN/TXT/?qid= 1570699362212&uri=CELEX:62016CJ0218.

resident in Germany, who has requested the application of the Polish succession law for an asset located in Germany. Anyway, the woman chose the application of a succession institution which is not present on the German territory and for this reason the notary, considering the act to be illicit, refused to draw it up. The case arrived before the Court which, in accordance with the principle of the TFEU and with Articles 1, Paragraph 2, points k^{23} and ℓ^{24} , as well as Article 31 of Regulation No 650/2012, stated, in the historical sentence C-218/16²⁵, the principle by which these articles «must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy «by vindication», provided for by the law governing succession chosen by the testator in accordance with Article 22 (1) of that Regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place».

Despite the principle highlighted by the Court, it is also important to take into account the non-interference principle between the succession law and the typicality of the rights *in rem* provided for each legislation, the so-called *numerus clausus*. This is highlighted by both Recital No 15 and Article 31²⁶ of EU Regulation 650/2012, according to which the rights attached from the *de cuius* are recognized through the adaptation of the equivalent right *in rem* and closest to the legislation in which the decision will take effect²⁷. From the reading of these articles comes the adaptation applied by the Court with the aim of protecting the free movement of persons within the European Union and, above all, of safeguarding the position of the beneficiary but also the last will expressed by the *de cuius*²⁸.

²³ In the Article 1, Paragraph 2, point k we read: «the nature of rights in rem; and».

²⁴ In the Article 1, Paragraph 2, point / we read: «any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register».

²⁵ See note 22.

²⁶ See M.M. SALVADORI, *Adattamento dei diritti reali (art. 31)*, in A. BONOMI and P. WAUTELET (eds.), *Il regolamento europeo sulle successioni*, Milano, 2015, p. 413 ff.

²⁷ In this regard, we can read another example in P. LAGARDE, *Les principes de base du nouveau règlement européen sul les successions*, in *Rev. crit. dir. int. priv.*, 2012, p. 715 f. where he gives the example of usufruct on the whole succession or on a part of it in favor of the surviving spouse provided by French legislation and the forecast of German legislation which only admits a usufruct on individual assets.

²⁸ In the same regard, we can read D. ACHILLE, Lex successionis e compatibilità con gli ordinamenti degli Stati membri nel reg. UE n. 650/2012, in Nuova giur. civ. comm., 2018, 5, p. 697.

Let care be taken that European judges, result of the legislative combined application, do not change the prospect of the Community legislator for which the complex system of every Member States' rights *in rem* remains the responsibility of the national legislator²⁹. The latter will always have preserved the principle of closed number of rights *in rem*³⁰.

5. Conclusion

The above opens up a series of questions regarding the enforceability or otherwise of the possible agreements arising from the application of the Regulations. In fact, they admit, although with some limitations, to choose the applicable law³¹. From this derives the possibility, subject of the previous case, of institutions' application that not all legal systems admit. On the one hand, if the problem of institutions not provided for in a legislation has been solved through the adaptation principle, on the other hand, the attention needs to be paid, not so much to the lawfulness, but to the respect of the public policy. The question that needs to be asked is: in which limits for our forum could these agreements be considered contrary to public policy?

Firstly, it must be said that, even talking about legal system in its unity – with a multiple, national, European and international sources – it is unavoidable to distinguish the applicative importance of each principle founding public policy. Of course, there are some internal principles which prevail on the others³². In this regard the Italian Supreme Court, by judgement n. 16601 of 2017³³, underlined that the notion of public policy, which constitutes a limit to the foreign law's application, has undergone a deep change. According to the Court,

²⁹ In this regard the article 345 TFEU states: « The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership». We can read B. AKKERMANS and E. RAMAEKERS, *Article 345 TFEU (ex. Article 295 EC)* - Its meaning and interpretation, in *Eur. law journal*, 2010, p. 292 ff.

³⁰ C.M. BIANCA, *Diritto civile*, V. 6, *La proprietà*, Milano, 2017, p. 94 and M. COMPORTI, *Diritti reali*, in *Enc. Giur. Treccani*, XI, Roma, 1989, p. 5.

³¹ See note 5.

³² Constitutions and legal traditions with their differences constitute a limit still alive: deprived of selfish veins, which gave them «short breath», but made more complex by the interweaving with the international context in which the State is situated. There can therefore be no retreat of control over the essential principles of the *«lex fori»* in matters, such as that of work, which are controlled by a set of system regulations which implement the basis of the Republic. In this regard we can read O. FERACI, *L'ordine pubblico nel diritto dell'Unione Europea*, Milano, 2012, p. 28.

³³ You can see that on http://www.contabilita-pubblica.it/Archivio2017/Giurisprudenza/GanciII/GanciII.pdf.

in fact, the judge cannot rely exclusively on the rules of internal law but must, necessarily, take into account the protections recognized at supranational level, respect of which the States are bound³⁴. Once again reference must be made to the above-mentioned judgement of the Court in which the main effect brought about by the transposition and internalization of the supranational law is not the reduction of control against the entry of foreign regulations or judgements which «can undermine the internal consistency» of the legal system. So the foreign judgement which is an application of an institution not ruled by the national legislation, even if not obstructed by European legislation, has to be measured up with the result of the constitution and of those laws which, like sensitive nerves, fibers of the sensory apparatus and vital parts of an organism, concretize the constitutional order.

It can be said that, in the event hypothesized, the judge will have to, according to the specific case, evaluate whether those principles that identify an order, also constituting the so-called international public policy, have been infringed by a law and/or a foreign provision³⁵.

In conclusion, recovering a concept previously used, the «globalization» cannot cancel the sovereignty of each State. The aim of public policy control is not only to protect the person and the citizen from the State and the market but also to protect the State from the market³⁶. Therefore, the case under examination might be said to be positively resolved both with regard to the applicable principle of adaptation and already derived from the EU Regulation 650/2012 and for the respect of the public policy principles³⁷.

Abstract: The European legal framework in family and succession law raised many questions about rights in rem. The main problem is how to allow nationals from another EU Member State to benefit from rights deriving from succession or from the choice of law in property regimes. In the talk, I will focus on the case of legacy by vindication concerning persons with different nationality. In the examined case, the wife is an Italian national but she lives with

³⁴ In this regard G. PERLINGIERI and G. ZARRA, Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale, Napoli, 2019, p. 77.

³⁵ In this regard G. PERLINGIERI and G. ZARRA, *o.u.c.*, p. 78.

³⁶ In this regard G. PERLINGIERI and G. ZARRA, o.u.c., p. 224.

³⁷ In this regard G. PERLINGIERI and G. ZARRA, o.u.c., passim.

her husband in Germany. They live in her parents' house. Her parents worked and lived in Germany but, since they returned to Italy, left the house to her. They decide to apply the Italian succession law in their will and, as a form of legacy by vindication, they want to leave their house in Germany to their daughter. However, the notary in Italy refuses to draw up the act, because according to him it would be illicit under German law for two reasons: firstly, the German law does not recognize this type of legacy and secondly, this act would encounter problems under the new European regulations in family and succession law. The solution is to enhance the circulation of rights in the European Union among different Member States. The latter is namely in accordance with the position taken by the Court of Justice of the European Union and at the same is in line with the spirit of the new European regulations.

Francesco Giacomo Viterbo

Claim for maintenance after divorce: legal uncertainty regarding the determination of the applicable law

Summary: 1. The quaestio iuris to be analysed – 2. Hypothetical case to discuss – 3. Preliminary observations on EU Member States' scenarios regarding after-divorce maintenance – 4. The issue of how the applicable law should be determined – 4.1 Solution 1): Both the claim for maintenance order in scenario A and the request for a compensatory lump sum payment in scenario B fall within the scope of the 2007 Hague Protocol – 4.2 Solution 2): Scenario A (claim for maintenance payment) falls in the scope of the 2007 Hague Protocol, while scenario B (claim for a compensatory allowance) falls in the scope of Regulation (EU) 2016/1103 – 5. Conclusions.

1. The quaestio iuris to be analyzed

This study focuses on cases that raise the issue of legal uncertainty regarding the determination of law applicable to the allowance or maintenance to be paid to the financially less secure spouse after divorce.

The issue pertains to the definition of the boundary between the scope of recent Regulations (EU) 2016/1103 and 2016/1104 and the scope of Regulation (EC) n. 4/2009 on jurisdiction and the law applicable to maintenance obligations. Despite the fact that maintenance obligations between spouses should be excluded from the scope of Regulations 2016/1103 and 2016/1104 in accordance with their Recital 22, it is necessary to focus on the meaning of «maintenance obligations» resulting from the interpretation of the Court of Justice of the European Union, given that there is no definition of the term in EU regulations. Moreover, in some Member States, there are cases in which the maintenance to be paid after divorce should be considered as an aspect or a consequence of the matrimonial property regime. The following analysis is intended to focus on the question of whether such cases

should or should not be included in the scope of Regulation (UE) 2016/1103 rather than Regulation (EC) n. 4/2009.

The application of the former rather than the latter Regulation can also have a significant effect on the case in which the spouses have renounced their right to maintenance in a previous matrimonial agreement, and yet, after divorce, the weaker spouse nonetheless intends to claim for maintenance.

2. Hypothetical case to discuss

A French woman, Sophie, and an Italian man, Carlo, get married in Italy where they decide to live together. Sophie is an engineer, Carlo is a doctor, so they are both freelancers and financially secure. Therefore, they choose the property regime deriving from the separation of assets, according to Articles 215 and 217, Paragraph 1, of the Italian Civil Code. This is an exception to the legal property regime called 'legal community of assets', namely the community of assets acquired by spouses after marriage. Furthermore, the same matrimonial agreement provides that each of the spouses renounces his or her right to maintenance in case of future divorce.

Five years later, after the spouses have a son, the family moves to Germany where Carlo has an important job opportunity. Sophie volunteers to abandon her job so she can be home most of the time with their little child and take care of her family.

Fifteen more years pass. Carlo has gone forward in his career as a doctor, his annual income has tripled and he has accumulated a very large savings account. In contrast, Sophie has a modest savings account, but she has enjoyed a higher standard of family life during this last period.

After their son goes away to university, Carlo and Sophie realize they are unhappy together and get a divorce. Sophie comes back to France in order to begin a new life.

Carlo is sure to be free from maintenance obligations to be paid to Sophie by virtue of the matrimonial agreement in which each of them renounced such right.

Scenario A

Sophie intends to bring a formal claim to Court seeking a monthly support payment from Carlo to continue indefinitely, given that she has no retirement account and she is not self-sufficient.

Scenario B

Sophie, despite being self-sufficient as the owner of two flats, intends to bring a formal claim to Court seeking a lump sum payment from Carlo. In particular, she intends to argue that the amount of such allowance should be determined in relation to both her contribution to the marital enrichment during the long period of marriage and the sacrifice of her job in order to take care of their child and family. Furthermore, their original option for the property regime of «separation of assets» has penalised her, in the light of their subsequent family life choices and situations.

3. Preliminary observations on EU Member States' scenarios regarding after-divorce maintenance

In some Member States, the right to maintenance after divorce aims mainly at guaranteeing the weaker spouse economic self-sufficiency without regard to the past marriage, in accordance with the principle of self-responsibility. In Germany¹, for example, § 1569 BGB provides that «after the divorce, each spouse must provide for his own maintenance. If he is not in a position to do this, he has a claim for maintenance against the other spouse», but only under the conditions provided for by the same BGB. In particular, the entitled spouse may demand «maintenance to care for a child for at least three years after the birth» (§ 1570 BGB), or if he (or she) cannot engage in gainful employment (§ 1573 BGB), especially by reason of old age (§ 1571 BGB), or illness or other infirmities (§ 1572 BGB), or equity (§ 1576 BGB). The self-sufficiency principle is at the core of the EU harmonisation process in family law. According to the Principles of European Family Law,

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¹ For more details on German family law, see T. PERTOT, *Germany*, in L. RUGGERI, I. KUNDA and S. WINKLER (edited by), *Family Property and Succession in EU Member States. National Reports on the Collected Data*, Rijeka, 2019, available at https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf, p. 270.

which were elaborated by the Commission of European Family Law (CEFL), «each spouse should provide for his or her own support after divorce»².

In other Member States, after-divorce maintenance orders can be an equitable compensation for the sacrifices made during the marriage by one spouse to meet family needs. This is, for example, the Italian case in the aftermath of the Court of Cassation Joint Divisions³ decision to provide a *revirement* in case law, making such allowance composite in nature, namely both welfare-oriented and compensatory. In accordance with Article 5, Paragraph 6, of the Italian law on divorce⁴, the court's decision pronouncing the dissolution or cessation of the marriage's civil effects orders one spouse to periodically pay an allowance to the other if the latter does not have adequate means or for objective reasons cannot obtain them. From July 2018 onward, the «adequacy of means», that is, the issue of whether such allowance should be paid and its amount, is a concept to be anchored to all the elements that are listed in the same article⁵. In particular, this implies that the court's decision has to be

²See Article 2:2 of the «Principles on Divorce and Maintenance Between Former Spouses», available at http://ceflonline.net/wp-content/uploads/Principles-English.pdf. For more details, see K. BOELE-WOELKI et al, Principles of European Family Law, Chapter I, General Principles, in K. BOELE-WOELKI et al (edited by), Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses, Antwerp-Oxford: Intersentia, 2004, VII, p. 137.

