

THE LAW APPLICABLE TO DIVORCE AND LEGAL SEPARATION UNDER REGULATION (EU) NO. 1259/2010 OF 20 DECEMBER 2010*

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Riassunto: Il Regolamento (UE) n. 1259/2010 del 20 dicembre 2010, spesso designato come regolamento «Roma III» nel dibattito politico e fra gli studiosi, reca una disciplina uniforme dei conflitti di leggi in materia di divorzio e separazione personale. Esso rappresenta il risultato della prima «cooperazione rafforzata» nella storia dell'Unione europea e troverà applicazione in quattordici Stati membri a partire dal 21 giugno 2012. Dopo aver ripercorso la vicenda che ha condotto all'adozione del Regolamento, l'articolo ne mette in luce le caratteristiche generali analizzando le scelte di fondo compiute a tale riguardo dagli autori del nuovo testo. L'articolo prosegue analizzando le varie disposizioni dettate dal Regolamento, cominciando da quelle che ne definiscono la sfera applicativa. Vengono quindi esaminate le norme che consentono ai coniugi di accordarsi in ordine alla legge applicabile al divorzio e alla separazione personale —una delle innovazioni salienti della nuova disciplina— nonché quelle che presiedono all'identificazione di detta legge in mancanza di scelta. Sono poi analizzati i limiti al funzionamento delle predette norme di conflitto. Tali limiti rinviano in vario modo a considerazioni di ordine materiale e riflettono, ancor più di altre soluzioni del Regolamento, l'esistenza di marcate divergenze fra un ordinamento e l'altro quanto alla disciplina sostanziale della crisi matrimoniale. Una valutazione critica del Regolamento viene tentata nelle pagine finali del contributo. Da un lato, pur ammettendosi che la logica della «integrazione differenziata» rappresenti una minaccia all'unità e alla coerenza interna della normativa dell'Unione nel campo della cooperazione giudiziaria in materia civile, si osserva che tale minaccia può essere almeno in parte contrastata ricorrendo ai meccanismi istituzionali concepiti per accrescer la «qualità» applicativa del diritto dell'Unione europea, come la competenza in via pregiudiziale della Corte di giustizia o il contributo suscettibile di essere dato dalla Rete giudiziaria europea in materia civile e commerciale alla nascita e alla diffusione di una «cultura» della cooperazione fra gli Stati membri. Dall'altro, viene rilevato come alcune delle soluzioni accolte dal Regolamento non appaiano del tutto persuasive sul piano tecnico e che, pertanto, a tempo debito, andrebbe considerata l'opportunità di riconsiderare alcune delle nuove disposizioni, anche alla luce dell'esperienza applicativa che si sarà andata nel frattempo maturando in seno agli Stati membri partecipanti.

Parole chiave: divorzio, separazione personale, norme di conflitto, diritto internazionale privato dell'Unione europea, cooperazione rafforzata, promozione dell'integrazione sociale, tutela dell'identità culturale, scelta di legge ad opera delle parti, *lex patriae*, residenza abituale, ordine pubblico.

Abstract: Regulation (EU) No. 1259/2010 of 20 December 2010, often referred to in the political and scholarly debate as the «Rome III» Regulation, lays down uniform conflict-of-laws rules on divorce and legal separation. It represents the outcome of the first «enhanced cooperation» in the history of the European Union and will apply in fourteen Member States from 21 June 2012. After tracing the path that led to its adoption, the paper highlights the general features of the new piece of legislation. It goes on to

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examine the different provisions of the new instrument, starting from those defining its scope of application. The rules allowing the spouses to agree on the law applicable to divorce and legal separation, one of the salient features of the new instrument, and the rules applicable in the absence of choice, are then illustrated and commented. The article further examines the limitations affecting the functioning of these rules due to substantive reasons, thus reflecting the significant differences existing in the area of family law between national legal systems. Finally, the paper provides a critical assessment of the new piece of legislation. On one side, while conceding that «differentiated integration» poses a threat to the unity and the internal consistency of the body of rules governing judicial cooperation in Europe, it submits that such threat may be countered to some extent through existing institutional devices designed to enhance the «quality» of the application of European Union law, such as the competence of the Court of Justice to decide references for preliminary rulings, or the work that might be done by the Judicial Network in Civil and Commercial Matters to promote a «culture» of cooperation among Member States. On the other side, it observes that, regrettably, some of the technical solutions adopted by the drafters of the Regulation are not entirely convincing and that the possibility should be considered, in due course, of amending the relevant provisions in light of the practical experience that will be developed over the next few years within the participating Member States.

Key words: divorce, legal separation, conflict-of-laws, private international law of the European Union, enhanced cooperation, integration, cultural identity, agreements as to the choice of law, *lex patriae*, habitual residence, public policy.

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I. The path to Regulation No. 1259/2010, from the Green Paper to enhanced cooperation

1. Regulation (EU) No. 1259/2010 of 20 December 2010¹ lays down a comprehensive set of rules determining the law applicable to divorce and legal separation in situations featuring a foreign element. It will apply in full from 21 June 2012².

¹ O.J. L 343 of 29 December 2010, p. 10 *et seq.*

² See further *infra*, § 37.

The new instrument —often referred to as the «Rome III» Regulation, thus suggesting a close relationship with Regulation No. 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations («Rome I»)³ and Regulation No. 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations («Rome II»)⁴— represents the most recent addition to the body of rules enacted by the European Union in the field of «judicial cooperation in civil matters» (Article 81 of the Treaty on the Functioning of the European Union; hereinafter, TFEU)⁵. It will operate alongside Regulation (EC) No. 2201/2003 of 27 November 2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (hereinafter, the «Brussels II bis» Regulation)⁶, somehow complementing the latter's provisions.

The unification of the rules on the law applicable to divorce and legal separation and the unification of the rules governing jurisdiction and the recognition and enforcement of judgments in this area pursue, in the end, a common goal, that of ensuring a high degree of legal certainty as regards transnational family relationships in Europe. As a matter of fact, the combined operation of Regulation No. 2201/2003 and Regulation No. 1259/2010 should allow the spouses to: (i) determine on objective grounds the Member State where divorce or separation proceedings may be instituted; (ii) identify in advance the substantive law governing the merits (and reasonably predict, on that basis, the outcome thereof); (iii) rely on a European-wide recognition of relevant decisions.

At the same time, the introduction of a unified conflict-of-laws regime for divorce and legal separation is designed to prevent the risk that the rules on jurisdiction of the «Brussels II bis» Regulation might *de facto* encourage an abusive recourse to «forum shopping», *i.e.* the practice whereby the party who institutes the proceedings chooses where to bring the action based on which court is likely to provide the most favourable judgment⁷. There are actually circumstances where Regulation No. 2201/2003 grants the spouses the option of bringing matrimonial proceedings in two or more Member States⁸. Moreover, Article 19 of the latter Regulation provides that, where proceedings relating to divorce or legal separation between the same parties are brought before courts of different Member States, the court second seized shall stay its proceedings until such time as the jurisdiction of the court first seized is established⁹. This may result in a «rush to the courthouse» by each spouse, with a view to pre-empting a «parallel» initiative on the part of the other. To the extent that uniform rules are resorted to in different Member States to decide conflict-of-laws issues, forum shopping is practically less «appealing»: instituting proceedings in one Member State instead of another becomes immaterial, at least in that respect¹⁰.

³ O.J. L 177 of 4 July 2008, p. 6 *et seq.*

⁴ O.J. L 199 of 31 July 2007, p. 40 *et seq.* As a matter of fact, like the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, all three regulations lay down uniform conflict-of-laws provisions for European States. It is nevertheless worth mentioning that, contrary to the «Rome I» and «Rome II» regulations, where the reference to «Rome» is part of the formal denomination of the act, Regulation No. 1259/2010 is not *officially* regarded as being part of the «Rome» series of regulations. In light of this, the expression «Rome III» will not be used in this paper.

⁵ See, recently, on the development of this body of rules, S. BARIATTI, *Cases and Materials on EU Private International Law*, Oxford, Hart Publishing, 2011 p. 1 *et seq.*

⁶ O.J. L 338 of 23 December 2003, p. 1 *et seq.*

⁷ See however A. BONOMI, «Il diritto applicabile alla separazione e al divorzio nella recente proposta di regolamento comunitario», in S. BARIATTI / C. RICCI (eds.), *Lo scioglimento del matrimonio nei regolamenti europei: da Bruxelles II a Roma III*, Padova, Cedam, 2007, p. 92 *et seq.*, emphasising that in the framework of the «Brussels II bis» Regulation, forum shopping responds, to a certain extent, to a substantive objective pursued by the European lawmakers, *i.e.* avoiding the risk that the significant differences between the Member States in the field of family law might represent an obstacle to divorce in transnational cases.

⁸ See further on this subject C. GONZÁLEZ BEILFUSS, «Jurisdiction Rules in Matrimonial Matters under Regulation 'Brussels II bis'», in H. FULCHIRON / C. NOURISSAT (eds.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris, Dalloz, 2005, p. 53 *ss.*

⁹ Cf. Recital 9 of the Regulation.

¹⁰ Of course, forum shopping may still be practically relevant as long as *other* differences exist as between Member States. These differences may relate both to the way in which proceedings are «managed» by national authorities (the procedural aspects of divorce and legal separation are governed by the law of the forum, and no harmonization exists at the European level; besides, the speed and the efficiency of these proceedings may vary considerably from one country to the other), and —to a certain extent— by the way in which divorce and legal separation are looked at by local substantive rules. As far as the latter aspect is concerned, it is worth considering that the functioning of unified conflict-of-laws rules, too, may be subject to limitations —under the public policy exception, for example— aimed at safeguarding certain substantive policies *of the forum*.

2. Despite the strong connection with the existing rules governing jurisdiction and the recognition of judgments in matrimonial matters, the path leading to Regulation No. 1259/2010 has proved to be a particularly difficult and long one¹¹.

In July 2006, following the publication of a Green Paper¹², the Commission adopted a Proposal for a regulation aimed to amend the «Brussels II *bis*» Regulation as regards jurisdiction and to introduce uniform rules on the law applicable to divorce and legal separation¹³. Unanimity was prescribed for the adoption of the proposed act. In 2008, after a heated debate within the European institutions and among scholars¹⁴, the Council concluded that, due to the objections raised by some Member States¹⁵, and notwithstanding the efforts of the Commission and the Presidencies to devise possible solutions, «insurmountable difficulties existed», making a decision requiring unanimity impossible to achieve, «now and in the foreseeable future»¹⁶.

By acknowledging the *impasse*, the Council in fact paved the way to «enhanced cooperation», *i.e.* the special procedure whereby —as a last resort, when it is established that the objectives of cooperation «cannot be attained within a reasonable period by the Union as a whole»— a certain number of Member States (at least nine of them) may be authorised to make use of the institutions of the Union and exercise the non-exclusive competences thereof in order to adopt measures that will be binding only upon themselves, the remaining Member States being entitled to join in at any moment, if they wish (Article 20 of the Treaty on European Union; hereinafter, TEU).

In July 2010, by an unprecedented decision (enhanced cooperation had never been put in practice before), the Council authorised Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain (hereinafter, the participating States) to establish between themselves an enhanced cooperation in the area of the law applicable to divorce and legal separation¹⁷. Five months later, the fourteen participating Member States implemented the Council's authorisation by adopting Regulation No. 1259/2010¹⁸.

II. Setting the context: the diversity of substantive and conflict-of-laws rules regarding divorce and legal separation in Europe

3. Family law deals with sensitive issues. The answers these issues are given on the substantive law level vary considerably from one country to the other, depending on a combination of social, political, historical and sometimes religious factors.

Sharp differences exist within the European Union, too. Some core values —including the right to marry and found a family (Article 12 of the European Convention for the Protection of Human Rights

¹¹ Regarding the initiatives that have eventually resulted in the adoption Regulation, see generally, and for further references, K. BOELE-WOELKI, «To Be, Or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union», *Victoria University of Wellington Law Review*, 2008, p. 780 *et seq.*

¹² COM (2005) 82 final, of 14 March 2005.

¹³ Proposal for a Regulation amending Regulation (EC) No. 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters; COM (2006) 399 final, of 17 July 2006.

¹⁴ See *ex pluribus* A. FIORINI, «Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?», *International Journal of Law, Policy and the Family*, 2008, p. 178 *et seq.*; A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, «La ley aplicable al divorcio en Europa: el futuro reglamento Roma III», *CDT*, 2009, p. 36 *et seq.*; O. LOPES PEGNA, «La proposta di cooperazione rafforzata sulla legge applicabile a separazione e divorzio: profili problematici», *CDT*, 2010, p. 135 *et seq.*

¹⁵ Some Member States even questioned the competence of the European Union to legislate on the matter. A detailed account of the reasons behind the failure to reach unanimity on the Regulation is provided by N.A. BAARMSMA, «European Choice of Law on Divorce (Rome III): Where Did it Go Wrong?», *Nederlands Internationaal Privaatrecht*, 2009, p. 9 *et seq.*

¹⁶ Council meeting held in Luxembourg on 5 and 6 June 2008; doc. 9985/08, available at <http://register.consilium.europa.eu>.

¹⁷ Decision 2010/405/EU of 12 July 2010, O.J. L 189 of 22 July 2010, p. 12 *et seq.*

¹⁸ Regarding the institutional aspects of the Regulation, see S. PEERS, «Divorce, European Style: The First Authorization of Enhanced Cooperation», *European Constitutional Law Review*, 2010, 339 *et seq.*; I. OTTAVIANO, «La prima cooperazione rafforzata dell'Unione europea: una disciplina comune in materia di legge applicabile alla separazioni e divorzi transnazionali», *Diritto dell'Unione europea*, 2011, p. 113 *et seq.*, especially at p. 125 *et seq.*; F. POCAR, «Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato europeo», *RDIPP*, 2011, p. 297 *et seq.*

and Fundamental Freedoms; hereinafter, ECHR; Article 9 of the Charter of Fundamental Rights of the European Union; hereinafter, CFRUE) and the equality of the spouses¹⁹— are common to all Member States. Yet, conflicting policies, such as the stability of family ties and the self-determination of the individual, are weighed one against the other in each country on the background of local traditions and prevailing social models, thus resulting in significant differences among national legislations.

This is particularly true for the rules relating to the breakdown of marriage. While respect for private and family life is guaranteed in all Member States under Article 8 of the ECHR and under Article 7 of the CFRUE, divorce law is traditionally regarded as an area in which European countries enjoy a wide margin of appreciation. In this respect, the European Court of Human Rights, after having conceded that «protection of private or family life may sometimes necessitate means whereby spouses can be relieved from the duty to live together», held in *Johnston v. Ireland*, back in 1986, that Article 8 of the ECHR cannot be regarded as implying an obligation on the part of contracting States to introduce measures permitting divorce and re-marriage²⁰.

Nowadays, divorce is allowed in all European countries. However, the rules establishing the possible grounds therefor (and other practically important aspects, such as prior separation requirements) tell of the different ways in which the institution is still dealt with across the continent. Some States²¹, like Finland and Sweden, do not require the spouses to give any reasons for having their marriage dissolved, and more generally ignore separation as an independent legal institution. Others follow a definitely stricter standard. Under Maltese law, for example, where the institution of divorce has been ignored until very recently, the dissolution of marriage is allowed subject to a four-year separation, provided *inter alia* that the court is satisfied that there is no reasonable prospect of reconciliation of the spouses²².

4. The rules of private international law regarding family relationships display a similar lack of uniformity. While it is frequently acknowledged that openness and intercultural dialogue play an important role among the strategies aimed at addressing the issues posed by the increasing mobility of individuals, national legal systems retain different views as to the way in which a fair balance should be struck between the promotion of cultural diversity and the safeguard of local traditional values.

Besides, in coping with this tension, account must be taken of the fact that the actual enjoyment of the fundamental rights of the individuals in the field of family law, largely relies on the existence of appropriate private international law rules. Thus, to a certain extent, safeguarding the expectations of the concerned individuals, protecting the weaker party and preventing the risk that «limping» situations may arise in this area, do not only obey a logic of «convenience» but rather correspond to a goal that States are *bound* to pursue in order to fully conform with the relevant international (and constitutional) provisions on human rights²³.

5. As far as divorce and legal separation are concerned, a significant number of States, while displaying a relatively liberal attitude towards the recognition of foreign decrees, tend to avoid, or to reduce to a minimum, the application of a law other than their own.

¹⁹ See further *infra*, § 22.

²⁰ European Court of Human Rights, judgment of 18 December 1986, *Johnston and others v. Ireland*; the text is available through the *Hudoc* database at <http://echr.coe.int>. See generally on this subject, *ex pluribus*, M. ANTOKOLSKAIA, «The 'Better Law' Approach and the Harmonisation of Family Law», in K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerp, Intersentia, 2003, p. 174 *et seq.*

²¹ The salient features of both the substantive and the conflict-of-laws provisions in force in the Member States of the European Union are illustrated in the Commission Staff Working Document accompanying the Commission's Proposal of 2006 aimed at amending the «Brussels II bis» regulation and introducing rules on the law applicable to divorce (hereinafter, Working Document); SEC (2006) 949. Unless otherwise specified, information regarding the mentioned domestic rules are taken from this Working Document.

²² *Civil Code (Amendment) Act*, 2011, in *Government Gazette of Malta* No. 18.784 of 29 July 2011, available at <http://www.doi.gov.mt>. The amended text shall be effective as of 1 October 2011.

²³ On this subject see, recently, P. KINSCH, «Recognition in the Forum of a Status Acquired Abroad. Private International Law Rules and European Human Rights Law», in K. BOELE-WOELKI / T. EINHORN / D. GIRSBERGER / S. SYMEONIDES (eds.), *Convergence and Divergence in Private International Law. Liber amicorum Kurt Siehr*, The Hague, Eleven International Publishing, p. 259 *et seq.*

In Europe, two opposed models may actually be detected as regards the applicability of foreign law in this field. In England, for example, divorce is subject, as a rule, to the *lex fori*, no matter whether the situation features a transnational element or is purely domestic in nature²⁴. Hence, instituting divorce proceedings in England automatically triggers the application of English law to the merits. A similar approach may be found, with some variations (and some exceptions), in Sweden, Finland, Ireland and Cyprus.

On the contrary, in other Member States, issues regarding the law applicable to divorce and legal separation are dealt with through bilateral conflict-of-laws rules, *i.e.* rules that, according to the circumstances, may designate a law other than the law of the forum.

Differences exist, however, among these Member States as regards the most appropriate connecting factor(s) to be used in this area. While many refer to the common nationality of the spouses as the primary factor for divorce and legal separation (Italy, Poland and Spain, for example, are among these countries), others prescribe, at least in the first place, the application of the law of the country where the spouses are domiciled or are habitually resident (Lithuania and Estonia). From a different perspective, the autonomy of the spouses as to the law applicable to their divorce or legal separation is allowed to play a role in some European countries (Germany, Belgium and the Netherlands), but none in the others.

In any case, the frequency with which divorce and legal separation are actually governed by a foreign law further depends on the availability, and the actual use, of devices—such as the public policy exception—capable of altering the operation of the provisions in question especially with a view to protecting the substantive policies of the forum.

In light of the foregoing, Regulation No. 1259/2010 may be regarded as an attempt to reconcile and renew the diverse traditions of the Member States as to the way divorce and legal separation should be dealt with when a foreign element is present.

III. Some general features of the conflict-of-laws rules laid down by the Regulation

6. Before we turn to examining the provisions laid down by the Regulation in some detail, a few *general* features of the new piece of legislation should be mentioned.

1. The Regulation is a piece of uniform law

7. The rules set forth in Regulation No. 1259/2010 are uniform rules. Uniformity should therefore be ensured in their application: uniform interpretation actually allows uniform rules to achieve their goals, while guaranteeing the equality of the rights and obligations arising therefrom for the individuals concerned²⁵.