³ Court of Cassation Joint Divisions, 11 July 2018, No 18287, in Giur. it., 2018, p. 1843 ff., with note of C. RIMINI, Il nuovo assegno di divorzio: la funzione compensativa e perequativa; for further comments, see C.M. BIANCA, Le Sezioni Unite sull'assegno divorzile: una nuova luce sulla solidarietà post-coniugale, in Fam. dir., 2018, p. 955 ff.; E. QUADRI, Il superamento della distinzione tra criteri attributivi e determinativi dell'assegno di divorzio, ivi, p. 971 ff.; M. SESTA, Attribuzione e determinazione dell'assegno divorzile: la rilevanza delle scelte di indirizzo della vita familiare, ivi, p. 983 ff. For a brief description of the history of changes among judges and interpreters concerning the Italian law on after-divorce maintenance, see G. TERLIZZI, 'Ties that Bind': Maintenance Order After Divorce in Italy, in The Italian L. Journ., 2018, 2, p. 449 ff.

⁴ We refer to the Italian law, l. 1° December 1970, no 898. Its Article 5, Paragraph 6, provides that «the court's decision pronouncing the dissolution or cessation of the marriage's civil effects considers the conditions of the spouses, the reasons for the decision, each one's personal and economic contribution to running the household and the formation of each one's assets or their joint assets, and their incomes; and having assessed all said elements, including based on the length of the marriage, it orders one spouse to periodically pay an allowance to the other if the latter does not have adequate means or for objective reasons cannot obtain them».

⁵ From the 1990s onward, case law was quite uniform in upholding that the parameter used to determine whether the spouse requesting after-divorce maintenance has 'adequate means' is the 'tenor of life' enjoyed during marriage, despite its lack of mention in Article 5, Paragraph 6, of the law on divorce. Therefore, the criterion to concede or deny maintenance payments until 2017 was assessed on the basis that ex-spouses have a right to retain the same 'tenor of life' after divorce. Recently, in a ruling pronounced in May 2017, the Court of Cassation modified the interpretation of mentioned Article 5, stating that after-divorce maintenance can be paid only to the spouse who is not self-sufficient, independently of the spouses' living conditions and the other circumstances of the past marriage. In this latter perspective, the term 'adequate means' should be interpreted in the sense of protecting a free and dignified life, with the exclusion of the right of the beneficiary spouse to maintain the previous standard of living: see Court of Cassation, 10 May 2017, No 11504, in *Nuova giur. civ. comm.*, 2017, p. 1001 ff.; in *Giur. it.*, 2017, p. 1299 ff., with note of A. Di Majo; in *Corr. giur.*, 2017, p. 885 ff.,

taken on the basis of the following parameters: «the circumstances of the spouses»; and the «personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets», as well as «the income of both spouses»; furthermore, all these elements should be assessed «in the light of the duration of the marriage». It follows that, when deciding for maintenance, judges must give importance to the choices and roles on which the conjugal relation and family life were based. Such maintenance is tailored to the previous relationship and specifically refers to rebalancing exspouses' positions. In fact, where the spouses organised their family life in a way that one of them could dedicate energy and time to increase his (or her) earning capacity whilst the other invested most of their time and effort in taking care of children and domestic work, the commitments and sacrifices made by the latter spouse have to be reflected in the allowance assigned to him (or her) after divorce. It is also undeniable that the matrimonial property regime chosen by spouses must be considered in order to assess such right to after-divorce maintenance functioning as a compensatory mechanism in accordance with the circumstances of each individual case⁶.

In other legal systems, the principle of self-responsibility is equally combined with a balanced policy of distribution of family resources. The French Civil Code provides that «divorce puts an end to the duty of support between spouses», but «a spouse may be required to pay the other spouse an allowance to compensate, as far as possible, the disparity that the breakdown of the marriage creates in their respective living conditions»⁷. In particular, when fixing the compensatory allowance, the judge must take into account: "the consequences of

with note of C. Rimini; and in Fam. dir., 2017, p. 636 ff., with note of E. Al Mureden. See also F.G. VITERBO, L'an e il quantum dell'assegno di divorzio: una valutazione da effettuare in concreto, in Dir. succ. e fam., 2017, p. 935 ff. The last revirement is due to Court of Cassation Joint Divisions, 11 July 2018, No. 18287, cit.

⁶ Such interpretation was partially anticipated in E. QUADRI, Rapporti patrimoniali nel divorzio, Napoli, 1986; R. TOMMASINI, Il diritto all'assegno di divorzio: criteri di determinazione, in E. QUADRI (edited by), La riforma del divorzio. Atti del Convegno di Napoli 22 maggio 1987, Napoli, 1989, p. 273 ff.; and Court of Udine, 1° June 2017, in Corr. giur., 2018, p. 633. Furthermore,see P. PERLINGIERI, Il diritto civile nella legalità costituzionale, II, Napoli, 2006, p. 972.

⁷ See Article 270 of the French Civil Code, available at www.legifrance.gouv.fr. For more details, see P.-J. CLAUX and S. DAVID (edited by), *Droit et pratique du divorce*, Paris: Dalloz, 2017; A. BÉNABENT, *Droit de la famille*, LGDJ, 2018, p. 275 ff. The solution adopted by French legislator has been recognised as a good example for the Italian legal system by C. RIMINI, *Verso una nuova stagione per l'assegno divorzile*, in *Nuova giur. civ. comm.*, 2017, p. 1279 ff.; and by E. QUADRI, *L'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità'*, *ivi*, p. 1261 ff.

the professional choices made by a spouse during the couple's union either for the sake of their children's education (and the time that this responsibility would continue to require), or to promote the career of the other spouse at the expense of his or her own career"; and where estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial property regimes.

It is worth noting that, according to the French Civil Code, this allowance «shall be in the nature of a lump sum» and «it shall take the form of a capital the amount of which must be fixed by the judge». To the contrary, the Italian divorce law provides that the allowance should take the form of a maintenance to be paid to the entitled ex-spouse recurrently, while it can take the form of a lump sum to be paid in one solution only on the basis of an agreement between ex-spouses⁹.

4. The issue of how the applicable law should be determined

In the case of Sophie and Carlo's divorce, how should the applicable law be determined?

We try to answer this question in the following analysis, taking into account the above scenarios A and B, as they can give rise to the following solutions:

1) In both scenarios A and B, the applicable law is determined on the basis of Article 15 of «Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations»,

- l'âge et l'état de santé des époux;

⁸ See the following text of Article 271 of the French Civil Code: 'La prestation compensatoire est fixée selon les besoins de l'époux à qui elle est versée et les ressources de l'autre en tenant compte de la situation au moment du divorce et de l'évolution de celle-ci dans un avenir prévisible.

A cet effet, le juge prend en considération notamment:

⁻ la durée du mariage;

⁻ leur qualification et leur situation professionnelles;

⁻ les conséquences des choix professionnels faits par l'un des époux pendant la vie commune pour l'éducation des enfants et du temps qu'il faudra encore y consacrer ou pour favoriser la carrière de son conjoint au détriment de la sienne:

⁻ le patrimoine estimé ou prévisible des époux, tant en capital qu'en revenu, après la liquidation du régime matrimonial;

⁻ leurs droits existants et prévisibles;

⁻ leur situation respective en matière de pensions de retraite en ayant estimé, autant qu'il est possible, la diminution des droits à retraite qui aura pu être causée, pour l'époux créancier de la prestation compensatoire, par les circonstances visées au sixième alinéa'.

⁹ See Article 5, Paragraph 8, of the Italian law on divorce (l. 1° December 1970, no 898).

namely in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter: the 2007 Hague Protocol)¹⁰;

2) In scenario A, the applicable law is determined on the basis of the 2007 Hague Protocol, while in scenario B, the applicable law is determined on the basis of rules provided for by Regulation 2016/1103¹¹.

4.1 Solution 1): Both the claim for maintenance order in scenario A and the request for a compensatory lump sum payment in scenario B fall within the scope of the 2007 Hague Protocol

At first glance, all maintenance obligations fall within the scope of the 2007 Hague Protocol according to Article 15 of Regulation (EC) n. 4/2009. This can find confirmation in the Explanatory Report by Prof. Andrea Bonomi¹².

In fact, the Report under its Paragraph 25 specifies that «the Protocol does not provide for reservations enabling Contracting States to limit its scope to specific maintenance obligations or to exclude others. *The Protocol's scope is accordingly very broads*¹³. Moreover, in accordance with Paragraph 32, the Protocol «is also applicable to agreements relating to maintenance, in so far as such agreements are designed to modify or further specify an obligation arising from a family relationship».

Article 3 of the Protocol lays down the general rule on applicable law, namely the principle of connection of the maintenance obligations to the law of the State of the creditor's habitual residence, save where it provides otherwise. In fact, the Protocol contains a specific regulation of maintenance obligations between spouses and ex-spouses under its

¹⁰On the interpretation of the 2007 Hague Protocol in German case-law relating to cross-border maintenance after divorce, see S. SPANCKEN, Report on Recent German Case-Law relating to Private International Law in Family Law Matters, in Riv. dir. int. priv., 2014, p. 239. In particular, see BGH, decision of 23 June 2013 - XII ZR133/11, in Zeitschrift für das gesamte Familienrecht, 2013, p. 1366.

¹¹ On the interpretation of Regulations (EU) 2016/1103 and 2016/1104, see P. Bruno, I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate, Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019, Milano, 2019; D. DAMASCELLI, Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law, in Trusts & Trustees, 2018, p. 1 ff.

¹² The Explanatory Report by Mr Andrea Bonomi, edited by the Permanent Bureau of the Hague Conference on Private International Law, serves as a commentary on the Protocol adopted by the Twenty-First Session, which is set out in the Final Act of 23 November 2007. The Report is available at https://www.hcch.net/en/publications-and-studies/details4/?pid=4898.

¹³ Italics added.

Article 5. For such obligations, the connection, in principle, to the creditor's habitual residence is to yield to application of the law of another State, in particular the State of the spouses' last common habitual residence, if that law has a closer connection with the marriage.

According to Paragraph 78 of the Report, the provision of such special rule is based on the observation that «application of the law of the creditor's habitual residence is not always suitable for obligations between spouses or ex-spouses». Nonetheless, such rule is provided in the form of an «escape clause», as its application is contingent upon a request by one of the parties.

Therefore, according to the rules of the 2007 Hague Protocol, in scenario A of the case of Sophie and Carlo's divorce, French law should be, in principle, the applicable law, save where the German law is requested to be the applicable law by one of the ex-spouses. In fact, after the divorce, Sophie (the creditor) comes back to France where she takes up her last habitual residence; while the spouses' last common habitual residence was in Germany.

Such solution can also fit scenario B, having regard to the case law of the European Court of Justice (hereinafter: ECJ).

In this regard the case *Van den Boogaard vs. Laumen* is illustrative, treated in the judgement of 27 February 1997¹⁴. Mr Van den Boogaard and Miss Laumen were married in the Netherlands in 1957 under the regime of community of property. In 1980, they entered into a marriage contract, again in the Netherlands, which altered their matrimonial regime into one of separation of goods. In 1982, they moved to London. By judgment of 25 July 1990, the High Court dissolved the marriage and also dealt with an application made by Miss Laumen for full ancillary relief. Since the wife sought a «clean break» between herself and her husband, the English Court awarded her a capital sum so that periodic payments of maintenance would be unnecessary. Part of the amount of that capital sum was covered by the transfer of ownership in certain property. The English Court also held that the Netherlands separation of goods agreement was of no relevance for the purposes of its decision in the case. By application lodged at the Amsterdam Court, Miss Laumen sought

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¹⁴ ECJ, 27 February 1997, C-220/95, *Antonius van den Boogaard vs. Paula Laumen*, available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-220/95.

enforcement of the English judgement, relying on the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. The Amsterdam Court was uncertain whether the English Court's judgement was to be classified as a «judgment given in matters relating to maintenance» or whether it was to be classified as a «judgment given in a matter relating to rights in property arising out of a matrimonial relationship», in which case the Hague Convention could provide no basis for enforcement. According to the ECJ reasoning, in order to distinguish between those different matters, it is necessary to have regard in each particular case to the specific aim of the decision rendered: «[i]f this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship»¹⁵. Consequently, the ECJ concluded that «a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance»¹⁶. Furthermore, the judgement specifies that «[i]t makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income. [...] It is clear that the choice of method of payment made by the court of origin cannot alter the nature of the aim pursued by the decision»¹⁷.

Following the reasoning of the ECJ, the claim for allowance made by Sophie after divorce in scenario B should be regarded as relating to maintenance, as it does not directly concern dividing property between the ex-spouses.

¹⁵ Italics added. See Paragraphs 21 and 22 of the judgment.

¹⁶ See Paragraph 27 of the judgment.

¹⁷ See Paragraphs 23 and 24 of the judgment.

4.2 Solution 2): Scenario A (claim for maintenance payment) falls in the scope of the 2007 Hague Protocol, while scenario B (claim for a compensatory allowance) falls in the scope of Regulation (EU) 2016/1103

The application of both Regulation (EC) n. 4/2009 and the 2007 Hague Protocol to the case in question is indisputable in scenario A, but not in scenario B. It is true that «maintenance obligations between spouses» should be excluded from the scope of the Regulations 1103 and 1104 in accordance with their Recital 22. Nonetheless, the notion of «maintenance obligations» requires their nature to be better analysed.

To this end, some important clues are given in the Explanatory Report by Prof. Bonomi. Explaining the reason for the connection with the State of the creditor's habitual residence provided by the 2007 Hague Protocol, the Report specifies that «the creditor will use his maintenance to enable him to live»; accordingly, «it is wise to appreciate the concrete problem arising» in connection with «the social environment in the country where the creditor lives and engages in most of his or her activities»¹⁸. It follows that the notion of "maintenance obligations" seems to mainly refer to all types of support payments intended to guarantee the creditor's economic self-sufficiency; in other words, what is necessary to ensure him or her a free and dignified life.

It is worth posing the issue of whether such nature of «maintenance obligations» should or should not include an allowance compensatory in nature, but not welfare-oriented.

A distinction should be made with regard to the aim of a compensatory allowance that is awarded to the ex-spouse whose sacrifices during the marriage were much heavier, allowing the other spouse to advance in career and increase income. In such cases, the judge can order the payment of an allowance from the latter ex-spouse in order to rebalance the differences in economic means between the ex-spouses. Such aim is pursued independently from the circumstance that the ex-spouse acting as plaintiff is or is not self-sufficient. In this perspective, the reason for the connection with the State of the creditor's habitual residence provided by the 2007 Hague Protocol is lacking. Accordingly, it should be wise to appreciate the concrete problem arising in connection with the social environment in the country where

¹⁸ Italics added. See Paragraph 37 of the Explanatory Report where Prof. Bonomi refers to the Verwilghen Report.

the spouses spent the major part of the duration of their marriage and organised their family life. Moreover, in rebalancing ex-spouses' positions, the judge can't do so without considering their matrimonial property regime. In this light, the assignment of a compensatory allowance should be considered as a part of liquidation of the matrimonial property regime. As a consequence, matrimonial life and the matrimonial property regime should be the main aspects to which the applicable law should be connected.

Following the above reasoning, the claim for an allowance compensatory in nature should fall outside the notion of "maintenance obligations" under both Regulation (EC) 4/2009 and the 2007 Hague Protocol. It should rather fall in the scope of Regulation (EU) 2016/1103 that "should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separations¹⁹.

In fact, as above specified, according to the 2007 Hague Protocol, the connection with the State of the spouses' last common habitual residence is provided in the form of an escape clause, as its application is contingent upon a request by one of the parties. This rule has several drawbacks. Likewise, the «weaknesses» of the connection to the creditor's habitual residence in the case of maintenance obligations between divorced spouses have been stressed by Prof. Bonomi in the Explanatory Report²⁰.

The Regulation (EU) 2016/1103, conversely, has introduced harmonised conflict-of-law rules to determine the law applicable to all the spouses' property on the basis of a scale of connecting factors. The first common habitual residence of the spouses shortly after marriage should constitute the first criterion, ahead of the law of the spouses' common nationality at the time of their marriage. If neither of these criteria apply, or failing a first common habitual residence in cases where the spouses have dual common nationalities at the time of the conclusion of the marriage, the third criterion should be the law of the State with which the spouses have the closest links. All such connecting parameters seem to be much more coherent to the aims pursued by judging on a claim for a compensatory allowance rebalancing ex-spouses' positions after divorce.

¹⁹ See Recital 18 of Regulation 2016/1103. Italics added.

²⁰ See Paragraph 79 of the Report.

Therefore, in the light of the above reasoning, the claim for allowance made by Sophie after divorce in scenario B should not be regarded as relating to maintenance obligations as she is self-sufficient. It should rather be considered a civil-law aspect of the liquidation of matrimonial property regime and fall in the scope of Regulation 2016/1103. It follows that the Italian law should be the applicable law with regard to scenario B, inasmuch as Sophie and Carlo had their first common habitual residence in Italy after marriage.

5. Conclusions

The option for either solution 1) or solution 2) to scenario B of the case in question can also have a significant effect on the issue of whether the right to maintenance can or cannot be renounced by each spouse in a previous matrimonial agreement.

If the applicable law is determined on the basis of the 2007 Hague Protocol, its Article 8, Paragraph 4, should be applied. According to such article, «[n]otwithstanding the law designated by the parties [...] the question of whether the creditor can renounce his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation»²¹. Such a rule, conversely, is not provided by Regulation 2016/1103. Therefore, if the latter Regulation is to determine the applicable law, such law will also determine the question of whether each spouse can renounce his or her right to maintenance.

In any event, with regard to scenario B of the case in question, it is very difficult to say which solution is to be preferred between the above-mentioned solving proposals 1) and 2).

The idea that a claim for compensatory allowance should be regarded as relating to maintenance obligations and fall within the scope of the 2007 Hague Protocol seems to be consistent with the literal meaning of the same Protocol and regulations, but not with the intention to focus on the creditor's social environment when providing the connection with the State of the creditor's habitual residence. From this perspective, the solution given by the judgement of the ECJ on the case *Van den Boogaard vs. Laumen* could be revised in light of the

²¹ On Article 8, Paragraph 4, of the 2007 Hague Protocol, see Paragraph 148 of the Explanatory Report, according to which «[t]his provision is naturally intended to prevent the creditor, through the choice of a particularly liberal and unprotective law, from being made to renounce the maintenance to which he or she would be entitled under the applicable law if there had been no choice».

recent Regulations 2016/1103 and 2016/1104, the scope of which «should include all civillaw aspects of matrimonial property regimes» as well as «the liquidation of the regime, in particular as a result of the couple's separation». In fact, by regarding after-divorce compensatory allowance as relating to a sort of partial liquidation of the matrimonial regime, the claim made by Sophie in scenario 2) should be included in the scope of Regulation 2016/1103. Such solution is probably more consistent with the intention to focus on the matrimonial life ensured by that regulation when it provides the connection with the State of the first common habitual residence of the spouses shortly after marriage and the other connecting factors.

In accordance with the judgement of the ECJ, it makes no difference in this regard that payment of allowance is provided for in the form of either a lump sum or a maintenance obligation. It is clear that the choice of method of payment made by the plaintiff cannot alter the nature of the aim pursued by his or her claim.

Abstract: This study focuses on a practical case that raise the issue of legal uncertainty regarding the determination of law applicable to the allowance or maintenance to be paid to the financially less secure spouse after divorce. In some Member States, there are cases in which the compensatory allowance to be paid after divorce should be considered as an aspect or a consequence of the matrimonial property regime rather than a «maintenance obligation» in the meaning resulting from the interpretation of the Court of Justice of the European Union. It follows that the analysis is intended to focus on the question of whether such cases should or should not be included in the scope of Regulation (EU) 2016/1103 rather than Regulation (EC) n. 4/2009.

Danijela Vrbljanac

The matrimonial property regime regulation: selected issues concerning applicable law. Working paper

Summary: 1. Introduction. – 2. Applicable law under the Matrimonial Property Regime Regulation. – 3. Hypothetical case 1 – Applicable law in the absence of choice: first common habitual residence after the conclusion of the marriage. – 4. Hypothetical case 2 – Party autonomy restrictions in choosing applicable law for matrimonial regime. – 5. Hypothetical case 3 – The interrelation between chapters on international jurisdiction and applicable law with regards to temporal application. – 6. Conclusion.

1. Introduction

In January 2019, two new regulations on property of international couples entered into force: 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 regimes¹ (hereinafter: Matrimonial Property Regime Regulation) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (hereinafter: Property Consequences of Registered Partnerships Regulation).² Given that these regulations were enacted within enhanced cooperation, only courts in Member States which decided to participate in enhanced cooperation apply them. Currently, there are 18 participating Member States: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, Czechia, the Netherlands, Austria, Bulgaria, Finland and Cyprus. Other Member States are free to join. Estonia notified its intention to

¹ 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, OJ L 183, 8.7.2016, p. 1-29.

² 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, OJ L 183, 8.7.2016, p. 30-56.

participate in enhanced cooperation concerning these regulations.³

Both Regulations cover all private international law issues which arise in cross-border litigation: courts of which Member State have jurisdiction, law of which state will apply and conditions under which the judgment rendered in one Member State may be recognized and enforced in another Member State. The paper will concentrate solely on the Matrimonial Property Regime Regulation, more precisely certain problems which may arise in applying rules on applicable law for matrimonial property regime.

The Matrimonial Property Regime Regulation applies to proceedings instituted on or after 29 January 2019.⁴ However, for the purposes of Chapter III containing rules on applicable law, the temporal scope of application is defined differently. Chapter III applies only to matrimonial property regimes of spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019.⁵ Due to the recent entry into force of the Matrimonial Property Regime Regulation and difficulty in finding case-law regarding it, the paper will use hypothetical cases. The aim of the paper is to point out possible problems which may arise in application of rules on applicable law in the Matrimonial Property Regime Regulation without providing an in-depth scientific analysis.

2. Applicable law under the Matrimonial Property Regime Regulation

One of the Matrimonial Property Regime Regulation cornerstones is the unity of the law regime. In other words, the law applicable to the matrimonial property regime should be applicable to all assets, even if they are located in different Member States or a third state, for the purposes of legal certainty and avoidance of fragmentation of the matrimonial property regime.⁶

Party autonomy plays an important role in the Matrimonial Property Regime Regulation. Parties are allowed to choose applicable law. However, the party autonomy in

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³ At a glance, Plenary-20 June 2016, European Parliament, https://www.europarl.europa.eu/RegData/etudes/ATAG/2016/583835/EPRS_ATA%282016%295 83835_EN.pdf (12.11.2019).

⁴ Article 69(1) and (2) of the Matrimonial Property Regime Regulation.

⁵ Article 69(3) of the Matrimonial Property Regime Regulation.

⁶ Article 21 and Recital 43 of the Matrimonial Property Regime Regulation. See also Lagarde, Paul, Introduction, in: U. BERGQUIST ET AL., *The EU Regulations on Matrimonial and Patrimonial Property*, Oxford University Press, Oxford, 2019, p. 10, Paragraph 30-34.

choosing applicable law is restricted to two options: habitual residence of spouses or one of the spouses at the time the agreement is concluded or the law of a State of nationality of spouses or one of the spouses at the time the agreement is concluded. Choice may be made or changed at any moment, before the conclusion of marriage, at the time the marriage is concluded or during the course of the marriage. If the spouses decide to change the applicable law during the marriage, unless otherwise agreed, it will have prospective effect only. Furthermore, the retroactive change of applicable law cannot adversely affect the rights of third parties. In this manner, the Regulation envisages a safeguard against adverse effects in the event the mutability of the applicable law, for instance, affects the assets and transforms the sole ownership of one spouse into joint ownership.

The material validity of the agreement on choice of law is governed by the chosen law as if the agreement was valid. In order to establish that he did not consent, a spouse may rely upon the law of the country in which he has his habitual residence at the time the court is seised, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the chosen law. The agreement on choice of law will be formally valid if it is in written form, dated and signed by both spouses. Communication by electronic means is considered to be equivalent to writing if it provides a durable record of the agreement. There is a possibility that additional formal requirements of other Member States' laws will apply. Additional formal requirements prescribed in following Member States' laws may apply if they exist: Member State in which both spouses have their habitual residence at the time the agreement is concluded; Member State in which either one of the spouses is habitually resident, if they 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; Member State in which one of the spouses is habitually resident at the time the agreement is concluded, if only one spouses is habitually resident in one of the Member State and that Member State lays down additional formal requirements. 10

⁷ Article 26 of the Matrimonial Property Regime Regulation.

⁸ P. LAGARDE, Applicable Law: Articles 20-35, in U. BERGQUIST ET AL., The EU Regulations on Matrimonial and Patrimonial Property, Oxford University Press, Oxford, 2019, p. 101, Paragraph 22.11.

⁹ Article 24 of the Matrimonial Property Regime Regulation.

¹⁰ Article 23 of the Matrimonial Property Regime Regulation.

If the spouses do not choose the applicable law, the applicable law will be determined in accordance with Article 26 of the Matrimonial Property Regime Regulation. Article 26 contains a scale of connecting factors which have to be applied in the hierarchical order.¹¹ The first connecting factor is spouses' first common habitual residence after the conclusion of the marriage. However, law of that state may not be applied if one spouse objects to it, and if the spouses had their last common habitual residence in another state for a significantly longer period of time than in the state of the spouses' first common habitual residence after the conclusion of the marriage and both spouses relied on the law of that other state in arranging or planning their property relations. The law of that other state applies from the time the marriage is concluded, unless one spouse disagrees. In the latter case, the law of that other state has effects as from the establishment of the last common habitual residence in that other state. The application of the law of that other state cannot have adverse effect on the rights of third parties deriving from the law of the state of the spouses' first common habitual residence. The law of that other state cannot be applicable if the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other state. The second connecting factor is spouses' common nationality at the time of the conclusion of the marriage unless spouses have more than one common nationality in which case this connecting factor becomes unusable. The third connecting factor points towards state with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.12

The determination of law applicable under the Matrimonial Property Regime Regulation in a particular case may have jurisdictional consequences. Namely, Article 7 of the Matrimonial Property Regime allows to parties to choose the competent court. Party autonomy in choosing the competent court is limited to the following options: the courts of the Member State whose law is applicable pursuant to Article 22; the courts of the Member State whose law is applicable pursuant to Article 26(1)(a) or (b); the courts of the Member State in which the marriage is concluded.