The fact that the Regulation has been adopted in the framework of enhanced cooperation and that its rules do not bind the whole of the Member States, does not exclude that uniformity is needed in respect of the Regulation, and does not affect the means by which uniformity may be achieved. While it is true that under Article 20, paragraph 4, of the TEU, acts adopted in the framework of enhanced cooperation «shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union», the aim of enhanced cooperation is still to «further the objectives of the Union, protect its interests and reinforce its integration process» (Article 20, paragraph 1, second sentence).

The teaching of the Court of Justice of the European Union, as developed in respect of other normative instruments regarding judicial cooperation in civil matters (and in respect of the «conventional» predecessor thereof, the Brussels Convention of 27 September 1968 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters), shall therefore be regarded as equally relevant for the purpose of the new piece of legislation. In particular, the legal expressions employed in Regulation

²⁴ C.M.V. CLARKSON / J. HILL, *The Conflict of Laws*, 4th ed., Oxford, Oxford University Press, 2011, p. 428 *et seq.*

²⁵ Cf., *ex pluribus*, Court of Justice, judgment of 22 March 1983, *Martin Peters Bauunternehmung*, case 34/82, *EC Reports*, 1983, p. 987 *et seq.*, paragraph 9.

No. 1259/2010 should be treated as «autonomous» notions, and thus be interpreted independently from national legal systems.

In determining the scope and meaning of the said expressions, reference shall be made, as a rule, to the object and purpose of the Regulation and to the meaning ascribed to the corresponding expressions in other relevant instruments («inter-textual» interpretation)²⁶, be they rules belonging to the «secondary» legislation of the European Union (Regulation No. 2201/2003 shall be of particular importance in this respect)²⁷ or international conventions concluded by the Union itself (such as the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations; hereinafter, the Hague Protocol)²⁸.

8. In reality, Regulation No. 1259/2010 does not bring about *complete* uniformity within participating Member States as regards the rules governing conflict-of-laws issues in respect of divorce and legal separation. This lack of uniformity may be perceived from at least three different points of view.

In the first place, the Regulation does not (and actually could not, as we will see) prevent the participating Member States from applying, instead of the new rules, the rules provided for by the international conventions to which they were a party at the time when the Regulation was adopted (Article 19, paragraph 1)²⁹.

Secondly, the Regulation itself contemplates that some of its provisions may be supplemented by domestic rules. For example, under Article 7, paragraph 2, of the Regulation, the agreement of the spouses as to the law applicable to divorce and legal separation is subject to the additional formal requirements, if any, provided for by the law of the participating Member State where the spouses are habitually resident³⁰.

Thirdly, issues may arise in the application of the Regulation that are not (explicitly) dealt with by the latter. The situation, as we will see, may emerge for example whenever the public policy exception provided for by Article 12 of the Regulation prevents the application of the foreign law designated by the relevant conflict-of-laws provision, since the new piece of legislation does not specify which law should be applied instead³¹.

Generally speaking, whenever it appears that a gap in the uniform regime cannot be filled through interpretation or by analogy, *i.e.* from *within* the Regulation and/or European Union law at large, national courts should fall back on the law of the forum. They are allowed to do so as long as the domestic rules that are called upon to fill the gap do not compromise the «*effet utile*» of the Regulation, *i.e.* the latter's ability to attain its objectives³².

2. The Regulation only addresses conflict-of-laws issues

9. The purpose of Regulation No. 1259/2010 is to determine how conflict-of-laws issues must be decided. The Regulation does not purport to do more than that.

As a matter of fact, things could hardly be otherwise. On one side, in view of the competences attributed to the European Union, no measure may at present be adopted at a European level introducing *substantive* rules governing family relationships. On the other side, since Regulation No. 1259/2010 is an act adopted in the framework of enhanced cooperation, the rules provided therein must «comply with the Treaties and Union law» (Article 326 of the TFEU). This implies, *inter alia*, that the operation of the

²⁶ Concerning inter-textual interpretation, see recently, within the case law of the Court of Justice, the judgment of 15 March 2011, *Heiko Koelzsch*, case C-29/10, not yet published in the *EC Reports*, paragraph 33 *et seq.*

²⁷ See Recital 10.

²⁸ The text and status of the Protocol are available at <http://www.hcch.net>. The Protocol, by the way, is applicable in the Member States of the European Union (with the exception of the United Kingdom); see Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, O.J. L 331 of 16 December 2009, p. 17 *et seq.*

²⁹ See further *infra*, § 41.

³⁰ See further *infra*, § 57.

³¹ See further *infra*, § 83.

³² P. FRANZINA, «Il coordinamento fra lex fori e norme uniformi nell'accertamento del titolo di giurisdizione secondo il regolamento (CE) n. 44/2001», *RDI*, 2004, p. 348 *et seq.*

«Brussels II *bis*» Regulation cannot be affected by the new rules. For the sake of clarity, this is stated explicitly in Article 2 of Regulation No. 1259/2010³³.

3. The Regulation is only concerned with the dissolution or loosening of matrimonial ties

10. The breakdown of marriage affects a number of situations of either a personal or economic nature³⁴. Under the relevant substantive rules, divorce and legal separation generally have a bearing, *inter alia*, on the name of the spouses, their matrimonial property regime and the rights and duties relating to the person or the property of their children.

Regulation No. 1259/2010 does not purport to deal with these other matters: its scope is confined to the dissolution or loosening of matrimonial ties. Issues upon which divorce and legal separation may be premised, such as the existence of a valid marriage, and issues whose decision logically depends upon divorce or legal separation being granted, such as the right of one spouse to keep using the surname of the other after the dissolution of marriage, fall outside the scope of the new piece of legislation³⁵.

The decision not to extend the scope of the new rules so as to cover situations *connected* to the dissolution or loosening of matrimonial ties is apparently grounded on practical considerations.

On one side, some of the issues at hand —namely maintenance and parental responsibility— are the object of uniform rules, *i.e.* the rules respectively set forth in the Hague Protocol, and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, presently in force for the majority of the participating Member States³⁶.

On the other side, reaching a sufficiently wide consensus as to the possible design of rules regarding the remaining connected situations —presently governed by domestic rules or by international conventions in force for a minority of States³⁷— would have proved to be extremely difficult, both from a technical and a political point of view.

The question nevertheless remains as to whether, and how, a proper coordination may be ensured between the «core» issues of divorce and legal separation, and the «neighbouring» issues we have mentioned. Overlooking this need for «trans-sectorial» coordination may in fact result in a loss of legal certainty and bring about practical difficulties.

In its present stage of development, European private international law displays a significant degree of fragmentation and is far from being complete. The issue of coordination is therefore a particularly delicate one.

An «inter-textual» interpretation of the new rules may represent a solution to some of the said shortcomings³⁸. It should help avoiding, in particular, the risk that the scope of application of Regulation

³³ By the way, Regulation No. 2201/2003, too, states in a way that its operation is unaffected by the rules on the law applicable to divorce and legal separation. While, generally speaking, the recognition of judgments relating to matrimonial matters does not depend on the law applied to the merits of the proceedings, as may be designated by the relevant conflict-of-laws provisions in force in the country of origin, Article 25 of the «Brussels II *bis*» Regulation is explicit in saying that recognition «may not be refused because the law of the Member State in which such recognition is sought would not allow divorce [or] legal separation ... on the same facts».

³⁴ According to A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, «La ley aplicable al divorcio en Europa: el futuro reglamento Roma III», *CDT*, 2009, p. 40, «el divorcio comporta la disolución del vínculo matrimonial, pero produce una explosión paralela de efectos jurídicos en otras esferas jurídicas».

³⁵ See further *infra*, § 35 *et seq.*

³⁶ Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (text and status available at <http://www.hcch.net>). See also Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify the Convention, or accede to it, «in the interests» of the European Community, O.J. L 151 of 11 June 2008, p. 36 *et seq.*

³⁷ See, for instance, the Munich Convention of 5 September 1980 on the Law Applicable to Surnames and Forenames (text and status available at <http://www.ciecl.org>).

³⁸ See generally on this topic S. FRANCO, «Les champs d'application (matériel et spatial) dans les textes de référence. De la cohérence terminologique à la cohérence systémique. En passant par la théorie générale...», in M. FALLON / P. LAGARDE / S. POILLOT-PERUZZETTO (eds.), *La matière civile et commerciale, socle d'un code européen de droit international privé?*, Paris, Dalloz, 2009, p. 35 *et seq.*

No. 1259/2010 may overlap the scope of application of other European instruments regarding judicial cooperation in civil matters, or *vice versa*.

Apart from this, coordination may be difficult to achieve. As we will see, the drafters of the Regulation have apparently taken this problem into some account in allowing the spouses to choose the law applicable to divorce and legal separation³⁹, and in selecting the appropriate connecting factors to be employed in the absence of choice. In the latter respect, it is worth noting that, since habitual residence plays a key role both in Regulation No. 1259/2010 and in the legal instruments, either enacted or currently under elaboration, laying down uniform conflict-of-laws rules in family matters⁴⁰, it will not be unlikely for the different facets of one and the same relationship to be governed by one the same law⁴¹.

4. The Regulation is based on bilateral conflict-of-laws rules

11. The methodological opposition we have mentioned before, between the approach based on the systematic application of the *lex fori* and the approach involving the use of bilateral conflict-of-laws rules, has been resolved, in the Regulation, in favour of the latter.

To understand the reasons behind this choice, both options should be briefly examined and compared, so as to assess their respective ability to: (i) safeguard the substantive policies of the forum in the field of divorce and legal separation; (ii) ensure an efficient administration of justice in transnational divorce cases; (iii) coordinate the substantive and procedural dimensions of divorce and legal separation; (iv) take properly account of the coexistence, within an area of supranational integration, of marked difference among national legislations as regards family law; (v) promote the mobility of individuals across borders.

12 (i) The *lex fori* approach clearly allows, by its very nature, a thorough respect of the substantive policies of the forum. This may be seen as particularly important in an area such as family law, where fundamental and deeply rooted values are often at stake and national legal systems —as we have seen— tend to retain a marked identity.

For their part, however, bilateral conflict-of-laws rules, while possibly pursuing a wider range of policies, are not incapable of safeguarding, at least to a certain extent, the substantive values of the forum.

Firstly, within a bilateral conflict-of-laws regime the relevant rules may be designed with a view to ensuring that the application of the *lex fori* represents the most frequent outcome of their application. Apparently, this is what happened with Regulation No. 1259/2010. By deciding that the habitual residence of the spouses should play a primary role as regards both the *electio iuris* of the spouses (Article 5) and the designation of the applicable law absent a choice of the parties (Article 8), the drafters of the Regulation had apparently this objective, among others, in mind. As a matter of fact, since the «Brussels II bis» Regulation largely relies on habitual residence as a head of jurisdiction⁴², the combined operation of the two instruments should, in a significant number of cases, result in the court of a participating

³⁹ See *infra*, § 46.

⁴⁰ See, *inter alia*: Article 3 of the Hague Protocol; Article 16 of the Commission's Proposal for a Regulation 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, of 14 October 2009, COM (2009) 154 final (hereinafter, Proposal on Successions); Article 17 of the Commission's Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes of 16 March 2011, COM (2011) 126 final (hereinafter, Proposal on Matrimonial Property Regimes).

⁴¹ Of course, the mere fact that habitual resident is employed by the different legal instruments at stake does not necessarily result in the same law being applied to the different situations they are respectively concerned with. Much depends, actually, on the design of the provisions in question, including, for example, the relevant moment under each provision for the purpose of determining habitual residence.

⁴² Under Article 3, paragraph 1, of the «Brussels II bis» Regulation, in matters relating to divorce and legal separation, jurisdiction shall lie, *inter alia*, with the courts of the Member State in whose territory the spouses are habitually resident, or the spouses were last habitually resident, insofar as one of them still resides there, or the respondent is habitually resident, or, in the event of a joint application, either of the spouses is habitually resident, or the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there.

Member State being allowed to apply its own law as to the substance of the dispute. Regulation No. 1259/2010 further reinforces the chances of the *lex fori* being applied within divorce and legal separation proceedings by explicitly allowing the spouses to choose that law, and by envisaging the application of the law of the forum under the «objective» conflict-of-laws rule of Article 8.

Secondly, conflict-of-laws rules based on geographical connecting factors may embody (or be supplemented by) special devices designed to secure that a certain substantive outcome may be achieved *under the law of the forum*, whenever such result is precluded under the designated foreign law. Article 10 of Regulation No. 1259/2010, as we will see, employs precisely this technique, stating that, where the law applicable pursuant to Article 5 or Article 8 «makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex», the *lex fori* shall apply.

Finally, the foreign law designated through bilateral conflict-of-laws rules shall not apply whenever such application would be incompatible with the public policy (*ordre public*) of the forum. Regulation No. 1259/2010 lays down a provision to this effect in Article 12. While it is generally accepted that recourse to public policy should be confined to exceptional situations, this device is clearly intended to safeguard the substantive policies of the participating Member States where divorce or legal separation proceedings take place.

13. (ii) Applying the law of the forum to divorce and legal separation is generally likely to accrue the speed of court proceedings and enhance the «quality» of the ensuing decisions, since the *lex fori* is, obviously, the law that the seized court is most familiar to.

These are indeed important goals, and deserve to be properly taken into account. According to a well-settled case law of the European Court of Human Rights, the fundamental procedural safeguards enshrined in Article 6 of the ECHR —*i.e.* the right to a fair hearing, and more particularly the right to obtain a decision on the merits within a reasonable time— should be understood as implying that «special diligence» is required «in cases relating to civil status and capacity»⁴³, including divorce and legal separation.

In reality, the systematic application of the *lex fori* is not necessarily the only means by which respect for the obligation in question may be ensured. Bilateral conflict-of-laws rules, as we have seen, may be designed so as to favour the application of the law of the forum. In any case, while it is certainly true that the application of foreign law may result in lengthier proceedings, this does not necessarily imply a violation of the right to a fair (and swift) hearing: the reasons of the delay must be assessed in light of the peculiar feature of each case, and the conclusion may be reached that a longer time was reasonably necessary in the circumstances in order to meet the needs of justice⁴⁴.

The argument regarding the «quality» of judgments based on foreign law cannot be overstated. Practical difficulties connected with the application of foreign law may of course arise in any field of private international law, and reasonably effective measures exist to cope with these difficulties. International cooperation, either through conventions (such as the London Convention of 7 June 1968 on Information on Foreign Law)⁴⁵, or through the European Judicial Network in Civil and Commercial Matters⁴⁶, may actually be of help.

⁴³ European Court of Human Rights, judgment of 29 March 1989, *Bock v. Germany*, paragraph 49; judgment of 27 February 1992, *Maciariello v. Italy*, paragraph 18; judgment of 18 February 1999, *Laino v. Italy*. All texts may be retrieved through the *Hudoc* database at <http://echr.coe.int>.

⁴⁴ Regarding the standards employed by the European Court of Human Rights to assess whether the right to a fair hearing has been violated, more particularly where the length of national proceedings is at stake, see generally, ex pluribus, C. GRABENWARTER, «Fundamental Judicial and Procedural Rights», in D. EHLERS (ed.), *European Fundamental Rights and Freedoms*, Berlin, De Gruyter, 2007, p. 167 *et seq.*

⁴⁵ European Convention on Information on Foreign Law of 7 June 1968. Under Article 1, paragraph 1, of the Convention, «[t]he Contracting Parties undertake to supply one another, in accordance with the provisions of the present Convention, with information on their law and procedure in civil and commercial fields as well as on their judicial organization». The text of the Convention may be found at <http://www.conventions.coe.int>. The Convention is currently in force for more than forty States, including nearly all the Member States of the European Union. One Member State —Spain— is also a party to the Inter-American Convention on proof of and information on foreign law, of 5 August 1979, in force for several Central and South American countries.

⁴⁶ Network created by Decision 2001/470/EC of 28 May 2001, O.J. L 174 of 27 June 2001, p. 25 *et seq.*, amended by Decision 568/2009/EC of 18 June 2009 (in force from 1 January 2011; O.J. L 168 of 30 June 2009, p. 35 *et seq.*). Under Article

Rather, it must be conceded that the costs connected with the application of foreign law within court proceedings might sometimes prove to be considerable. Generally speaking it will be for the parties to bear those costs, and this might be regarded as particularly disgraceful in an area such as family law, where litigants are not always in a position to afford high costs. The (harmonized) rules governing legal aid in connection with transnational disputes in civil and commercial matters are only part of the answer to this problem⁴⁷.

14. (iii) The designation of the *lex fori* as the law applicable to divorce and legal separation results in the law of a single country being applicable to the merits of the dispute and to the procedural aspects thereof (the latter being always subject to the law of the forum: *lex fori regit processum*). This coincidence may prove to be particularly convenient in this area of law, in view of the close relationship existing between the rules that address the substance of family relationships and the procedural tools by which those rules may actually take effect. Under the majority of legal systems, the dissolution or loosening of matrimonial ties *necessarily* imply the intervention of a public authority, and the way in which this intervention takes place is determined by the seized authority's procedural rules. Thus, procedural and substantial rules regarding matrimonial matters may somehow be looked at as two sides of the same coin.

The risk of a dissociation between the substantial and the procedural aspects of divorce or legal separation may *de facto* be minimized by favouring, as we have already seen, the application of the law of the forum in a significant number of cases. Apart from this, whenever foreign law is applicable, experience shows that «adaptation» and «substitution» techniques, though sometimes difficult to implement, may significantly reduce the inconvenience of the described dissociation⁴⁸.

15. (iv) Within an area of supranational integration like Europe, comprising national legal systems with sharply different legislations in the field of family law, some further arguments may be put forward in favour of bilateral conflict-of-laws rules.

While the *lex fori* approach implies, by its nature, that only one point of view (the point of view of the forum) may be considered for the purpose of regulating matrimonial matters, the use of bilateral conflict-of-laws rules is premised on the assumption that different national points of view might deserve attention and that the option in favour of one of them, instead of any other, cannot be made once and forever, but rather depends on certain (pre-determined) features of the case at hand.

In a way, the approach based on bilateral conflict-of-laws rules builds upon some of the basic ideas that make integration possible, namely the principle whereby different legal systems (actually, those of the countries that take part to the integration process) should be put on an equal standing.

Of course, even within an area of supranational integration, a State's «openness» towards foreign legal systems is not without limits. Yet, as we have seen, the relevant bilateral rules may be designed in such a way as to accommodate different needs, including the protection of the substantive policies of the forum.

16. (v) Trans-border mobility of persons, as we shall see in greater detail in the following paragraph, is strongly promoted in Europe. The use of bilateral conflict-of-laws provisions may help reducing the obstacles possibly affecting such mobility.

3 of the Decision, as amended, the Network «shall be responsible for ... facilitating judicial cooperation between the Member States in civil and commercial matters, including devising, progressively establishing and updating an information system for the members of the Network» and for «facilitating judicial cooperation between the Member States in civil and commercial matters, including devising, progressively establishing and updating an information system for the members of the Network». In particular, under Article 5, paragraph 2, lit. c, of Decision 2001/470/EC, as amended, the national contact points of the Network shall «supply any information to facilitate the application of the law of another Member State that is applicable under a Community or international instrument».

⁴⁷ Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; O.J. L 26 of 31 January 2003, p. 41 *et seq.*

⁴⁸ Regarding these techniques, see, *ex pluribus*, D. BUREAU / H. MUIR WATT, *Droit international privé*, 2nd ed., Paris, Presses Universitaires de France, 2010, p. 506 *et seq.*

The interplay between rules on jurisdiction and rules dealing with conflict-of-laws issues plays an important part in this respect: the possibility of properly «managing» transnational situations may in fact depend, for the interested individuals, upon the design and coordination of those rules.