¹¹ Recital 35 of the Matrimonial Property Regime Regulation.

¹² Article 26 of the Matrimonial Property Regime Regulation.

3. Hypothetical case 1 – Applicable law in the absence of choice: first common habitual residence after the conclusion of the marriage

Facts

Linda, an Italian national, has been living in Trieste all her life. During her studies in architecture at the University of Trieste, in 2015, she met Luka, a Croatian and Italian national who enrolled at the University of Trieste in 2012 and has been living in Trieste ever since. The couple fell in love and started a relationship. After the graduation in 2017, Luka returned to Croatia where he settled and started working in the architecture firm owned by his father. After maintaining the relationship at a distance for two years, they planned to get married during the holidays in Greece. They concluded the marriage in March 2019 in Santorini. Luka returned to Croatia, bought an apartment for two of them and Linda returned to Italy to arrange her move to Croatia where she was supposed start working together with Luka in the architecture office as of April 2019. However, their plan was interrupted by the offer Luka received to complete a year-long LLM studies in London. They decided to take an unpaid leave of absence, move to London in April 2019 and return to Croatia after Luka finishes his studies. They signed a one-year-lease for a flat in London. In a year, as planned, they moved back to Croatia where they live and work.

Applicable law

In the event the spouses do not agree on applicable law for their matrimonial regime, Article 26 of the Matrimonial Property Regime Regulation is applicable. The first connecting factor prescribed by Article 26 is spouses' first common habitual residence after the marriage is concluded. The doctrine has already recognized potential problems with regard to this connecting factor. The issue which arises in applying the connecting factor of the first common habitual residence of the spouses after the marriage is concluded is the time frame in which spouses have to acquire the common habitual residence after the marriage. Even though the provision does not specify the relevant time frame, Recital 49 states that the first

¹³ P. LAGARDE, Applicable Law: Articles 20-35, in U. BERGQUIST ET AL., The EU Regulations on Matrimonial and Patrimonial Property, Oxford University Press, Oxford, 2019, p. 112, Paragraph 26.05.

criterion for determining the applicable law should be the first common habitual residence of the spouses *shortly* after marriage. It is not entirely clear what happens if the spouses do not acquire the first common habitual residence shortly after the marriage. Does this connecting factor become unusable and should court resort to the next one in scale?

In the presented hypothetical case, the spouses have not acquired their first common habitual residence for more than a year or perhaps even a longer period after they concluded marriage. The Matrimonial Property Regime Regulation does not give any guidance on how to determine habitual residence. The habitual residence will not necessarily be understood in the same manner in all the European private international law regulations. 14 However, for the purposes of the Matrimonial Property Regime Regulation, in majority of cases, the term should be interpreted in accordance with the 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 responsibility¹⁵ (Brussels II bis Regulation).¹⁶ While interpreting the Brussels II bis Regulation, the CJEU has provided guidance on how to assess child's habitual residence, ¹⁷ whereas for adults, the explanation is borrowed from other legal areas. 18 Thus, the habitual residence should, for the purposes of the hypothetical case be understood as the place where person's center of life is located. The most important elements to be taken into consideration are the spouses' intention and duration of stay in a particular Member State. Spouses intention regarding their life in London is to stay there for one year only which is apparent from the fact that they did not terminate their employment in Croatia, leased an apartment in London for one year and the

¹⁴ The state of implementation of the EU Succession Regulation's provisions on its scope, applicable law, freedom of choice, and parallelism between the law and the courts, Legal affairs, European Parliament, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596822/IPOL_BRI(2017)596822_EN.pdf (26.11.2019), p. 3

¹⁵ 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, OJ L 338, 23.12.2003, p. 1-29.

¹⁶ See P. LAGARDE, Introduction, in: U. BERGQUIST, ET AL., The EU Regulations on Matrimonial and Patrimonial Property, Oxford University Press, Oxford, 2019, p. 61, Paragraph 6.16.

¹⁷ See A. LIMANTE AND I. KUNDA, Jurisdiction in Parental Responsibility Matters, in: HONORATI, COSTANZA (ed.), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, A Handbook on the Application of Brussels IIa Regulation in National Courts, G. Giappichelli Editore, Peter Lang, Torino, 2017, pp. 62-91.

¹⁸ See C. RICCI, Jurisdiction in Matrimonial Matters, in: HONORATI, COSTANZA (ed.), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, A Handbook on the Application of Brussels IIa Regulation in National Courts, G. Giappichelli Editore, Peter Lang, Torino, 2017, pp. 38-59.

fact that the purpose of their stay in London is the completion of Luka's LLM studies. Furthermore, they intend to live in Croatia where they are both employed and own an apartment. Therefore, taking into consideration these facts and duration of their stay in London, one would most likely conclude that they did not acquire habitual residence in London. Luka's habitual residence is in Croatia where he has been living and working for two years after the graduation and where he plans to come back after one year spent in London. Linda's habitual residence is in Italy. Even though her intention is to move to Croatia, she never actually lived there. In its case-law concerning habitual residence of the children, the CJEU has demonstrated reluctance towards linking the habitual residence of a child to a Member State based on expression of intention of the parents, without the child ever being physically present in that Member State.¹⁹ This line of reasoning might be applicable for determining habitual residence of adults even more so, considering the level of autonomy of adults in deciding on their whereabouts, whereas children's, especially younger children's place of life depends on their caretaker's decision. Therefore, Linda's habitual residence would probably be located in Italy during her stay in London. Following a pass of a certain period of time after the move to Croatia, she would probably acquire habitual residence in Croatia. Hence, the parties would acquire their first common habitual residence in Croatia more than one year after the conclusion of marriage.

If a dispute between the spouses in the hypothetical case arises concerning their property relations, there are two possible outcomes. The seised court might decide to apply Article 26(1)(a) according to which Croatian law is applicable as the law of their first common habitual residence. The court might resort to Article 26(1)(a) either because it disregards the term *shortly* from Recital 49 or because it concludes that a period of time in duration of one and a half or two years in which the spouses obtain common habitual residence after the marriage fulfills the condition of being acquired shortly after the marriage, particularly having in mind that a certain amount of time in which the person is present in the territory of a Member State has to pass before the person becomes habitually resident there. From that point of view, the time frame of one and a half or two years after the marriage fulfills the condition from Recital 49. The second outcome is the situation in which the deciding court

¹⁹ C-111/17, OL v PQ, EU:C:2017:436.

might find Article 26(1)(a) inapplicable and apply Article 26(1)(b) pursuant to which Italian law would be applicable as both spouses are Italian nationals. This hypothetical case demonstrates that for certain category of proceedings, it will be uncertain whether connecting factor from Article 26(1)(a) may be applied.

4. Hypothetical case 2 – Party autonomy restrictions in choosing applicable law for matrimonial regime

Facts

Robert and Ana, both Croatian nationals, decided to move to Austria in search of employment at the end of 2013. During their stay in Austria, they bought a car and a small house in an Austrian village. During 2018, they started planning their return to Croatia and their wedding in Croatia. In 2018, they concluded an agreement by which they chose Austrian law as applicable to their matrimonial regime. In February 2019, they returned to Croatia and concluded a civil marriage. Ana and Robert both found employment, bought an apartment in Zagreb and rented their house in Austria.

Applicable law

Pursuant to Article 22 of the Matrimonial Property Regime Regulation, Robert and Ana may choose either the Croatian law, the law of their nationality, or Austrian law, the law of their habitual residence, as applicable for their matrimonial property regime. In 2018, at the time agreement is concluded, they are both habitually resident in Austria and they are both Croatian nationals. Under the presumption that the agreement was concluded in accordance with Article 23 of the Matrimonial Property Regime Regulation, their choice of Austrian law as applicable for their matrimonial property regime is valid based on Article 22. If a dispute concerning their property arises after they have been living for some time in Croatia, where they acquired habitual residence, in the absence of prorogation agreement, Croatian court would have international jurisdiction based on Article 6(a) of the Matrimonial Property Regime Regulation. Pursuant to Article 42 of the Croatian Family Act (NN 103/2015) it is not permissible to choose foreign law as applicable to property relations by way of marriage contract. Such restriction to party autonomy may be found in other Member

States' laws such as § 1409 of the German BGB and its justification lies in the fact that the law which has the closest connection to spouses' property relations and with which the spouses are most familiar with should be applied. ²⁰ Certain scholars interpreted this provision to be applicable whenever the spouses are Croatian nationals, whereas foreign law may be applied when there is an international element, i.e. when one of the spouses is foreign.²¹ Indeed, international element in a legal relationship might exist because parties are of different nationality, they are domiciled or habitually resident in different countries. However, international element is not necessarily represented through parties. It may reflect itself in the fact that the proceedings concerns a contract concluded in one country which has to be performed in another or perhaps property is situated abroad.²² It follows that in disputes with an international element, regardless of how this international element is represented, the applicability of party autonomy restriction from Article 42 will depend on whether Croatian law is applicable. This interpretation is supported by viewpoint of one part of Croatian doctrine which established that Article 42 of the Croatian Family Act should be applied in cross-border disputes only when the applicable law is Croatian.²³ According to this interpretation, Robert and Ana could choose Austrian law as applicable despite the fact that they are both Croatian nationals. The dispute has an international element since the property is located in Austria and the Matrimonial Property Regime Regulation allows them to choose Austrian law as applicable.

²⁰ L. RUGGERI and S. WINKLER, *Neka pitanja o imovinskim odnosima bračnih drugova u hrvatskom i talijanskom obiteljskom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No 1, 2019, p. 177.

²¹ A. KORAĆ, *Imovinski odnosi*, in: M. ALINČIĆ ET AL., (eds.), *Obiteljsko pravo, Narodne novine*, 2006, p. 511.

²² U. GRUŠIĆ ET AL., P. TORREMANS, (ed.), *Cheshire, North & Fawcett Private International Law*, 15th edn, Oxford University Press, Oxford, 2017, p. 5.

²³ P. ŠARČEVIĆ and I. KUNDA, *Part III. Property Rights in the Family Law*, in: P. ŠARČEVIĆ ET AL., *Family Law in Croatia*, Wolters Kluwer, Alphen aan den Rijn, pp. 190-191, pp. 179-196.

5. Hypothetical case 3 – The interrelation between chapters on international jurisdiction and applicable law with regards to temporal application

Facts

Ema, a Slovenian national and Klaus, a German national met in 2015. As of 2016, they started living together in Germany. In 2016, they concluded a marriage during their holidays in Bled. For approximately a year after the conclusion of the marriage, they lived in Germany. After that, because of Klaus's work, they lived in Belgium and Luxembourg, in each country for a year. Following a deterioration of their relationship, in March 2019, they decided to divide their assets. During a meeting in March 2019 together with their attorneys, they discussed the possibility of choosing the German court as competent for discussing the division of their property.

Prorogation of jurisdiction

Based on Article 6 of the Matrimonial Property Regime Regulation which contains a scale of jurisdictional bases in case parties do not agree on the competent court, German court would not be competent. However, according to Article 7 of the Matrimonial Property Regime Regulation, parties may choose the competent court. They cannot prorogate the jurisdiction of any court. Their choice is limited to the court of the Member State whose law is applicable pursuant to Article 22 or Article 26(1)(a) or (b), or the courts of the Member State where the marriage was concluded. Since Ema and Klaus did not choose applicable law pursuant to Article 22 and they do not have common nationality, they have at their disposal courts in Member States of their first common habitual residence after the marriage was concluded mentioned in Article 26(1)(a) or the Member State where the marriage was concluded. Under the presumption that Ema and Klaus actually acquired habitual residence in Germany, they would be able to designate the German court as the competent one pursuant to Article 7 of the Matrimonial Property Regime Regulation. However, one has to keep in mind that Chapter II of the Matrimonial Property Regime Regulation which contains rules on jurisdiction and Chapter III which contains rules on applicable law have different temporal application. Rules on jurisdiction apply if the proceedings were instituted on or after 29 January 2019,²⁴ whereas for the rules on applicable law to be applicable, the spouses have to conclude marriage or agree on the law applicable to the matrimonial property regime after 29 January 2019.25 Consequently, certain category of matrimonial property disputes, namely those instituted after 29 January 2019 which concern marriages concluded before that date and property regimes for which the law was chosen before that date, will fall into the scope of Chapter II but will remain outside of Chapter III. The issue to be resolved is how will this two-fold temporal ambit affect the application of Article 7 which is jurisdictional rule but links almost all of the potential jurisdictional bases which parties may choose to applicable law. For that category of disputes, such as the present one, there are two potential solutions. The first one is allowing the parties to agree on jurisdiction of courts of any Member State whose law would be applicable, as if the Chapter III were applicable. In this particular case, Klaus and Ema would be able to choose the German court as the competent one, since Germany is the state of their first common habitual residence after the marriage. The second one is giving parties only the option of prorogating the jurisdiction of the court located in the Member State where the marriage was concluded, since this is the only jurisdictional base prescribed in Article 7 not linked to applicable law. Under this approach Ema and Klaus would be able to prorogate the jurisdiction of only one court, the Slovenian one.

6. Conclusion

The Matrimonial Property Regime Regulation, along with the Property Consequences of Registered Partnership Regulation, complements the list of European private international law sources in the area of family law. By covering all the private international law issues which arise in cross-border situations, it facilitates division of international spouses' assets. Due to the recent entry into force of the Matrimonial Property Regime Regulation, case law interpreting it is virtually non-existent. However, doctrine has already anticipated certain problems which may arise in application of the Regulation provisions. The recognition of other potential issues derives from Regulation particularities

²⁴ Article 69(1) of the Matrimonial Property Regime Regulation.

²⁵ Article 69(3) of the Matrimonial Property Regime Regulation.

such as different temporal application of chapters in Regulation. In terms of applicable law, the Matrimonial Property Regime Regulation enables spouses to choose applicable law, restricting the party autonomy to two possible choices: habitual residence and nationality of one or both spouses at the time the choice is being made. Certain Member States, like Croatia, prescribe further restrictions to choice of law for property relations. Therefore, the potential issue which may arise derives from the interplay of such restrictions with provisions of the Matrimonial Property Regime Regulation on choice of applicable law. In the absence of the choice of law, the Matrimonial Property Regime Regulation prescribes the scale of connecting factors. The first one is the first common habitual residence of spouses after the marriage, which might be problematic if spouses do not acquire common habitual residence shortly after the conclusion of marriage. It remains to observe the doctrinal and judicial developments concerning these issues and see how they will be resolved.

Abstract: The recent development of European private international law has been marked with the enactment of two new regulations concerning property relations of international couples. Applicable law rules in one of these regulations, namely the Matrimonial Property Regime Regulation will be analyzed. Against this background and based on three hypothetical cases, selected issues which may arise in application of these rules will be detected and anticipated.

KARINA ZABRODINA

The law applicable to property regimes and agreements on the choice of court according to Regulations (EU) 1103 and 1104 of 2016

Summary: 1. Professio iuris and the role of the parties' will. – 2. The choice of the court through an *e-mail* message. – 3. The validity of the agreement: substantial and formal requirements. – 4. The positive contribution of the «twin» Regulations. – 5. Conclusion.

1. Professio iuris and the role of the parties' will

The ever-increasing phenomenon of international couples and the legal difficulties¹ they have to face in managing their property, whether during marriage, registered partnership or following the possible separation, divorce or death of one of the spouses or partners, has led the European legislator to seek an effective solution that can establish a genuine European area of justice². For this purpose, on 24 June 2016 the Council of the European Union adopted Regulations (EU) 1103³ and 1104⁴ implementing enhanced cooperation⁵ in the area of jurisdiction, applicable law, the recognition and enforcement of decisions, with

¹ On the problems of international couples about their asset relations see M. PINARDI, I Regolamenti europei del 24 giugno 2016 NN. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate, in Eur. Dir. Priv., Issue 2, 2018, p. 733 ff.

² Article 67, Paragraph 1 of the Treaty on the Functioning of the European Union provides that the Union establishes an area of freedom, security and justice with respect for fundamental rights and the various legal systems. About the need for harmonization see F. POCAR, La comunitarizzazione del diritto internazionale privato: una "European Conflict of Law Revolution"?, in Riv. dir. int. priv. proc., 2000, p. 873; C. KOHLER, Lo spazio giudiziario europeo in materia civile e il diritto internazionale privato, P. PICONE (ed.), Padova, 2004.

³ 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. It shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union and shall apply from 29 January 2019.

⁴ 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. It shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union and shall apply from 29 January 2019.

⁵ Decision (EU) 2016/954 of 9 June 2016. About enhanced cooperation see, G. GAJA, *La cooperazione rafforzata*, in *Dir. Un. Eur.*, 1996, p. 321 ff.

reference to matrimonial property regimes and the property consequences of registered partnerships⁶. Judicial cooperation on civil law matters having cross-border implications is an important legislative instrument. It provides the participating Member States⁷ a clear and comprehensive legal framework for the property regimes of international couples; it guarantees citizens adequate solutions with regard to legal certainty; moreover, it facilitates the movement of decisions and authentic instruments between Member States⁸.

The certainty, predictability and flexibility of the law are reinforced by the central role that the two Regulations give to the autonomy of the parties, allowing them, in certain circumstances, to choose the substantive law applicable to their property relationships and to establish the related competent court. The importance of the autonomy of will of couples in the family field⁹, characterised by the multicultural development of contemporary society, ensures the stability and the continuity of cross-border relations and represents the effective expression of the freedom of self-determination of individuals¹⁰. Nevertheless, the freedom to self-regulate and organise one's family life is also expressed by two general principles underlying the determination of the applicable law: universal application and the unity of the applicable law¹¹. The management of property relationships between spouses and of the patrimonial effects of registered partnerships requires in fact that the applicable law, in addition to being foreseeable, is also suitable to regulate all the assets of the couple, regardless of their nature, location in a Member State or in a Third country. The universal nature of the two cooperation instruments in question is expressly laid down in Articles 20 and 21. Therefore, the law of a Third country¹² may also be applied to all goods, regardless of their

⁶ Articles 70 of Regulations (EU) 2016/1103 and 2016/1104.

⁷ Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden and Cyprus.

⁸ See Recital 6, Decision (EU) 2016/954 of 9 June 2016.

⁹ Several European Regulations governing relations in family matters, by virtue of enhanced cooperation, allow the parties to opt out: Article 15 of Regulation (EC) 4/2009 about maintenance obligations, Article 5 of Regulation (EU) 2010/1259 regulating the legal separation and the divorce or, also, some provisions of Regulation (EU) 2012/650 on succession.

¹⁰ O. FERACI, L'autonomia della volontà nel diritto internazionale privato dell'Unione Europea, in Riv. dir. int., Issue 2, 2013, p. 424.

¹¹ P. Bruno, I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate, Milano, Giuffrè, 2019, p. 167

¹² However, it should be specified that the law of a Third State chosen by the parties as applicable to their property relationships, in exceptional circumstances and in particular for reasons of public interest, may be disregarded by the courts of the Member States if the application of that law is manifestly incompatible with the public policy of the Member State concerned. Article 31, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104.

location, if this intention is expressly stated in a written agreement, dated and signed by the parties¹³.

In particular, with regard to matters relating to matrimonial property regimes or registered partnerships¹⁴, Articles 22 of both Regulations provide the parties the possibility to «designate or change the law applicable to their property regime» as long as it is the law of the State of habitual residence or the law of a State of nationality of either part at the time the agreement is concluded. In case of the registered partnerships, an additional option is contemplated which provides for the possibility to choose «the law of the State under whose law the partnership was created»¹⁵. In addition, Articles 7 specify that the parties may also agree on the attribution of exclusive jurisdiction to rule on such matters. The spouses can choose «the courts of the Member State whose law is applicable pursuant to Articles 22, or point (a) or (b) of Article 26(1)» or to those of the Member State in which the marriage was concluded. The partners of the unions can opt for the «courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1) or the courts of the Member State under whose law the registered partnership was created». It is therefore clear that the parties' power to carry out the aforementioned professio iuris, according to their common will, is directed towards pursuing and achieving the general objectives of Regulations (EU) 1103 and 1104, including the free circulation of persons, the simplification for couples of different nationality of the management or division of their assets, the guarantee of legal certainty and its predictability, the harmonious functioning of justice¹⁶.

At this point, it is necessary to focus attention on the ways of manifesting the will of the parties with regard to the applicable law and to the election of the court; moreover on the related formal requirements¹⁷ that these agreements must comply with for the purposes

¹³ «The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State», Articles 20, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104; «The 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», Article 21, Regulation (EU) 2016/1103; «The law applicable to the property consequences of a registered partnership shall apply to all assets that are subject to those consequences, regardless of where the assets are located», Article 21, Regulation (EU) 2016/1104.

¹⁴ See O. FERACI, Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate, in Riv. dir. int., 2016, p. 676 ff.

¹⁵ Article 22, Paragraph 1, point (c), Regulation (EU) 2016/1104.

¹⁶ See Recital 1, Recital 8, Recital 15, Regulation (EU) 2016/1103 and 2016/1104.

¹⁷ «As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses (or partners) 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». Recital 47, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104.

of formal validity, as well as to substantial¹⁸ one. In family matters, more specifically in relation to matrimonial property regimes, any relevance of the tacit or presumed will of the parties is excluded¹⁹.

With regard to *optio legis*, this one must be expressly stated in the written, dated and signed by both parties, agreement. In general, the requirement of the written form can also be satisfied by «any communication by electronic means which provides a durable record of the agreement»²⁰. However, it should be noted that if «the law of the Member State in which both spouses (or partners) have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements (or for partnership property agreements)»²¹, the aforementioned requirements must be respected by agreement on the choice of applicable law too²².

No such indication has been provided for the agreement by which the parties may determine the court for the regulation of any disputes²³ about patrimonial regimes arising during marriage or registered partnership. The two Regulations in fact only establish some minimum formal requirements, as for the agreement on the applicable law. The problem that comes to the fore, concerns exactly the nature and form of the agreements on the choice of the court. Which are the recorded electronic communications that can satisfy the formal requirements of an agreement on the choice of the court?

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¹⁸ From a substantive point of view the validity of a court agreement has to be verified pursuant to Articles 22 and 26 of Regulations. Whereas, the formal requirements are provided by Articles 7. See, P. BRUNO, *I Regolamenti europei*, cit, p. 101 ff.

¹⁹ In this sense, O. FERACI, L'autonomia della volontà, cit., p. 424 ff. says: «in ragione della delicatezza dei temi trattati, i regolamenti dettano espressamente alcune garanzie formali minime volte a garantire un'adeguata tutela del soggetto più debole del rapporto. Esse, in particolare, richiedono la forma scritta dell'accordo di scelta, che consenta una registrazione durevole della volontà delle parti, esigendo che la scelta sia debitamente sottoscritta da entrambe le parti e datata».

²⁰ Articles 23, Paragraph 1, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104.

²¹ Articles 23, Paragraph 2, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104.

²² The European legislator has also provided for cases in which, at the time of conclusion of the agreement, the habitual residence of spouses or partners is in different Member States or when only one of them has his habitual residence in a Member State. In such cases it is sufficient to comply with the additional formal requirements of one of the States. Articles 23, Paragraphs 3 and 4, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104.

²³ Articles 7, Regulation (EU) 2016/1103, Regulation (EU) 2016/1104 can be applied only in cases of patrimonial problems that do not deal with inheritance, divorce, legal separation or the dissolution of a registered partnership because these matters are specifically regulated by Articles 4 and 5. So the provisions on the choice of the court have a residual nature because they operate only outside the cases of exclusive competence in succession or family matters. P. Bruno, *I Regolamenti europei*, cit, p. 102.

2. The choice of the court through an e-mail message

For greater clarity and for an effective solution to the above questions, a practical case is assumed where the protagonists are a couple formed by a French citizen and a Spanish citizen who are married in France. Immediately after the wedding, they moved to Italy, where they live permanently. The spouses have not made any agreement with regard to the law applicable to their patrimonial regime. Therefore, according to point (a) of Article 26(1)²⁴, and so in the absence of choice of the parties²⁵, the law applicable to the patrimonial regime of the couple is the Italian²⁶ law that is the law of the first common habitual residence of the spouses after the conclusion of the marriage.

At the time of marriage, the wife returns for work in France where she buys some real estate. Meanwhile, the husband's work affairs suffer the ongoing financial crisis. For these reasons, and precisely in view of the deterioration of the groom's business, the couple decides to determine the competent forum for the resolution of any patrimonial issues. For this purpose, they stipulate the agreement, with the indication of the French forum, through a simple exchange of e-mails: the proposal of the wife, contained in an e-mail message, is accepted by the husband with another e-mail²⁷.

Once the dispute arose, according to the stipulated agreement, the French judge is called. However, the defendant spouse complains the invalidity of the agreement for non-compliance with the minimum requirements and indicates the competent Italian court in the light of the criterion of the last common habitual residence²⁸. Will the judge have to consider valid, from the formal point of view, the agreement stipulated through a simple exchange of e-mails between the parties?

²⁴ «In the absence of a choice-of-law agreement pursuant to Article 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 ...», Article 26, Paragraph 1, point (a), Regulation (EU) 2016/1103.

²⁵ F. VISMARA, Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (UE) n. 2016/1103 in materia di regimi a tripicali il regimi para consisti in Principali in Principal

di regimi patrimoniali tra i coniugi, in Riv. dir. inter. priv. proc., 2017, p. 356 ff.

26 In Italy, unless otherwise agreed by the spouses, the legal matrimonial property regime is the communion of assets pursuant to Article 159 of Italian Civil Code.

²⁷ For an extensive collection of practical cases see P. BRUNO, Le controversie familiari nell'Unione europea. Regole, fattispecie, risposte, Milano, Giuffrè, 2018, passim.

²⁸ If no court is specifically chosen by agreement of the spouses, pursuant to point (b) of Article 6, of Regulation (EU) 2016/1103 «jurisdiction to rule shall lie with the court of the Member State in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised».