If all Member States were to subject matrimonial matters to the law of the forum, the issue of jurisdiction would become crucial in this area⁴⁹. Identifying the court possessing jurisdiction would in fact entail decisive, and almost inescapable, consequences on the conflict-of-laws plane, and hence on the substantive-law level. In a scenario like this, forum shopping would most likely be encouraged. Petitioners would seek to pre-determine the outcome of the proceedings by making use of the jurisdictional opportunities afforded by the relevant rules, so as to «move» litigation towards a more favourable forum. In the end, this might hinder the predictability of the court with jurisdiction and raise the costs of justice due to possibly parallel litigation.

Allowing domestic courts to apply foreign law in appropriate situations, might overcome some of these problems. The assumption, here, is that individuals would be less hesitant towards the prospect of crossing borders, if they knew that in the host country they would be granted access to local courts on objective and predictable grounds, and if they further knew that this would not necessarily result in the application of the substantive local rules as regards their family relationships.

In a way, mobility would be facilitated if the «original» personal status of the persons in question were allowed to «follow» the latter from one country to the other.

5. The Regulation aims at striking a fair balance between the goal of social integration and the idea that cultural identity of the individual should be preserved

17. The remarks made in the preceding paragraph show that, within an integrated supranational area, different (and possibly conflicting) policies might need to be accommodated, and that flexibility as to the law applicable to divorce and legal separation may represent an asset to that end. Two policies—both traditionally inherent to the private international law of personal status—play a central role as far as divorce and legal separation are concerned: promoting social integration and preserving the cultural identity of individuals⁵⁰.

18. The European Union has set itself the objective of creating and maintaining an «area of freedom, security and justice» without internal frontiers, in which the free movement of persons is ensured (Article 3 of the TEU). European citizens enjoy, as such, the right to move and reside freely within the territory of the Member States (Article 17, paragraph 2, lit. c, of the TFEU). Individuals possessing the nationality of a third country, as well as other persons (stateless persons, refugees etc.), may equally move, subject to certain conditions, from the territory of one Member State to the other for personal or economic reasons.

Fostering the integration of European citizens and other individuals within their host societies is one of the core concerns of the Union in this area, and private international law is one of the means by which the goal of integration may actually be pursued.

From a conflict-of-laws standpoint, the most direct means by which integration may be enhanced consists in using «habitual residence» as the (primary) connecting factor for determining the law applicable to the *statut personnel* of the concerned individual. The habitual residence of a person corresponds to the centre of this person's interests⁵¹. It is generally accepted that, under the relevant

⁴⁹ F. POCAR, «Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio», in S. BARIATTI, *La famiglia nel diritto internazionale privato comunitario*, Milano, Giuffrè, 2007, p. 274.

⁵⁰ See, *ex pluribus*, A. BUCHER, «La famille en droit international privé», *RCADI*, 2000, vol. 283, p. 24 *et seq.*

⁵¹ See, *inter alia*, Court of First Instance, judgment of 25 October 2005, case T-298/02, *Anna Herrero Romeu, EC Reports*, 2005, p. II-4599 *et seq.*, paragraph 51, stating that «[t]he place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests»; the judgment further states that, for the purpose of determining habitual residence, «all the factual circumstances which constitute such residence and, in particular, the actual residence of the [individual] concerned must be taken into account». See further, as regards the intentional element of the notion at hand, Court of Justice, judgment of 25 February 1999, case C-90/97, *Robin*

rules of European Union law, an individual cannot possess more than one habitual residence at the same time⁵².

Habitual residence should be regarded as an «autonomous» notion of European Union law. It must be determined *in concreto* by looking at objective indicia denoting a certain degree of integration of the individual in a given country. While a case-by-case approach is needed, account should generally be taken of the family situation of the person in question, as well as of the length, the reasons and the degree of continuity of his or her residence on the territory of a certain country etc. The intentions of the concerned individual, as they objectively appear from the circumstances, shall also be relevant⁵³.

By designating the law of the country where the person resides, conflict-of-laws rules actually guarantee that this person's rights and obligations in family and personal matters are subject to the same regime as the rights and obligations of anybody else residing in the country, regardless of their nationality and other factors. This way, the moral and legal ties between the person in question and the local community become stronger, thus supporting the feeling that that person is part of the larger social structure.

Regulation No. 1259/2010 pursues the goal of integration by referring to the habitual residence of the spouses in different respects: within the rule whereby the spouses may agree on the law applicable to divorce and legal separation (article 5); within the rules relating to the substantial and formal validity of such agreement (Article 6 and 7); within the rule determining the law governing divorce and legal separation in the absence of choice (Article 8).

19. While pursuing the goal of integration, the fact cannot be ignored that individuals involved in cross-border mobility phenomena usually retain meaningful relationships with their social, cultural and religious communities of origin. These relationships nurture the intrinsic cultural diversity of Europe, a value that the Treaties and the CFREU strive to safeguard in different respects⁵⁴.

Bilateral conflict-of-laws rules represent, by their very nature, a powerful tool for safeguarding diversity. Although an individual's cultural identity represents the combination of a wide range of factors —such as language, religious beliefs, philosophical convictions etc.— the view is often expressed that the use of nationality as a connecting factor represents a suitable means by which cultural identity may be preserved on the private international law plane. This view assumes that nationality is generally capable of expressing a sense of «belonging» in respect of an individual, based on historical, ethnic and cultural ties⁵⁵.

Submitting matters of personal status to the national law of the individual in question helps enhancing the «social visibility» of these ties may be enhanced: traditional values inherent to the individual's culture of origin are allowed to keep governing his or her life during his or her stay in the host society.

Swaddling, EC Reports, 1999, p. I-1075 *et seq.*, paragraph 30 *et seq.* See generally: A. RICHEL PONS, «La notion de 'résidence'», in H. FULCHIRON / C. NOURISSAT (eds.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris, Dalloz, 2005, p. 139 *et seq.*; R. LAMONT, «Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law», *Journal of Private International Law*, 2007, p. 261 *et seq.*; C. RICCI, «Habitual Residence in Matrimonial Disputes», in A. MALATESTA / S. BARIATTI / F. POCAR (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, Padova, Cedam, 2008, p. 207 *ss.*; SHÜLLEABHÁIN, *Cross-Border Divorce Law – Brussels II bis*, Oxford, Oxford University Press, 2010, p. 36 *et seq.*; M. MELLONE, «La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie», *Riv. dir. int. priv. proc.*, 2010, p. 685 *et seq.* See also C. CAMPIGLIO, «Il foro della residenza abituale del coniuge nel Regolamento (CE) n° 2201/2003: note a margine delle prime pronunce italiane», *CDT*, 2010, p. 242 *et seq.*, showing *inter alia* that non negligible differences exist among Member States as to the way in which the notion of habitual residence is understood and applied in matrimonial matters.

⁵² See *e.g.* High Court of Justice, Family Division, 3 September 2007, *Marinos v. Marinos*, available through the database of the British and Irish Legal Information Institute, at <http://www.bailii.org>.

⁵³ See *supra*, footnote 51.

⁵⁴ Cf. Article 3, paragraph 3, of the TEU, whereby the Union «shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced»), Article 167, paragraph 1, of the TFEU («The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore»), and Article 22 of the Charter of fundamental rights of the European Union («The Union shall respect cultural, religious and linguistic diversity»).

⁵⁵ E. JAYME, «Identité culturelle et intégration: le droit international privé postmoderne», *RCADI*, 1996, vol. 251, in particular, p. 167 *et seq.*

Furthermore, as far as divorce and legal separation are concerned, the application of the national law of the spouse(s) may facilitate the recognition of divorce judgments in the country of origin of the individuals in question, namely in those countries (outside the European Union)⁵⁶ where the recognition of foreign judgments depends, *inter alia*, on the judgment being rendered in accordance with the substantive law of the requested State.

Regulation No. 1259/2010 appears to be sensitive to the need for preserving cultural identity. The nationality of the spouses, as we will see, is relevant both in the framework of Article 5 on choice of law agreements, and in the framework of Article 8, on the law applicable failing a choice by the spouses.

Unsurprisingly, the Regulation avoids defining nationality for the purpose of its rules. As a matter of fact, it appears to be beyond dispute that nationality must be determined in accordance with the rules of the State that appear to be «willing» to grant such status to the individual in question. This implies that, in order to ascertain the nationality of a person for conflict-of-laws purposes, an inquiry may be needed based on the relevant provisions of more than one legal system⁵⁷.

20. A tension, of course, exists between the goal of social integration, on one side, and the idea that cultural identity should be preserved, on the other.

Regulation No. 1259/2010 strives to manage this tension in various ways. The key role played by party autonomy in this context may be explained, *inter alia*, as an attempt to mitigate that opposition: promoting party autonomy, and at the same time confining it to a limited range of options (including the law of the country of habitual residence and the law of nationality) may actually be seen as a means to determine, in light of the peculiar circumstances of each situation and from the standpoint of the spouses, whether the weight of integration factors is stronger than the weight of cultural factors, or *vice versa*.

Absent a choice by the parties, the dialectics between integration and cultural identity has been dealt with by the drafters of the Regulation through a *combination* of connecting factors, as opposed to a drastic and «final» choice in favour of either of the two «polarities». Article 8 lays down a «ladder» of connecting factors, where different policies appear to be taken into account following certain priorities. Integration is given primary importance, since the law applicable in the absence of choice is stated to be, in the first place, the law of the State where the spouses are habitually resident at the time the court is seized, or, failing that, the law of the State where the spouses were last habitually resident, provided that certain conditions are met. Yet, cultural identity, too, plays a role as connecting factor, since it comes into play whenever the preceding factors are unavailable in the circumstances⁵⁸.

6. The Regulation aims at making divorce and legal separation easier to obtain for both spouses on an equal footing

21. European Union law, as we have mentioned, does not (and cannot) regulate divorce and legal separation at the substantive-law level. This does not exclude that the rules of private international law enacted by the European Union in this field might reflect, *inter alia*, substantive policies.

The «Brussels II *bis*» Regulation, just like its «predecessors» (the Convention of 28 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, and the «Brussels II» Regulation of 29 May 2000)⁵⁹, is designed to facilitate both the access to justice in matrimonial matters whenever a foreign element arises and the recognition of the ensuing judgments across Europe⁶⁰.

⁵⁶ As regards matrimonial proceedings, judgments rendered in one Member State are recognized in the other Member States according to Article 22 of the «Brussels II *bis*» Regulation. The substantive law applied in the country of origin does not have, as such, any bearing on the recognition itself. The Regulation underlines this by stating, in Article 25, that «[t]he recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts».

⁵⁷ Regarding stateless persons and refugees, see *infra* § 50.

⁵⁸ See further *infra*, § 59 *et seq.*

⁵⁹ O.J. C 221 of 16 July 1998, p. 2 *et seq.*, and O.J. L 160 of 30 June 2000, p. 19 *et seq.*, respectively.

⁶⁰ See, *inter alia*, *Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*, prepared by ALEGRIA BORRÁS; O.J. C 221 of 16 July 1998, p. 27 *et seq.*, paragraph 12.

Favor divortii is likewise a guiding principle of Regulation No. 1259/2010. The idea that the spouses should be allowed to divorce, albeit subject to substantive provisions that may vary considerably depending on the applicable law, is especially reflected in Article 10, whose purpose is to alter the functioning of the conflict-of-laws provisions laid down by the Regulation in the event that the law designated by the latter makes no provision for divorce.

22. From the standpoint of European Union law, the right to divorce should not only be guaranteed as such: divorce and legal separation should also be open to both spouses on an equal footing.

Discrimination in this field would actually be at odds with primary rules of European Union law, such as Article 21 of the CFREU, prohibiting discrimination on the ground, *inter alia*, of sex, racial or ethnic origin, and religious belief, and Article 19, paragraph 1, of the TFEU, whereby the Union is entitled to adopt measures aimed at combating discrimination.

It would be further at odds with the ECHR, which—pending the accession of the European Union—enshrine fundamental rights that already constitute general principles of European Union law (Article 6 of the TEU). In particular, under Article 1 of Protocol No. 12 to the Convention, «[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status». Besides, and more specifically, Article 5 of Protocol No. 7, provides that «[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution»⁶¹.

Regulation No. 1259/2010 aims at safeguarding the equality of the spouses in two respects: (i) on one side, it ensures that the design of the relevant conflict-of-laws provisions is not discriminatory *per se*; (ii) on the other side, it strives to avoid the risk that the application of the latter provisions might result in divorce or legal separation being subject to a substantive law placing granting one spouse a preeminent position.

23. (i) Privileging one spouse at the detriment of the other for the purpose of determining the law applicable to the dissolution of marriage (e.g. by providing that the nationality of the husband, not the nationality of the wife, shall be relevant), would represent a discrimination in itself, no matter whether in the circumstances the relevant conflict-of-laws provisions might result in the designation of a law being fully compliant, in its substantive content, with the principle of equality⁶².

This appears to be a firmly established principle in contemporary private international law, at least as far as the Member States of the European Union are concerned⁶³. It is not surprising that Regulation No. 1259/2010 conforms to this principle. On one hand, the new piece of legislation grants spouses an equal standing with regard to agreements determining the law applicable to divorce and legal separation: the formal requirements provided for by the Regulation are meant to ensure that the agreements in question are the result of the converging free will of both spouses⁶⁴. On the other hand,

⁶¹ At the international level, discrimination is further prohibited, *inter alia*, under the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on 18 December 1979 (text and status available at <http://treaties.un.org>).

⁶² See on this subject, *ex pluribus*, A.V.M STRUYCKEN, «Co-ordination and Co-operation in Respectful Disagreement: General Course on Private International Law», *RCADI*, 2009, vol. 311, p. 243 *et seq.* Under a request for a preliminary ruling, the Court of Justice had been asked to state whether Community law, namely the prohibition of all discrimination on grounds of nationality, should be interpreted as precluding the application of a national conflict-of-laws rule that, in respect of divorce, refers to one of the spouses' nationality as a connecting factor. In its judgment of 10 June 1999, *Johannes*, case C-430/97, *EC Reports*, 1999, p. I-3475 *et seq.*, paragraph 37, the Court answered in the negative, asserting that (at that time) «[n]either the national provisions of private international law determining the substantive national law applicable to the effects of a divorce nor the national provisions of civil law substantively regulating those effects fall within the scope of the Treaty».

⁶³ Cf. H. GAUDEMET-TALLON, «La désunion du couple en droit international privé», *RCADI*, 1991, vol. 226, p. 72 *et seq.*

⁶⁴ See *infra*, § 56 *et seq.* The fact that the agreement of the spouses may designate the law of the country of which *either* spouse is a national is not as such inconsistent with the rules prohibiting discrimination: the will of each spouse has the same standing, and the agreement—in case of spouses possessing different nationalities—may equally privilege the nationality of the husband or the nationality of the wife.

the Regulation employs objective connecting factors that do not result *per se* in a privileged position of one spouse, but rather, whenever it is possible, in the designation of a country with which the matrimonial relationship —regarded objectively— is significantly connected, such as the country where *both* spouses habitually reside (or have last habitually resided) or the country of which *both* spouses are nationals (Article 8).

24. (ii) Non-discriminatory connecting factors may well designate a law whose substantive content is at odds with the principle of equality. This event is explicitly envisaged by Article 10 of Regulation No. 1259/2010. According to this rule, where the law applicable pursuant to the Regulation's conflict-of-laws provisions «does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex», the latter law shall be disregarded and «the law of the forum shall apply»⁶⁵.

The risk that the designated law might discriminate between the spouses on other grounds may be countered through the public policy exception provided for by Article 12 of the Regulation⁶⁶.

7. The Regulation has a «universal» character and excludes the relevance of the conflict-of-laws rules of the designated law

25. The new piece of legislation lays down «universal» rules. According to Article 4, the law designated pursuant to the Regulation «shall apply whether or not it is the law of a participating Member State». The *erga omnes* approach followed by Regulation No. 1259/2010 is common to the «Rome I» and «Rome II» Regulations⁶⁷, as well as to the Hague Protocol⁶⁸ and to the acts currently under elaboration by the European Union laying down conflict-of-laws provisions⁶⁹.

The adoption of this approach allows participating Member States to convey within one legal instrument the whole of the rules that national authorities might need to resort to when dealing with conflict-of-laws issues in the area of divorce and legal separation, no matter whether the situation at stake is connected with countries bound by the same rules, or not.

26. Since the Regulation may designate the law of a State other than a participating Member State, the question arises as to whether the (possibly non-harmonized) conflict-of-laws rules in force in the State in question should be relevant, in the circumstances, to the determination of the law applicable to divorce and legal separation.

The question must be answered in the negative. Under Article 11, where Regulation No. 1259/2010 provides for the application of the law of a State, «it refers to the rules of law in force in that State other than its rules of private international law». Once the Regulation has designated the applicable law, no further inquiry shall be carried out to determine whether the designated law «wants» to apply in the circumstances, or whether, on the contrary, it designates through its own conflict-of-laws provisions the law of a different country, be it the law of the forum (*renvoi au premier degré*, *Rückverweisung*, *rinvio indietro*) or the law of another State (*renvoi au second degré*, *Weiterverweisung*, *rinvio oltre*).

The solution is in line with the corresponding provisions established in the «Rome I» and «Rome II» Regulations, and in the legal instruments currently negotiated within the European institutions⁷⁰.

⁶⁵ See *infra*, § 73 *et seq.*

⁶⁶ See *infra*, § 80 *et seq.*

⁶⁷ See Article 3 of Regulation No. 864/2007.

⁶⁸ See Article 2 of the Hague Protocol.

⁶⁹ See, *e.g.*, Article 21 of the Proposal on Matrimonial Property Regimes.

⁷⁰ See Article 20 of the «Rome I» Regulation, and Article 24 of the «Rome II» Regulation; see also, *inter alia*, Article 26 of the Proposal on Successions. On the reasons behind the trend against *renvoi* in the private international law of the European Union, see, *ex pluribus*, for further references, P. FRANZINA, «Articolo 20 —Esclusione del rinvio», in F. SALERNO / P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali («Roma I»)*— *Commentario*, Nuove leggi civili commentate, 2009, p. 903 *et seq.*

IV. The scope of application of the Regulation

1. The notions of «divorce» and «legal separation»

27. Regulation No. 1259/2010 applies to «divorce and legal separation» (Article 1, paragraph 1). Failing an explicit definition, «divorce» and «legal separation» should be regarded as «autonomous» notions and understood as having the same meaning as the corresponding expressions employed in the «Brussels II *bis*» Regulation. They should thus cover all proceedings instituted before the authorities of a participating Member State with a view to dissolving or loosening matrimonial ties.

Under the «Brussels II *bis*» Regulation, proceedings in respect of divorce and legal separation belong to the wider notion of «matrimonial proceedings». The latter also includes proceedings for the annulment of marriage. Regulation No. 1259/2010 follows a different approach in this respect, explicitly excluding marriage annulment from its scope of application. The ensuing «asymmetry» between the two instruments appears to be justified⁷¹. For conflict-of-laws purposes, the annulment of marriage raises peculiar issues, closely connected to the validity of marriage, a matter explicitly excluded from the scope of application of the new text.

The Regulation shall apply irrespective of the nature of the court or tribunal seized⁷². The nature of the proceedings —*e.g.* whether they should be brought before a jurisdictional or an administrative authority⁷³, or whether they feature a contentious or a non-contentious character— should likewise have no bearing on the applicability of the Regulation⁷⁴.

28. For the purpose of ascertaining whether a situation falls within the material scope of application of the Regulation, the notion of «matrimonial ties» should be regarded —it is submitted— as an autonomous notion, too⁷⁵.

In the framework of Regulation No. 2201/2003, too, the question is frequently asked whether «matrimony» should be given an independent, European meaning. Diverging views have been expressed in this respect, and the Court of Justice of the European Union has not provided yet a definitive clarification⁷⁶. This is, by the way, a politically sensitive issue, since adopting a generous notion of matrimony would attract within the scope of judicial cooperation in civil matters, as it is governed by uniform rules, family models —such as same-sex marriages— whose recognition is far from being unanimous among Member States.