3. The validity of the agreement: substantial and formal requirements

For a correct resolution of this case, the French judge is required to verify that the agreement respects both the substantive and the formal criteria.

Keeping in mind Article 7²⁹ of Regulation (EU) 2016/1103 it must be assumed that the spouses' willingness to elect the French forum respects the substantive criteria required. This choice is, in fact, attributable to the prediction of the parties' power to attribute the exclusive competence to the judicial authority of the Member State of the conclusion of the marriage which is in our case France. Nevertheless, the spouses could have also opted for the French forum on the basis of the connection criteria pursuant to points (a) and (b) of Article 22(1): law of the State of the habitual residence of one of the spouses or of his citizenship at the time of the conclusion of the agreement. Consequently, considering that the wife is a French citizen and that she has established her residence in France, the spouses could have designated the French judicial authority³⁰.

With regard to the formal profile, the Regulation provides for some minimum guarantees to ensure the parties an informed and conscious choice of the substantive and procedural rules applicable to their patrimonial relationships; nevertheless, due to the delicacy of the family matter, to ensure adequate protection of the weakest subject in the relationship³¹. In particular, the agreement of the parties must be formally documented or documentable³², because in this way it is possible to prove that the parties have expressed, clearly, precisely and knowingly their consent³³. Therefore, the choice of the parties must be expressly stated by a written document with a certain date, duly signed by the parties.

With regard to the «written» criterion, it is important to underline how technological development, the change in socio-economic reality and the growth of cross-border

²⁹ «1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, or point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime. 2. The agreement referred to in Paragraph 1 shall 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», Article 7, Regulation (EU) 2016/1103.

³⁰ In any case, according to Article 22, as an alternative to the French court the spouses could have also designed: the Italian judge according to the criterion of the residence of the husband at the time of conclusion of the agreement; the Spanish judge according to the criterion of citizenship of the husband.

³¹ O. FERACI, L'autonomia della volontà, cit. p. 424 ff.

³² P. Bruno, I Regolamenti europei, cit., p. 103 f.

³³ For example, with regard to the commercial sphere, the European Court of Justice has ruled on various occasions regarding the consent and the formal requirements for the validity of the clauses attributing jurisdiction. ECJ, 14 December 1976, C-24/76, Estasis Salotti Snc v Ruva Polstereimaschinen GmbH, European Court reports, 1976; ECJ, 20 February 1997, C-106/95,MSG v Les Gravières Rhénanes SARL, European Court reports, 1997; ECJ, 20 April 2016, C-366/13, Profit Investment SIM Spa v Stefano Ossi, Reports of Cases, 2016.

relationships between people have led the European legislator to adapt to this reality by providing in multiple instruments of enhanced cooperation the equivalence between the written form and «any communication by electronic means which provides a durable record of the agreement». On the subject, even if in a completely different context³⁴, a constant orientation of the European Court of Justice was formed according to which the requirement of «written form» is satisfied also through the use of any electronic means, material or immaterial, which guarantees a durable recording of the content provided by the parties.

Case C-322/14³⁵ dealt with the issue of the validity of an exclusive jurisdiction clause accepted by a «click» and kept on the seller's website. The Court stated that acceptance by «click» constitutes an electronic communication which permits the permanent recording of this clause when it allows printing and saving the text. In this regard, the European judge has made a literal interpretation of the provision³⁶ of the case. He has ruled that it provides for the «possibility» of durably registering the clause conferring jurisdiction regardless of whether it is contained in a web page and that this circumstance cannot call into question the validity of the clause.

Subsequently, this orientation was also confirmed in case C-64/17³⁷ which concerned the validity of the conferring jurisdiction clause, stipulated in the general sales conditions mentioned in invoices issued by one of the contracting parties. In the specific case, the Court established that the clause under discussion did not meet the requirements required by Article

³⁴ In relation to the form requirements, in particular to the written form of the clauses attributing competence it is possible to consult a rich European case-law jurisprudence in civil and commercial matters.

³⁵ In fact, the request for a preliminary ruling concerned the interpretation of Article 23(2) of Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction, the recognition and enforcement of judgments in civil and commercial matters. ECJ, 21 May 2015, C-322/14, *Jaouad El Majdoub v. Cars on The Web. Deutschland GmbH*, Reports of cases, 2015.

³⁶ «1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing», Article 23, Paragraphs, 1 and 2, Regulation (EC) No 44/2001.

³⁷ The request for a preliminary ruling concerned the interpretation of Article 25 of Regulation (EU) 2012/1215 of the European Parliament and of the Council, of 12 December 2012, on jurisdiction, the recognition and execution of judgements in civil and commercial matters. ECJ, 8 March 2018, C-64/17, Saey Home & Garden/Lusavouga-Maquinas e Accessorios Industriais, Reports of Cases, 2018.

25³⁸ of Regulation (EU) 2012/1215 because it was concluded in oral form and not specifically signed, resulting indirectly from the general conditions contained in the invoices issued. However, it specified that in any case the clause conferring jurisdiction must actually be the subject of *inter partes* agreement, which must be expressed in a precise and clear way and which must be concluded in writing form. Anyway, the Court pointed out that such clause would have been valid even if contained in an invoice, if the parties had expressly referred to these general conditions.

In the light of the interpretative guidelines provided by the Court with regard to the clauses on civil and commercial jurisdiction and, by analogy of the problems dealt with, it is possible to believe that the French judge will have to consider the agreement stipulated by a simple exchange of e-mails valid and therefore to confirm his competence. Acceptance of the proposal by sending an e-mail presupposes in fact that the party has previously read the content of the agreement, knowingly giving its consent. Consequently, like acceptance by «click», it can be assumed that an e-mail complements the form requirements required by Article 7 of Regulation (EU) 2016/1103 because it allows to record durably, to print and to save the agreement so stipulated. Moreover, because it guarantees the parties the possibility to express their consent in a clear, precise and conscious way.

4. The positive contribution of the «twin» Regulations

In recent years, the European legislator has been particularly committed to seeking an effective solution to the problems of international couples with different citizenship or residence³⁹. With regard to Regulations No 1103 and 1104 of 2016, it is necessary to specify that these ones are applicable starting from 29 January 2019 to the spouses who have contracted the marriage and to the partners who have registered their union following that date⁴⁰. Therefore, for couples formed on a previous date, the rules of national law in force in

³⁸ Since 2012 the Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been replaced by the Regulation (EU) 2012/1215. This one largely incorporates some provisions as well as the content of Article 25 that is almost the same as in Article 23 of Regulation (EC) 44/2001.

³⁹ In 2009 the European Council underlined the convenience to extend the mutual recognition to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States' legal systems, including public policy, and national traditions in this area. The Stockholm Programmean open and secure Europe serving and protecting citizens (2010/C, 115/01).

https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF

⁴⁰ Moreover, according to Articles 69, Paragraph 3 the provisions on the choice of applicable law shall apply also to spouses (or partners) who specify the law applicable to the matrimonial property regime (or to the

the individual member countries apply. The practical case, analyzed and resolved in the light of the new European legislation in force, highlights one of the many practical difficulties that such couples may encounter in the daily management of their family life. It would therefore be interesting to make some brief comments on the case of the French citizen and the Spanish citizen, if they had concluded their marriage before the entry into force of the Regulation (EU) 2016/1103.

The rules of Italian private international law provide that property relations between spouses are governed by the law applicable to their personal relationships that is, in the case of spouses with different nationalities, by the law of the State in which married life is predominantly localized⁴¹. However, without further legal specifications, such personal relationships are difficult to identify. In the present case, both spouses could in fact invoke respectively the French or the Italian law, leaving to the judge the arduous task of providing a solution to this conflict of rules. In addition to the conflict of rules that may arise in this case with reference to the laws that can be abstractly referred to for the discipline of a certain relationship, there is also a conflict of jurisdiction. In fact, the problem arises from the moment that the same controversy can be brought before judges of different countries with different solutions.

The Italian Law No 218 of 31 May 1995 also provides the couples for the possibility to agree on the law applicable to their property relationships. In this case the spouses can choose the law of the State of which at least one of them is a citizen or in which at least one of them resides. However, even if the two spouses had agreed on the applicable law by choosing one of these laws, but had predominantly located their married life in Italy, the difficulty of an Italian judge to apply the foreign law indicated by the parties remains. On the one hand, this legislative choice operates in compliance with the cultural identity of foreigners permanently located in Italy. On the other hand, however, it cannot be believed that the choice of property regimes can be limited only to the choice between the separation or communion of assets. In fact, it should be noted that, despite the presence of analogies between foreign legal institutions, a further problem may arise when they are interpreted and

property consequences of registered partnership) after 29 January 2019. Articles 69, Paragraph 3, Regulations (EU) 2016/1103 and 2016/1104.

⁴¹ Articles 29-30, Law of 31 May 1995, No 218.

applied. The same term «communion» could be used in different legal contexts and systems without arriving at a clear and uniform definition⁴².

Therefore, the positive impact of the new Regulation on matrimonial property regimes is evident. The power to choose the applicable law guarantees the certainty and predictability of the right, while the possibility of agreeing on the choice of the court optimizes its application and simplifies the procedures. In general, the fragmentation of the discipline of the individual Member States in the matter of property regimes is going to be overcome. In any case, only a practical implementation of the Regulations will be able to clarify whether the regulatory system based on enhanced cooperation is suitable to avoid the practical difficulties in managing patrimonial relations and to provide international couples with adequate solutions to their problems⁴³.

5. Conclusion

In light of the above considerations, both the proactive commitment of the States adhering to the enhanced cooperation and the adoption of the «twin» Regulations are fundamental⁴⁴. These ones ensure, with a view to uniformity and harmony of European principles, the compatibility of the rules applicable in the Member States to conflicts of law and jurisdictions. In addition, they protect the autonomy of the will of the spouses and partners of registered partnerships. Indeed, the choice of the law applicable to the disputed relationship often tends to combine with the possibility of agreeing on the choice of the forum too.

The coordination between jurisdiction and applicable law achieves two important goals. In fact, the coincidence between forum and ius is fulfilled, which on the one hand simplifies the legal framework of reference and on the other, produces advantages in terms

⁴² E. CALÒ, Variazioni sulla professio iuris nei regimi patrimoniali delle famiglie, in Riv. not. Issue 6, 2017, p. 1093 ff.

⁴³ As noted in the doctrine, in the enhanced cooperation on matters of patrimonial regimes the same Member States do not participate in the cooperation under Regulation (EU) 2010/1259 on the area of family law. The feared danger is that the non-coincidence between Member States and the close connection between two disciplines will give life to a Europe with a supervariable geometry in the field of civil judicial cooperation on family matters. This is also because this European regulatory framework must necessarily deal with the law of individual States with particular reference to the substantive rules that define family ties and to private international law. E. M. MAGRONE, Un'Europa a geometria supervariabile in materia di regimi patrimoniali delle coppie internazionali? Prime considerazioni sui Regolamenti 2016/1103 e 2016/1104, in E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN and R. VIRZO (eds.), Dialoghi con Ugo Villani, Bari, 2017, pp. 1132-1140; P. BRUNO, I Regolamenti europei, cit., passim.

⁴⁴ In implementing enhanced cooperation in civil matters, multiple Regulations have been adopted including: Regulation (EC) 44/2001 (cd. Bruxelles I) e Regulation (EU) 2012/1215 (cd. Bruxelles I-bis); Regulation (EC) 2201/2003 (cd. Bruxelles II); Regulation (EU) 2010/1259; Regulation (EU) 2012/650; and lastly, Regulation (EU) 2016/1103 e Regulation (EU) 2016/1104.

of legal certainty and predictability of solutions⁴⁵. Furthermore, the will of the parties is enhanced to the point of prevailing over any other objective connection criterion envisaged by the Regulations: «the jurisdiction of a court or the courts of a Member State, agreed by the contracting parties in an agreement conferring jurisdiction is, in principle, exclusive»⁴⁶. The same interpretative orientation is also accepted by the Italian Supreme Court of Cassation where it reiterates that «la clausola contrattuale con la quale le parti indicano la competenza - intesa come frazione o misura della giurisdizione - del giudice, appartenente ad un determinato Stato, ai fini della decisione di eventuali controversie tra le stesse insorte deve essere normalmente intesa, salva specifica ed espressa previsione in senso contrario, come volta a conferire la giurisdizione esclusiva al giudice appartenente al sistema giurisdizionale di quello Stato»⁴⁷.

On the other hand, however, the problem of the form and minimum requirements envisaged for the validity of the agreements on the choice of the forum remains. On this point the two Regulations do not provide for specific indications except for the generic equivalence of the written form to any electronic communication registered durably. Furthermore, unlike in the commercial sphere, in family matters the European legislator refers to «agreements» between the parties, not to the clauses conferring jurisdiction. Consequently, there is also the problem of the possible analogical application of the interpretative principles relating to these clauses to the «family» agreements on the choice of the court.

In conclusion, it is evident how the Regulations No 1103 and 1104 of 2016 represent a further step towards the harmonization of European law and towards the creation of that area of justice so desired by Article 3 of the Treaty on European Union⁴⁸. At the same time, these cooperation tools leave a lot of space for the European judge both for the definition of uniform interpretative principles and for the solution of the concrete case.