29. It is submitted that, as far as Regulation No. 1259/2010 is concerned, the notion of matrimonial ties should be given a broad meaning, covering *any* matrimonial relationships between two in-

⁷¹ P. HAMMJE, «Le nouveau règlement (UE) n° 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps», *Revue critique de droit international privé*, 2011, p. 291 *et seq.*, paragraph 6.

⁷² See Recital 13 of Regulation No. 1259/2010.

⁷³ Cf. Article 2 of the «Brussels II *bis*» Regulation, clarifying that for the purpose of that Regulation, «the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation», and «the term ‘judge’ shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation». The close relationship between Regulation No. 1259/2010 and Regulation No. 2201/2003 suggests that those definitions, failing any indication to the contrary, should be followed in the interpretation of both instruments.

⁷⁴ Cf. P. HAMMJE, «Le nouveau règlement (UE) n° 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps», *Revue critique de droit international privé*, 2011, p. 291 *et seq.*, paragraph 7: «[c]e qui compte est l’objet de la procédure, non ses modalités». The same author adds, however, that purely religious proceedings should be deemed to fall outside the scope of the Regulation, «car l’autorité n’intervient pas dans ce cas au nom de l’Etat membre participant, sauf à être instituée par lui» (*ibidem*). On the latter point, see also A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, 12th ed., II, p. 189 *et seq.*

⁷⁵ See, generally, on the interpretation of legal expressions in this field, L. TOMASI / C. RICCI / S. BARIATTI, «Characterisation in Family Matters for Purposes of European Private International Law», in G. MEEUSEN *et al.* (eds.), *International family law for the European Union*, Antwerpen, Intersentia, 2007, p. 342 *et seq.*

⁷⁶ See, for further references, I. OTTAVIANO, «La prima cooperazione rafforzata dell’Unione europea: una disciplina comune in materia di legge applicabile alle separazioni e ai divorzi transnazionali», *Diritto dell’Unione europea*, 2011, p. 132 *et seq.*

dividuals, irrespective of their sex. A «matrimonial» relationship should be understood as one implying a family tie featuring a *formal* and *stable* character: the relationship in question must be set up through a particular procedure governed by law (as opposed to the mere will of the individuals at stake resulting in a *de facto* relationship), and must be such that —for the sake of its stability— a somehow parallel procedure needs to be followed for the purpose of its dissolution. Where these requirements are met, the relationship in question should be deemed to be «matrimonial» for the purpose of the Regulation, no matter whether it might be regarded as invalid under the law of the forum (*e.g.* due to the spouses being individuals of the same sex).

In support of the latter view an argument may be drawn, *a contrario*, from Article 13 of the Regulation. The latter provision states that nothing in the Regulation «shall oblige the courts of a participating Member State whose law ... does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation». This provision would be meaningless if national courts of participating Member States were entitled not to apply the Regulation whenever the *lex fori* regards the family relationship at stake as being invalid.

In the end, the proposed reading appears to be supported by *methodological* reasons (legal expressions used by uniform rules should be interpreted autonomously, in principle), *practical* reasons (the proposed view allows Member States that put homosexual and heterosexual marriage on an equal standing to cooperate between themselves under the legal instrument in question, thus corroborating the *effet utile* thereof), and *political* reasons (in light of the «safeguard» provided for by Article 13 of the Regulation, a broad understanding of the notion of matrimony does not imply that Member States who do not share such broad view in their national legal order should change their policies or reconsider their values).

30. Registered partnerships, no matter whether they involve individuals of an opposite sex or of the same sex, should be deemed to fall outside the notion of «matrimony».

Accordingly, the dissolution of partnerships does not correspond to «divorce» for the purpose of Regulation No. 1259/2010. While in some cases it may be difficult to distinguish a marital relationship from a registered partnership, the relevance of the distinction should be upheld. The Commission, by presenting two separate proposals involving property regimes —one in respect of «matrimonial property regimes», the other regarding the «property consequences of registered partnerships»⁷⁷— suggest that European institutions, as far as judicial cooperation in civil matters is concerned, are inclined not to treat the two situations entirely alike.

2. The transnational character of the situation

31. Article 1, paragraph 1, of the Regulation adds that the latter shall apply in «situations involving a conflict of laws». The expression —common to the «Rome I» and «Rome II» Regulations— is meant to clarify that the new piece of legislation is exclusively concerned with situations featuring a foreign element: divorce and legal separation occurring within a purely domestic scenario will be in no way affected by the rules we are examining.

To make this clearer, Article 16 adds that participating Member States in which different systems of law or sets of rules apply to divorce and legal separation shall not be required to apply the Regulation to «conflicts of laws arising solely between such different systems of law or sets of rules»⁷⁸.

32. Along with the «Rome I» and the «Rome II» Regulations, Regulation No. 1259/2010 does not state precisely upon which grounds a situation may be deemed to be transnational in nature, thus suggesting that *any* element, as long as it is likely *in abstracto* to play some role in the conflict-of-laws or substantive regulation of divorce or legal separation, might give the situation a transnational flavour.

⁷⁷ Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, COM (2011) 127 final of 16 March 2011.

⁷⁸ An almost identical provision may be found in Article 22, paragraph 2, of the «Rome I» Regulation and in Article 25, paragraph 2, of the «Rome II» Regulation.

Divorce and legal separation may possess a transnational character either due to the personal conditions of the spouses or to the objective features of their relationship. Thus, a divorce between a German wife and a Spanish husband is just as transnational as a divorce between a German wife and a German husband living in France.

In assessing whether a situation is transnational or domestic, the «point of view» from which the inquiry is carried out might in some cases be decisive. The legal separation of Austrian spouses having lived together in Austria is indeed a domestic legal separation when viewed from Austria. The answer would be different if, for some, the situation was looked at from the standpoint of another country.

33. It is not clear whether, for the purpose of Article 1 of the Regulation, the relevant foreign element must exist at the time when the breakdown of marriage occurs, or may equally have existed at any moment since the matrimonial relationship in question was constituted, *i.e.* between the celebration of marriage and the dissolution thereof.

In principle, the applicability of a normative instrument should be determined with reference to the moment in which an issue, possibly requiring the application of the instrument in question, arises: since Regulation No. 1259/2010 is only concerned with the dissolution or loosening of marriage, and not with marriage itself (*i.e.* the personal relationship between the spouses etc.), the relevant moment for the purpose of ascertaining «transnationality» should be the moment at which divorce or legal separation proceedings are instituted. On this assumption, the applicability of the Regulation should be excluded in a situation where the matrimonial relationship at stake, though initially transnational in nature, had since lost all of its foreign elements: one might think, for example, of divorce proceedings instituted in State X between spouses being both nationals of State X, who have resided in country Y for some time, but have returned to country X well before the proceedings in question commenced.

In reality, excluding the applicability of the Regulation to a situation like this might lead to unfortunate practical outcomes, in particular if, during their stay in country Y, the spouses had concluded an agreement under Article 5 of the Regulation prospectively submitting divorce to the law of State Y.

It is therefore submitted that, in order to safeguard the reasonable expectations of the parties, Article 1 of the Regulation should be interpreted as meaning that divorce or legal separation feature a transnational character whenever the matrimonial relationship they are meant to dissolve or loosen have, or have had, a genuine and substantial connection with more than one country. In the preceding example, the latter requirement should not be met if the only connections of the matrimonial relationship of the spouses with country Y were short, transitory and remote in time.

34. Since party autonomy plays an important role within Regulation No. 1259/2010, the question arises as to whether a situation, otherwise totally domestic, might be regarded as transnational only because the spouses have agreed, under Article 5, on the application of the law of a foreign country⁷⁹.

The issue echoes a problem that has been extensively dealt with by scholars in respect of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, and more recently in respect of the «Rome I» and «Rome II» Regulations. As regards the latter instruments, the view of several authors is that the parties may indeed confer, through an *electio iuris*, a foreign character to their relationship⁸⁰. The risk that such opportunity may be exercised in an abusive way, so as to circumvent the application of provisions that would be otherwise applicable, is in fact countered by a provision explicitly addressing the issue of choice of law agreements made in respect of «internal» situations. Under Article 3, paragraph 3, of the «Rome I» Regulation (substantially reproducing Article 3, paragraph 3, of the Rome Convention), where all elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, «the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by

⁷⁹ See on this issue A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, 12th ed., II, p. 196.

⁸⁰ P. BERTOLI, «Articolo 1 - Campo di applicazione materiale - I», in F. SALERNO / P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali («Roma I») – Commentario, Nuove leggi civili commentate*, 2009, p. 553 *et seq.*

agreement». As far as non-contractual obligations are concerned, the same rule is stated in Article 14, paragraph 2, of the «Rome II» Regulation.

Within Regulation No. 1259/2010, the problem arises under a different light. Contrary to the «Rome I» and the «Rome II» Regulations, where the parties are free to choose the law of *any* country, no matter whether a substantial connection exists between that country and the relationship at stake, the agreement of the spouses as to the law applicable to divorce and legal separation can only designate the law of a country with which the situation is genuinely connected: the law of the country where the spouses habitually reside, or have last habitually resided, the law of the country of which either of them is a national, or the *lex fori* (Article 5, paragraph 1). The restriction makes it *de facto* unnecessary to lay down a provision countering the risk of party autonomy being abusively exercised.

Situations where a foreign element existed at the time when the agreement was made, but has subsequently disappeared, should be treated in accordance with the solution envisaged in the preceding paragraph.

It is worth recalling, in any case, that pursuant to a well-established general principle of European Union law, supranational rules cannot be relied on for abusive or fraudulent ends⁸¹. Thus, if the spouses had fraudulently created a transnational matrimonial situation, with the sole purpose of taking advantage of the provisions of Regulation No. 1259/2010 (namely Article 5), the courts of a participating Member States should be entitled, without violating European Union law, to treat that situation as domestic and disregard the Regulation.

3. Matters excluded from the scope of application of the Regulation

35. Regulation No. 1259/2010 does not apply to the matters listed in Article 1, paragraph 2: matters relating to the legal capacity of natural persons, the existence, validity or recognition of marriage, its annulment, the name of the spouses, the property consequences of the marriage, parental responsibility, maintenance obligations, trusts or successions.

For the reasons we have seen⁸², the legal expressions used in this provision need to be interpreted autonomously. Terms employed in other supranational legal instruments in the field of judicial cooperation should be deemed to possess, for the purpose of Article 1, paragraph 2, of Regulation No. 1259/2010, the meaning they possess under such other instruments.

Thus, the words «maintenance obligations» should be understood as covering —consistently with Regulation (EC) No. 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions in Matters relating to Maintenance Obligations⁸³, and with the former Article 5 point 2 of the «Brussels I» Regulation— obligations based on a family relationship aimed at the maintenance of the creditor and whose amount is determined on the ground of the economic conditions of the debtor and the needs of the creditor⁸⁴. For similar reasons, «parental responsibility» should be interpreted as referring —in accordance with the «Brussels II *bis*» Regulation— to «all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect», including «rights of custody and rights of access»⁸⁵. «Annulment of marriage», too, must be deemed to bear one and the same meaning under Regulation No. 1259/2010 and under Regulation No. 2201/2003.

The words «property consequences of the marriage» should similarly be considered as having, in principle, the same meaning as the expression «rights in property arising out of a matrimonial rela-

⁸¹ See, e.g., Court of Justice, judgment of 23 March 2000, *Dionysios Diamantis*, case C-373/97, *EC Reports*, 2000, p. I-1705 *et seq.*, paragraph 33 *et seq.*

⁸² See *supra*, § 7.

⁸³ O.J. L 7 of 10 January 2009, p. 1 *et seq.*

⁸⁴ See generally on this subject M. CASTELLANETA / A. LEANDRO, «Il regolamento CE n. 4/2009 relativo alle obbligazioni alimentari», *Le nuove leggi civili commentate*, 2009, p. 1051 *et seq.*, and M.E. CORRAO, «Il diritto internazionale privato e processuale europeo in materia di obbligazioni alimentari», *CDT*, 2010, p. 118 *et seq.*

⁸⁵ Article 2, paragraph 7, of Regulation No. 2201/2003.

tionship» under Article 1, paragraph 2, lit. *a*, of Regulation No. 44/2001⁸⁶. Both notions, by the way, should be interpreted in light of the notion of «matrimonial property regimes» due to be adopted in the future European instrument on jurisdiction, applicable law and the recognition and enforcement of judgments in that area⁸⁷.

The concept of «succession» should likewise correspond to the notion of «wills and successions» under Article 1, paragraph 2, lit. *a*, of Regulation No. 44/2001, and to the notion of «successions to the estates of deceased persons» in the coming regulation on this matter, currently negotiated within the European institutions⁸⁸. The word «trust» should presumably be construed having regard to the same sources, and to the exclusion provided for, *inter alia*, by Article 1, paragraph 3, lit. *f*, of the «Brussels II *bis*» Regulation.

Determining the meaning of the remaining expressions —«legal capacity of natural persons», «existence, validity or recognition of a marriage», «name of the spouses»— should only rarely give raise to particular difficulties, in spite of the absence of uniform rules providing (or suggesting) an autonomous definition.

36. Article 1, paragraph 2, specifies that the Regulation shall not apply to the aforementioned excluded matters «even if» an issue relating to such matters arises «merely as a preliminary question within the context of divorce or legal separation proceedings»⁸⁹.

The Regulation evokes, here, a well-known topic of the theory of private international law. A «preliminary» or «incidental» question (*Vorfrage*, *question préalable*, *questione preliminare*), arises whenever the decision of a certain issue (the main question) logically requires another issue (the preliminary question) to be decided in the first place. When this happens, and the situation features a foreign element, one must wonder whether, and how, the way in which conflict-of-laws issues are dealt with in respect of the main question should somehow affect the way in which the corresponding issues must be addressed and decided as regards the preliminary question. Roughly stated, the problem is whether the preliminary question should be decided in accordance with the (substantive or the conflict-of-laws rules of the) law applied to the main question, or whether the two questions, notwithstanding their interplay in the case at hand, should be treated separately, as if they arose in two different contexts, thus possibly being governed by the law of different countries⁹⁰.

The Regulation, as we have said, does not purport to solve this problem. By mentioning the issue, it limits itself to recognizing its practical relevance in the area of divorce. As a matter of fact, divorce and legal separation proceedings frequently involve some (separate) questions to be decided at a (logically) preliminary stage.

In these circumstances, the way in which preliminary questions should be dealt with in the framework of divorce or legal separation proceedings must be deemed to be entirely left with the law (or the practice) of each participating Member State.

It is worth mentioning, however, that in one case, the way in which a preliminary question is decided has a direct bearing on the functioning of the Regulation: under Article 13, the courts of a participating Member State are not obliged to pronounce a divorce *if the law of the forum* deems the marriage in question invalid for the purpose of divorce⁹¹.

⁸⁶ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters («Brussels I»), O.J. L 12 of 16 January 2001, p. 1 *et seq.*

⁸⁷ See *supra*, footnote 40.

⁸⁸ See *supra*, footnote 40.

⁸⁹ It is worth noting, by the way, that in at least one case the «point of view» of the forum as regards a particular preliminary question —the question relating to the existence and the validity of the marriage— does affect the way in which the law applicable to divorce and legal separation is determined under the Regulation. Article 13, as we will see *infra*, § 84 *et seq.*, allows a participating Member State not to apply the law designated by the Regulation whenever it «does not deem the marriage in question valid for the purposes of divorce proceedings».

⁹⁰ See generally on this subject P. PICONE, *Saggio sulla struttura formale del problema delle questioni preliminari nel diritto internazionale privato*, Jovene, 1971, and T.S. SCHMIDT, «The Incidental Question in Private International Law», *RCADI*, 1993, vol. 233, p. 305 *et seq.*

⁹¹ See further *infra*, § 84 *et seq.*

4. The temporal scope of application of the Regulation

37. As regards the temporal scope of application of the Regulation, two concepts need to be distinguished at the outset: the date of entry into force, *i.e.* the moment in time at which a set of rules becomes binding as a normative act; and the date of application, *i.e.* the temporal element on the basis of which a given situation may be considered to be subject to the regime in question⁹². Regulation No. 1259/2010 has entered into force on 30 December 2010, the day after its publication in the Official Journal (Article 21, first sentence). Its date of application, as we have already mentioned, is 21 June 2012 (safe for Article 17, applicable from 21 June 2011).

38. Article 18, paragraph 1, states that the Regulation «shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 concluded as from 21 June 2012», although «effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with Articles 6 and 7», regarding consent and validity.

Proceedings instituted before 21 June 2012 will remain, in principle, unaffected by the new piece of legislation. Yet, since the Regulation equally applies to «agreements ... concluded as from 21 June 2012», the situation may arise where a choice of law is made *after* 21 June 2012 in respect of proceedings instituted *prior* to that date. The possibility of doing so, it is submitted, should be checked against the law of the forum, in accordance with Article 5, paragraph 3, of the Regulation, regarding agreements made during the course of proceedings.

The second sentence of Article 18, paragraph 1, aims apparently at encouraging the spouses to avail themselves of the autonomy granted by the Regulation. The provision in fact broadens the temporal scope of application of Article 5 by instructing courts of participating Member States to give effect to agreements that would otherwise fall outside the scope of application of the Regulation. Arguably, the extension has been made on the assumption that the spouses, in concluding the agreement at a time when the Regulation was not yet applicable, acted in view of proceedings that they expected might be instituted at a later stage, subsequent to the date of application of the new regime. The provision, in other words, is meant to protect the expectations of the parties based on the foreseeable applicability of Regulation No. 1259/2010. It should therefore be interpreted as covering agreements *fully* compliant with the Regulation —*i.e.* with Article 5, 6 and 7, not only with Article 6 and 7— concluded after the entry into force of the Regulation⁹³, though prior to its date of application.

39. Pursuant to Article 18, paragraph 2, the Regulation «shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seized before 21 June 2012».

Apparently, this is nothing more than a clarification of what is already stated in paragraph 1. There is actually little doubt that, in proceedings commenced before 21 June 2012, the admissibility and the effects of a prior agreement as to the law applicable to divorce and legal separation must be verified on the basis of the conflict-of-laws rules of the forum, not with the Regulation⁹⁴.

5. The irrelevance of nationality and habitual residence of the spouses

40. The Regulation is silent as to its personal scope of application. As a matter of fact, its applicability does not seem to depend on any personal condition relating to the spouses⁹⁵. In the participating

⁹² Cf. on these notions the opinion of Advocate General Mengozzi delivered on 6 September 2011 in case C-412/10, *Deo Antoine Homawoo*, available at <http://curia.europa.eu>.

⁹³ A different reading, concerning the latter aspect, would *de facto* result in the Regulation receiving a retroactive application.

⁹⁴ One might wonder whether Article 18, paragraph 2, should be understood as meaning that it is for the conflict-of-laws rules of the forum, and not for the Regulation, to determine whether, and to what extent, the spouses may modify their agreement in the course of such proceedings.

⁹⁵ A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, 12th ed., II, p. 191.

Member States, Regulation No. 1259/2010 will thus apply to divorce and legal separation proceedings involving spouses of any nationality, no matter where they reside.

The solution is implicit in Article 4, stating the «universal» application of Regulation No. 1259/2010, and is common to the «Rome I» and «Rome II» Regulations⁹⁶.

V. The relationship between the Regulation and existing international conventions

41. The actual applicability of Regulation No. 1259/2010, and the operation of its rules, may be affected by reason of the respect due to the international engagements, if any, taken by participating Member States prior to the adoption of the Regulation itself. Under Article 19, paragraph 1, the Regulation «shall not affect the application of international conventions to which one or more participating Member States are party at the time when this Regulation is adopted ... and which lay down conflict-of-laws rules relating to divorce or separation». The solution adopted is in line, in its rationale, with the «general» safeguard clause provided for by Article 351 of the TFEU as regards rights and obligations arising from agreements concluded between one or more Member States, on the one hand, and one or more third countries, on the other, before European Union law came into effect for them⁹⁷.