Abstract: The purpose of the present work is to reflect on the legislative, jurisprudential and doctrinal contribution regarding patrimonial regimes between international couples in light

⁴⁵ O. FERACI, L'autonomia della volontà, cit., p. 424 ff.

⁴⁶ ECJ, 21 May 2015, C-322/14, Jaouad El Majdoub v. CarsOnTheWeb.DeutschlandGmbH, Reports of cases, 2015.

⁴⁷ Supreme Court of Italy, 11 April 2017, No 9283, in Foro it., 2017, p. 330 ff.

⁴⁸ «...The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime», Article 3, Paragraph 2, TUE.

of the recent reforms of the European Union. Firstly, attention will be paid to the possibility for the parties to choose the law applicable to their relations as well as to agree on the choice of the competent court pursuant to the Regulations (EU) 1103 and 1104 of 2016. Secondly, through the example of a practical case, the substantial and formal criteria of these agreements will be analyzed which are required for the exercise of the *professio iuris* of the parties. Finally, a brief reflection will be made on the impact of the «twin» Regulations on the current regulatory framework concerning family law.

MIRELA ŽUPAN and PAULA PORETTI Application of the matrimonial property regulation in Croatia

Summary: 1. Introduction. – 2. Pratical issues. – 3. Conclusion.

1. Introduction

Growing number of cross-border family disputes reopens/triggers/ the debate on the impact of the civil justice on European citizen's everyday life. Although EU is providing for a legal framework, its complexity is undeniable. Lack of consensus among Member States leads to regulations of enhanced cooperation, contributing to multispeed Europe. Interplay of universal and regional level of harmonization, as well as its interplay with national procedural and substantive rules, comes to forefront here. In the end, atomized approach of European Union civil justice results with sector specific regulations of a narrow scope of application. In the platform of matrimonial property regime, atomized approach results with a mosaic of legal regimes to be applied in one single scenario. Interplay takes stand at various family related disputes, whereas a typical interaction of matrimonial property issues appears with the divorce, maintenance obligation and obligations towards third parties (contracts, tort). Being a successor in the legislative circle of EU cross-border family law, Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter: MPR)² intends to find a proper balance with the

¹ M. ŽUPAN, Scope of application, definitions and relation to other instruments" in C. HONORATI (ed.) Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts, Giappichelli - Peter Lang, Torino, 2017, p.1 ff.

² OJ L 183, 8.7.2016, p. 1–29. Recitals 32-36.

instruments already at stage. Its overall aim is to lean on previously adopted rules, to provide efficiency of cross-border procedures and give more legal certainty to international couples. Synchrony should be achieved on the level of jurisdiction and applicable law at first, but also in respect of characterization, preliminary issues, common provisions and false parallel proceedings, in particular. Diversity of jurisdictional grounds for a divorce, maintenance obligations, and matters concerning property consequences of marriage and registered partnerships may result with proceedings in multiple Member States, for interrelated family matters. Jurisdictional rules of the MPR aim to achieve a concentration in that respect. These aims however may be hindered by national procedural rules, as out hypothetical cases will illustrate.

In relation to applicable law, it is well known that EU law tends to achieve synchrony of *fora* and *ius*, which is not always possible. Additionally, questions of "general part" pertaining to "EU PIL code" remains undrafted.³ That leads to an inconsistency within the European judicial sphere. Issues of characterization have already proved to be problematic in general, and Croatian practice would not be an excuse. Although each Regulation emphasized clearly issues out of the scope and each has its own positive scope of application, issue of delimination still appears. Issues of general nature have been a great challenge for Croatian courts as well. The application of foreign law, identification of a case as a case with cross-border element when most of the contacts are purely national, or an interpretation of the concept of habitual residence, can be emphasized here. The experience of Croatian legal practitioners in the application of 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

³ P. BEAUMONT ET AL. Cross-Border Litigation in Europe. Hart 2017, pp. 63 et. seq.

⁴ Delimination of pure property dispute - matrimonial property C-67/17 Todor Iliev v BlagovestaIlieva; Delimination of successions - matrimonial property C-558/16, Mahnkopf, Delimination of maintenance obligation - matrimonial property C-220/95 Van den Boogaard v Laumen.

⁵ I. KUNDA, Novi međunarodnoprivatnopravni okvir imovine bračnih i registriranih partnera u Europskoj uniji: polje primjene i nadležnost. Hrvatska pravna revija, broj 3/2019.

⁶ M. ŽUPAN, Foreign law before Croatian authorities – at the cross-roads?, YUKO NISHITANI (eds.) Treatment of Foreign Law – Dynamics towards Convergence? Springer 2017. (93-111)

⁷ Recent request for a preliminary ruling in relation to a succession may be illustrative, C-80/19.

Succession (hereinafter SR)⁸shows that situations in which a large part of the matrimonial property is situated in the Member State of the spouses nationality and habitual residence and only a portion in another Member State, for example bank accounts, may lead to the omisson⁹ of the court to identify the cross-border element in the case.¹⁰

Another important aspect is the request for increasing legal certainty, predictability and party autonomy by way of enabling spouses or partners to conclude a choice of court agreement in favor of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage or of the registered partnership. ¹¹ From the standpoint of Croatian legal system where traditionally a marriage agreement is not common between spouses, the effectiveness of these solutions under the MPR might be hindered, as will be discussed later.

Finally, in order for the MPR to be applied properly, procedural rules in some Member States will need coordination and adjustment. For example, in Croatia notaries public are only entitled to decide in regard to undisputed (non-contentiosa) matters. If there is a need to decide on matrimonial property regime within the procedure on succession, the notary public can only declare which part of the property of the successor is to be considered as matrimonial property in his judgment. The surviving spouse needs to initiate a separate court proceedings in order to obtain a judgment on the matrimonial property-related issues which will enable him/her to register the immovable property in the registry.¹²

Viewed from the eyes of international family, one has to doubt if the transnational legislation is a clear framework for international couples? Along with it, are parties with cross-border family life able to identify legal issues they might face in divorce, custody,

⁸ OJ L 201, 27.7.2012, p. 107–134.

⁹ P. PORETTI, Odlučivanje o imovinskimodnosimabračnihdrugova u ostavinskimpostupcimasukladnoUredbi 2016/1103 o bračnoimovinskomrežimu, Zbornik PravnogfakultetaSveučilišta u Rijeci, 38(2017), 1, p. 455. J. GREY; P. Q. REDONDO, Stress-testing the EU Proposal on MatrimonialPropertyRegimes: Co-operationbetween EU privateinternationallawinstruments on familylaw and successions (4) available at: http://www.familyandlaw.eu/tijdschrift/fenr/2013/11/ FENR-D-13-00008, 1.02.2017.

¹⁰ See more the ReportEuFam's II: M. ŽUPAN, P. PORETTI, M. ŠEGO and M. DRVENTIĆ, Report on the Croatian Exchange Seminar in the framework of EUFAMS II project. http://www2.ipr.uni-heidelberg.de/eufams.

¹¹ C. GRIECO, 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 (Octubre 2018), Vol. 10, No 2, pp. 457-476, (464).

¹² P. PORETTI, Odlučivanje o imovinskimodnosimabračnihdrugova, cit., p. 458.

maintenance, division of matrimonial property claims; is there predictability and legal certainty for international couples facing interrelated issues?

2. Practical issues

Having in mind that great number of cross-border disputes arises in connection to divorces, ¹³ it is predictable that the MPR would often be applied to settle the property issues upon divorce. However, the fact that private international law rules are often ignored by Croatian judiciary is disturbing. ¹⁴ Since the MPR applies to procedures initiated since the end of January 2019, to our knowledge no judgment applying it has yet been rendered in Croatia. There are however several pending cases that have already raised interesting issues.

In a hypothetical case, spouses of opposite sex with mixed nationality (wife Croatian and German, husband Canadian) initiate a divorce before Croatian courts. Divorce is granted in April 2018. In November 2018 husband, now living in Canada, stands with matrimonial property claim in respect of the immovable property in Croatia. In February 2019 wife addresses the court with a counterclaim in respect of a property situated in Canada, house they have purchased in the time of marriage duration.

First issue that Croatian practice faces expectedly relates to temporal scope of application. In a matrimonial property dispute predating the Regulation, initiated by one of the spouses in respect of property situated in Croatia, the former legal regime applies – *i.e.* PIL Act of 1982.¹⁵ However, once the wife raises a counterclaim, in respect of immovable and other assets situated abroad, the MPR is already being applied. The question arises if the Croatian court has to apply the MPR to settle the counterclaim, or it has to treat the counterclaim pursuant to the national regime predating the MPR? Croatian PIL Act of 2017^{16}

¹³ M. ŽUPAN, I. MEDIĆ, P. PORETTI, N. LUCIĆ and M. DRVENTIĆ, "Croatian Practice in Cross-Border Family and Successions Matters", I. VIARENGO and F. VILLATA (eds.): Planning the future of cross-border families: a path through coordination. Hart Law Publishing.; M. ŽUPAN, P. PORETTI, M. ŠEGO and M. DRVENTIĆ, Report on the Croatian Exchange Seminar in the framework of EUFAMS II project. http://www2.ipr.uni-heidelberg.de/eufams

¹⁴ Confirmation of the fact in respect of matrimonialpropertydisputewithcross-border element maybefoundinseveralrecentlyissuedjudgements: Općinski sud u Osijeku, P Ob-400/2017-22 of 25 January 2019, Općinski sud u Splitu Pob-600/17, 18 January 2019.

¹⁵ The Law on Resolution of Conflict of LawswithRegulations of OtherCountries (Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima), OfficialGazette of SFRJ, No. 43 of 23 July 1982 withcorrigendain No. 72/82, adoptedin Croatian OfficialGazette, No 51/91.

¹⁶ Act on Private International Law (Zakon o međunarodnomprivatnompravu), Official Gazette, No 101/17.

clearly indicates the application of the MPR.¹⁷ The MPR applies only to legal proceedings instituted "on or after 29 January 2019".¹⁸ Turning now to the issue of a counterclaim, several provisions have to be combined. If a counterclaim is submitted in the period where the MPR is already applied, clearly the MPR has to be applied to the mater. MPR indicates that the court in which proceedings are pending pursuant to Article 4, 5, 6, 7, 8, 9 (2), 10 or 11, shall also have jurisdiction to rule on a counterclaim which falls within the substantive scope of the MPR (Art 12). However, if the jurisdiction for the main claim was established according to rules predating MPR, counterclaim would be an option only it those rules would correspond to the MPR provisions on jurisdiction deriving out of listed provisions. In respect of the Croatian PIL Act of 1982, that would not be the case.¹⁹ Consequently, the counterclaim would not be an option.

Additional problem in this hypothetical case arises in relation to a claim over a property situated in a third, non-EU state. MPR aimed to avoid the fragmentation of the matrimonial property regime. Hence, the applicable law governs the property as a whole. It covers all of the assets irrespective of its nature, regardless if the assets are located in another Member State or in a third state. ²⁰ There is however, a limitation of proceedings available in a situation assets subject to a succession (but also property division) are located in a third state. The court seized to rule on the matrimonial property regime may, in such a scenario, upon a request of one of the parties, decide not to rule on such assets (all/each of them), if it may be expected that its decision in respect of those assets will not be recognised in that third state. This provision clearly enables limitations if a matrimonial property claim arises in connection to a succession, but what if it comes in a package with adivorce, just as in our hypothetical case? Jurisdiction in respect of immovable property was in the Croatian PIL Act of 1982 in general afforded only for those situated in Croatia. In property relations as well as in successions the principle of division of property was advocated. Since the Act of 2017 started with application only in 2019, this shift in the general approach is rather revolutionary. Even in the previous regime the court could have engaged in a matrimonial property dispute

¹⁷ PIL Act, Article 49.

¹⁸ MPR, Article 69.

¹⁹ Jurisdictionwasbased on domicile of the respondent and lexreisitae.

²⁰ MPR, recital 43.

in relation to an immovable property situated outside Croatia, but only if out of the total value of the matrimonial property the higher value was situated in Croatia. Such an exercise was not taken often by Croatian court.²¹ If a court in the end accepts its jurisdiction, national rules (reciprocity) on the rights of a foreigners to acquire immovable in Croatia may be problematic for third country nationals.²²

In another scenario spouses of mixed nationality, divorce in Croatia in June 2019. Spouses have lived together in Belgium, but wife has moved back to Croatia year ago and husband left for his country of origin in France. In August 2019 wife initiates a matrimonial property claim before Croatian courts. Here an interesting problem relates to jurisdictional rulesenabling a court to decide on a MPR in connection to a divorce. Article 5, Para 1 states that "where a court of a Member State is seized 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." It is not sufficiently clear if the divorce procedure must be pending, or already settled divorce jurisdiction may serve as a ground to engage with a MPR procedure as well. Namely, in respect of attribution of a property claim to a divorce procedure, an issue arises - as in Croatian system the property matter is settled after the divorce procedure has finished. Grammatical reading of the MPR indicates that concentration counts only for pending divorces! If the divorce procedure finished there would be no possibility to dissolve matrimonial property in the same fora! If the wider interpretation is advocated, jurisdiction for matrimonial property regime is grounded on Article 5. Again, in the first scenario of a narrow interpretation, Croatian court would not hold jurisdiction for this claim. In a rather typical scenario, neither the grounds enlisted to Article 6 of MPR could be takento justify jurisdiction of Croatian Court.