The practical relevance of this provision in the field of divorce and legal separation is likely to be scarce: participating Member States have actually concluded a limited number of bilateral⁹⁸ and multilateral⁹⁹ conventions, addressing conflict-of-laws issues in family matters. Yet, the inclusion of this rule within the Regulation is hardly surprising, as similar provisions may be found in other instruments enacted by the European Union in the field of judicial cooperation in civil matters. Article 19 substantially corresponds, with some variations, to Article 25 of the «Rome I» Regulation and Article 28 of the «Rome II» Regulation.

Like the latter provisions, Article 19 of Regulation No. 1259/2010 clarifies that, in any case, the Regulation shall, as between participating Member States, take precedence over conventions concluded *exclusively* between two or more of them.

VI. The agreement of the spouses as to the law applicable to divorce and legal separation

42. The will of the spouses, as we have mentioned, has a primary role in Regulation No. 1259/2010. In determining the law applicable to divorce and legal separation, the first question to be answered is whether a valid agreement has been concluded in this respect. The «objective» connecting factors provided for by Article 8 may only come into play once it is established that no such agreement exists.

⁹⁶ P. FRANZINA, «Articolo 2 — Carattere universale», in F. SALERNO / P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali («Roma I») — Commentario, Nuove leggi civili commentate*, 2009, p. 606 *et seq.*

⁹⁷ See, *mutatis mutandis*, P. FRANZINA, «Las relaciones entre el reglamento Roma I y los convenios internacionales sobre conflictos de leyes en materia contractual», *CDT*, 2009, especially p. 94 *et seq.*

⁹⁸ For example, Article 19 of the Regulation should come into play whenever proceedings are instituted in France regarding the divorce of a Moroccan national. By a bilateral Convention on personal and family matters as well as judicial cooperation, made at Rabat on 10 August 1981, France and Morocco have agreed on uniform conflict-of-laws rules regarding *inter alia* divorce proceedings: Moroccan law will apply to the dissolution of marriage where the spouses are both Moroccans, while the divorce of a Franco-Moroccan couple shall be subject to the law of the country where the spouses are both domiciled, or were last both domiciled (Article 10 of the Convention). The text of the Convention may be retrieved through the *Pacte* database at <http://www.doc.diplomatie.gouv.fr>.

⁹⁹ Article 19, Regulation No. 1259/2010, for example, shall not prevent Italian, Spanish and Portuguese courts from applying the second sentence of Article 1, paragraph 1, of the Munich Convention of 5 September 1980 on the Law Applicable to Surnames and Forenames (see *supra*, footnote 37). The Convention provides that the surnames and forenames of a person shall be governed by the law of the State of which he or she is a national, but it also adds that, for this purpose, the situations on which surnames and forenames depend — e.g. divorce and legal separation — shall be assessed in accordance with that law. See also *infra*, § 50, on the interplay between Regulation No. 1259/2010, on one side, and the Conventions of 1951 and 1954 on refugees and on the status of stateless persons, on the other.

Party autonomy law in respect of divorce and legal separation enjoys a limited recognition in the Member States' systems of private international law. The majority of States adopting a bilateral approach in this area simply do not envisage the possibility of the spouses choosing the law applicable to the dissolution or loosening of matrimonial ties. Only Germany, Belgium and the Netherlands, as mentioned, allow the governing law to be identified in accordance with the spouses' *electio iuris*, though limiting in several respects the autonomy of the parties.

Under Article 55, paragraph 2, of the Belgian Code of private international law of 2004, for example, the spouses may only designate Belgian law or the law of the State of which either of them is a national. What is more, an agreement as to the choice of law can only be made in the occasion of the spouses' appearance in court.

In light of the foregoing, Article 5 of the Regulation represents a remarkable innovation for the vast majority of the participating Member States.

Spouses are allowed to choose among four options. They can designate the law of the State where they are habitually resident, the law of the State where they were last habitually resident, the law of the State of nationality of either of them, or the law of the forum. Besides, the choice may be made either before proceedings are instituted or in the course of the latter, provided that certain conditions are met¹⁰⁰. Formal requirements are in principle rather liberal, although supplemental requirements may be imposed in some cases in accordance with the national law of a participating Member State¹⁰¹.

1. The reasons explaining the favour of the Regulation towards autonomy

43. Several reasons, it is submitted, explain the favourable attitude of the Regulation towards party autonomy¹⁰². These reasons relate *inter alia* to: (i) the substantive policies underlying the regulation of divorce and family relationships in Europe; (ii) the difficulties affecting the unification of conflict-of-laws rules in an area of private international law traditionally showing little or no uniformity, such as divorce and legal separation; (iii) the search for devices capable of avoiding some «technical» shortcomings of the connecting factors traditionally employed in this area¹⁰³.

44.(i) Self-determination of the individual is today a key value as far as the substantive regulation of personal and family relationships is concerned. The respect due to private and family life under Article 8 of the European Convention on Human Rights implies, *inter alia*, the right of individuals to take by themselves the basic decisions affecting their life¹⁰⁴. Legitimate restrictions may be imposed to such right with a view to safeguarding social and collective values, or with a view to protecting the individual concerned; yet, generally speaking, these restrictions are subject to strict limitations.

With the individual dimension of family law increasingly gaining importance, a trend arises from the standpoint of substantive law, favouring private contracting as a way of ordering family relationships, either at the moment in which these relationships are created or at the moment of their dissolution¹⁰⁵.

This evolution significantly affects the way in which family relationships are treated from a private international law perspective.

¹⁰⁰ See further *infra*, § 54.

¹⁰¹ See further *infra*, § 56 *et seq.*

¹⁰² See also on this subject A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, 12th ed., II, p. 208 *et seq.*

¹⁰³ See on this subject, for further references, P. FRANZINA, «L'autonomia della volontà nel regolamento sui conflitti di leggi in materia di separazione e divorzio», *RDI*, 2011, p. 489 *et seq.*

¹⁰⁴ Self-determination is actually protected, under Article 8 of the ECHR (although to a variable extent, depending on the situation), in respect of, *inter alia*, sexual life (see, e.g., European Court of Human Rights, judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, paragraph 44), procreation (see, e.g., European Court of Human Rights, judgment of the Grand Chamber of 10 April 2007, *Evans v. the United Kingdom*, paragraph 71) and personal identity (European Court of Human Rights, judgment of the Grand Chamber of judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, paragraph 90).

¹⁰⁵ See, generally, the essays collected in D. FENOUILLET / P. DE VAREILLES-SOMMIÈRES (eds.), *La contractualisation de la famille*, Paris, Economica, 2001.

On one side, the trend towards «contractualization» of family law triggers a redefinition of public policy (*ordre public*) in this area: public policy in family matters is not only reducing itself to a smaller core of essential values, but is also undergoing a transformation that may be described as a gradual shift from an *ordre public de direction*, aiming primarily at the preservation of certain family models, to an *ordre public de protection*, focusing on the position of the individual and on the safeguard of his or her rights¹⁰⁶.

On the other side, and somehow more drastically, the enhancement of the role of individual self-determination in substantive family law is the premise upon which an overall reconsideration of the traditional conflict-of-laws solutions in this area may progressively be built. The idea that the spouses should be entitled, under certain conditions, to choose the law governing their relationship, or at least the breakdown thereof, represents the most salient outcome of this reconsideration.

45. (ii) Recognizing the freedom of the spouses as regards the law applicable to divorce and legal separation may be regarded, as we have noticed, as a means by which the opposing traditions of the Member States in this field of private international law may be more easily reconciled¹⁰⁷. By allowing party autonomy to play a role in the determination of the law governing divorce and legal separation, the drafters of Regulation No. 1259/2010 have somehow «mediated» between the advocates of nationality and those supporting the use, in this area, of habitual residence and domicile. Indeed, the relevance of «objective» connecting factors has not been entirely superseded, as the spouses, under Article of the Regulation, are entitled to designate nothing more than their law of residence, their law of nationality or the *lex fori*.

Party autonomy, seen from this angle, appears to be vested with a «corrective» function. Habitual residence and nationality are still regarded as being the most appropriate connecting factors in the field of divorce and legal separation, but the point is made that the operation of those traditional factors may sometimes result in unconvincing practical outcomes. While a too large recourse to nationality might represent an obstacle to social integration and prevent migratory flows from being effectively managed, the systematic use of habitual residence may run counter the goal of preserving pluralism and safeguarding cultural diversity.

In the end, the enhancement of party autonomy is a means to reinforce, and renew, the operation of the connecting factors of habitual residence and nationality. Such a move is meant to make unification of conflict-of-laws rules easier, since traditional options, far from being suppressed or replaced, are combined together within a new and flexible framework.

46. (iii) Autonomy in private international law is traditionally associated with the idea of legal security. As a matter of fact, allowing the parties to choose the law governing their relationship normally results in conflict-of-laws issues being decided in an easy and straightforward way, satisfying both the expectations of the parties and the goal of a sound administration of justice.

Advantages like these appear to be of particular importance when party autonomy is weighed against objective connecting factors such as nationality and habitual residence.

As a matter of fact, habitual residence is not always easy to determine. Delicate issues may sometimes arise as to which indicia should be given paramount importance in determining the centre of a person's interests in a given case. Apart from this, habitual residence is by its very nature an «unstable» connecting factor, especially within an area like Europe, where mobility from one country to the other is particularly intense and enjoy a strong legal protection.

Nationality, of course, is a more stable factor, but the event of a change in nationality or the acquisition of a new one (through marriage, for example) can no longer be regarded as remote and unlikely.

Through party autonomy, if properly regulated, some of the traditional shortcomings inherent to nationality and habitual residence may be overcome, or reduced to a minimum.

¹⁰⁶ See further P. FRANZINA, «L'autonomia della volontà nel regolamento sui conflitti di leggi in materia di separazione e divorzio», *RDI*, 2011, p. 493.

¹⁰⁷ See E. JAYME, «Party Autonomy in International Family and Succession Law: New Tendencies», *YPIL*, 2009, p. 3.

In particular, Regulation No. 1259/2010 is drafted as to ensure that the choice of the spouses may bring about *stable* effects. Under Article 5, paragraph 1, lit. *a*, the spouses may elect the law of the country where they habitually reside «at the time the agreement is concluded». This means that their choice remains valid and effective in spite of any subsequent change in the habitual residence of either spouse. A similar safeguard applies to agreements designating the law of the country where the spouses were last habitually resident or the law of which either spouse is a national. Autonomy seems thus to provide a valuable answer to the accrued need for predictability and legal certainty in Europe.

From a different point of view, party autonomy may help satisfying the need for trans-sectorial coordination, we have mentioned to above¹⁰⁸. As long as different rules, based on different connecting factors, govern situations that are closely connected to one another on the substantive law level, the risk exists that different —and possibly diverging— laws apply to each one of the situations in question. A proper coordination between the relevant rules may thus be difficult to achieve relying solely on «objective» connecting factors. Party autonomy may become useful in this respect producing a sort of «streamlining» effect, since the spouses —if they wish— may choose to submit their divorce or legal separation to the law applicable to a «neighbour» institution (their maintenance obligations, their matrimonial property regime etc.).

Finally, the will of the parties may help overcoming the disadvantages stemming from the possible dissociation between the law governing the substance of divorce and the law governing court proceedings instituted to that end¹⁰⁹. In granting the spouses the possibility of choosing the law of the forum, Regulation No. 1259/2010 facilitates *inter alia* such an outcome.

2. The «conflictual», as opposed to substantive, nature of the autonomy of the spouses

47. Article 5 of Regulation No. 1259/2010 grants the spouses a «conflict-of-laws» autonomy, not a substantive one. The only purpose of the agreement made under Article 5 is to identify the legal system from which the relevant substantive provision should be drawn. It will be for the law applicable to divorce and legal separation, as determined by the relevant conflict-of-laws rules, to state whether, under which circumstances and to what extent the spouses may be entitled to agree on the substance of their rights and obligations, thus derogating from any provision otherwise applicable under the *lex causae*.

An agreement as to the law applicable to divorce and legal separation may be concluded well before divorce or legal separation proceedings are instituted. The substantive content of the law chosen by the spouses may change over time. Accordingly, at the time of the proceedings the spouses may find themselves subject to substantive provisions (belonging to the legal system they choose, but) bearing a different content from what they expected.

One may wonder whether the spouses, in order to avoid this risk, could specify in their agreement that they intend to ensure the application of such rules as were in force in the chosen legal system *at the time of the agreement*. It is submitted that, since «incorporating» the rules in force in a legal system within an act of (substantive) autonomy is a different thing from «choosing» the legal system in question under Article 5 of Regulation No. 1259/2010 (just as it is under Article 3 of the «Rome I» Regulation and Article 14 of the «Rome II» Regulation)¹¹⁰, the possibility —if any— of «freezing» the applicable substantive provisions should be assessed on the ground of the *lex causae*, as may be identified in accordance with the relevant Regulation's provisions (the agreement of the spouses as to the applicable law, if any, or the objective rule of Article 8).

Rather, the spouses may consider introducing a clause in their agreement, according to which the latter shall be terminated in the event that a given modification is brought about within the chosen

¹⁰⁸ See *supra*, § 10.

¹⁰⁹ See *supra*, § 14.

¹¹⁰ Cf. P. BERTOLI, «Articolo 1 - Campo di applicazione materiale - I», in F. SALERNO / P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali («Roma I») – Commentario, Nuove leggi civili commentate*, 2009, p. 554 *et seq.*

legal system, affecting the substantive content thereof. The Regulation does not provide anything explicitly in this respect. However, since the rationale of Article 5 is basically to safeguard the expectations of the spouses, while enhancing legal security and promoting the sound administration of justice, it is argued that a clause to that effect is not inconsistent with the latter provision, at least when the intention of the spouses as to the event resulting in the termination of the agreement is clear. In the end, clauses like this (not less than clauses providing, more simply, that the agreement of the spouses shall terminate at a certain date) may be seen as a means by which the spouses avail themselves of a possibility explicitly contemplated in the Regulation, *i.e.* the possibility of modifying at any moment (under a prior agreement, in this case) an existing *electio iuris* (Article 5, paragraph 2).

3. The possible content of the agreement

48. The spouses, as we have said, are not allowed to choose any law they like. Under Article 5 of Regulation No. 1259/2010, they can only opt for the law of the State where they are habitually resident at the time the agreement is concluded, the law of the State in which they were *last* habitually resident («in so far as one of them still resides there at the time of the agreement»), the law of the State of nationality of either of them at the time of the agreement, or the law of the forum.

According to Recital 16 of the Regulation, the spouses should in fact be able to choose either the law of a country «with which they have a special connection» or the law of the forum.

49. The remarks made before concerning the notion of habitual residence¹¹¹ and the way in which the nationality of an individual must be determined for the purpose of the Regulation¹¹², should apply, it is submitted, when it comes to identifying *in concreto* the country whose law may be chosen under Article 5.

50. Further remarks may nevertheless be necessary in particular cases. As far as nationality is concerned, the situation may arise where the interested person has more than one nationality, or has none.

In connection with dual and multiple nationals, Recital 22 states that where the Regulation refers to nationality as a connecting factor for the application of the law of a State, «the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union».

Thus, for example, in case of divorce proceedings instituted in Italy, in order to determine whether the law chosen by the spouses is among those listed in Article 5 of the Regulation, reference should be made to Article 19, paragraph 2, of the Law of 31 May 1995 reforming the Italian system of private international law. According to this provision, any person possessing more than one nationality shall be deemed to be a national of the State with which he or she has the closest connection, save that, if one of the different nationalities at stake is the Italian, the latter shall prevail. Following Recital 22 of the Regulation, the latter sentence should only come into play to the extent to which it is compatible with the general principles of European Union law, and more particularly with the principle prohibiting all discrimination on grounds of nationality (Article 18 of the TFEU). The «primacy» of the Italian nationality shall therefore be disregarded each time the spouse in question possesses, together with the Italian nationality, the nationality of another Member State¹¹³.

The principle underlying Recital 22 should likewise be followed, it is submitted, as regards stateless persons. National rules in this respect should thus be seen as supplementing Article 5 of the Regulation, insofar as the latter provision refers to the nationality of the spouses. The said national rules should be all the more relevant to the application of Regulation No. 1259/2010 whenever they have been enacted by a Member State in order to implement an international agreement concluded by that State

¹¹¹ See *supra*, § 18.

¹¹² See *supra*, § 19.

¹¹³ See generally S. BARIATTI, «Cittadinanza», in R. BARATTA (ed.), *Dizionari del diritto privato – Diritto internazionale privato*, Milano, Giuffrè, 2010, p. 48 *et seq.*

«before 1 January 1958 or, for acceding States, before the date of their accession»: under Article 351 of the TFEU, as we have seen¹¹⁴, European Union law as whole does not affect such agreements. Now, several participating Member States are parties to the Convention relating to the status of stateless persons of 28 September 1954¹¹⁵. Under Article 12, paragraph 1, of the Convention, «[t]he personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence». Accordingly, whenever an agreement on the law applicable to divorce and legal separation is brought before a court of a Member State bound by this rule, Article 5, paragraph 1, of Regulation No. 1259/2010 should be understood as allowing the spouses to choose, *inter alia*, the law of the country where either of them, being a stateless person, has his or her domicile, or —failing a domicile— his or her residence.

For similar reasons, the same solution should be followed in respect of refugees. In most cases, refugees retain the nationality of their country of origin. However, it is generally accepted that it would be inappropriate to consider a refugee's personal status to continue to be governed by the law of such country. Under Article 1A of the Convention Relating to the Status of Refugees of 28 July 1951, a refugee is in fact a person who «owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country». Nationality, in these circumstances, is regarded as formal, and Article 12, paragraph 1, of the 1951 Convention (to which all Member States are a party) provides, just like the corresponding provision of the 1954 Convention on the status of stateless persons, that the personal status of a refugee shall be governed by the law of the country of his domicile or, if he or she has no domicile, by the law of the country of residence.

51. Divorce, just as legal separation, may only be governed by one law: «cumulative» choices, *i.e.* agreements designating the law of two or more countries, are clearly not admitted by Regulation No 1259/2010¹¹⁶.

The situation is different when the spouses choose to designate, within the options contemplated in Article 5, the laws of two (ore more) countries, so that the law designated in the second place shall apply whenever the law designated in the first place should turn out to be inapplicable in the forum on grounds of public policy or in accordance with Article 10.

The policies underlying Article 5, namely enhancing legal certainty and the self-determination of the spouses, together with the policies underlying the Regulation at large, namely the idea that effective access to divorce should be favoured, seem to suggest that the issue may be answered in the affirmative, provided that the will of the parties is unequivocal as to the way in which the «sequence» of designations should work¹¹⁷.

52. Under Article 5 of Regulation No. 1259/2010, the spouses may agree to designate the law applicable to divorce *and* legal separation. This should be read as meaning that the autonomy granted to the spouses covers both institutions, but not that divorce and legal separation should be considered *jointly* for the purpose of the agreements in question.

Rather, since divorce and legal separation are recognized by the Regulation as being two different institutions, normally corresponding to two separate proceedings (safe where legal separation may be converted into divorce)¹¹⁸, the Regulation —it is argued— does not prevent the spouses from concluding two distinct agreements, possibly designating the law of two different countries.

¹¹⁴ See *supra*, § 41.

¹¹⁵ Text and status available at <http://treaties.un.org>.

¹¹⁶ A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, 12th ed., II, p. 217.

¹¹⁷ According to L. ÁLVAREZ DE TOLEDO QUINTANA, «El pacto de elección de *lex separationis* y *lex divorcii* en el Reglamento 1259/2010 del Consejo, de 20 de diciembre de 2010», *Diario La Ley*, 18 April 2011, p. 3, Article 5 of the Regulation does not prevent the spouses from making a choice in the terms indicated below: party autonomy, he argues, «no se opone radicalmente a las preceptivas contenidas en los arts. 10 y 12 del Reglamento, que pueden interpretarse en el sentido de hacerse aplicación de la *lex fori* solo en cuanto se hayan agotado las posibilidades alumbradas por la autonomía de la voluntad».

¹¹⁸ See *infra*, § 63 *et seq.*

53. The case of agreements designating the law of a country consisting of two or more legal systems, or directly one of such systems, will be examined below, when will turn to Article 14 of the Regulation¹¹⁹.

4. The moment at which the agreement may be concluded

54. Under Article 5, paragraph 2, «an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized». Paragraph 3 adds that, if the law of the forum so provides, «the spouses may also designate the law applicable before the court during the course of the proceeding»; such designation shall then be recorded in court «in accordance with the law of the forum».

The solutions adopted by the drafters of the Regulation concerning the time at which the agreement may be concluded seem to reflect two policies. On one side, the view is taken that a liberal approach should be followed in this respect in order to promote autonomy: the spouses may enter into an agreement as to the law applicable to divorce and legal separation at any time, and modify it whenever they want. On the other side, legal certainty and the good administration of justice demand that, once the court is seized, no more changes should be allowed possibly resulting in the change of the law applicable to the merits.

By stating that the spouses may deviate from the latter rule if the *lex fori* so provides, the Regulation allows participating Member States to reinforce the liberal approach underlying Article 5. The solution may be seen as conferring a reasonable degree of flexibility to the supranational regime. It also responds to a practical need, since the admissibility of agreements made in the course of proceedings cannot be properly assessed without considering the way in which the proceedings themselves are regulated, *i.e.* without considering the procedural law of the forum.

All this notwithstanding, the problem remains that a practically important issue regarding the functioning of Article 5 shall not be decided uniformly among the participating Member States, but rather in accordance with the possibly diverging views of each of them.

In order to enhance predictability, Article 17 of the Regulation requires participating Member States to provide the Commission with the relevant information regarding their own legal systems in connection with Article 5, paragraph 3. The information collected shall be made publicly available, in particular through the website of the European Judicial Network on Civil and Commercial Matters.

5. Issues regarding consent and the material validity of the agreement

55. Drawing inspiration from Article 10 of the «Rome I» Regulation, Article 6 of Regulation No. 1259/2010 provides, in paragraph 1, that the existence and validity of an agreement designating the law applicable to divorce and legal separation, or of any term thereof, shall be determined by the law that would govern divorce and legal separation¹²⁰, under the Regulation, «if the agreement or term were valid».

¹¹⁹ See *infra*, § 64 *et seq.*

¹²⁰ The English version of Article 6 is somewhat ambiguous, as it submits the issues relating to the existence and validity of the agreement to the law that would govern «it» —«it» being the agreement, one would say— under the Regulation. In fact, the relevant law, here, is the law that would govern divorce and legal separation. The reading proposed is in line with other linguistic versions of Regulation No. 1259/2010. According to the French one, for example, «[l]’existence et la validité d’une convention sur le choix de la loi ou de toute clause de celle-ci sont soumises à la loi qui serait applicable en vertu du présent règlement si la convention ou la clause était valable». The Italian and the German versions feature a similar drafting: «[l]’esistenza e la validità di un accordo sulla scelta della legge o di una sua disposizione si stabiliscono in base alla legge che sarebbe applicabile in virtù del presente regolamento se l’accordo o la disposizione fossero validi»; «Das Zustandekommen und die Wirksamkeit einer Rechtswahlvereinbarung oder einer ihrer Bestimmungen bestimmen sich nach dem Recht, das nach dieser Verordnung anzuwenden wäre, wenn die Vereinbarung oder die Bestimmung wirksam wäre». The Spanish version, on the contrary, follows (and somehow reinforces) the reference to the law applicable *to the agreement*, instead of the law applicable to divorce and legal separation, common to the English version. It provides in fact that «[l]a existencia y la validez de un convenio de elección de la ley aplicable y de sus cláusulas se determinarán con arreglo a la ley por la que se regiría el convenio en virtud del presente Reglamento si el convenio o cláusula fuera válido». In the end, however, the French and Italian reading should be preferred. On one side, they are consistent with the solution adopted in respect of the same issue by Article 10, paragraph 1, of

Paragraph 2 goes on to state that, nevertheless, «a spouse, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence at the time the court is seized» if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law specified above. The relevant circumstances, it is submitted, may be, in particular, those in which the agreement has been negotiated (whether the spouse in question enjoyed legal assistance etc.).

6. The formal requirements of the agreement

56. Party autonomy, as we have seen, rests on the idea that self-determination of the spouses represents a value in family law. With this in mind, Regulation No. 1259/2010 aims to ensure that the agreement of the spouses as to the law governing divorce and legal separation may reflect to the largest possible extent a *genuine* expression of self-determination: autonomy would in fact be illusory, or even counterproductive, if the will expressed by either spouse was not the outcome of a free determination, made in full awareness of its legal consequences. Recital 18 is explicit in this respect when it states that «[t]he informed choice of both spouses is a basic principle» of the Regulation, and that each spouse «should know exactly what are the legal and social implications of the choice of applicable law».

The formal requirements set forth in Article 7 of the Regulation pursue precisely this goal¹²¹. Under Article 7, paragraph 1, the agreement of the spouses—including any subsequent agreement aimed at modifying an existing *electio iuris*— «shall be expressed in writing, dated and signed by both spouses»¹²²; the provision clarifies that any communication by electronic means shall be deemed equivalent to writing, as long as it provides «a durable record of the agreement»¹²³.

57. The Regulation states that participating Member States are free to provide additional formal requirements in respect of agreements designating the law applicable to divorce and legal separation. The spouses may be required, for example, to express their consent before a notary, or to ensure—following certain procedures—that their agreement is officially recorded.

Article 7, paragraph 2, states that the formal validity of an agreement entered into by the spouses for the purposes of Article 5 may need to be assessed, in the first place, on the ground of the additional requirements, if any, laid down by the law of the participating Member States «in which the two spouses have their habitual residence at the time the agreement is concluded».

Under Article 7, paragraph 3, if the spouses are habitually resident in different participating Member States at the time of the agreement, and the laws of those States provide for different formal requirements, «the agreement shall be formally valid if it satisfies the requirements of either of those laws».

Finally, according to Article 7, paragraph 4, if only one of the spouses is habitually resident in a participating Member State at the time of the agreement, and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

58. Allowing participating Member States to supplement the uniform regime by introducing additional formal requirements reflects the importance attached by the Regulation to the means by which

the «Rome I» Regulation («The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid»). On the other, since the Regulation does not say anything (save here, in Article 6) about the law applicable to the agreement of the spouses, the French and Italian versions have the advantage of actually providing a solution to the issue of the existence and material validity of the *electio iuris* (i.e. the designation of the *lex divortii*), while, in the face of the English and Spanish ones, the question remains *de facto* unanswered.

¹²¹ Cf. Recital 19: «Rules on material and formal validity should be defined so that the informed choice of the spouses is facilitated and that their consent is respected with a view to ensuring legal certainty as well as better access to justice».

¹²² By stressing that the signature of *both* spouses is required for the formal validity of the agreement, the Regulation reiterates that the way in which conflict-of-laws issues are decided in matters of divorce and legal separation must be fully compliant with the prohibition of gender discrimination.

¹²³ The latter clarification may be found in other normative instruments enacted by the European Union in the field of judicial cooperation in civil matters: see Article 23, paragraph 2, of the «Brussels I» Regulation, and Article 4, paragraph 2, of Regulation No. 4/2009 on maintenance obligations.

the freedom of the spouses may practically be ensured. Nevertheless, the resulting regime is a combination of uniform and national provisions, possibly varying from one participating Member State to the other. In this respect, the uniformity of the conflict-of-laws regime set forth by Regulation No. 1259/2010 is seriously affected.

In order to safeguard legal security, the Regulation provides that the relevant additional requirements shall be those in force at the time in which the agreement is concluded. Subsequent modifications will therefore not prejudice the «original» validity of the agreement¹²⁴.

Article 17 of the Regulation provides that the participating Member States wishing to introduce such requirements shall inform the Commission by 21 September 2011, and that the latter shall make all information communicated publicly available, in particular through the website of the European Judicial Network in Civil and Commercial Matters.

VII. The law governing divorce and legal separation absent a choice of the spouses

59. Absent a valid choice by the spouses, the law applicable to divorce and legal separation shall be determined in accordance with Article 8 of Regulation No. 1259/2010. This provision lays down four objective connecting factors, whose operation follows a «step-by-step» scheme often referred to as the *Kegelsche Leiter* («Kegel's ladder»), after the German scholar GERHARD KEGEL.

60. Common habitual residence of the spouses is the key concept here. It may be found on the first and on the second stage of the ladder. The law applicable to divorce and legal separation shall be the law of the State where the spouses are habitually resident at the time the court is seized¹²⁵. Failing a common habitual residence at that time, the applicable law shall be the law of the State where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized¹²⁶, and that one of the spouses still resides in that State at the time the court is seized. Where the latter requirement is not met, divorce and legal separation—we are now on the third stage of the ladder—shall be subject to the law of the State of which both spouses are nationals when the court is seized. Finally, if the spouses do not possess a common nationality, the *lex fori* will apply.

61. Article 8 is a complex provision, designed to accommodate different needs. It strikes a balance, as we have seen, between the promotion of social integration and the preservation of cultural identity. It aims at designating the law of a country with which the matrimonial relationship has a genuine and meaningful connection, *i.e.* the law of the country where the spouses are habitually resident. At the same time, whenever the integration of the couple within one country is relatively weak (since the spouses do not possess a common habitual residence or have not possessed it in the previous year), the provision relies on other relevant factors, such as the common nationality of the spouses. In the end, «proximity» is pursued in the framework of a relatively flexible system of connecting of factors.

¹²⁴ A participating Member State may in principle modify its additional formal requirements from time to time. Nothing in the Regulation prevents that in a case like this, should the State pass from a stricter to a more liberal approach, the new requirements might apply retroactively. The *effet utile* of the Regulation would in fact be enhanced.

¹²⁵ As stated in Recital 13, the relevant moment for determining the habitual residence of the spouses under Article 8 of Regulation No. 1259/2010 should be determined, for the sake of uniformity, in accordance with the criteria set out in Article 16 of the «Brussels II bis» Regulation. Under the latter provision, a court «shall be deemed to be seized: (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court».

¹²⁶ While it might be difficult to identify a precise moment in time in which habitual residence «ends», the relevant criteria for the calculation of time should those laid down in Regulation (EEC, Euratom) No. 1182/71 of 3 June 1971, determining the rules applicable to periods, dates and time limits. In particular, Article 3, paragraph 1, of the latter Regulation provides that, «[w]here a period, expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question».

The respect due to the reasonable expectations of the spouses, too, represents a concern under Article 8. The very fact of designating the law of a country being closely connected to the relationship of the spouses is a means by which predictability should be normally ensured. Furthermore, by referring to the last habitual residence of the spouses, provided that it did not end more than one year before the institution of the proceedings and that one of the spouses still resides in the same State, the Regulation avoids the risk that a change in the life of one of the spouses (*e.g.*, an employment abroad) might end up frustrating the said expectations.

While Article 8 is based on «geographic» factors, substantive considerations are not entirely foreign to its design. The «interest» of the forum for regulating on the substantive law level the family matters brought before its courts is indirectly satisfied by the primary role played by the habitual residence of the spouses: as we have seen, this should allow the courts of the participating Member States to apply the law of the forum in a non negligible number of cases. The same goal is pursued in a direct way, but on the last stage of the «ladder», by the designation of the *lex fori*.

62. In the majority of cases, the practical operation of Article 8 should not give rise to particular difficulties. The habitual residence of the spouses shall be determined by looking at the indicia of integration we have mentioned before¹²⁷, while their nationality shall be ascertained on the basis of the relevant provisions of the State, or States, «willing» to recognize such status¹²⁸.

As regards dual nationals, stateless persons and refugees, Article 8 should be applied —it is submitted— in accordance with the rules we have illustrated before, when we examined Article 5¹²⁹.

In at least one case, however, a different solution must be followed in the framework of Article 8. As a matter of fact, while Article 5 refers to the nationality of either spouse, the latter provision speaks of the common nationality of the spouses. If they share *one* common nationality, that will be the relevant nationality for Article 8, but there may be cases where the spouses, being both dual (or multiple) nationals, have two (or more) common nationalities. As we have seen, the courts of participating Member States are precluded from applying domestic rules whose purpose is to privilege one common nationality (the nationality of the forum) at the detriment of others, whenever this would be inconsistent with the general principles of European Union law, *i.e.* whenever, in particular, the spouses possess the common nationality of two (or more) Member States.

The situation has been examined by the Court of justice in the *Hadadi* judgment of 16 July 2009 with a focus on the rules on jurisdiction of the «Brussels II *bis*» Regulation. The Court held, in that occasion, that where spouses each hold the nationality of the same two Member States, Article 3, paragraph 1, lit. *b*, of Regulation No. 2201/2003¹³⁰ precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. It thus concluded that the courts of those Member States of which the spouses hold the nationality have jurisdiction under the said provision, so that the spouses may seize the court of the Member State of their choice. As a matter of fact —the Court observed— Article 3 of Regulation No. 2201/2003 is based on a number of alternative objective grounds with no hierarchy being established between them, thus permitting the coexistence of several courts having jurisdiction over the same matter¹³¹.

The solution adopted in *Hadadi* does not lend itself to be transposed to the conflict-of-laws plane. The substantive regulation of divorce (or legal separation) can only be drawn from one legal system¹³². The «cumulative» application of the law of two (or more) countries would be unworkable.

¹²⁷ See *supra*, § 19.

¹²⁸ See *supra*, § 20.

¹²⁹ See *supra*, § 50.

¹³⁰ Under Article 3, paragraph 1, lit. *b*, of the «Brussels II *bis*» Regulation, in matters relating to divorce and legal separation, jurisdiction shall lie, *inter alia*, with the courts of the Member State «of the nationality of both spouses».

¹³¹ Cort of Justice, judgment of 16 July 2009, *Hadadi*, case C-168/08, *EC Reports*, 2009, p. I-6871 *et seq.*, paragraph 48 *et seq.*

¹³² O. LOPES PEGNA, «La proposta di cooperazione rafforzata sulla legge applicabile a separazione e divorzio: profile problematici», *CDT*, 2010, p. 135.

It is argued that, whenever the described situation arises, nationality should be disregarded altogether for the purpose of Article 8, and the *lex fori* should apply in accordance with the last sentence of the latter provision¹³³. This is probably an unfortunate outcome, since—in order to avoid discrimination—spouses possessing two common «European» nationalities would be prevented from enjoying this status for conflict-of-laws purposes, while spouses possessing two common «non-European» nationalities would be entitled to rely on one of them, according to the rules of the forum¹³⁴.

Yet, it is submitted, no other solution is available. One might think, it is true, of resorting to the principle of proximity, and accordingly regard the «most effective» common nationality as the sole relevant nationality for the purpose of Article 8¹³⁵.

At least three arguments, however, militate against a similar reading: (i) the Court of justice held, in *Hadadi*, that there is no room in Regulation No. 2201/2003 for looking at the «effective» common nationality of the spouses as a (subsidiary) head of jurisdiction¹³⁶: there is no clear evidence, it is submitted, that Regulation No. 1259/2010 might be interpreted in a different way, *i.e.* as implicitly referring, in a case like this, to the «effective» common nationality of the spouses; (ii) referring to the common «effective» nationality of the spouses would not always represent a workable solution: the situation may arise where the spouses, while possessing the common nationality of two or more Member States, do not entertain any meaningful relationship with those countries; relying on a weak connection with one of these States would be at odds with the principle of proximity and results in unpredictable results; (iii) looking at the common «effective» nationality of the spouses would almost amount to «creating» a connecting factor by interpretive means: the possibility, of any, of going that far should only be admitted, it is argued, as a last resort, when no other solution is available on the face of the relevant provisions, and the functionality of the supranational regime is seriously at stake; these strict conditions are not met in the circumstances: the Regulation does provide for a connecting factor—the forum—to be employed whenever the reference to nationality does not allow to determine the law applicable to divorce and legal separation.

VIII. Conflict-of-laws issues relating to the conversion of legal separation into divorce

63. Not all legal systems distinguish divorce from legal separation. In those countries where the distinction is made, divorce and legal separation represent two distinct legal institutions, pursuing different functions (the dissolution as opposed to the loosening of matrimonial ties).

Given the respective autonomy of the two notions, it cannot be excluded, as we have mentioned in respect of Article 5, that the divorce and legal separation of one couple may be subject, under the Regulation, to the laws of different countries. As a matter of fact, this is not in itself unreasonable, since a significant period of time may elapse between legal separation and divorce proceedings, and changes may well occur in the meanwhile in respect of the relevant connecting factor (the habitual residence of the spouses, their nationality). The will of the spouses, too, may change during that time and result in a new agreement under Article 5 being concluded for the purpose of divorce.

Things are different when proceedings instituted in respect of separation are «converted» into divorce proceedings. In order to guarantee a properly coordination between the two «stages» of the resulting (unified) proceedings, Article 9, paragraph 1, of Regulation No. 1259/2010 provides that, in case of conversion, the law applicable to divorce shall be, in principle, «the law applied to the legal separation».

¹³³ By the way, a similar solution is envisaged in Article 17, paragraph 2, of the Proposal on Matrimonial Property Regimes.

¹³⁴ Under Article 17, paragraph 2, of the proposal mentioned in the preceding footnote, a similar «reverse discrimination» is de facto avoided, since the no distinction is made between spouses possessing «European» or «non-European» common nationalities.

¹³⁵ Cf. P. HAMMJE, «Le nouveau règlement (UE) n° 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps», *Revue critique de droit international privé*, 2011, p. 291 *et seq.*, paragraph 37.

¹³⁶ *Ibidem*, paragraph 51 *et seq.*

The provision introduces an exception to the «ordinary» conflict-of-laws rules otherwise applicable in the circumstances. The exception at stake is based on the assumption that, in the event of conversion, unity of applicable law between legal separation and divorce proceedings should be regarded as the prevailing concern. To attain this objective, Article 9, paragraph 1, sets forth an «accessory connecting factor»¹³⁷: the designation of the law applicable to divorce is made dependant on the law applied to separation.

64. The Regulation explicitly allows the spouses to prevent the application of Article 9 by making use of the autonomy they are granted under Article 5 («*unless the parties have agreed otherwise*»). Thus, if the spouses have decided to submit their legal separation and their divorce to the law of two different countries, their agreement shall be upheld.

Article 9, paragraph 2, adds that «if the law applied to the legal separation does not provide for the conversion», then «Article 8 shall apply, unless the parties have agreed otherwise in accordance with Article 5».

The provision is not thoroughly clear. The Regulation seems to consider the issue of «convertibility» as a substantial one, to be resolved in accordance with the law applicable to legal separation. If that law does not provide for conversion, one would normally conclude that conversion will not take place, and that spouses will need to bring the separation proceedings to an end before they can institute proceedings for divorce. The solution adopted by the Regulation is a different one: whenever the conversion proves to be impossible under the *lex separationis*, Article 8 shall apply, unless the spouses have made a choice of law under Article 5. The provision, it is submitted, should be read as meaning that, in the case at hand, the possibility of converting legal separation in divorce should be assessed on the background of the law designated under Article 8 or under Article 5, *i.e.* taking into account any change of habitual residence (or nationality) that might have occurred subsequent to the institution of separation proceedings (but before the conversion), and giving effect to the relevant agreements of the parties on the governing law.

One cannot exclude that, even so, the designated law will not provide for conversion. It is argued that the consequence, then, will be inescapable: two separate proceedings, one for legal separation, the other for divorce, will take place in turn.