In a scenario of couples with multiple dual nationalities (Hadadi vs Mesco scenario),²³ we have to highlight the potential issue in relation to overriding EU principles.

²¹ Supreme court of Croatia, VSRH Rev 1376/2007-2, 27.12.2007; VSRH Rev 302/2010-2, 15.7.2015.

²² Croatian Constitution, Article 48 para 3; Law on Property and Other Real Rights, NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, Article 356. G. MILAKOVIĆ, *Stjecanje prava vlasništva stranaca na nekretninamana temelju zakona i nasljeđivanjem*, 42/15, Javni bilježnik, pp.51.

²³ ECLI:EU:C:2009:474, C-168/08 - Hadadi Laszlo Hadadi (Hadady) v Csilla Marta Mesko.

Non-discrimination and citizenship of the Union are upgraded as superior EU principles.²⁴ MPR clearly indicates that whenever nationality is used as a factor in the regulation, in event of multiple/double, issue falls out of the scope of the MPR."Where this Regulation refers to nationality as a connecting factor, the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, international Conventions, in full observance of the general principles of the Union. This consideration should have no effect on the validity of a choice of law made in accordance with this Regulation."²⁵ National interpretation is however under the scrutiny of CJEU rulings, which abolish exclusivity of nationality.²⁶ Still, old principle of exclusivity of domestic nationality has been retained with Article 3 Para 1 of the Croatian PIL Act of 2017. Hence, if a multiple dual national addresses a Croatian court, pursuant to national PIL Act the mere fact of Croatian nationality is sufficient for the court to ground its jurisdiction. Having in mind the CJEU case law, such reasoning could not be automatically accepted. Issue could normally be triggered if in a situation described above, respondent objects jurisdiction of Croatian courts, since Croatian nationality is truly not an effective one.

In a scenario the matrimonial property, division raises in connection to a successions procedure, MPR aims to achieve a concentration of jurisdiction with Article 4. Combined application of SR and MPR might target that effect, but it may be hindered at the national law level. Application of the national rules may lead to partial concentration, if under domestic system of local jurisdiction these procedures may not be joined. Such an example may be found in Croatia, since under domestic system the succession is handled by the notary and matrimonial property by the court. Consequently, only partial concentration would be achieved, as both cases would be handled in Croatia, but before different bodies.

It should be kept in mind that the expected coordination of jurisdiction in regard to succession and the matrimonial property regime will not be achieved in full, if criteria for establishing jurisdiction other than Article 4 of the SR apply. Namely, if Articles 5 or 6 of the SR, which allow for party autonomy to choose the applicable law in a succession case applied, the issue whether the interests of the heirs or the surviving spouse prevail may arise.

²⁴ Article 21 (ex Article 18 TEC) TFEU.

²⁵ MPR, Recital 50.

²⁶ ECLI:EU:C:2003:539, C-148/02 - Carlos Garcia Avello v Belgian State.

A scenario is possible in which the deceased who lived with his family in Germany during his lifetime had chosen Croatian law as the law of his/her nationality as applicable law in agreement with his/her spouse, expecting that Croatian courts will have jurisdiction to decide on both succession and matrimonial property. The surviving spouse would in such a case be in agreement with this solution in regard to jurisdiction. However, due to the disagreement of children as heirs (under Article 5 SR) in regard to prorogation of jurisdiction, German court as the court of the last habitual residence of the deceased could actually decide in the matter. Also, a vice versa situation could also occur and children, unlike the surviving spouse, could be interested in the jurisdiction of Croatian courts. The reasons of the lack of agreement between the parties on jurisdiction of the court of a certain Member State might differ. In most cases they will be connected to the wish of the parties for the court of their habitual residence to decide in the matter for reasons of practicality or because they wish that the law which best suits their interests to apply. If parties are unable to agree on the prorogation, any of the parties under Article 6 Para 1 SR may request the court to decline jurisdiction if he finds that the court of the Member State of the nationality of the deceased would be better suited to decide in the matter. However, this provision does not guarantee such an outcome in all cases, since the court's exercise of discretion is usually connected to the examination of the practical circumstances of the case, which would confirm that the court of the nationality is better placed to hear the case (for example, the immovable property is situated in that Member State).²⁷

Scholars were right to criticize this solution for not respecting or giving priority to the interests of the surviving spouse regarding the choice of the court of the Member State which will decide on succession and matrimonial property. In this sense, it was argued that it would have been reasonable if the possibility for the surviving spouse to explicitly agree that the court first seised in regard to succession also decides on the matrimonial property under Article 4 MPR was provided.²⁸

²⁷ P. PORETTI, Odlučivanje o imovinskimodnosimabračnihdrugova, cit., p. 459.

²⁸ P. PORETTI, *Odlučivanje o imovinskimodnosimabračnihdrugova*, cit., p. 459.; J. GREY and P. Q. REDONDO, cit., p. 11.

Subsidiary jurisdiction provided under Article 10 SR can also be problematic as criteria for establishing jurisdiction. On the one hand, the interests of the surviving spouse are not necessarily protected under Article 10 SR. On the other hand, in cases under Article 10/2 SR courts or notaries in different Member States can decide, each over the property situated in that Member State.

In a hypothetical case under Article 10/1 SR if spouses had habitual residence in Bosnia and Herzegovina, jurisdiction of Croatian court as the court of the Member State of the nationality or the deceased will not necessarily agree with the interests of the surviving spouse (especially if the difficulties in regard to the recognition and enforcement of the decision in Bosnia and Herzegovina are taken into account), but under Article 4 MPR, it can not be avoided. Even more difficulties and uncertainty arises in connection to the application of Article 10/2 SR which provides that where no Member State has jurisdiction under 10/1 SR, courts of the Member State in which assets are located shall never the less have jurisdiction to rule on those assets, as opposed to the succession as a whole. In a hypothetical case of a deceased with the last habitual residence in Serbia, who shared property situated indifferent Member State with her husband (Croatia, Italy, Austria), this might resultin the jurisdiction of courts of different Member States in which the property issituated to decide on succession and matrimonial property. The husband as the surviving spouse and children as heirs will have to seize courts of different Member States in order to resolve the matter. This goes completely agains the idea of enabling (one) courts eised with succession to have his jurisdiction extended to related matrimonial regime proceedings and to deal with all aspects of the situation at hand.²⁹

In regard to the coordination of the law applicable to the succession and matrimonial property a scenario of a couple living in Croatia who made a choice of Croatian law as the law applicable to the matrimonial property, but later moved to Italy where one of the spouses dies, comes to mind. In such a case, according to the rules of the SR, the court of the last habitual residence will hear the case and apply Italian law to succession and Croatian law to

²⁹ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2016) 106 final, 6.

the matrimonial property-related issues. Obviously, the desired coordination of the applicable law can not be fully achieved here.

As to the criteria in Article 22/1 MPR, the fact that the law of a Member State of nationality of either spouse or future spouse at the time the agreement is concluded is problematic because only one nationality of the spouse is preferred. Namely, unlike the SR which enables the party with multiple nationalities to choose as applicable the law of either of the Member States (Article 22/1 SR), MPR limits the choice to the law of the Member State of nationality of either spouse or future spouse at the time the agreement is concluded (Article 22/1b MPR). The criticism in the legal theory relies on the fact that this solutions are contrary to the case law of the CJEU³⁰. ³¹

Additional issue may arise in relation to matrimonial agreements, as Croatian Family Act of 2015 enables spouses to enter a matrimonial contract, but it prohibits any choice of foreign law on matrimonial property matters.³²This provision pertaining to cross-border issues has been inserted to Family Act, but its effects are rather limited. In general theory cross-border issues are subject to *lex specialis* – PIL Act. Even the old PIL Act of 1982 allowed certain autonomy in respect of the applicable law (Article 37). PIL Act of 2017 clearly directs towards the superior legal source, a MPR, where no such general restriction stands (Article 22).

Another problematic situation may appear if same-sex couple concluded the marriage abroad and wishes to rely on this fact in the property-related proceedings before the Croatian courts. This is in particular relevant as Croatian Constitution explicitly finds a marriage as a union of opposite sexes. Hence, in a scenario presented above the courts will find themselves in the dilemma if a same sex marriage effects are contrary to public policy embodied in a Constitution. That dilemma should clearly be set aside, as EU principles prohibit discrimination based on sexual orientation. PIL Act of 2017 provides for a further guidance

³⁰ CJEU C-148/02 - Garcia Avello, ECLI:EU:C:2003:539; C-168/08 - Hadadi, ECLI:EU:C:2009:474.

³¹ W. PINTENS, Applicable law in the Proposal for Regulation on matrimonial property law, in Successions and matrimonial property regimesin Europe: notarial solutions, Société de législation comparée, Paris, 2014, 85-90, (87); D. MARTINY, Die Kommissionsvorschläge, IPRax, 20 Die Kommissionsvorschläge für das international Ehegüterrechtsowie für das internationale Güterrechteingetragener Partnerschaften', IPRax2011, (449).

³² Family Act (Obiteljskizakon), Official Gazette, No 103/15. Article 42.

as it states that a registered life union of persons of same sex, celebrated abroad, is recognized in Croatia as a life partnership.³³ Still, the matter of applicability of the two property regulations remains (2016/1103; 2016/1104). Scholars advocate that likely the courts will not be able to apply the Matrimonial Property Regulation, but that they should characterise such marriage as a registered partnership for the purpose of application of the Registered Partnership Property Regulation.³⁴

3. Conclusion

The coordinated approach in the application of the MPR along with the existing instruments of European PIL aimed at simplification of procedures will obviously bring certain challenges to the courts dealing with matrimonial property in divorce proceedings, legal separation and annulment of the marriage or a succession case. Efforts will have to made in order to dismantle the obstacles arising from national procedural solutions, such as differing rules on competence of different authorities in divorce, succession and propertyrelated proceedings, type of proceedings (contentious, non-contentious) and manner in which the proceedings are initiated (ex officio, at the request of the parties; prior or after mandatory counseling or mediation between spouses). Additionaly, competent authorities will face the exercise of reconciling and accommodating solutions provided under the MPR and national substantive (family and succession law). Tensions may also arise from the interpretation of national PIL law, in regard to certain basic principles, such as principle of exclusivity of domestic nationality under Article 3 para 1 of the Croatian PIL Act of 2017. While the coordinated application of Regulations in divorce and property-related proceedings may result in the different courts deciding on different aspects of the same matter, with the possibility of issuing conflicting judgments, in succession and propertyrelated procedings it could lead to the same court applying different substantive laws in regard to succession and matrimonial property. This fragmentation is obviously not desiredby the European legislator and will probably have to be dealt with in future by the

³³ PIL Act, Article 39.

³⁴ M. BUKOVAC PUVAČA, I. KUNDA, S. WINKLER and D. VRBLJANAC, *Croatia* in L. RUGGERI, I KUNDA and S. WINKLER, (eds.) *Family Property and Successionin EU Member States National Reports on the Collected Dana*. University of Rijeka, Faculty of Law, Rijeka. p. 77 ff.

CJEU. Additional complexity will arise from the fact that MPR is an enhanced cooperation Regulation only and certain Member States will be third countries in the context of the matrimonial property regime. In this sense, it seems that there is a rather challenging task upon the competent authorities to ensure that the complexity inherent to the analysed coordination of the European PIL instruments does not hinder the EU citizens in exercising the rights the EU confers on them.

Abstract: Growing number of cross-border family disputes reopens/triggers/ the debate on the impact of the civil justice on European citizen's everyday life. Although EU is providing for a legal framework, its complexity is undeniable. Lack of consensus among Member States leads to regulations of enhanced cooperation, contributing to multispeed Europe. Interplay of universal and regional level of harmonization, as well as its interplay with national procedural and substantive rules, comes to forefront here. In the end, atomized approach of European Union civil justice results with sector specific regulations of a narrow scope of application. In the platform of matrimonial property regime, atomized approach results with a mosaic of legal regimes to be applied in one single scenario. Being a successor in the legislative circle of EU cross-border family law, Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter: MPR)³⁵intends to find a proper balance with the instruments already at stage

Diversity of jurisdictional grounds for a divorce, maintenance obligations, and matters concerning property consequences of marriage and registered partnerships may result with proceedings in multiple Member States, for interrelated family matters. Jurisdictional rules of the MPR aim to achieve a concentration in that respect. These aims however may be hindered by national procedural rules, as out hypothetical cases will illustrate.

³⁵ OJ L 183, 8.7.2016, p. 1–29. Recitals 32-36.

Hence, viewed from the eyes of international family, one has to doubt if the transnational legislation is a clear framework for international couples? Along with it, are parties with cross-border family life able to identify legal issues they might face in divorce, custody, maintenance, division of matrimonial property claims; is there predictability and legal certainty for international couples facing interrelated issues?

The coordinated approach in the application of the MPR along with the existing instruments of European PIL aimed at simplification of procedures will obviously bring certain challenges to the courts dealing with matrimonial property in divorce proceedings, legal separation and annulment of the marriage or a succession case. Efforts will have to made in order to dismantle the obstacles, as will be shown in the paper.

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