IX. The designation of a law consisting of two or more legal systems

65. The law designated by Regulation No. 1259/2010, either through the agreement of the spouses or on objective grounds, may consist of two or more legal systems, each having its own set of rules concerning divorce and legal separation. Whenever this happens, the issue arises as to which of these systems should govern the situation at stake.

Two cases must be distinguished. On one hand, it may be that the country pointed at by the Regulation is made of several territorial units, each having an autonomous body of rules governing divorce (the United States of America, for example). On the other hand, the designated law may provide for (or refer to) different sets of rules, each governing divorce in respect of spouses featuring certain personal characteristics, *e.g.* spouses belonging to a certain ethnic group or religion (Lebanon, for example). The first case is dealt with by Article 14 of the Regulation, while the second by Article 15.

66. Under Article 14 of the Regulation, whenever a «territorial» conflict arises as between the different legal systems of the designated law, the relevant conflict-of-laws provisions should be read as follows.

67. Under Article 14, lit. *a*, any reference to the law of State comprising different territorial units shall be construed «as referring to the law in force in the relevant territorial unit».

¹³⁷ See, among others, on the «akzessorische Anknüpfung», P. NYGH, *Autonomy in International Contracts*, Oxford, Oxford University Press, 1999, p. 240 *et seq.*

68. Article 14, lit. *b*, of the Regulation clarifies that any reference to habitual residence in the said State «shall be construed as referring to habitual residence in a territorial unit». Hence, for example, Article 5 of Regulation No. 1259/2010 should be understood as allowing Mr X and Mrs Y, both residing in the United Kingdom, to choose English law, as opposed to the law of Scotland, whenever it is established that their habitual residence is, say, Birmingham, not Edinburgh; similarly, if the last habitual resident of the spouses before one came to Europe was Austin, the law applicable to their divorce or legal separation shall be —under Article 8 of the Regulation— the law of Texas.

69. Article 14, lit. *c*, provides that any reference to nationality «shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection».

The first part of the rule does not raise particular problems. It will be for the rules in force in the United States, for example, to determine whether the divorce of two United States citizens, habitually resident in different countries, should be governed, under Article 8 of the Regulation, by —say— the law of Virginia or the law of Michigan.

The second part of Article 14, lit. *c*, is a bit less clear, since it does not specify whether the «choice», here, should be understood to be substantially the same thing (and therefore treated substantially the same way) as the «choice» contemplated in Article 5.

As a matter of fact, a sharp difference exists between the two «choices» in question as regards their function and the place they occupy within the «conflictual reasoning» (*i.e.* the reasoning leading to the identification of the substantive rules applicable in the circumstances). The choice of Article 5 comes into play at an early stage of that reasoning and is designed to allow the spouses to directly determine the outcome thereof, *i.e.* which law should apply to divorce or legal separation. The choice of Article 15, on the contrary, is a choice the relevance of which may be perceived only after an «ordinary» connecting factor (nationality) has been resorted to, resulting in the designation of a law consisting of several legal systems. In the end, although both choices evoke the principle of autonomy, the choice envisaged by Article 5 rests on the idea that the will of the parties is a sufficient reason for applying the law of the chosen country, while Article 14 refers to the autonomy of the spouses for the mere purpose of «rectifying», whenever the need arises, the operation of another conflict-of-law rule.

The *enjeu* of the two choices being different, one would be tempted to say that the option of Article 14 should be treated more liberally than the agreements in Article 5. Be that as it may, some inquiry as to whether the will of both spouses has been genuinely and freely expressed seems to be inherent to the idea itself of «choice» under the Regulation: the requirements provided for in respect of the agreements contemplated in Article 5 pursue precisely that goal¹³⁸, and should therefore represent (at least) a reference for the purpose of Article 14, too.

Apart from that, the doubt remains as to whether a rather sophisticated choice, as that contemplated in Article 14, will be frequently resorted to in practice. In at least two situations, it is submitted, such choice might prove to be practically useful. The first case arises when the spouses agree under Article 5 on their divorce or legal separation being submitted to the law of the State of which either of them is a national, and the designated law consists of two or more legal systems: here, the spouses might want to opt directly for one of these systems, somehow «merging» within one agreement an Article 5 and an Article 14 choice (yet, in the face of Article 14, one should assume that the latter choice may only be followed when the law of the designated country does not provide for any special rule designating the relevant territorial unit in the circumstances). The second case may occur where the spouses become aware of the problem of determining the relevant territorial unit of the country in question in the course of the proceedings, and actually manage to agree on a choice for the purpose of Article 14: following the liberal approach we have advocated before, a choice like this should be taken into account no matter whether, under Article 5, paragraph 3, the law of the forum does not allow the spouses to make an agreement as to the choice of law after the court is seized.

¹³⁸ See *supra*, § 56.

The final part of Article 14, lit. *c*, is a rule of last resort based on the principle of proximity. It allows the court to take all relevant circumstances in account with a view to determining, within the designated country, the territorial unit with which the spouses (or the relevant spouse, as the case may be) entertain the most significant relationship. Reference, it is submitted, may be made for this purpose to elements such as language, family ties, the place where the marriage has been celebrated etc.

70. The way in which «territorial» conflicts of laws are dealt with under Regulation No. 1259/2010 differs in some respects from the way in which the same conflicts are dealt with in the «Rome I» and «Rome II» Regulations. Article 22, paragraph 1, of Regulation No. 593/2008, and Article 25, paragraph 1, of Regulation No. 864/2007 set forth a relatively simple solution, common to both texts, whereby, should the designated country consist of two or more units, «each territorial unit shall be considered as a country» for the purpose of identifying the law applicable under the two Regulations.

The rationale of Article 14, lit. *a* and lit. *b*, of Regulation No. 1259/2010 is substantially the same as the rationale of the corresponding provisions of the «Rome I» and «Rome II» Regulations, and one may wonder whether it would not have been advisable to adopt a uniform wording across the three instruments, and to introduce a new and different provision only in respect of situations where nationality comes into play.

Rather, Article 14 of Regulation No. 1259/2010 draws inspiration from the solutions adopted in international conventions elaborated within the Hague Conference on Private International Law, namely the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, and the Hague Protocol. In some important aspects, however, the Regulation seems to depart from that model, too. For instance, a difference exists as to nationality between Article 14, lit. *c*, of the Regulation and Article 16, paragraph 1, of the Protocol. The latter apparently provides a more detailed, yet easier to apply, solution, distinguishing between cases where the nationality of both parties is relevant from cases where the nationality of only one is referred to, and omitting any reference to the choice of the interested individuals¹³⁹.

71. The issues arising out of the designation of the law of a country consisting of different «personal» legal systems are dealt with —as we have mentioned— by Article 15.

The rule here is somehow more straightforward. The Regulation makes a reference to the rules of the designated State, governing «inter-personal» conflict of laws, safe that, in the absence of such rules, «the system of law or the set of rules with which the spouse or spouses has or have the closest connection applies».

This is a novel solution as far as European Union law is concerned, since neither in the «Rome I» nor in the «Rome II» Regulation the issue of «inter-personal» conflicts is addressed. Rather, the approach taken seems to be in line, at least in its general features, with the solution adopted in the domestic systems of some participating Member States¹⁴⁰ and in international conventions made at the Hague¹⁴¹.

From a different perspective, the question remains as to whether Regulation No. 1259/2010, by referring to the rules of the designated State (and somehow incorporating such rules in the conflictual reasoning based on its own provisions), might eventually bring about, within a participating Member State, a discrimination contrary to the relevant provisions of the Treaties, the CFREU and the relevant international conventions. The problem cannot be examined here in detail. It is submitted that certain foreign rules governing inter-personal conflicts of laws could, indeed, result in a prohibited discrimination (*e.g.* where the connecting factors they employ reflect the position of primacy granted to the

¹³⁹ Under Article 16, paragraph 1, lit. *d*, «any reference to the State of which two persons have a common nationality shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the maintenance obligation is most closely connected»; lit. *e* goes on to state that «any reference to the State of which a person is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the person has the closest connection».

¹⁴⁰ See *e.g.* Article 18 of the Italian Law of 31 May 1995 on Private International Law.

¹⁴¹ See, in particular, Article 17 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

husband over his wife), and should therefore be disregarded, either through an interpretation of Article 15 of the Regulation aimed at ensuring that its practical application is in conformity with the relevant provisions of primary law, or through the public policy exception (on the assumption that the latter may cover in principle any rule of the designated law, be it a substantive rule or a rule governing an «inter-personal» conflict of laws).

In doing this, regard must be had to the fact that the Regulation, by addressing the issue of «inter-personal» conflict of laws, implicitly reaffirms the policy whereby cultural identity of the individuals represents a value, and that diversity—including the ethnic or religious one that rules on inter-personal conflicts of laws strive to manage—should be preserved (as long as they do not result in intolerable discrimination).

X. Limitations affecting the functioning of the rules of the Regulation due to substantive reasons

72. The substantive regulation of divorce and legal separation, as we have mentioned, varies considerably from one country to the other. While bilateral conflict-of-laws rules rest on the assumption that the diversity of national experiences poses a problem of coordination, not a threat, limitations are provided in every system of private international law for the purpose of avoiding the risk that the «contact» with a foreign legal culture might be a risk for the identity of the domestic legal order, *i.e.* its basic values.

In this respect, Regulation No. 1259/2010 sets forth three possible limitations affecting the conflict-of-law rules provided therein: (A) Article 10 prescribes the application of the law of the forum whenever the law designated by the relevant conflict-of-laws provisions would lead to certain unacceptable substantive results; (B) under Article 12, the designated law may be disregarded according to the «traditional» public policy exception; (C) Article 13 introduces a safeguard whereby participating Member States shall not be bound to apply the law designated by the Regulation whenever this would be at odds with certain core values of the forum in the field of marriage and divorce.

1. The application of the *lex fori* for reasons related to the substantive content of the designated law

73. Under Article 10 of Regulation No. 1259/2010, whenever the law designated pursuant to Article 5 or Article 8 «makes no provision for divorce» or «does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex», divorce or legal separation shall be subject to the law of the forum.

The provision pursues a twofold substantive objective: avoiding the risk that matrimonial ties might turn out to be impossible to dissolve, and safeguarding the equality of the spouses as regards the right to institute divorce proceedings. In order to attain these goals, the possibility is contemplated of disregarding the designation made by the relevant conflict-of-laws provisions, and applying the *lex fori*.

Since the rule in question is a device capable of altering the operation of «ordinary» conflict-of-laws provisions such as Article 5 and Article 8, it is submitted that Article 10 should not be interpreted extensively. Before resorting to Article 10, one should verify whether the substantive objectives mentioned above are actually *impossible* to attain *in the circumstances* under the designated law.

74. Article 10 may be considered as a conflict-of-laws provision «with a substantive flavour» (*à caractère substantiel*)¹⁴². Its purpose is to designate the law applicable to the situation at stake, not to regulate the latter substantively. Yet, substance lies at the heart of Article 10, as this provision only comes into play where the substantive outcome that the Regulation aims at ensuring—an actual and equal opportunity for obtaining divorce—cannot be achieved through «ordinary» means, *i.e.* through the application of the law designated pursuant to Article 5 or Article 8 of the Regulation. In light of this, Article 10 may be described as a device aimed at supplementing and «rectifying», on substantive grounds, the functioning of the conflict-of-laws regime of the Regulation.

¹⁴² Cf. H. GAUDEMET-TALLON, «Le pluralisme en droit international privé: richesses et faiblesses», *RCADI*, 2005, vol. 312, p. 228 *et seq.*

The provision laid down in Article 10 and the public policy exception of Article 12 feature, quite clearly, some similarities. Both provisions have been conceived to safeguard substantive values and to operate whenever those values run the risk of being frustrated through the designation of a foreign law. As we will see, a number of the situations that would normally be dealt with under the latter provision should first come for consideration under Article 10.

Yet, a comparison between Article 10 and the public policy exception shows at least three points of difference between the two provisions: (i) regarding the values at stake, Article 10 is specifically meant to serve supranational goals, indicated therein, while under the public policy exception—as we will see—a wider range of sources (national, supranational, international) may come into play; (ii) concerning the nature of the devices at hand, Article 10 lays down a prescription («the law of the forum shall apply»), while the public policy exception grants a faculty to individual Member States («application... of the law designated ... may be refused»); (iii) as for the consequences of the operation of the two devices, Article 10 invariably results in the application of the *lex fori*, while public policy may lead—as we will see—to a different outcome¹⁴³.

75. Article 10 is apparently premised on the assumption that, the substantive outcome in contemplated by the regulation (the right of both spouses to obtain divorce, and to obtain it on an equal footing) may at times be precluded under the *lex causae*, but is systematically available under the *lex fori*. As we will see in the following paragraphs, this assumption may not be always true.

Be that as it may, the provision in question, for the very reason of referring to the law of the forum, must be read in conjunction with the rules governing jurisdiction in matrimonial matters. Thus, the (degree of) achievement of the substantive goals «protected» by the Regulation will not depend on Article 10 alone, but also on the State before whose courts Article 10 shall come into play.

76. As mentioned, Article 10 prescribes the application of the *lex fori* each time the law designated by the relevant rules of the Regulation (i) «makes no provision for divorce» or (ii) «does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex».

77. (i) The first of the two events should be deemed to occur where, under the *lex causae*, the possibility of obtaining divorce is excluded altogether (this is what presently happens under the law of the Philippines, for example). The wording of Article 10 («makes no provision for divorce», «ne prévoit pas le divorce», «no contempe el divorcio», «non preveda il divorzio») suggests that, if divorce is possible *in abstracto* under the designated law, the said condition is not met and Article 10 shall not step in. For example, where divorce proceedings are instituted in Austria, and Irish law is applicable to the merits, the spouses should not be entitled to rely on Austrian law (which allows spouses to obtain divorce, *inter alia*, on the ground of their mutual consent) just because under Irish law, which is less liberal, no ground for divorce is available *in the circumstances*.

Whenever divorce is impossible under the *lex causae*, the application of the *lex fori* should result in the obstacle being systematically overcome. As a matter of fact, since Malta has introduced divorce in its legislation, no Member State of the European Union presently prevents spouses from obtaining divorce.

78. It is not entirely clear whether Article 10 might play a role in respect of situations involving same-sex couples. Opposing views—it is well known—are taken by Member States as to whether marriage and divorce should be open, as such, to homosexual couples¹⁴⁴. Under Portuguese law, for example, heterosexual and homosexual couples are treated equally as regards the right to marry and divorce¹⁴⁵. As

¹⁴³ See *infra*, § 83.

¹⁴⁴ See generally, A.-L. CALVO CARAVACA / J. CARRRASCOSA GONZÁLEZ, «Efectos legales de los matrimonios entre personas de mismo sexo en la Unión Europea», in *El agua como factor de cooperación y de conflicto en las relaciones internacionales contemporáneas: XXII Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, Murcia, Instituto Euromediterráneo del Agua, 2007, p. 397 *et seq.*

¹⁴⁵ Law No. 9/2010 of 31 May 2010, *Diário da República*, 31 May 2010, available at <http://dre.pt>.

far as Italian law is concerned, on the contrary, the opinion is frequently stated that matrimonial ties may only exist—and accordingly be dissolved—as between a man and a woman¹⁴⁶.

In these circumstances, one might wonder whether, for instance, a Portuguese court, seized of a petition for divorce regarding two individuals of the same sex, could rely on Article 10 of Regulation No. 1259/2010 in order to disregard the *lex causae*—say, Italian law—on the ground that the latter makes no provision for divorce *in respect of homosexual couples*.

If the view is accepted that Regulation No. 1259/2010 applies to the dissolution or loosening of *any* matrimonial ties¹⁴⁷, the conclusion should be reached that in the preceding example the Portuguese court should indeed be allowed to rely on Article 10 and grant divorce in accordance with the *lex fori*.

Adopting a different reading would preclude (participating) Member States from relying on the Regulation to dissolve relationships (featuring a foreign element) that they regard as «matrimonial» in nature. This would possibly hinder the free movement of those persons as may be a party to such relationships, thus running counter the objectives of judicial cooperation in civil matters and undermining the *effet utile* of the existing supranational rules—such as Regulation No. 1259/2010—adopted precisely to achieve that goal.

79. (ii) The second event contemplated in Article 10 occurs, typically, where, under the *lex causae*, the substantive conditions for obtaining divorce or legal separation depend on whether divorce or legal separation are sought by the husband, or by the wife. The discrimination that would ensue from the application of the designated law would contradict a fundamental value common to the legal systems of the Member States and firmly established within European Union law¹⁴⁸.

It is assumed that the application of the *lex fori* under Article 10 of the Regulation as a «remedy» for the designated law being discriminatory, will occur in respect of those legal systems that provide for repudiation (*talaq*)¹⁴⁹ of the wife on the part of the husband, and deny the former any equivalent opportunity for obtaining the dissolution of marriage.

2. The public policy exception

80. Article 12 of the Regulation provides that the application of the designated law «may be refused only if such application is manifestly incompatible with the public policy of the forum».

The device envisaged by this provision is well known to national systems of private international law and to international conventions and supranational instruments. The wording of Article 12 of Regulation No. 1259/2010 is identical, in particular, to the wording of Article 21 of the «Rome I» Regulation and Article 26 of the «Rome II» Regulation. Instruments currently in the process of being elaborated by the European Union in the field of private international law include, too, similar provisions¹⁵⁰.

In the conflict of laws, public policy is a defense aimed at protecting those substantive values as may be regarded as essential to the «identity» of the legal system of the forum. It is generally accepted that the operation of the clause is exceptional. It is actually meant to cover situations where the *application* of foreign law—not foreign law as such, taken *in abstracto*—would result in the said values being irretrievably frustrated. The wording of Article 12 («... *only* if such application is *manifestly* incompatible...») confirms that this is the correct view under Regulation No. 1259/2010, too.

81. The Regulation does not specify which values might be regarded by participating Member States as belonging to their public policy.

¹⁴⁶ Cf., recently, Corte costituzionale, order of 5 January 2011, No. 4, available at <http://www.cortecostituzionale.it>.

¹⁴⁷ See *supra*, § 29.

¹⁴⁸ See *supra*, § 22 *et seq.*

¹⁴⁹ See generally on this subject P. COURBE, «Le rejet des répudiations musulmanes», *Recueil Dalloz*, 2004, p. 815 *et seq.*, and R. CLERICI, «La compatibilità del diritto di famiglia musulmano con l'ordine pubblico internazionale», *Famiglia e diritto*, 2009, p. 197 *et seq.* See further C. CAMPIGLIO, «Il diritto di famiglia islamico nella prassi italiana», *RDIPP*, 2008, p. 43 *et seq.*

¹⁵⁰ See, e.g., Article 23 of the Proposal on Matrimonial Property Regimes.

A plurality of sources may need to be looked at for the purpose of answering this question¹⁵¹. Domestic law will normally play an important role in this respect. Both constitutional and infra-constitutional rules governing private relationships may be relevant, to the extent that they reflect the existence of «fundamental» principles of the legal system they belong to. International conventions, too, may be relevant, in particular those in the field of human rights, be they «regional» (such as the ECHR) or «universal» instruments (such as the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966)¹⁵². The same may be said of those rules of European Union law, as are conceived to ensure or reinforce the respect of fundamental rights in connection with personal status and family relationships.

Since the scope and content of the notion at hand depends on a combination of factors, public policy may vary from one country to the other and, within one country, from time to time.

While public policy reflects the identity of each legal system, the way in which the exception is actually applied by national authorities is, in principle, subject to scrutiny at the European level. The assumption reflects a well-settled case law of the Court of Justice¹⁵³ and should be deemed to apply both in respect of rules for the recognition of foreign judgments, and in respect of rules dealing with conflict-of-laws issues.

82. As regards divorce and legal separation, public policy is traditionally understood to cover, in the Member States, mainly two substantive values: the right to obtain (divorce or) legal separation whenever life in common becomes intolerable to either of the spouses, and the equality of the spouses in respect of divorce and legal separation.

The protection of these values, as we have seen, is ensured in the first place under Article 10 of the Regulation. The latter provision is meant to «rectify» the operation of Article 5 and Article 8 of the Regulation, and should therefore come into play *before* the public policy exception may be resorted to. Public policy is in fact traditionally conceived as a device coming for consideration at the end of the «conflictual reasoning», after the applicable law has been designated. This means, it is submitted, that public policy, under Regulation No. 1259/2010, should normally perform a «residual» purpose, its practical relevance being confined to situations that cannot be addressed, or properly addressed, under Article 10. It is assumed that public policy exception may be used, for example, where the designated law, though not excluding the right to divorce altogether, does not allow the dissolution of marriage to any of the spouses in circumstances that, from the standpoint of the forum, make the preservation of matrimonial ties absolutely intolerable (*e.g.*, when acts of serious domestic abuse have been committed by one of the spouses). Article 12 should likewise be resorted to, for example, whenever, under the law designated pursuant to Article 5 or Article 8, spouses are discriminated on a ground other than sex.

83. Article 12 confines itself to allowing the court of a participating Member State to disregard the law designated by the relevant conflict-of-laws provision, whenever the described conditions are met. It does not say which law should be applied instead. The same situation may be found in the «Rome I» and «Rome II» Regulations, too¹⁵⁴.

¹⁵¹ Cf. G. CONTALDI, «Ordine pubblico», in R. BARATTA (ed.), *Dizionari del diritto privato – Diritto internazionale privato*, Milano, Giuffrè, 2010, p. 273 *et seq.*

¹⁵² Article 26 of the Covenant states that «[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law»; the law, it is added, «shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status». Under Article 23, paragraph 4, States parties «shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution». The text and status of the Covenant are available at <http://treaties.un.org>.

¹⁵³ Court of justice, judgment of 28 March 2000, *Krombach*, case C-7/98, *EC Reports*, 2000, p. I-1935 *et seq.*, paragraph 22 *et seq.*

¹⁵⁴ On this matter, see generally G. BIAGIONI, «Le conseguenze dell'incompatibilità della legge straniera con l'ordine pubblico nella Convenzione di Roma», *RDI*, 2003, p. 1089 *et seq.*

It is submitted¹⁵⁵ that the issue regarding the «positive» consequences of the operation of the public policy exception should be decided, failing a uniform rule to this effect, in accordance with the rules followed in this respect in the forum¹⁵⁶.

Thus, for example, if divorce or legal separation proceedings are instituted in Italy, Article 16, paragraph 2, of the Italian Law of 31 May 1995 on Private International Law shall apply. The latter provision states that —once it is established that the designated law cannot be applied on public policy grounds— the situation shall be deemed to be governed by the law designated through a different connecting factor, if any, applicable to the situation at stake; failing that, the *lex fori* shall apply. In practice, if the spouses have chosen under Article 5 the law of State X, and the application of the latter is manifestly incompatible with the Italian public policy, then the seized court should apply the law (possibly a foreign one) designated through Article 8 of the Regulation.

In any event, the application of the rules of the forum cannot frustrate the *effet utile* of the Regulation. It is submitted that a solution like the Italian one, whereby the substantive law of the forum is applied only as a last resort, would be in full conformity with the said requirement.

3. The possibility of disregarding the law designated by the Regulation whenever such law is at odds with the views of the *lex fori* as to the validity of the marriage in question

84. Under the heading «Differences in national law», Article 13 provides that nothing in Regulation No. 1259/2010 «shall oblige the courts of a participating Member State whose law (i) does not provide for divorce or (ii) does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce» by virtue of the Regulation.

The provision aims to safeguard the core substantive values of the *lex fori* as regards marriage and divorce, whenever the application of the law designated pursuant to Article 5 and Article 8 of the Regulation would be at variance with the basic policies of the forum in two particular respects: the recognition of the right to divorce and the validity of marriage.

The political significance of the rule is clear. Member States, as we have seen, retain diverging views as to the way in which matrimonial relationships should, or could, be set up and dissolved. By envisaging the possibility of disregarding foreign law where particularly sensitive issues are at stake, the drafters of the Regulation pursued the goal of a wider participation to the uniform regime. At the same time, as a compromise solution between opposing national views, Article 13 significantly affects the degree of uniformity achieved by the Regulation and may thus be seen as decreasing, somehow paradoxically, the attractiveness of the new regime.

85. Since it alters the operation of the conflict-of-laws provisions set forth in the Regulation, Article 13 should be given a narrow reading. The approach towards this rule should basically be the same as the approach towards the public policy exception contemplated in Article 12. As a matter of fact, the two provisions have much in common: they both grant Member States the possibility of disregarding foreign law with a view to protecting the substantive values of the forum.

In a way, Article 13 may be seen as a *specification* of the public policy exception as regards the two aspects mentioned above. The purpose of this specification is twofold. On one side, the point is made clear for the avoidance of doubt that courts of participating Member States are entitled to deny divorce whenever the designated law is at odds with certain well determined domestic policies; this may of help for national courts (deciding public policy issues may be difficult and time consuming) and for the spouses seeking divorce (as long as they can chose where to bring their action under the relevant jurisdictional rules, they are somehow warned in advance of the existence of «unwelcoming» fora). On

¹⁵⁵ See further, though in respect of a different context, P. FRANZINA, «Legge applicabile alle obbligazioni extracontrattuali (Roma II)», *Le nuove leggi civili commentate*, 2008, p. 1044.

¹⁵⁶ See on this subject, for a more detailed account of the various options at stake, O. LOPES PEGNA, «La proposta di cooperazione rafforzata sulla legge applicabile a separazione e divorzio: profili problematici», *CDT*, 2010, p. 137; I. OTTAVIANO, «La prima cooperazione rafforzata dell'Unione europea: una disciplina comune in materia di legge applicabile alla separazioni e divorzi transnazionali», *Diritto dell'Unione europea*, 2011, p. 139.

the other side, the issue is settled at the outset that, although «national» public policy is generally subject to review at a supranational level¹⁵⁷, participating Member States are not in breach of the uniform rules if they disregard the designated law for the sake of protecting national policies regarding the two particular aspects mentioned above.

86. Article 13, as we have seen, refers to two situations. The first occurs where the law of the forum «does not provide for divorce». The expression employed corresponds (word by word, in some linguistic versions, including the French and the Italian ones) to the expression appearing in Article 10. It should thus be understood as referring to a legal order where divorce is denied on *any* ground.

Since Malta has introduced divorce in its legislation¹⁵⁸, the practical importance of this part of Article 13 is reduced to none, at least as far as heterosexual couples are concerned¹⁵⁹.

87. The second situation contemplated in Article 13 occurs where the law of the forum «does not deem the marriage in question valid for the purposes of divorce proceedings». Issues relating to the validity of marriage, as we have seen, fall outside the material scope of application of Regulation No. 1259/2010. However, since the dissolution and the loosening of matrimonial ties imply (logically, if not legally) that the seized court somehow takes a stand as to the existence and the validity of those ties, the point is made clear that no such standing must be taken under the Regulation, if this doing so is intolerable in the forum's view.

It is assumed that the provision will apply, in particular, in those participating Member States, like Italy, where same-sex marriages are deemed to be invalid, whenever a petition for divorce as regards a marriage of this kind is sought. It is doubtful whether other, less politically sensitive, grounds for invalidity might justify the application of Article 13: since a narrow reading must be adopted, the provision in question should not prevent the courts of a participating Member State to pronounce a divorce under the law designated by the relevant conflict-of-laws provision, where the marriage in question is deemed to be invalid for a reason other than those amounting to public policy.

As mentioned, Article 13, far from *prescribing* that the designated law be disregarded, allows participating Member States not to grant divorce whenever the said conditions are met.

It is further worth noting in this respect that Article 13 textually envisages nothing more than the possibility not to «pronounce a divorce» under the described circumstances («prononcer un divorce»; «emettere una decisione di divorzio»; «pronunciar una sentencia de divorcio»; «eine Ehescheidung ... auszusprechen»). Hence, at least in the face of it, Article 13 should not prevent the courts of a participating Member State like Italy to decide under Belgian law, for example, the merits of a petition for divorce in respect of a homosexual couple, as long as the conclusion is reached that divorce *cannot* be granted in the circumstances because, say, the conditions laid down to this effect under Belgian law are *not* met.

88. Article 13, just like Article 12, does not state which law should apply whenever the designated law is disregarded thereunder. It is argued that the same solution adopted in respect of the public policy exception should be followed here, too.

89. As with all others rules allowing the preservation of areas of non-uniformity within the supranational regime on the law applicable to divorce and legal separation, the existence of Article 13 results in the rules of jurisdiction becoming *de facto* decisive for the purpose of determining whether divorce may be obtained or not: seizing the courts of a participating Member State whose law deems the marriage in question to be invalid will (likely) result in the petition being denied.

If jurisdiction, in the circumstances, lies with the courts of only one State, this would result in

¹⁵⁷ See *supra*, § 81.

¹⁵⁸ See *supra*, § 3.

¹⁵⁹ In the participating that do not allow same-sex marriages, the dissolution of the latter should normally come for consideration under the second part of Article 13, as explained in the following paragraph. The distinction, in any case, has little or no practical importance, since the two situations in question entail the same legal consequences.

matrimonial ties being *de facto* impossible to dissolve. In view of this, the Council, at the moment of adopting Regulation No. 1259/2010, formally invited the Commission to «submit at its earliest convenience ... a proposal for the amendment of Regulation (EC) No 2201/2003 with the aim of providing a forum in those cases where the courts that have jurisdiction are all situated in Member States whose law either does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings (*forum necessitatis*)».¹⁶⁰

XI. The scope of the *lex divortii*

90. Contrary to the «Rome I» and «Rome II» Regulations, where the issue is dealt with by a specific provision (Article 12 and Article 15, respectively), Regulation No. 1259/2010 does not define explicitly the scope of the law designated by the relevant conflict-of-laws rules, *i.e.* the issues that must be decided in accordance with the *lex divortii*.

Since the material scope of application of Regulation No. 1259/2010 is confined to the dissolution or loosening of matrimonial ties, it is to be assumed that only a limited range of issues are actually governed by the law in question.

There is little doubt, in this respect, that it is for the law designated through the Regulation to determine on which grounds divorce or legal separation may be granted, *e.g.* whether prior separation is required as a condition for divorce, and —assuming that separation is needed— what consequences derive from a temporary reconciliation of the spouses.

91. It is similarly for the law designated by the Regulation —it is argued— to determine whether an inquiry may be carried out to determine if either of the spouses has contributed to the breakdown of marriage (*e.g.* by committing adultery).

Indeed, the decision on «fault» issues may have a bearing on situations falling outside the material scope of application of Regulation No. 1259/2010, such as maintenance obligations or succession rights. Yet, since the idea of a fault is closely related, as such, to the idea of «crisis» in the relationship between the spouses, it is reasonable to assume that one and the same law should determine whether divorce should be granted or not, and whether the fault of one or both spouses should be part of the picture. It should be added that, with respect to maintenance obligations, the uniform rules presently regulating conflict-of-laws issues in Europe, *i.e.* the rules of the Hague Protocol, do not purport to regulate the basic substantive relationship whereby a person is entitled to claim maintenance from another: hence, it is not for the law designated by the Protocol to determine whether an ex-spouse, having contributed to the breakdown of marriage, may nevertheless claim maintenance from the other spouse¹⁶¹. Thus, «extending» the reach of the *lex divortii* to the said issue would not be detrimental to the Protocol.

The fact that the *lex divortii* should determine whether an inquiry must be carried out in respect of the issue of fault, does not imply that all aspects of fault should be assessed in accordance with that law. Since a «fault» consists in the breach of one or more duties arising out of marriage, it is for the law governing the personal relationship of the spouses to identify the scope and content of the relevant duties¹⁶². The proposed reading, it is conceded, may result in practical difficulties and possibly inconsistencies as to the substantive regulation of the relevant facts. Such an unfortunate outcome, however, is a by-product of the fragmentation and lack of completeness of the body of rules presently governing conflict-of-laws issues in Europe in this area.

¹⁶⁰ Doc. No. 5009/11 - ADD 1 of 21 March 2011, available at <http://register.consilium.europa.eu>.

¹⁶¹ See further, on the scope of the law applicable to maintenance obligations, Article 11 of the Hague Protocol.

¹⁶² *A fortiori*, the law designated by Regulation No. 1259/2010 should be deemed *not* to govern the issue of whether the breach of the said duties may result in some form of liability on the part of the wrongdoer, thus entitling the other spouse to claim damages. By the way, the «Rome II» Regulation seems to be equally inapplicable, since, under Article 1, paragraph 2, lit. a, «*non-contractual obligations arising out of family relationships*» are explicitly excluded from its material scope of application.

92. The question further arises as to whether the law designated by Regulation No. 1259/2010 in order to govern divorce or legal separation should also govern issues relating to evidence. The Regulation is silent on the subject.

Inspiration may be drawn from the solutions explicitly adopted in this respect in the «Rome I» and «Rome II» Regulations, since a close relationship, as we have seen, is generally deemed to exist between the three instruments. The «Rome I» and «Rome II» Regulations, while stating that issues regarding «evidence and procedure» fall outside their scope of application (Article 1, paragraph 3, of the two acts), clarify that the law designated by the respective conflict-of-laws provisions shall also apply to the extent that, as far as contractual and non-contractual obligations are concerned, «it contains rules which raise presumptions of law or determine the burden of proof» (Article 18, paragraph 1, of the «Rome I» Regulation; Article 22, paragraph 1, of the «Rome II» Regulation).

It is submitted that a common understanding exists in the field of judicial cooperation in civil matters in Europe as to the fact that rules raising presumptions of law and rules determining the burden of proof address substantial, as opposed to procedural, issues, and should therefore be decided in accordance with the *lex causae*. Based on this assumption, the solution set forth in the «Rome I» and «Rome II» Regulations, should be followed *mutatis mutandis* for matters regarding divorce and legal separation.

XII. Concluding remarks

93. Regulation No. 1259/2010 represents the outcome of an ambitious project, touching an area of private international law where little or no precedents of cooperation exist, either in Europe or elsewhere. In this respect, it is a remarkable achievement.

The new instrument is possibly the most striking expression, so far, of «differentiated integration» among the Member States of the European Union.

Differentiation may be viewed, here, either as a fatal danger for the unity of European Union law or as a pragmatic response to the challenges posed by the construction of an «area of freedom security and justice» in Europe. Time will tell which of these views provides the most accurate account of the present stage of development of European Union law as far as judicial cooperation is concerned.

What can be said as of now is that, in reality, to some degree, differentiation has *always* existed within the private international law of the European Union. The special «opt-out» and «opt-in» regimes provided for by the Treaties in order to accommodate the needs of Denmark, Ireland and the United Kingdom, show that full uniformity has never been perceived as an absolute necessity in this area. The two Regulations adopted in 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on various sectors of private international law¹⁶³, confirm that Member States are keen on preserving a role as (relatively) independent actors, alongside the Union, in this area, thus multiplying the levels at which judicial cooperation is carried out and enhancing the diversification of the overall picture.

No doubt, enhanced cooperation brings the degree of differentiation significantly further. Yet, in light of the foregoing, the problem today is not (anymore) whether differentiation, as such, is a good option or not, but whether, and by which means, the complexity of the resulting body of rules may be properly «managed».

94. The task, as far as Regulation No. 1259/2010 is concerned, is probably more difficult than it could have been. At least two reasons explain why things are so.

¹⁶³ Regulation No 662/2009 of 13 July 2009 Establishing a Procedure for the Negotiation and Conclusion of Agreements between Member States and Third Countries on Particular Matters Concerning the Law Applicable to Contractual and Non-contractual Obligations, O.J. L 200 of 31 July 2009, p. 25 *et seq.*; Regulation (EC) No 664/2009 of 7 July 2009 Establishing a Procedure for the Negotiation and Conclusion of Agreements between Member States and Third Countries Concerning Jurisdiction, Recognition and Enforcement of Judgments and Decisions in Matrimonial Matters, Matters of Parental Responsibility and Matters Relating to Maintenance Obligations, and the Law Applicable to Matters Relating to Maintenance Obligations, *ibidem*, p. 46 *et seq.*

- (i) By allowing participating Member States to supplement the uniform regime in some practically important respects (the additional formal requirements of choice of law agreements, the «treatment» of dual nationals, the «positive» consequences of the public policy exception etc.), the drafters have somehow open an «internal» front of differentiation (*i.e.* as among participating Member States), alongside the existing (and almost inevitable) «external» one, *i.e.* the line drawn between the participating Member States, on one side, and the *non* participating Member States on the other.
- (ii) A certain number of technical issues, it is submitted, might have been the object of explicit solutions. Besides, some of the solutions elaborated by the drafters might need to be re-considered in due course, in light of the practical experience that the Participating Member States will develop over the next few years. A clarification, for example, could be useful concerning the way in which stateless persons and refugees should be treated whenever nationality is employed as a connecting factor, while a reconsideration might be sought as regards the rule on «territorial» conflicts of law whenever nationality is at stake.

95. The said shortcomings may be dealt with and possibly minimized, it is submitted, by resorting to two institutional devices, or strategies, capable of enhancing the «quality» of application of uniform rules and «ordering» —to a certain extent— the complexity of the existing body of rules governing judicial cooperation.

The first of these devices is the «centralized» interpretive function of the Court of Justice under Article 267 of the TFEU. The role of the Court has been particularly important in respect of the «Brussels II *bis*» Regulation, thanks *inter alia* to the opportunity granted to national jurisdictions to take more fully advantage of the dialogue with the Court, following the introduction of the urgent preliminary reference procedure for matters relating to the area of freedom, security and justice, under Article 104 *b* of the Rules of Procedure, and the suppression, by the Treaty of Lisbon, of the obstacles restricting the access to the Court, previously contemplated in Article 68 of the Treaty establishing the European Community.

The second strategy is represented by the inter-institutional dialogue among Member States that the European Judicial Network in Civil and Commercial Matters is committed to foster. The Network, as far as Regulation No. 1259/2010 is concerned, might provide a threefold contribution: (i) by playing an active role in the information on foreign law¹⁶⁴, the Network could make it easier for the courts of participating Member States to cope with the difficulties inherent to the possible application (*e.g.*, by virtue of choice of law agreements) of foreign law in a sensitive and often technically complicated area such as divorce; (ii) by favouring the development and the exchange of good practices as regards the application of the Regulation, the Network may help elaborating interpretive solutions in order to overcome some of the technical difficulties mentioned above¹⁶⁵; (iii) finally, by relying in particular on the work of its «new» members —*i.e.* «the professional associations representing, at national level in the Member States, legal practitioners directly involved in the application of Community and international instruments concerning judicial cooperation in civil and commercial matters»¹⁶⁶— the Network may give an important contribution to disseminating among the public a practical knowledge of Regulation No. 1259/2010. This would be useful, in particular, with a view to promoting an informed and effective exercise of the autonomy provided for by Article 5.

While the role of the Network cannot be overstated and the Court of Justice might need years before it may provide a significant contribution to the interpretation of the new rules, it is submitted that the promotion of a *culture* of judicial cooperation represents, in the long term, one of the most efficient means by which a somehow «fragile» instrument such as Regulation No. 1259/2010 may be reinforced and properly applied in the participating Member States.

¹⁶⁴ See *supra*, § 13.

¹⁶⁵ Under Article 10, paragraph 1, lit. *c*, of Decision 2001/470, as amended, the Networks contact points should, *inter alia*, «identify best practices in judicial cooperation in civil and commercial matters and ensure that relevant information is disseminated within the Network».

¹⁶⁶ Article 2, paragraph 1, lit. *e*, of Decision 2001/470, as amended.